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Supp. 3 to
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Supplement 3

**U.S. Nuclear Regulatory
Commission**
Office of the Executive Legal Director



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PREFACE

This third supplement to the second edition of the NRC Staff Practice and Procedure Digest contains a digest of a number of Commission, Atomic Safety and Licensing Appeal Board and Atomic Safety and Licensing Board decisions issued during the period from January 1, 1979 to December 31, 1980 interpreting the NRC's Rules of Practice in 10 C.F.R. Part 2. The supplement, which is intended to be used as a "pocket-part" supplement to the Digest itself, includes a number of new subsections and topics not covered in the Digest. The new subsections are noted in the index for the supplement.

The Practice and Procedure Digest and the supplements thereto were prepared by attorneys in the NRC's Office of the Executive Legal Director as an internal research tool. Because of the Digest's usefulness to these attorneys, it was decided that it might also prove useful to members of the public. Accordingly, the decision was made to publish the Digest and subsequent editions thereof and supplements thereto.

Persons using this Digest and supplements are placed on notice that they may not be used as authoritative citations in support of any position before the Commission or any of its adjudicatory tribunals. Further, neither the United States, the Nuclear Regulatory Commission nor any of their employees makes any expressed or implied warranty or assumes liability or responsibility for the accuracy, completeness or usefulness of any material presented in the Digest and supplements.

As with the Digest itself, the supplements are roughly structured in accordance with the chronological sequence of the nuclear facility licensing process as set forth in Appendix A to 10 C.F.R. Part 2. Those decisions which did not fit into the structure are dealt with in a section on "general matters." Where appropriate, particular decisions are indexed under more than one heading. Some topical headings contain no citations or discussions. It is anticipated that future supplements to the Digest will utilize these headings.

Office of the Executive Legal Director
U. S. Nuclear Regulatory Commission

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I. APPLICATION FOR LICENSE/PERMIT3. Application for Early Site Review

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

4. Form of Application for Construction Permit or Operating License(new) 4.3 Termination

Where an applicant abandons its construction of a nuclear facility and requests that construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas and Electric Corporation, et al. (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980).

7. Notice7.1. Federal Register

One may be charged with notice of matters published in the Federal Register. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). (Note - The Appeal Board expressly declined to reach the question of whether the Federal Register notice binded the petitioners to its terms. Id. at 10).

8. Staff Review

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

It is on the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980).

10. Abandonment of application

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1) ALAB-605, 12 NRC 153, 154 (1980).

II. PREHEARING MATTERS1. Scheduling of Hearings1.1 General

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 CFR 2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet to be filed operating license application. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 27-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Section 2.104(a) of the Commission's Rules of Practice contemplates determination of a need for a hearing in the public interest on an operating license, only after application for such a license is made. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 27-28 (1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

1.2 Public Interest Requirements

Findings under 10 CFR 2.104(a) on a need for a public hearing on an application for an operating license in the public interest cannot be made until after such application is filed. Such finding must be based on the application and all information then available. While, the Commission can determine that a hearing on an operating license is needed in the public interest, a licensing board could not. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

1.5 Postponement of Hearings1.5(4) Time Extensions for Case Preparation

The Appeal Board granted staff's request for an extension of a deadline for filing written testimony but called the matter to the attention of the Commission, which has supervisory authority over the Staff. In granting the extension, made as a result of the Staff's inability to meet the earlier deadline due to assignment of Staff to Three Mile Island related matters, the Board rejected the intervenor's suggestion that it hold a hearing to determine the reasons for, and reasonableness of, the extension request. Florida Power and

Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12 (1979)

Where time extensions have been granted, the original time period is immaterial in seeing whether due process has been observed.

Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980).

(new) 1A. Necessity of Hearing

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor) LBP-80-26, 12 NRC 367, 371 (1980).

Where complainants were denied a hearing where they had put forth failure of the Director to take stronger action, the Appeal Board, in upholding the denial, noted that the Director's decision in no way restricted the authority of the ASLB to further restrict or even deny the license for operation of the facility. Further, it was not grounds for a hearing that, if a hearing was not immediately held on Director's decision, the money spent on plant would later sway the Licensing Board. Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 288-290 (1980).

2. Place of Hearing

2.3 Convenience of Litigants

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses four distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-31 (1979).

3. Issues for Hearing

3.1 General

A licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979), Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also, Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980), Northern Indiana Public Service Company, (Bailey Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980).

The issue of management capability to operate a facility is better determined at the time of operating license application, than years in advance on the basis of preliminary plans. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Only the Commission may decide to consider Class 9 accidents in individual licensing proceedings. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), CLI-80-8, 11 NRC 433 (1980); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-587, 11 NRC 474, 475 (1980); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225 (1980).

Findings under 10 CFR 2.104(a) on a need for a public hearing on issues involved in an application for an operating license cannot be made until after such application is filed. Such finding must be based on the application and information then available. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Since the Appendix I [of 10 CFR 50] rule itself does not specify health effects, and there is no evidence that the purpose of the Appendix I rulemaking was to determine generally health effects from Appendix I releases, it follows that health effects of Appendix I releases must be litigable in individual licensing proceedings. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 276 (1980).

3.4 Issues not Addressed by a Party

An adjudicatory board's examination of unresolved generic safety issues, not put into controversy by the parties, is necessarily limited to whether the Staff's approach is plausible, and the explanations given for support of continued safe operation of the facility are sufficient on their face. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-620, 12 NRC 574, 577 (1980).

3.5 Separate Hearings on Special Issues

The Appeal Board's holding in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), that any early findings made by a Licensing Board, in circumstances where the applicant had disclosed an intent to postpone construction for several years, would be open to reconsideration "only if supervening developments or newly available evidence so warrant", does not support a later Licensing Board's action in imposing a similar limitation on the right to raise issues which were not encompassed by the early findings. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979), reconsid. denied, ALAB-539, 9 NRC 422 (1979).

Upon certification the Commission held that in view of fact that TMI accident resulted in hydrogen generation

gas in excess of hydrogen generation design basis assumptions of 10 CFR § 50.44, hydrogen gas control could be properly litigated under Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR § 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guidelines values. Metropolitan Edison Company (Three Mile Island, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980).

3.6 Construction Permit Extension Proceedings

Intervenors in a construction permit extension proceeding may only litigate those issues that (1) arise from the reasons assigned to the requested extension, and (2) cannot abide the operating license proceeding. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LBP-80-31, 12 NRC 699, 701 (1980).

In an extension proceeding, the Board must consider issues related to health, safety and environmental which arise from the reasons given for extension which cannot abide until the operating license hearing, even if the issues are not related to the prolonged period of construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LB 80-22, 12 NRC 191, 198 (1980), citing Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2, ALAB-129, 6 AEC 414 (1973).

"... The mere request for an extension is no reason to accelerate a consideration of issues that the rules provide for considering no earlier than the operating license stage." Bailly, supra, at 199.

Even when it is determined that issues advanced in construction permit extension proceeding would have been heard at construction permit hearing, those issues will be heard in extension proceeding only if there is not "reasonable assurance" that all safety matters will be satisfactorily resolved by the new completion date. Bailly, supra, at 200.

The Board ruled that issues that do not arise from the reasons for the delay in construction or are otherwise unrelated to the prolonged period construction could be considered, in an extension proceeding, if they are necessary to protect the public interest and cannot abide the operating license proceeding. The Board did note that any jurisdiction the Board exercises under the above interpretation would be strictly limited to situations in which the petitioner has made a convincing prima facie showing that the safety matter alleged will not be satisfactorily resolved by the new completion date. Bailly, supra, at 204-206.

3.7 Issues for Hearing in Export Licensing Proceedings

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-proliferation Act of 1978, the Commission in making its export licensing determinations focuses on non-proliferation and safeguards concerns,

and not on foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-261 (1980).

4. Notice of Hearing

4.1 Contents

A licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also, Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailey Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980).

Operating license proceedings start with the notice of proposed action (10 CFR 2.105) and are separate from prior proceedings. Thus, a licensing board in a construction permit hearing may not order that certain issues be tried at the OL proceeding. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 517 (1980).

4.2 Adequacy

One receiving filings in a proceeding is charged with reading and knowing matters therein which might affect his rights. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

Where an original notice of hearing is overly narrowly drawn, a requirement in a subsequent notice that those who now seek to intervene state that they did not intervene before because of limitations in the original notice was not improper. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

4.3 Federal Register

The Licensing Board rejected Petitioner's argument that "mere notice in the Federal Register ... is inadequate notice ..." The Federal Register Act expressly provides that such publication constitutes notice to "all persons residing within the States of the Union", (44 U.S.C. 1508). Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975); and a U.S. Supreme Court ruling that publication in the Federal Register gives legal notice to all citizens. (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 191-92 (1979).

In an operating license amendment proceeding, the Licensing Board ruled that the law required the NRC to publish once in the Federal Register notice of its

intention to act on the application for amendment to the operating license. Turkey Point, supra, at 192.

Publication in Federal Register of conditions on intervention is notice as to all of those conditions, and one cannot excuse a failure to meet those conditions by a claimed lack of knowledge. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

5. Prehearing Conferences

5.4 Prehearing Conference Order

5.4(1) Effect of Order

Licensing Board may limit the time for the filing of contentions to less than that normally allotted by the rules, 10 CFR 2.714(a)(3) and (b), so that all participants know before they arrive at the special prehearing conference, what position the proponents of the plant are taking on the various contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979).

8. Intervenor

8.2 Need for Counsel

As an example of less stringent standards, the intervenors will be held to in the absence of counsel, the intervenors were held to a less stringent filing requirement. (They were allowed to file the original and 2 copies with the Secretary, rather than the usual original and twenty copies. Dairyland Power Cooperative (La Crosse Boiling Water Reactor) Docket No. 50-509 (FTOL Proceeding) - (unpublished Decision issued July 8, 1980).

Insofar as organizations are concerned, 10 CFR 2.713(a) clearly limits representation to either an attorney or a member, and it can logically be read as precluding representation by an attorney and a member at the same time. But it does not appear to bar representation by a member throughout a proceeding if, at some earlier time during the proceeding, an attorney has made an appearance for the organization. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-79-17, 9 NRC 723, 724 (1979).

8.3 Petitions to Intervene

8.3(1) General

An affidavit which makes conclusory assertions not susceptible of verification by either other litigants or the adjudicatory tribunal is insufficient to establish standing. Both the Board and the other parties are entitled to be provided with sufficient information to enable them to determine for themselves whether standing exists. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377,399-400 (1979).

8.3(2) Pleading Requirements

Although a totally deficient pleading may not be justified on the basis that it was prepared without the assistance of counsel, a pro se petitioner is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), cited in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980).

Where an original notice of hearing is overly narrowly drawn, a requirement that those who subsequently seek to intervene state that they did not intervene before because of limitations in the original notice was not an abuse of discretion. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The petition of an organization to intervene must show that the person signing it has been authorized by the organization to do so. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LCP-79-1, 9 NRC 73, 77 (1979).

8.3(4) Time Limits & Late Petitions8.3(4)(a) Time for Filing

A Licensing Board did not abuse its discretion in shortening the time to file contentions where there were many intervenors. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

8.3(4)(c) Consideration of Untimely Petitions

The key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and orderly conduct of our proceedings." Houston Lighting and Power Co., (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-49 (1979), citing Nuclear Fuel Services, Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

The five factors listed in 10 CFR 2.714(a) are to be considered in determining whether to allow late intervention. Newly acquired standing by moving to the vicinity of a plant is not alone enough to justify belated intervention. Nor does being articulate show a contribution can be made in developing the record. Other parties having the same interest weigh against allowing late intervention. Houston

Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241 (1980). The first factor of those specified in 10 CFR 2.714(a) is whether there exists "good cause, if any, for the failure to file on time." Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 862 (1980). In considering the "good cause" factor, the Appeal Board pointed out that a strong excuse for lateness will attenuate the showing necessary on the other factors of 10 CFR § 2.714. It added that the 1978 amendment of the language of § 2.714, far from altering this substantive principle, regarding excuse for lateness, merely codified it. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). See also, Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed CLI-78-12, 7 NRC 939 (1978).

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. (Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 640, 462 (1977) and cases there cited). In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. The greater the tardiness, the greater the likelihood that the addition of a new party will delay the proceeding - e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. (Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).) Puget Sound Power & Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause". Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122,

24 (1979) cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980). Nor does preoccupation with other matters afford a basis for excusing a non-timely motion to intervene. Poor judgment or imprudence in the first place is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. The Appeal Board said this consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence. On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (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, 148-49 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

With regard to the second factor of 10 CFR § 2.714(c), the Appeal Board said that the suggestion that an organization could adequately protect its interest by submitting a limited appearance statement gave insufficient regard to the value of participational rights enjoyed by parties - including the entitlement to present evidence and to engage in cross-examination. The Board also rejected assertions that the organization might adequately protect its interest by making witnesses available to a successful petitioner or by transmitting information in its possession to appropriate State and local officials. Duke Power Company (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, n. 7 (1979).

With regard to the fourth factor of 10 CFR § 2.714(a), the extent to which petitioner's interest will

be represented by existing parties, the Appeal Board ruled that the fact that a successful petitioner has advanced a contention concededly akin to that of a late petitioner does not necessarily mean that the successful petitioner is both willing and able to represent the late petitioner's interest. Duke Power Company (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).

The Licensing Board in Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979) said that NRC practice has failed to provide a clear-cut answer to the question of whether the fourth factor, the extent to which the petitioner's interest will be represented by existing parties, is applicable when there are no intervening parties and no petitioners other than the latecomer, and a hearing will not be held if the late petitioner is denied leave to intervene. The Licensing Board reviewed past Licensing Board decisions on this question:

1. In St. Lucie and Turkey Point the Licensing Board decided that the fourth factor was not directly applicable but went on to note that without the petitioner's admission there would be no other party to protect petitioner's interest. Florida Power and Light Company (St. Lucie Plants, Units 1 and 2 and Turkey Point, Units 3 and 4), LBP-77-23, 5 NRC 789, 800 (1977).

2. In Virgil C. Summer the Licensing Board acknowledged uncertainty as to the applicability of factor four, but it said that if the factor were applicable it would be given zero weight because of the particular circumstances of that case. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213-14 (1978).

3. In Kewaunee, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the fourth factor weighed in favor of admitting them as intervenors. Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

In Turkey Point, the Licensing Board ruled that the Commission intended that all five factors of 10 CFR 2.714(a)(1) should be balanced in every case involving an untimely petition. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-10, 10 NRC 183, 195 (1979).

The Licensing Board in Turkey Point, also ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None". The fourth factor therefore, was held to weigh in favor of the late petitioners. Id.

With respect to the fifth factor, the extent to which a late petitioner's participation would delay a proceeding, the Appeal Board in Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), assessed this factor, as of the time of the Appeal Board's hearing, not as of the time the petitioners filed their petition. A person who attempts to intervene three and a half years after the petition deadline has no right to assume that his intervention will go unchallenged, rather he has every right to assume that objections will be made and that the appellate process might be invoked. Skagit, supra. at 172-173.

The permissive grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. Although Section 2.714(c) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it does reflect the expectation that, absent demonstrable good cause for not doing so, an individual interested in the outcome of a particular proceeding will act to protect his interest within the established time limits. Skagit, supra, at 172-73.

8.3(4)(d) Appeals from Rulings on Late Intervention

In a decision vacating a Licensing Board's grant of late intervention because the grant was based on improper criteria, the Appeal Board refused to examine whether the petitioner had met

the regulatory requirements for intervention (i.e., 10 CFR 2.714). Puget Sound Power & Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63-64 (1979), petition for review denied, Puget Sound Power & Light Co. (Skagit Nuclear Project, Units 1 and 2), unreported, (January 16, 1980).

It is for the licensing boards to make the initial assessment of how late intervention petitions fare in light of the intervention criteria. Skagit, supra, at 63.

(new)

8.3(4)(e) Mootness of Petitions

Where Commission was in the process of ruling on Indian tribes' untimely petition to intervene, and where applicant moved to amend the application and conclude the proceeding, petition to intervene was dismissed as moot. Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980).

8.4 Interest and Standing

8.4(1) Judicial Standing

8.4(1)(a) General

Judicial concepts of standing govern whether a petitioner has made an adequate showing of interest to become a party to a proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979), citing, Portland General Electric Company (Pebble Springs Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

The Commission applies judicial tests of "injury in fact" and "arguably within the zone of interest" to determine standing. "Injury" as a premise to standing must come from an action, in contrast to failure to take an action. One who claims that an Order in an enforcement action should have provided for more extensive relief does not show injury from relief granted and thus does not have standing to contest the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

To establish the requisite "injury in fact" for standing, a petitioner must have a "real stake" in the outcome, that

is, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979).

The economic interest of ratepayers is not enough to confer standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 445 (1979).

A petitioner may base its standing upon a showing that his or her residence, or that of its members, is within the geographical 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), see also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979).

Close proximity has always been deemed enough standing alone, to establish the requisite interest" for intervention. In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, at 115-16. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, at 116.

8.4(1)(b) Standing of Organizations

Based upon the Commission's holding in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-24, 4 NRC 610, 614 (1976), a Licensing Board has used judicial concepts of standing to determine the propriety of intervention by an organization as a matter of right. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), LBP-79-2, 9 NRC 90, 95 (1979).

To establish the requisite "injury in fact" for standing, a petitioner must have a "real stake" in the outcome, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979).

An organization may meet the injury-in-fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979). Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-113 (1979).

With respect to national environmental groups, standing is derived from injury in fact to individual members. South Texas, supra, at 647, citing Sierra Club v. Morton 405 U.S. 727 (1972).

An organization seeking to obtain standing in a representative capacity must demonstrate that a member has in fact authorized such representation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444 (1979) aff'd, ALAB-549, 9 NRC 644 (1979). Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979).

Upon a determination that an adequate showing has been made that public

revelation of the identity of a member of the petitioner organization might threaten rights of association, the licensing board should place an appropriate protective order upon that information. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

An organization has sufficiently demonstrated its standing to intervene if its petition is signed by a ranking official of the organization who himself has the requisite personal interest to support the intervention. An organization seeking intervention need not demonstrate that its membership had voted to seek intervention on the matter raised by a submitted contention, and had authorized the author of the intervention petition to represent the organization. Duke Power Company (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).

An organization cannot meet the "interest" requirement for standing by acquiring a new member considerably after the deadline for filing of intervention petitions who meets the "interest" requirement, but who has not established good cause for the out-of-time filing. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 335 (1979). The organization cannot in this situation amend its original pleading to show the interest of the new member; the Licensing Board has interpreted 10 CFR § 2.714(a)(3) to permit amendment of a petition relative to interest only by those individuals who have made a timely filing and are merely particularizing how their interests may be affected. WPPSS, *supra*, at 336.

8.4(1)(c) Standing in Export Licensing Cases

Judicial precedents will be relied on in deciding issues of standing to intervene in export licensing. Westinghouse Electric Corp. (Export

to South Korea) CLI-80-30, 12 NRC 253, 258 (1980).

Institutional interests in disseminating information and educating the public do not establish a claim of right under Section 189a of the Atomic Energy Act for purposes of standing because it would not constitute an interest affected by the proceeding. There must be a causal nexus between the refusal to allow standing and the inability to disseminate information Id. at 259.

8.4(1)(d) Standing in Specific Factual Situations

"A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental release of fission products.' Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973)." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973) (40 miles); Fermi, supra (35 miles).

The Licensing Board refused to allow intervention on the basis of the possibility of petitioners' consuming produce, meat products, or fish originating within 50 miles of the site. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979).

A petitioner owning and renting out farmland 10 to 15 miles from the site and visiting the farm occasionally was held not to meet standing requirements. WPPSS, supra, at 336-38.

Those persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for the extension, would have standing to intervene in [extension proceedings] to show that no good cause existed and, consequently, new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company. (Bailly Generating

Station, Nuclear 1), LBP-80-22, 12 NRC 191, 195 (1980). affirmed, ALAB-619, 12 NRC 558, 563-65 (1980).

One living 26 miles from a plant cannot claim, without more, that his aesthetic interests are harmed. Conjectural interests do not provide a basis for standing. Nor does economic harm or one's status as a ratepayer provide a basis for standing. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242, 243 n.8 (1980).

Economic injury to ratepayers is not sufficient to confer standing upon state Commissions to challenge proposed license revocation because such injury results from termination of the project and not Commission "action," and because such injury cannot be redressed by favorable Commission action. Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-7 (1980) (views of Chairman Ahearn and Commissioner Hendrie).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, at 115-16. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, at 116.

8.4(2) Discretionary Intervention

The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

Intervenor allowed to participate as a matter of discretion in hearing before Appeal Board. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980).

In granting discretionary intervention, the foremost consideration is the degree to which the petitioner would likely produce a valuable contribution to the decisionmaking process. Where a petitioner failed to respond to Appeal Board order seeking clarification following presentation of evidence casting shadow on his purported qualifications, Appeal Board was entitled to conclude that a petitioner would not help to create a sound record, and that the veracity of his other statements were suspect, leading to denial of his petition. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-70-10, 9 NRC 439, 457-58 (1979).

8.5 Contentions of Intervenors

8.5(1) Requirements

The degree of specificity with which the basis for a contention must be alleged initially involves the exercise of judgment on a case-by-case basis. In passing on the admissibility of a contention, the licensing board need not reach the merits of the contention nor need the petition detail the evidence which will be offered in support of each contention. Nevertheless, it is incumbent upon intervenors to frame their contentions with sufficient preciseness to show that the issues raised are within the scope of the cognizable proceeding. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 687-8 (1980) quoting Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 NRC 13, 20 (1974).

Consideration of such matters as need for power and various plant alternatives is more appropriate at the construction permit stage - before a plant has been built - than at the operating license stage, where a completed plant must be assumed. A contention raising issues of this type at the operating license stage must include a strong showing that there exists a significant issue which had not previously been adequately considered or significant new information which had developed after the construction permit review. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303-04 (1979).

Originality of framing contentions is not a pleading requirement. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980).

Extraneous matters such as preservation of rights, statements of intervention, and directive for interpretation which accompany an inter-

venor's list of contentions will be disregarded as contrary to the Commission's Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-90 (1980).

A Licensing Board did not abuse its discretion in shortening the time to file contentions where there were many intervenors. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980).

8.5(3) Requirement of Contentions for Purposes of Admitting Petitioner

Intervenors are required by 10 CFR 2.714(b) to file "a list of the contentions which petitioners seek to have litigated in the matter, and the basis for each contention set forth with reasonable specificity." Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 696-87 (1980).

In determining whether an intervention petition should be granted, it is not the function of a licensing board to reach the merits of any of a petitioner's contentions. For this purpose, the requirements of 10 CFR 2.714 are met if a petitioner states the reasons (i.e., the basis) for at least one contention with reasonable specificity. The obligation to establish the existence of some factual support for the particular assertions that petitioners for intervention have advanced as the basis for their contentions need not be undertaken as a precondition to a board's acceptance of a contention for the limited purpose of determining whether to allow intervention under 10 CFR 2.714. Rather, that obligation arises solely (1) in response to a subsequent motion of another party seeking to dispose of the contention summarily under 10 CFR 2.749 for want of a genuine issue of material fact; or (2) in the absence of such a motion, at the evidentiary hearing itself. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-551 (1980).

It is not essential that pleadings of contentions be technically perfect. The Licensing Board would be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. Houston Lighting and Power Company (South Texas Projects, Units 1 and 2), ALAB-549, 9 NRC 644, 650 (1979).

It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits not to avoid them on technicalities. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116-117 (1979).

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The intervenors must be heard in response because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. Allens Creek, supra, at 524.

8.5(4) Contentions Challenging Regulations

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.758. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980).

8.5(6) Defective Contentions

A Licensing Board is not required to recast contentions to make them acceptable, but it also is not precluded from doing so. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979).

Contentions which constitute a general attack upon the methods used by the NRC Staff to insure compliance with regulations, without raising any issues specifically related to matters under consideration, are not appropriate for resolution in a particular licensing proceeding. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980).

(new)

8.5(10) Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Consolidated Edison Company (Indian Point Station, Unit 2), 7 AEC 17, 949 (1974); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980).

8.5(11) Timeliness of Submission

Not later than 15 days before a special prehearing conference or, where no special prehearing conference is held, 15 days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of his contentions. Additional time for filing the supplement may be

granted based upon a balancing of the factors listed in 10 CFR § 2.714(a)(1). 10 CFR § 2.714(b).

In considering the extent to which the petitioner had shown good cause for filing supplements out of time, the Licensing Board recognized that the petitioner was appearing pro se until just before the special prehearing conference. Petitioner's early performance need not adhere rigidly to the Commission's standards and that in this situation it would not weigh the good cause factor as heavily as it might otherwise. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979).

In considering the admissibility of late-filed contentions, the Licensing Board balanced the five factors specified in 10 CFR 2.714(a) for dealing with nontimely filings. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 214 (1979).

With respect to the second factor of 10 CFR 2.714(a) (availability of other means of protecting late petitioners' interest) and the fourth factor (the extent to which late petitioners' interest will be represented by existing parties), the Applicants in Zimmer supra at 215 claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless made an issue in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra at 215.

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra at 216 n.4, citing Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

8.5(12) Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the Applicant's Environmental Report for factual material in support of a proposed contention. Pennsylvania Power & Light Company, et al., (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979).

8.5(13) Contentions Challenging Absent or Incomplete Documents

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 693 (1980).

8.5A Conditions on Grants of Intervention

10 CFR § 2.714(e) empowers a licensing board to condition an order granting intervention on such terms as may serve the purposes of restricting duplicative or repetitive evidence and of having common interests represented by a single spokesman. 10 CFR § 2.715a deals with the general authority to consolidate parties in construction permit or operating license proceedings. In a license amendment proceeding, there is no good reason why the provisions of § 2.715a cannot be looked to in exercising the power granted by § 2.714(e), which section applies to all adjudicatory proceedings. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.9 (1979).

8.6 Appeals of Rulings on Intervention8.6(1) General

One may not appeal from any order denying an intervention petition unless the order denies the petition in its entirety. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-585, 11 NRC 469 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980).

A licensing board's order which determines that a petition seeking to intervene has demonstrated standing and good cause for being late but has not passed on the acceptability of contentions is not a final disposition of the intervention petition for the purposes of 10 CFR § 2.714a. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864 (1980).

It is settled under the Commission's Rules of Practice that a petitioner for intervention may not take an interlocutory appeal from Licensing Board action on his petition unless that action constituted an outright denial of the petition. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979).

8.6(2) Standards for Reversal

The principle that licensing board determinations on the sufficiency of allegations of affected

interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

8.9 Cost of Intervention

8.9(1) Financial Assistance to Intervenors

The Commission is in favor of funding intervenors but Congress has precluded such funding for fiscal year 1980. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 (1980) (and CLI-80-20, at 11 NRC 705).

A claim for funding by intervenor for past participation is precluded because the Commission has determined not to initiate a program to provide funding for intervenors. Puerto Rico Power Auth. (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767-68 (1980).

Some financial assistance has been made available to intervenors for procedural matters, such as free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in recently adopted Commission rules. 10 CFR 2.708(d), 2.712(f) and 2.750(c). (45 Fed. Reg. 49535, July 25, 1980). Although not specifically allowed by these rules, in the interest of efficiency in resolving issues in this proceedings, the Commission authorized the Board to provide procedural financial assistance, particularly free transcripts, to intervenors in a reactor re-start proceeding. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-43, 12 NRC 665, 666 (1980).

Prior to NRC policy of providing free transcripts of meetings to intervenors, the Board did order transcripts to be provided free of charge to intervenors. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), Docket No. 50-409 (FTOL Proceeding) (Unpublished decision issued July 8, 1980).

8.11 Intervention in Remanded Proceedings

The Licensing Board was "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission, and the petition for intervention dealt with matters outside that scope. The Licensing Board had limited jurisdiction in the proceeding and could consider only what had been remanded to it. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124, n.3 (1979).

9. Nonparty Participation--Limited Appearances and Interested States

9.2 Nonparty Interested State

Although a state has a statutory right to a reasonable opportunity to participate in NRC proceedings, it may not

seek to appeal on issues it did not participate in below, or seek remand of those issues. However, the state is given an opportunity to file a brief amicus curiae. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

Late decision by Governor of a state to participate as representative of an interested state can be granted, but Governor must take proceeding as he finds it. He cannot complain of rulings made or procedural arrangements settled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980).

10. Discovery

10.2 Discovery Rules

10.2(1) General

A party may seek discovery of another party without the necessity of licensing board intervention. Where, however, discovery of a non-party is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.720. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Applicants are entitled to discovery against intervenors in order to obtain the information necessary for Applicant to meet its burden of proof. This does not amount to shifting of burden to intervenors. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 338 (1980).

Intervenor may not directly seek settlement papers of the Applicant through discovery. Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. 10 CFR 2.759 states a policy encouraging settlement of contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring a party to produce its settlement documents because they are settlement documents would be inconsistent with this policy. Florida Power & Light Company (St Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-84 (1979). (NOTE - There seems to be a gap in reasoning here regarding Rule 408, but the Board does rely on 408. See pp. 183-184.)

10.2(3) Scope of Discovery

The Licensing Board, as provided by 10 CFR 2.740(c) and 10 CFR 2.740(d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-48 (1979).

If a party has insufficient information to answer interrogatories, a statement to that effect fulfills its obligation to respond. If the party subsequently obtains additional information, it must supplement its earlier response to include such newly acquired information, 10 CFR § 2.740(c). Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 911 (1980).

10.2(5) Privileged Matter

FOIA does not establish new government privileges against discovery. Consumers Power Company (Palisades Nuclear Power Facility) ALJ-80-1, 12 NRC 117, 121 (1980).

The Commission's rules on discovery have incorporated the exemptions contained in the FOIA. Id.

Section 2.790 of the rules of practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120.

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard under 10 CFR 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123.

The government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

Any documents in final form memorializing [the Director's] decision not to issue a notice of violations imposing civil penalties does not fall within Exemption 5. Id. at 129.

(new)

10.2(6)A Protective Orders

In using protected information, "those subject to the protective order may not corroborate the accuracy (or inaccuracy) of outside information by using protected information gained through the hearing process." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 6 (1980).

Protective orders regarding a security plan runs only to counsel and expert witnesses, not to intervenor group which will not be given protected information, and thus the order does not impinge upon intervenor group's ability to participate effectively in the proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 749 (1980).

An affidavit in support of a corporation's request for a protective order is criticized because it did not establish the basis for the affiant's personal knowledge (if any) respecting the basis for the

protective order - that is, the policies and practices of the corporation with regard to preserving the confidentiality of information said to be proprietary in nature. The Board might well disregard the affidavit entirely on the ground that it was not shown to have been executed by a qualified individual. While it may not be necessary to have the chief executive officer of the company serve as affiant, there is ample warrant to require that facts pertaining to management policies and practices be presented by an official who is in a position to attest to those policies and practices (and the reasons for them) from personal knowledge. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28 (1979),

The Appeal Board granted a protective order request but explicitly declined to find that the corporation requesting the order had met its burden of showing that the information in question was proprietary and entitled to protection from public disclosure under the standards set forth in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, (1976). No party had objected to the order, and the Appeal Board granted the order in the interest of obtaining the requested information without untoward further delay. However, its action should not be taken as precedent for future cases in which relief might be sought from an adjudicatory board based upon affidavits containing deficiencies as described above. North Anna, supra, at 28.

(new) 10.2(7) Work Product

In the absence of unusual circumstances, a corporate party cannot immunize itself from otherwise proper discovery merely by using discovery to make file searches for information relevant to answer an interrogatory. Houston Lighting & Power Company (South Texas Project, Units 1 and 2), LBP-79-05, 9 NRC 193, 195 (1979).

(new) 10.2(8) Updating Discovery Responses

Parties are under an obligation to update discovery responses as new information becomes available after those responses have been given. Dairyland Power Cooperative (La Crosse Boiling Water Reactor) Docket No. 50-409 (FTOL Proceeding) (Unpublished decision issued July 8, 1980).

(new) 10.2(9) Interrogatories

Interrogatories will not be rejected solely on the number of questions. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 330-35 (1980).

10.3 Discovery Against the Staff

Discovery against the Staff is on a different footing than discovery in general. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980).

According to provisions of 10 CFR § 2.720, interrogatories against the Staff may be enforced only upon a showing that the answers to be produced are necessary to a proper decision in the proceeding. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980).

Document requests against the Staff must be enforced where relevancy has been demonstrated unless production of the document is exempt under 10 CFR 2.790. In that case, and only then, must it be demonstrated that disclosure is necessary to a proper decision in the matter. Palisades, supra.

(new) 10.3A Responses to Discovery Requests

It is an adequate response to any discovery request to state that the information or document requested is available in public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-48 (1979).

10.4 Compelling Discovery

10.4(1) General

Section 2.740 of the NRC's Rules of Practice, under which subpoenas are issued, is not founded upon the Commission's general rule-making powers; rather, it rests upon the specific authority to issue subpoenas duces tecum contained in Section 161(c) of the Atomic Energy Act. Therefore, the rule of FMC v. Anglo-Canadian Shipping Company, 335 F.2d 255 (9th Cir. 1964) that agency discovery rules cannot be founded on general rule-making powers does not come into play. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 694 (1979).

The information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. Stanislaus, supra, at 695.

Subpoena must be issued in good faith, and pursuant to legitimate agency investigation. Metropolitan Edison Company (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 729 (1980).

Referral of matters to Department of Justice for criminal proceedings, which are separate and distinct from matters covered by subpoenas issued by Director of Office of Inspection and Enforcement, does not bar Commission from pursuing its general health and safety and civil enforcement responsibilities through issuance of subpoena. §161(c) of AEA, 42 USC 2201(c). Metropolitan Edison Company (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 725 (1980).

10 CFR 2.720(a) contemplates ex parte applications for the issuance of subpoenas. Although the Chairman of the Licensing Board "may require a showing of general relevance of the testimony or evidence sought," he is not obligated to do so. The matter of relevance can be entirely deferred until such

time as a motion to quash or modify the subpoena is filed. One of the grounds for such a motion is that the subpoena "requires evidence not relevant to any matter in issue." Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698 n.22 (1979).

Section 2.720(f) of the Rules of Practice specifically provides that a licensing board may condition the denial of a motion to quash or modify a subpoena duces tecum "on just and reasonable terms." That phrase is expansive enough in reach to allow the imposition of a condition that the subpoenaed person or company be reimbursed for document production costs. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698-699 (1979).

Generally, document production costs will not be awarded unless they are found to be not reasonably incident to the conduct of a respondent's business. Stanislaus, supra, at 702.

Under 10 CFR § 2.740 and § 2.740b, the presiding officer of a proceeding will rule upon motions to compel discovery which set forth the questions contained in the interrogatories, the responses of the party upon whom they were served, and arguments in support of the motion to compel discovery. An evasive or incomplete answer or response to an interrogatory shall be treated as a failure to answer or respond. Houston Light & Power Company, (South Texas Project, Units 1 and 2), LBP-79-05, 9 NRC 193, 194-95 (1979).

Specific objections must be made to the alleged inadequacy of discrete responses. South Texas, supra, at 195.

10.4(2) Sanctions for Failure to Comply with Discovery Orders

A licensee's motion for sanctions against an intervenor for failure to comply with discovery requests poses a three part consideration: (1) due process for the licensee; (2) due process for the intervenor; and (3) an overriding consideration of the public interest in a complete evidentiary record. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893, 897 (1980).

10.4(3) Compelling Discovery From ACRS and ACRS Consultants

Although 10 CFR § 2.720 did not explicitly cover consultants for advisory boards like the Advisory Committee on Reactor Safeguards (ACRS), it could fairly be read to include them where they have served in that capacity. Therefore, intervenors seeking to subpoena consultants to ACRS were required to show the existence of exceptional circumstances before the subpoenas were issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 42 n.2 (1979).

10.5 Appeals of Discovery Rulings

Questions about the scope of discovery concern matters which are particularly within a trial board's competence and appellate review of such rulings is usually best conducted at the end of case. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

A discovery order entered against a non-party is a final order and thus is appealable. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979).

III. HEARINGS1. Licensing Boards1.1 General Role

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980).

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A licensing board may conduct separate hearings on environmental, and radiological health and safety issues. Absent persuasive reasons against segmentation, contentions raising environmental questions need not be heard at the health and safety stage of a proceeding notwithstanding the fact they may involve public health and safety considerations. Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 908 (1980).

1.2 Powers and Duties of Licensing Boards1.2(1) General

A Licensing Board's powers are not coextensive with that of the Commission, but are based solely on delegations expressed or necessarily implied in regulation or in other Commission direction. A Licensing Board is not delegated authority to and cannot order a hearing in the public interest under 10 CFR 2.104(a). The notice constituting a construction permit Licensing Board does not provide a basis for it to order a hearing on whether an operating license should be granted. A construction permit licensing board's jurisdiction will usually terminate before an operating license application is filed. Thus, it probably never could be delegated authority or determine whether a hearing on the operating license application is needed in the public interest. Similarly, the general authority of a Licensing Board to condi-

tion permits or licenses provide a basis for it to initiate other adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980); reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

A licensing board's jurisdiction is defined by the Commission's notice of hearing. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company, (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979).

Cases involving a determination of Licensing Board's authority: The Licensing Board has authority to consider materials license questions where a petitioner raised questions regarding a materials license before a board delegated authority to consider an operating license application. Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

The Licensing Board has the requisite authority to determine de novo (following receipt of evidence on the subject) what acceleration level should be assigned for a postulated earthquake. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-618, 12 NRC 551, 552 (1980).

A hearing is not mandatory on an operating license, but where a Board is convened it may look at all serious matters it deems merit further exploration. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 229-231 (1980).

Absent special circumstances, a Licensing Board may consider ab initio whether it has power to grant relief that has been specifically sought of it. Every tribunal possesses inherent rights and duties to determine in the first instance its own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

A 10 CFR Part 70 materials license is an "order" which under 10 CFR 2.717(b) may be "modified" by a licensing board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

A licensing board has authority under 10 CFR 2.711(a) to extend or lessen the times provided in the Rules for taking any action. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

If a licensing board determines that a participation agreement prohibiting the flow of electricity

in interstate commerce is inconsistent with the antitrust laws, the board may impose license conditions despite a federal court injunction prohibiting participant from violating agreement. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 577 (1979).

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's administrative functions should bring the matter to the Commission's attention or certify the question to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a licensing board interfere in the review activities of the Staff. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

Licensing Board lacks authority to consider motion for an Order to Show Cause pursuant to 10 CFR §§ 2.202 and 2.206. Puerto Rico Electric Power Authority (North Coast Nuclear Plant Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

Licensing Board lacks authority to consider claim for damages. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

1.4 Disqualification of a Licensing Board Member

1.4(1) Motion to Disqualify, Requirements

An intervenor's status as a party to a proceeding does not of itself give it standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979).

A challenged member of an Appeal Board must first be given an opportunity to disqualify himself, before the Commission will act. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-9, 11 NRC 436 (1980).

(retitled)

1.4(2) Grounds for Disqualification (previously "Bias")

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear

Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 34 (1979).

The disqualification of a licensing board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-614, 12 NRC 347, 348-49 (1980).

In the absence of bias, an Appeal Board member who participated as an adjudicator in a construction permit proceeding for a facility is not required to disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511 (1980).

1A Export Licensing Hearings

1A.1. Scope of Hearing

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission in making its export licensing determinations, will consider non-proliferation and safeguards concerns, and not foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-61 (1980).

2. Hearing Scheduling Matters

(new) 2.7 In Camera Hearings

No reason exists for an in camera hearing on security grounds where there is no showing of some incremental gain in security from keeping the information secret. Duke Power Co. (Amendment to Materials License SNM-1773, Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), CLI-80-3, 11 NRC 185, 186 (1980).

Procedures for in camera hearings are discussed. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227 (1980).

4. Summary Disposition

4.1 General

Commission Rules of Practice governing motions for summary disposition, 10 CFR § 2.749, are modelled in Rule 56 of

the Federal Rules of Civil Procedure. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787, n.51 (1979).

On its face, 10 CFR § 2.749 provides a remedy only with regard to matters which have not already been the subject of an evidentiary hearing in the proceedings at bar, but which are susceptible of final resolution on the papers submitted by the parties in advance of any such hearing. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-554, 10 NRC 15, 19 (1979).

In a spent fuel pool expansion proceeding, the Licensing Board summarily dismissed some contentions upon finding that no genuine issue of material fact was raised. Certain matters are not covered in a license application, where those matters do not allege or raise a safety question or a matter of environmental concern. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 566-67 (1979).

There is no procedure (short of withdrawal by the Applicant) for a Board's disposition of a construction permit application without a hearing on health, safety and environmental issues, 42 U.S.C. 2239 and 10 CFR § 2.104. A motion for summary disposition is denied because 10 CFR § 2.749(d) states that such a motion may not be used to determine the ultimate issues as to whether a CP shall be issued. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

4.3 Motions for Summary Disposition

4.3(3) Content of Motions and Responses

Movant's papers which are insufficient to show an absence of an issue of fact, cannot premise a grant of summary judgment. Similarly, a response to motion for summary judgment must have a statement of material facts. Mere allegations and denials will not suffice, but there must be a showing of genuine issues of fact. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980).

4.3(4) Content of Summary Judgment Order

In grant of summary judgment, Licensing Board should set forth legal and factual basis for action. Where it has not the Appeal Board will examine the record and see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453, n.4 (1980).

4.4 Summary Disposition Rules

Answer filed in response to summary disposition motion, in support of the motion, was not considered by the Licensing Board because 10 CFR § 2.749 provides only for answers "opposing the motion." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557 (1979). Subsequently, the holding in Salem, supra, was rendered invalid by a change to 10 CFR § 2.749(a)

which specifically permits responses in support of, as well as in opposition to, motions for summary disposition. 45 FR 68919 (1980).

4.5 Appeals from Rulings on Summary Disposition

Where a Licensing Board has not set forth the legal and factual basis for its action on a summary judgment motion, the Appeal Board will examine the record to see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453, n.4 (1980).

6. Burden and Means of Proof

6.1 Duties of Applicant/Licensee

The NRC is dependent upon all of its licensees for accurate and timely information. The Licensee must have a detailed knowledge of the quality of installed plant equipment. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 712 (1980).

The ultimate burden of persuasion rests with applicant and with NRC Staff to extent Staff supports the applicant's position. Parties saddled with this burden typically proceed first and then have right to rebut the case presented by their adversaries. Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 529 (1977).

6.3 Specific Issues - Means of Proof

6.3(7) Management Capability

Areas of inquiry to determine if a utility is capable of operating a facility are outlined in Metropolitan Edison Co (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-5, 11 NRC 408 (1980); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

10. Evidence

10.1 General

Where Appeal Board is not sure of evidence considered below, it asks Licensing Board to identify that evidence. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 228-29 (1980).

Reliance on secondary evidence is no substitute for direct evidence. Board reversed where findings were based on an opinion of a plan, and not the plan itself. Diablo Canyon, supra, at 229.

10.2 Rules of Evidence

10.2(1) Admissibility

A determination on materiality will precede the admission of an exhibit into evidence, but this is not an ironclad requirement in administrative

proceedings in which no jury is involved. The determinations of materiality could be safely left to a later date without prejudicing the interests of any party. Public Service Company of New Hampshire, et al. Seabrook Station, Units 1 and 2, ALAB-520, 9 NRC 48, 50 n.2 (1979).

(new)

10.2(6) Government Documents

NRC adjudicatory boards may follow Rule 902 of the Federal Rules of Evidence, waiving the need for extrinsic evidence of authenticity as a precondition to admitting official government documents to allow into evidence government documents. Public Service Company of New Hampshire, et al. Seabrook Station, Units 1 and 2, ALAB-520, 9 NRC 48, 49 (1979).

11. Witnesses11.1 Compelling Appearance11.1(3) ACRS Members

The Appeal Board, at intervenors' request directed that certain consultants to the ACRS appear as witnesses in the proceeding before the Board. Such an appearance was proper under the circumstances of the case, since the ACRS consultants had testified via subpoena at the licensing board level at intervenors request. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-604, 12 NRC 149, 150-51 (1980).

11.4 Board Witnesses

In the interest of a complete record, the Appeal Board may order the Staff to submit written testimony from a "knowledgeable witness" on a particular issue in a proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-607, 12 NRC 165, 167 (1980).

11.5 Expert Witnesses

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability - for whatever reason - to provide the foundation for them to the decision maker and other litigants. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979).

A witness testifying to the results of an analysis need not have at hand every piece of datum utilized in performing that analysis. In this area, a rule of reason must be applied. It is not unreasonable, however, to insist that, where the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated. North Anna, supra, at 27.

13. Record13.1 General

Where Appeal Board is not sure of evidence considered below, it asks Licensing Board to identify that evidence. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 228-29 (1980).

13.2 Supplementing Record by Affidavits

There is no significance to the content of affidavits which do not disclose the identity of individuals making statements in the affidavit. Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-525, 9 NRC 111, 114 (1979).

13.4 Material not Contained in Record

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980).

14. Interlocutory Review via Directed Certification

Appeal boards undertake discretionary interlocutory review of a licensing board ruling only where it either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-572, 10 NRC 693, 694 (1979). The Appeal Boards certification authority was not intended to be applied to a mixed question of law and fact in which the factual element was predominant. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 11 (1979) quoting Public Service Company of Indiana (Marble Hill Station Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

The Commission's Rules of Practice, 10 CFR 2.714a, prohibit a person from taking an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety. Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-521, 12 NRC 578, 579 (1980).

15. Licensing Board Findings15.1 General

A licensing board decision which rests significant findings on expert opinion not susceptible of being tested on examination of the witness is a fit candidate for reversal. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979).

Licensing boards passing on construction permit applications must be satisfied that requirements for an operating license, including those involving management capability, can be met by the applicant at the time such license is sought. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Construction permit licensing board has no authority to condition such a permit on the holding of an operating license hearing. Shearon Harris, supra.

Where evidence may have been introduced by intervenors in an operating license proceeding, but the construction permit Licensing Board made no explicit findings with regard to those matters, and at the construction permit stage the proceeding was not contested, the operating license Licensing Board will decline to treat the construction permit Licensing Board's general findings as an implicit resolution of matters raised by intervenors. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 79 n.6 (1979).

16. Res Judicata and Collateral Estoppel

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One such exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co., et al. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-75 (1979).

There is no basis under the Atomic Energy Act or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages, where principles of res judicata and collateral estoppel then come into play. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 464 (1979).

A party countering a motion for summary judgment based on res judicata need only recite the facts found in the other proceeding, and need not independently support those "facts." Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14, 15 n.3 (1980).

Collateral estoppel requires presence of at least four elements in order to be given effect: (1) issue sought to be precluded must be same as that involved in prior action, (2) issue must have been actually litigated, (3) issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Houston Lighting & Power Co., et al. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979).

Where the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in litigation of similar issues under a different statute. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-29-27, 10 NRC 563, 571 (1979).

Denial of summary judgment on basis of res judicata and collateral estoppel affirmed on basis of opinion below (LBP-79-27, 10 NRC 563, (1979)). Houston Lighting & Power Co., et al. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14 (1980).

(new) 17. Termination of Proceedings

17.1 Termination of Proceedings, Procedures

Termination of adjudicatory proceedings on a construction permit application should be accomplished by a motion filed by applicant's counsel with those tribunals having present

jurisdiction over the proceeding. A letter by a lay official to the Commission when the Licensing Board has jurisdiction over the matter is not enough. Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 668-9 (1980).

17.2 Termination of Proceedings; Post Termination Authority of Commission

10 CFR § 2.107(a) expressly empowers Licensing Boards to impose conditions upon the withdrawal of a permit or license application after the issuance of a notice of hearing. Davis-Besse, Units 2 and 3, supra, at 669, n.2 (1980).

IV. POST HEARING MATTERS

1. Settlements and Stipulations

10 CFR § 2.759 expressly provides, and the Commission stresses, that the fair and reasonable settlement of contested initial licensing proceedings is encouraged. Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 283 (1979).

3. Initial Decision

3.1 General

It is the right and duty of a Licensing Board to include in its decision all determinations of matters on an appraisal of the record before it. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 30 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

A Licensing Board has authority to condition a permit or license to require measures in plant construction or operation in the interests of safety or the environment. However, a Licensing Board considering a construction permit application cannot determine an operating license adjudicatory hearing will be necessary in the public interest on management capability when considering a construction permit application. It lacks the factual basis to do so, since the facts may change before the operating license is sought. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 26-30 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The sanctioning of a construction permit does not make automatic the later issuance of a license to operate. The Board directed that certain issues addressed in the construction permit proceedings be reassessed by the Staff and the applicant at the operating license review stage. Public Service Electric and Gas Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 37 (1979).

3.2 Reconsideration of Initial Decision

Doubts concerning whether requirements on plans for operation can be met, do not require the suspension of outstanding construction permits, 10 CFR 50.34(a). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 22 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

4. Reopening Hearings4.1 General

The Appeal Board dismissed for want of jurisdiction a motion to reopen hearings in a proceeding in which the Appeal Board had issued a final decision, followed by the Commission's election not to review that decision. The Commission's decision represented the agency's final action, thus ending the Appeal Board's authority over the cause. The Appeal Board referred the matter to the Director of Nuclear Reactor Regulation because, under the circumstances, he had the discretionary authority to grant the relief sought subject to Commission review. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979).

4.2 Motions to Reopen4.2(1) Time for Filing

Where jurisdiction terminated on all but a few issues, Board should not entertain unrelated new or reopened issues even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980).

4.3 Grounds for Reopening

In order to reopen licensing proceeding, intervenor must show change in material fact which warrants litigation anew. Carolina Power & Light Co. Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4, CLI-79-10, 10 NRC 675, 677 (1979).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 at n.6 (1980).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, at 887.

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, the general state of economy, etc. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant relitigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

A possible one-year slip in need-for-power forecasts is legally insufficient to order relitigation of the issue of need-for-power. Shearon Harris, supra, at 610.

5. Motions to Reconsider

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980).

6. Sua Sponte Review by the Appeal Board

Appeal Board review will be routinely undertaken of any final disposition of a licensing proceeding founded upon substantive determinations of significant safety or environmental issues. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 303-304 (1980).

The Appeal Board, on sua sponte review, has the authority to reject or modify the findings of the Licensing Board. Monticello, supra, at 304.

A case, when properly before the Appeal Board on sua sponte review, is not confined to those issues on which the Licensing Board made substantive findings. Issues not raised by parties may be considered. However, in operating license proceedings such issues may be considered only when serious safety environmental or common defense and security matter exist. Monticello, supra, at 309.

In the course of its review of an initial decision in a construction permit proceeding, an Appeal Board is free to raise sua sponte issues which were neither presented to nor considered by the Licensing board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979).

If the Appeal Board determines sua sponte more information is needed, it may take evidence to develop the record. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-578, 11 NRC 189 (1980).

The Appeal Board, in lieu of remand, may undertake the conduct of hearings in the interests of expedition. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980).

V. APPEALS1. General(new) 1.0 Unpublished Opinions

Unless published in the official NRC reports, decisions and orders of appeal boards are usually not to be given precedential effect in other proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 745 (1980).

1.1 Right to Appeal

A prevailing party may defend a result on any ground presented in the record, including one rejected below, once the other side appeals. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 789 (1979).

1.2 Who Can Appeal

One seeking to appeal an issue must have participated and taken all timely steps to correct the error. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (March 12, 1980).

The Commission has long construed its Rules of Practice to allow the Staff to appeal from initial decisions. The decision of the presiding officer at the hearing becomes the final action of the Commission only if not reviewed on its initiative and if no exceptions are taken. 10 CFR § 2.762 explicitly treats the Staff as a party for purposes of filing exceptions. In the Matter of Radiation Technology, Inc., ALAB-567, 10 NRC 533, 547-48 (1979).

1.4 Time for Filing Appeals

Finality of a decision is usually determined by examining whether it disposes of at least a major segment of the case or terminates a party's right to participate. The general policy is to strictly enforce time limits for appeals following a final decision. However, where the lateness of filing was not due to a lack of diligence, but, rather, to a misapprehension about the finality of a Board decision, the Board will allow the appeal as a matter of discretion. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-60 (1980).

A petitioner's request that the denial of his intervention petition be overturned, treated as an appeal under 10 CFR § 2.714a, is denied as untimely where it was filed almost 3 months after the issuance of a Licensing Board's order, especially in the absence of a showing of good cause for the failure to file an appeal on time. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

1.5 Matters Considered on Appeal

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980).

One may not appeal from an order delaying a ruling, when appeal will lie from the ruling itself. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

Although a party generally, may appeal only on a showing of discernable injury, the Staff may appeal on questions of precedential importance. A question of precedential importance is a ruling that would with reasonable probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

1.5(2) Issues Raised for the First Time on Appeal

An appeal may only be based on matters and arguments raised below. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980).

Where jurisdiction terminated on all but a few issues, Board should not entertain new or reopened issues even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223 (1980).

Where finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a reasonable nexus between those matters and the issues remaining before the board. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979).

The jurisdiction of an appeal board to consider new matters arising during the course of its review of a licensing board decision does not hinge upon the nature of the proceeding. Rather, irrespective of whether a construction permit or an operating license is involved, the pivotal factor is the posture of the case and the degree of finality which has attached to the agency action which is in question. North Anna, supra, at 707.

The Appeal Board dismissed as moot intervenors' motion to introduce a new contention, where the matter is to be explored on the Appeal Board's own motion and intervenors will have the opportunity to participate in that exploration. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-537, 9 NRC 407, 412-13 (1979), reconsid. denied, ALAB-543, 9 NRC 626 (1979).

1.5(5) Consolidation Upon Consideration of Generic Issues

The Appeal Board consolidated and scheduled for hearing radon cases where intervenors are actively participating, and held the remaining cases in abeyance. Where the issues are largely generic,

consolidation will result in a more manageable number of litigants, and relevant considerations will likely be raised in the first group of consolidated cases. Philadelphia Electric Co., (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 433 (1979) reconsid. denied, ALAB-546, 9 NRC 636 (1979).

1.6 Appeal Board Actions

1.6(1) Role of Appeal Board

Appeal board review will be routinely undertaken of any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues. Washington Public Power System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979).

In the course of its review of an initial decision in a construction permit proceeding, an appeal board is free to sua sponte raise issues which were neither presented to nor considered by the licensing board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979).

If conditions on a license are invalid, the Appeal Board may either remand the matter or prescribe a remedy itself. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 31 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Where Appeal Board is not sure of evidence considered below, it asks Licensing Board to identify that evidence. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 228 (1980).

Appeal Board, in lieu of remand, undertakes the conduct of hearings. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980); Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-578, 11 NRC 189, 190 (1980).

Once an appeal board has wholly terminated its review of an initial decision - whether it be a construction permit or an operating license proceeding - its jurisdiction over the proceeding comes to an end. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 708 (1979).

The Appeal Board denied intervenors' motion requesting broad discovery in a matter to be heard by the Appeal Board, and directed the parties to provide material informally in order to reduce the extent of discovery disputes likely to be presented to the Appeal Board. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-543, 9 NRC 626, 627 (1979).

1.6(3) Standards for Reversing Licensing Board on Findings of Fact

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980).

Where Licensing Board imposes an incorrect remedy, an Appeal Board will search for a proper one. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234-35 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

License amended to require prompt notification of Staff of any change in operating procedures. However, Appeal Board refuses to order monitoring where lesser surveillance will suffice. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-578, 11 NRC 189, 219-20, 222 (1980).

1.6(5) Immediate Effectiveness of Appeal Board Decision

Decisions and orders of an Appeal Board are immediately effective. Absent an Appeal Board's or the Commission's issuance of a stay, a Licensing Board is both entitled and duty-bound to carry out Appeal Board directives with suitable dispatch. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-597, 11 NRC 870, 873-74 (1980).

(new)

1.6(7) Disqualification of Appeal Board Member

In denying a petition to review a decision by an Appeal Board member who decided not to recuse himself, the Commission ruled that in the absence of bias, an Appeal Board member who participated as a adjudicator on appeal in a construction permit proceeding need not disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511, 512 (1980).

2. Stays Pending Appeal

2.2 Requirements for a Stay

10 CFR § 2.788 confers the right to seek stay relief only upon those who have filed (or intend to file) a timely appeal from the decision or order sought to be stayed. Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979).

The Commission stated that the weightiest standard applied to stay motions is the need to maintain the status quo -- whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted. Westinghouse Electric Corp. (Exports to the Phillipines) CLI-80-14, 11 NRC 631, 662 (1980).

3. Specific Appealable Matters3.1 Rulings on Intervention

One may not appeal from an order denying intervention unless the order denies the petition in its entirety. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980).

Under settled practice, appeal boards do not on their own initiative review licensing board orders granting or denying intervention. If those affected do not deem themselves sufficiently aggrieved to appeal, there is no reason for appeal boards to concern themselves. Washington Public Power System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 688 (1979).

3.2 Scheduling Orders

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437-38 (1979).

Appeal Boards, absent extraordinary circumstances, will not consider scheduling controversies. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980).

3.10 Partial Initial Decisions

Even though the partial initial decision did not authorize the issuance of a construction permit, or pave the way for the issuance of a limited work authorization, it was nonetheless subject to immediate appeal. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-597, 11 NRC 870, 871 (1980).

3.11 Other Licensing Actions

Construction permit licensing board has no authority to condition a construction permit on the holding of an operating license hearing. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Where Licensing Board imposes an incorrect remedy, an Appeal Board will search for a proper one. Shearon Harris, supra, at 234.

5. Briefs on Appeal5.3 Contents of Brief5.3(1) General

A permitted reply to an answer should only reply to opposing briefs and not raise new matters. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 243, n.4 (1980).

Exceptions will be dismissed if sufficient information is not provided to dispose of the arguments intelligently and thus are "impossible of resolution." Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 786 (1979).

7. Actions Similar to Appeal

7.1 Motions to Reconsider

An Appeal Board may not reconsider a matter after it has lost jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980).

The practice followed by the Appeal Board, that it is unnecessary for a party to respond to a motion for reconsideration unless specifically requested to do by the Board, is also applicable to requests for clarification of a prior decision. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-544, 9 NRC 630, 631 (1979).

7.2 Interlocutory Reviews

7.2(1) General

Interlocutory appeals are generally not permitted as a matter of right under the Rules of Practice, 10 CFR § 2.730(f). Appeal Board may, as a matter of discretion, elect to entertain matters normally subject to appellate review at the end of a case when (and if) an appeal is taken from the Licensing Board's final decision, 10 CFR §§ 2.718(i) and 2.785(b)(1). Discretionary review is granted only sparingly and only when licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later case appeal or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980).

There might be warrant for treating in a 10 CFR § 2.730 motion for interlocutory appeal filed by a lay person unfamiliar with the Rules of Practice alternatively as a petition seeking directed certification under 10 CFR § 2.718(i). Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-563, 10 NRC 449 (1979).

The Appeal Board denied an intervenor's motion to strike applicant's appeal from the Licensing Board's order granting intervention, on the grounds that appeals from interlocutory board orders granting or denying intervention are governed by Section 2.714a of the Commission's Rules of Practice. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-545, 9 NRC 634 (1979).

7.2(2) Directed Certification

The Commission's rules do not allow the Appeal Board to entertain interlocutory appeals, 10 CFR § 2.730(f). In extraordinary circumstances, however, the Appeal Board can review interlocutory rulings by a petition for directed certification pursuant to 10 CFR § 2.718(i). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437 (1979).

There might be warrant for treating in a 10 CFR § 2.730 motion for interlocutory appeal filed by a lay person unfamiliar with the Rules of Practice alternatively as a petition seeking directed certification under 10 CFR § 2.718(i). Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-563, 10 NRC 449 (1979).

Discretionary interlocutory review will be granted only sparingly, and then only when a licensing board's action either (1) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980).

8. Exception to Orders, Rulings, Initial Decisions
Partial Initial Decisions8.2 Time for Filing Exceptions8.2(2) Variation in Time Limits

If unable to meet the deadline for filing a brief in support of its objection to a licensing board's decision, a party is duty-bound to seek an extension of time sufficiently in advance of the deadline to enable an appeal board to act seasonably upon the application. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554, 555 (1979).

8.3 Briefs on Exceptions

Briefs in support of exceptions must specify the precise portion of the record relied upon in support of the assertion of error. 10 CFR § 2.762(a); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 424 (1980).

9. Certification

A certification to the Commission would go first to the Appeal Board under the specific delegation of 10 CFR § 2.785(b)(1). Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), LBP-80-29, 12 NRC 581, 591 (1980).

The Commission's Rules of Practice contemplate that requests for relief (in matters such as discovery) be delegated to the Appeal Board, which functions as the Commission's delegate for these

matters. 10 CFR § 2.785. Absent extraordinary circumstances warranting Commission involvement, request for interlocutory review of Licensing Board rulings and other relief should be directed to the Appeal Board rather than to the Commission. 10 CFR §§ 2.730(f), 2.785. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980).

(new) 9A. Reconsideration by the Commission

The Commission's ability to reconsider is inherent in the ability to decide in the first instance. The Commission has 60 days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

10. Review of Appeal Board Decisions

10.1 General

Dicta of the Commission reflects its views, and is entitled to the Board's respect. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The expression of tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

A party cannot complain that the Commission decided issues necessary for a determination of a question presented to it. Sheffield, supra, at 4-5.

Question of late intervention of Indian tribes in Commission proceeding deemed to present unique and important issues involving meaningful public participation and avoidance of administrative delay, which justify Commission interlocutory review. However, petitions for review are denied. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2) (unreported decision, January 16, 1980).

Commission accepts interlocutory review of question of whether routing of shipments of fuel should be kept secret. Duke Power Co. (Amendment to Materials License SNM-1773, Transportation of Spent Fuel), CLI-80-3, 11 NRC 185 (1980).

Commission accepts review of "important policy issue of first impression" of whether civil penalties under the AEA can be imposed on a licensee because of acts committed by licensee's employee absent a showing of management fault. Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980).

10.2 Stays Pending Judicial Review

The Appeal Board suspended sua sponte its consideration of an issue in order to await the possibility of Supreme Court review of a related issues, following the rendering of a decision by the First Circuit Court of Appeals, where certiorari had not yet been sought or ruled upon for such Supreme Court review. Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-548, 9 NRC 640, 642 (1979).

(new) 10.4 Disqualification of a Commissioner

Determinations on the disqualification of a Commissioner reside exclusively in that Commissioner, and are not reviewable by the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

12. Procedure on Remand12.1 Jurisdiction of the Licensing Board on Remand

Where the Commission remands an issue to a Licensing Board it is implicit that the Board is delegated to prescribe warranted remedial action within the bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of its own review of the appeal board decision. Issues to be considered by the Board on remand would be shaped by that order. If the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of its scope to embrace discrete matters. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979).

The Licensing Board was "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission and the petition for intervention dealt with matters outside that scope. A Licensing Board had limited jurisdiction in the proceeding and could consider only what had been remanded to it. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979).

VI. GENERAL MATTERS1. Amendments to Existing Licenses and/or Construction Permits1.2 Hearing Requirements1.2(3) Intervention

Persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for the extension, have standing to intervene in construction extension proceedings to show that no good cause existed for extension and, consequently, new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 195 (1980).

1.2(5) Matters Considered in Hearings on License Amendments

In an extension proceeding the Board must consider issues related to health, safety and environment which arise from the reasons given for extension

which cannot abide until the operating license hearing, even if the issues are not related to the prolonged period of construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 198 (1980).

The mere request for an extension is no reason to accelerate a consideration of issues that the rules provide for considering no earlier than the operating license stage. Bailly, supra, at 199.

Even when it is determined that issues advanced in construction extension proceeding would have been heard at construction permit hearing, those issues will be heard in extension proceeding only if there is not "reasonable assurance" that all safety matters will be satisfactorily resolved by the new completion date. Bailly, supra, at 200.

Issues that do not arise from the reasons for the delay in construction or are otherwise unrelated to the prolonged period could be considered, in an extension proceeding, if they are necessary to protect the public interest and cannot abide the operating license proceeding. Any jurisdiction the Board exercises under the above interpretation would be strictly limited to situations in which the petitioner had made a convincing prima facie showing that the safety matter alleged will not be satisfactorily resolved by the new completion date. Bailly, supra, at 204-206.

(new) 1A. Amendments to License/Permit Applications

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before the applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board "vacate[d] without prejudice" the decisions of the Licensing Board sanctioning the LWA, and remanded the case for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979).

2. Antitrust Considerations

2.1 General

Only the NRC is empowered to make the initial determination under section 105(c) whether activities under the license would create or maintain a situation inconsistent with the antitrust laws, and if so what license conditions should be required as a remedy. Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 574 (1979).

In order to conduct a section 105(c) proceeding, it is not necessary to establish a violation of the antitrust laws. Any violation of the antitrust laws also meets the less rigorous standard of section 105(c) which is inconsistency with the antitrust laws. South Texas, supra, at 570.

NRC statutory responsibilities under section 105(c) cannot be impaired or limited by a state agency. South Texas, supra, at 577.

The legislative history and language of the Public Utilities Regulatory Policies Act of 1978 clearly establish that the act was not intended to divest NRC of its anti-trust jurisdiction. South Texas, supra, at 577.

When the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, he must be allowed to participate in those hearings. The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) and The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 272 (1979).

A directive to consider the "public interest" does not mean that the antitrust laws can be ignored or relaxed in favor of some broad interpretation of the "public interest". Davis-Besse and Perry, supra.

2.2

Consideration of Antitrust Matters After the Construction Permit Stage

A narrower, second antitrust review is to occur at the operating license stage, if and only if, "The Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission ..." in connection with the construction permit for the facility. South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 823 (1980).

The ultimate issue in the operating license stage antitrust review is the same as for the construction permit review: would the contemplated license create a situation inconsistent with the antitrust laws or the policies underlying those laws. South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824 (1980).

To trigger antitrust review at the operating license stage, the significant changes specified by Section 105(c) of the Atomic Energy Act must (1) have occurred since the previous antitrust review of the licensee; (2) be reasonably attributable to the licensee; and (3) have antitrust implications that would warrant Commission remedy. This requires an examination of (1) whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications and (2) whether the Commission has available remedies. Summer, supra, at 824-825.

Although the NRC regulations do not specify a period during which requests for a significant change determination will be timely, the relevant question in determining timeliness is whether the request has followed sufficiently promptly the operating license application. Summer, supra, at 829.

2.4 Discovery in Antitrust Proceedings2.4(1) General

The Noers Pennington doctrine will operate to immunize those legitimately petitioning the government, or exercising other First Amendment rights, from liability under the antitrust laws, even where the challenged activities were conducted for purposes condemned by the antitrust laws. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 174 (1979).

Material on Applicant's activities designed to influence legislation and requested through discovery is relevant and may reasonably be calculated to lead to the discovery of admissible evidence, and therefore is not immune from discovery. The Noers-Pennington cases, which applicant had based its argument, go to the substantive protection of the First Amendment and do not immunize litigants from discovery. Appropriate discovery into Applicant's legislative activities had to be permitted, and the information sought to be discovered may well be directly admissible as evidence. St. Lucie, *supra*, at 175.

2.4(2) Discovery Cutoff Dates

The imposition of a cutoff date for discovery is for the purpose of making a preliminary ruling about relevancy for discovery. The cutoff date is only a date after which, in the dimension of time, relevancy may be assumed for discovery purposes. Requests for information from before the cutoff date must show that the information requested is relevant in time to the situation to be created or maintained by a licensed activity. If the information sought is relevant, and not otherwise barred, it may be discovered, no matter how old, upon a reasonable showing. This is entirely consistent with 10 CFR § 2.740(b) and Rule 26(b) which are in turn consistent with the Manual for Complex Litigation, Part 1, § 4.30. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 169-70.

In antitrust proceedings, the relevant period for discovery must be determined by the circumstances of the alleged situation inconsistent with the antitrust laws, not the planning of the nuclear facility. St. Lucie, *supra*, 168.

Parties relying upon evidence, either defensively or in their respective cases in chief, which predated the cutoff date for discovery set by the Licensing Board, must be prepared to allow the other parties to follow the evidentiary trial. St. Lucie, *supra*, at 170.

A ten year time limit for discovery was established, since ten years appears to have been successfully employed as a general time period limitation on discovery in other antitrust litigations. St. Lucie, *supra*, at 171.

The standard for allowing discovery requests pre-dating a set cutoff date is that there be a reasonable possibility of relevancy; it is not necessary to show relevancy plus good cause. St. Lucie, supra, at 172.

3. Attorney Conduct

3.1 Practice Before Licensing and Appeal Boards

3.1(2) Professional Decorum

The Code of Professional Responsibility considerably restricts the comments that counsel representing a party in an administrative hearing may make to the public. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 750 (1980).

(new) 3.2 Disciplinary Matters (formerly Suspension of Attorneys)

The Comptroller General concludes there is no basis on which the NRC can reimburse a private attorney for out-of-pocket expenses in connection with the termination and settlement of a special proceeding brought to investigate misconduct charges against a private attorney and NRC Staff attorneys. Consumers Power Company (Midland Plant, Units 1 and 2), CLI-79-3, 9 NRC 107, 109 (1979).

5. Early Site Review Procedures

5.1 General

Early site review regulations provide for a detailed review of site suitability matters by the Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the Applicant, and the issuance by a Licensing Board of an early partial decision on site suitability issues. A partial decision on site suitability is not a sufficient basis for the issuance of a construction permit or for a limited work authorization. Neither of these steps can be taken without further action, which includes the full review required by Section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA), and by 10 CFR Part 51, which implements NEPA. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The early partial decision on site suitability does not authorize or license the Applicant to do anything; it does provide Applicant with information of value to Applicant in its decision to either abandon the site or proceed with plans for the design, construction, and operation of a specific nuclear power plant at that site. Implementation of any such plans is dependent upon further review by the Staff and approval by a licensing board. Fulton, supra.

5.2 Scope of Review

The early site review is not a "major Federal action significantly affecting the human environment" such as would require a full NEPA review of the entire proposed project. Commonwealth Edison Company (Carroll County Site), ALAB-601, 12 NRC 18, 25 (1980).

The scope of the early site review is properly limited to the issues specified in the notice of hearing subject to the limits of NEPA, Section 102(2)(c), 42 USC 4332(2)(c). Carrol County Site, supra, at 26.

8. Generic Issues

8.2 Consideration of Generic Issues In Licensing Proceedings

In an operating license proceeding, where a hearing is to be held to consider other issues, licensing boards are enjoined, in the absence of issues raised by a party, to determine whether the Staff's resolution of various generic safety issues applicable to the reactor in question is "at least plausible and ... if proven to be of substance ... adequate to justify operation." Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 311 (1979).

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses four distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530-31 (1979).

8.3 Unresolved Generic Issues, Effect of

8.3(2) On Operating License Proceedings

The Licensing Board has stayed its Initial Decision and retained jurisdiction authorizing the issuance of an operating license until further order of the Board following the issuance of a supplement to the Staff's Safety Evaluation Report addressing the significance of any unresolved generic safety issues. Duke Power Co. (William M. McGuire Nuclear Station, Units 1 and 2), LRP-79-13, 9 NRC 489, 546-48 (1979).

8A. Inspection and Enforcement

8A.1 General

Inspections of licensed activities during company-scheduled working hours are reasonable per se. Commission inspections may not be limited to "office hours." In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 540 (1979).

A search warrant is not needed for inspections of licensed activities. Id. at 538-40.

There is no need for warrants for NRC investigation. The Appeal Board's decision turned on the facts of the situation; the Staff's investigation was restricted in scope and designed to elicit evidence of potential safety problems. Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 140-42 (1979).

8A.2 Enforcement Actions8A.2(1) General

The Director of Inspection and Enforcement, subject to requirements that he give licensees written notice of specific violations and consider their responses in deciding whether penalties are warranted may prefer charges, may demand the payment of penalties, and agree to compromise penalty cases without formal litigation. Additionally, the Director may consult with his staff privately about the course to be taken. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 537 (1979).

The ability of the Director of Inspection and Enforcement to proceed against a licensee by issuing an order imposing civil penalties is not a denial of due process because the licensee was not able to cross-examine the Director to determine he had not been improperly influenced by Staff. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-38 (1979).

8A.2(2) Civil Penalties

When a hearing is requested to challenge the imposition of civil penalties, the officer presiding at the hearing, not the Director of Inspection and Enforcement, decides on the basis of the record whether the charges are sustained and whether civil penalties are warranted. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536 (1979).

Civil penalties are not invalidated by the absence of a formally promulgated schedule of fees when the penalties imposed are within statutory limits and in accord with general criteria published by the Commission. Id. at 541.

A civil penalty imposed by the Director of the Office of Inspection and Enforcement and upheld by the Administrative Law Judge, was set aside where the penalty properly should have been mitigated in the absence of an assertion of (1) management malfeasance, misfeasance or non-feasance or (2) a failure by the licensee to take prompt and corrective action to obviate a recurrence. In re Atlantic Research Corp., ALAB-542, 9 NRC 611, 618-621 (1979).

The propriety of a civil penalty hinges upon whether it serves a discernible remedial purpose, *i.e.*, whether it might have the effect of deterring future violations of regulatory requirements by the licensee in question or other licensees (or their employees). Civil penalties are outside the bounds of the authorization of Section 234 of the Atomic Energy Act

if their purpose or effect is solely punitive.
Id.

An adjudicatory hearing in a civil penalty proceeding is essentially a trial de novo. The penalty assessed by the I&E Director constitutes the upper bound of the penalty which may be imposed after the hearing but the Administrative Law Judge may substitute his own judgment for that of the Director. 10 CFR §§ 2.205(d),(e), and (f). In re Atlantic Research Corporation, ALAB-594, 11 NRC 841, 849 (1980).

10A. Material Licenses

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a licensing board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

11. Motions in NRC Proceedings

11.1 General

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The intervenors must be heard in response because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in Federal court. Allens Creek, supra, at 525.

11.4 Licensing Board Actions on Motions

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

12. NEPA Considerations

12.1 General

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction-permit review, 10 CFR § 51.21. To raise an issue in an operating license hearing concerning environmental matters which were considered at the construction-permit stage, there needs to be a showing either that the

issue had not previously been adequately considered or that significant new information has developed after the construction permit review. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 465 (1979).

Only the Commission may decide whether Class 9 accidents shall be considered in individual licensing proceedings. Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), CLI-80-B, 11 NRC 433 (March 21, 1980); Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-587, 11 NRC 474 (1980); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223 (1980).

The grant of a license amendment to increase the storage capacity of a spent fuel pool is not a major Commission action significantly affecting the quality of the human environment, and therefore, no EIS is required. Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 456 (1980); Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-68 (1979).

The Appeal Board, under 10 CFR 51.52(b)(3), deemed that the Staff's original environmental statement was modified by later decisions of the Licensing Board and the Appeal Board. Public Service Electric and Gas Company, et al. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979).

12.2 Environmental Statements

12.2(1) General

The Appeal Board, under 10 CFR § 51.52(b)(3), deemed the Staff's original environmental statement modified by later decisions of the Licensing Board and of the Appeal Board. Public Service Electric and Gas Company, et al. (Hope Creek Generating Station, Units 1 and 2), ALAB-528, 9 NRC 14, 39 (1979).

(new)

12.2(1)a Whether to Prepare an EIS

Although the determination, whether to issue an environmental impact statement, falls initially upon the Staff, that determination may be made an issue in an adjudicatory proceeding. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the final analysis, the significance of the impact of the project - in large part an evidentiary matter - will determine whether a statement must be issued. Palisades, supra.

The test of whether benefits of action outweigh its burdens, is distinct from the primary question of whether an environmental impact statement is needed because the action is a major Federal action significantly affecting the environment. Environmental review focuses on occupational exposure where that is the only significant impact. Virginia Electric Power Co. (Surry

Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

The fact that risks of other actions or no action are greater than that of proposed action does not show that risks of the proposed action are not significant so as to require an EIS. Where conflict in scientific community makes determination of significance of environmental impact problematical, the preferable course is to prepare an environmental impact statement. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

For an analysis of when an EIA rather than an EIS is appropriate, see Commonwealth Edison Company (Zion Station, Units 1 & 2), LBP-80-7, 11 NRC 245, 249-250 (1980).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major Federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low level waste. Nuclear Engineering Co. Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-63 (1980).

10 CFR §§ 51.5(b) and (c)(2) authorize the issuance of a negative declaration and an environmental impact appraisal in circumstances where the Staff has determined that the proposed licensing action would not have a significant effect upon the quality of the human environment. Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265 n.2 (1979).

The Appeal Board affirmed a Licensing Board decision applying this to a spent fuel pool expansion case; the Licensing Board has examined impacts associated with the expansion, had found those impacts to be local in character and insignificant in extent, and had concluded that an environmental impact statement was unnecessary. Trojan, supra, at 264-65.

The Commission has consistently taken the position that individual fuel exports are not "major Federal actions". Westinghouse Electric Corp. (Exports to Phillipines), CLI-80-15, 11 NRC 672 (1980).

12.2(1)b Scope of Environmental Statement

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken. Duke Power Company, (Amendment to Oconee SNM License and Spent Fuel Transportation at McGuire Nuclear Station), LBP-80-28, 12 NRC 459, 473 (1980).

Where the Staff issued a Final Generic Impact Statement for Handling and Storage of Spent Fuel

but where the Commission had not yet acted on it, the EIS for a license application must consider the five factors specified in the Commission's notice of intent to be considered in the GEIS. Id., 12 NRC at 476-9 (1980).

An Environmental Impact Appraisal of a spent fuel shipment proposal must adequately consider, inter alia, the potential social consequences of transshipment, including psychological, sociological and political impacts. Id., 12 NRC at 490 (1980).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978) the U.S. Supreme Court embraced the doctrine that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." The same has been held with respect to remote and speculative environmental impacts of the proposed project itself. Public Service Electric Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979).

When major federal actions are involved, if related activities taken abroad have a significant effect with the U.S., those effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3) et al., ALAB-562, 10 NRC 437, 446 (1979).

For a recent case discussing the "rule of reason" as applied to the NEPA environmental review, see, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 779 (1979).

The Staff's environmental statement pertaining to a manufacturing license application "... shall be directed at the manufacture of the reactor(s) at the manufacturing site; and, in general terms, at the construction and operation of the reactor(s) at an hypothetical site or sites having characteristics that fall within the postulated site parameters." 10 CFR Part 50, Appendix M. This relieves the Staff of any responsibility in the manufacturing license application proceeding for locating or evaluating any specific sites for a floating nuclear power plant. Rather, such issues are addressed in proceedings to place these floating plants at particular locations. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 9-10 (1979). (Comment - Appeal Board did not itself rule on the above issue. The Licensing Board interpretation of 10 CFR Part 50, Appendix M is reported here because it originally appeared in an unpublished order.)

12.2(2) Role of Environmental Statements

The impact statement does not simply "accompany" an agency recommendation for action in the sense

of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an environmental impact statement be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-60 (1979).

12.2(3) Circumstances Requiring Redrafting of FES

12.2(3)a General

For a recent case discussing recirculation of FES, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979).

12.2(4) Alternatives (formerly Alternate Sites)

Under NEPA, there is no need for Boards to consider economically better alternatives, which are not shown to also be environmentally preferable. No study of alternatives is needed under NEPA unless the action significantly affects the environment (§ 102(2)(c)) or involves an unresolved conflict in the use of resources (§ 102(2)(e)). Where an action will have little environmental effect, an alternative could not be materially advantageous. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-58 (1980).

NEPA does not require the NRC to choose the environmentally preferred site. NEPA is primarily procedural, requiring the NRC to take a hard look at environmental consequences and alternatives. Rochester Gas & Electric Corp., et al. (Sterling Power Project, Nuclear Unit No. 1), CLI-80-23, 11 NRC 731, 736 (1980).

The application of the Commission's "obviously superior" standard does not affect the Staff's obligation to take the hard look. The NRC's "obviously superior" standard is a reasonable exercise of discretion to insist on a high degree of assurance that the extreme action of denying an application is appropriate in view

of inherent uncertainties in benefit-cost analysis. Sterling, supra, at 735.

Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives (in Seabrook, alternative sites) to the proposal under consideration is preferable, based on a NEPA cost/benefit balance, it remains the Commission's obligation to satisfy itself, that that is so. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-557, 10 NRC 153, 155 (1979).

Citing its power to make "policy", a power the Appeal Board does not have, the Commission held, as a matter of policy, that "Class 9" accidents were appropriate for consideration in the FES on offshore nuclear power plants. Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979). (NOTE: The Commission has subsequently withdrawn the "proposed annex" and stated that, under its new policy, all accidents should be considered with appropriate weight being given to each. Statement of Interim Policy, 45 Fed. Reg. 40101 (June 12, 1980).)

The Appeal Board approved a Licensing Board's decision not to consider alternatives to pool capacity expansion in a proposed expansion proceeding. The Licensing Board had found that the environmental effects of the proposed action were negligible. Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 (1979).

The NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither 1) entail more than negligible environmental impacts, nor 2) involve the commitment of available resources respecting which there are unresolved conflicts. Trojan, supra, at 265-66.

12.2(5) Need for Facility

12.2(5)a General

The general rule applicable to cases involving differences or changes in demand forecasts is not whether the utility will need additional generating capacity but when. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 691 (1980).

12.2(6) Cost-Benefit Analysis

12.2(6)b Consideration of Specific Costs

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at

face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 561-62 (1979).

The environmental and economic costs of decommissioning necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 313 (1979).

Alternative methods of decommissioning do not have to be discussed. All that need be shown is that the estimated costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Susquehanna, supra, at 314.

12.3 Power of NRC Under NEPA

12.3(1) General

A licensing board may rule on the adequacy of the FES once it is introduced into evidence and may modify it if necessary. A licensing board's authority to issue directions to the NRC Staff regarding the performance of its independent responsibilities to prepare a draft environmental statement is limited. Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1984).

Neither NEPA nor the Atomic Energy Act applies to activities occurring in foreign countries and subject to their sovereign control. Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 445-46 (1979).

12.3(5) With Regard to FWPCA

Section 511(c)(2) of the FWPCA requires that the Commission and the Appeal Board accept EPA's determinations on effluent limitations. Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 282 (1979).

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 561-62 (1979).

12.4 Spent Fuel Pool Proceedings

A Licensing Board was not required to consider in a spent fuel pool expansion case the environmental effects of all other spent fuel pool capacity expansions. Because pending or past licensing actions affecting the capacity of other

spent fuel pools could neither enlarge the magnitude nor alter the nature of the environmental effects directly attributable to the expansion in question, there was no occasion to take into account any such pending or past actions in determining the expansion application at bar. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 267-68 (1979).

The attempt in a licensing proceeding of an individual pool capacity expansion, to challenge the absence of an acceptable generic long-term resolution of the waste management question was precluded in Prairie Island, ALAB-455, 7 NRC 41, restating the Commission's policy that for the purposes of licensing actions, the availability of offsite spent fuel repositories in the relatively near term should be presumed. Trojan, supra.

The Licensing Board need not consider alternatives to pool capacity expansion in a proposed expansion proceeding, since the environmental effects of the proposed action were negligible. The NEPA mandate that alternatives to the proposed licensing action be explored and evaluated, does not come into play where the proposed action will neither 1) entail more than negligible environmental impacts nor 2) involve the commitment of available resources respecting which there are unresolved conflicts. Trojan, supra, at 256-66.

13. NRC Staff

13.1 Role in Licensing Proceedings

13.1(1) General

The Staff plays a key role in assessing an applicant's qualifications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 34 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

It is on the Staff to decide its priorities in the review of applications. Shearon Harris, supra.

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

An early appraisal of an applicant's capability does not foreclose the Staff from later altering its conclusions. Such an early appraisal would aid the public and the Commission in seeing whether a hearing is warranted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 33-34 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Staff will make a technical judgment regarding continued operation where environmental qualification is poor or where other questions arise. In re Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 715 (1980).

(new) 13.5 Status of Standard Review Plan

Where the applicant used criteria required by the Staff's Standard Review Plan (NUREG-75/087, § 2.2.3) in determining the probability of occurrence of a postulated accident, it is not legitimate for the Staff to base its position on a denigration of the process which the Staff itself had promulgated. Public Service Electric and Gas Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 29 (1979).

15. Regulations15.1 General

Fundamental to NRC regulation of nuclear power reactors is the principle that safety systems must perform their intended functions in spite of the environment that may result from postulated accidents. Confirmation that these systems will remain functional under postulated accident conditions constitutes environmental qualification. Current legal requirements are found in GDC 1 and 4 of Appendix A, Part 50, Criterion III of Appendix B, Part 50 and 10 CFR 50.55a(h) (to plants receiving CP after 1-1-71) Regulatory Guide 1.89, which applies to plants whose SERs were issued after 7-1-74, has generally adopted IEEE Standard 323-1974. More definitive criteria have been developed by the Staff. The 1974 standard in NUREG-0588 will apply to replacement parts in operating plants. In re Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 710 (1980).

18. Staff Disclosure of Information to the Public18.2 Freedom of Information Act

Under FOIA, a Commission decision to withhold a document from the public must be by majority vote. Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), CLI-80-35, 12 NRC 409, 412 (1980).

While FOIA does not establish new government privileges against discovery, the Commission has elected to incorporate the exemptions of the FOIA into its own discovery rules. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.790 of the rules of practice is the NRC's promulgation in obedience to the Freedom of Information Act. Palisades, supra, at 120.

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Palisades, supra, at 123.

The government is no less entitled to normal privilege than is any other party in civil litigation. Palisades, supra, at 127.

Any documents in final form memorializing the Director's decision not to issue a notice of violations imposing civil penalties does not fall within Exemption 5. Palisades, supra, at 129.

18.4 Proprietary Information18.4(3) Security Plan Information Under 10 CFR 2.790(d)

In making physical security plan information available to intervenors, licensing boards are to follow certain guidelines. Security plans are sensitive and are subject to discovery in Commission adjudicatory proceedings only under certain conditions: (1) the party seeking discovery must demonstrate that the plan or a portion of it is relevant to its contentions; (2) the release of the plan must (in most circumstances) be subject to a protective order; and (3) no witness may review the plan (or any portion of it) without it first being demonstrated that he possesses the technical competence to evaluate it. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980).

Release of a security plan to qualified intervenors must be under a protective order and the individuals who review the security plan itself should execute an affidavit of non-disclosure. Diablo Canyon, supra, at 778.

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside the hearing process. A person subject to a protective order, however, is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Diablo Canyon, supra, at 778.

19. Show Cause Proceedings19.1 General

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. NRC can develop policy that has licensees consent to rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in a show cause proceeding. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

In the context of proceedings before the Commission, an order to show cause is a remedial step in dealing with failure to meet required standards of conduct. The Licensing Board denied a petition for a show cause order which did not make allegations of any such failure. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The Licensing Board ruled that in dealing with pleadings, an effort should be made to deal with its merits and to avoid an abrupt denial solely because of form, and proceeded to consider the merits of the pleading. Fulton, supra.

If an interested person desires a hearing on environmental qualification of equipment, after review of Staff's written judgment, that person may petition Commission pursuant to 2.202 or 2.206. In re Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 715 (1980).

The expression of a tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

Decision that cause existed to start a proceeding by issuing an immediately effective show cause order does not disqualify the Commission from later considering the merits of the matter. No prejudgment is involved, and no due process issue is created. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

New matters which cannot be raised before a Board because of a lack of jurisdiction may be raised in a petition under 10 CFR § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980).

Where petitioner's case has no discernible relationship to any other pending proceeding involving the same facility (e.g., one concerned with permit extension), the show cause proceeding set out in 10 CFR § 2.206 must be regarded as the exclusive remedy. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570 (1980).

Under 10 CFR § 2.206, one may petition the NRC for stricter enforcement actions than the agency contemplates. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

The agency has broad discretion in establishing and applying rules for public participation on enforcement proceedings. Marble Hill, supra, at 440-41.

19.2 Petition for Show Cause Order

19.2(1) Grounds

The institution of a show cause proceeding to modify, suspend, or revoke a license need not be predicated upon alleged license violations, but rather may be based upon any "facts deemed to be sufficient grounds for the proposed action" 10 CFR § 2.202. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570-71 (1980).

19.2(2) Burden of Proof

The Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so, including a show cause proceeding. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 571 (1980).

19.2(3) Issues in Show Cause Proceeding

One cannot seek to intervene in an enforcement proceeding to have NRC impose a stricter penalty than the NRC seeks. Issues in show cause proceeding are only those set out in the show cause order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

One may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the show cause order. One who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

19.3 Review of Decision on Request for Show Cause Order

Commission accepts petition for sua sponte review of denial of 10 CFR § 2.206 petition. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

The validity of a show cause order is judged on the basis of information available to the Director at the time it was issued at the start of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

Issuance of a show cause order requiring interim action is not the determination of the merits of a controversy. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 6 (1980).

Commission accepts review of "important policy issue of first impression" of whether civil penalties under the AEA can be imposed on a licensee because of acts committed by licensee's employees, absent a showing of management fault. In re Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980).

Review of an appeal by a denial by the Director of a request for a show cause order is limited to sua sponte review by the Commission. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 79 n.6 (1979).

The appeal of a show cause order must be accompanied by reasons in writing. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570-71 (1980).

There are five Commission criteria for determining if the Director acted within his discretion in issuing an order, as set forth in Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173 (1975), Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 676 n.1 (1979).

19.4 Notice and Hearing to Licensee, Permittee

The Director may issue an immediately effective order without prior written notice under 10 CFR § 2.202(f) if (1) the public health, safety or interest so requires, or (2) the licensee's violations are willful. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979).

Latent conditions which may cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where the consequences might not be subject to correction in the future. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979), citing Consumer Power Company (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 10-12 (1974).

Purported violations of agency regulations support an immediately effective order even where no adverse public health consequences are threatened. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678 (1979).

19.5 Burden of Proof

Civil penalties may be imposed for the violation of regulations of license conditions without a finding of fault on the part of the licensee, so long as it is believed such action will positively affect the conduct of the licensee, or serve as an example to others. It matters not that the imposition of the civil penalty might be viewed as punitive. A licensee is responsible for all violations committed by its employees, whether it knew or could have known of them. There is no need to show scienter. One is not exempted from regulation by operating through an employee. In re Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980).

(new) 19.7 Delay of Decision

The Board delayed decision on a show cause order pending a Commission decision on a point which might effect the outcome of the show cause proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor) Docket No. 50-409 (FTOL Proceeding) (unpublished decision issued July 8, 1980).

(new) 19.8 Necessity of Hearing

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the

decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980).

(new) 19.9 Intervention

The requirements for standing in a show cause proceeding are no stricter than those in the usual licensing proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980).

20A. Suspension, Revocation or Modification of License

A decision on whether to suspend a permit pending a decision on remand must be based on (1) a traditional balancing of the equities, and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-623, 12 NRC 670, 677 (1980).

(new) 20B. Technical Specifications

10 CFR § 50.36 specifies, inter alia, that each operating license will include technical specifications to be derived from the analysis and evaluation included in the safety analysis report, and amendments thereto, and may also include such additional technical specifications as the Commission finds appropriate. The regulation sets forth with particularity the types of items to be included in technical specifications. Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272 (1979).

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an application's safety analysis report (or equivalent) be subject to a technical specification, to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Trojan, supra, at 273.

(new) 22. Procedures in other Types of Hearings

22.1 Military or Foreign Affairs Functions

Under the Administrative Procedure Act, 5 U.S.C. § 554(a)(4), and the Commission Rules of Practice, 10 CFR § 2.700a, procedures other than those for formal evidentiary hearings may be fashioned when an adjudication involves the conduct of military or foreign affairs functions. Nuclear Fuel Services, Inc. (Erwin, Tennessee), CLI-80-27, 11 NRC 799, 802 (1980).

22.2 Export Licensing

22.2(1) General

Individual fuel exports are not major Federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980).

22.2(2) Jurisdiction of Commission

The Commission is neither required nor precluded by the Atomic Energy Act or NEPA from considering impacts of exports on the global commons. Provided that NRC review does not include visiting sites within the recipient nation to gather information or otherwise intrude upon the sovereignty at a foreign nation, consideration of impacts upon the global commons is legally permissible. Westinghouse Electric Corp. (Exports to the Phillipines) CLI-80-14, 11 NRC 631, 637-644 (1980).

The Commission's legislative mandate neither compels nor precludes examination of health, safety and environmental effects occurring abroad that could affect U.S. interests. The decision whether to examine these effects is a question of policy to be decided as a matter of agency discretion. Id., 11 NRC at 654.

As a matter of policy, the Commission has determined not to conduct such reviews in export licensing decisions primarily because no matter how thoroughly the NRC review, the Commission still would not be in a position to determine that the reactor could be operated safely. Id., 11 NRC at 648.

The Commission lacks legal authority under AEA, NEPA and NNPA to consider health, safety and environmental impacts upon citizens of recipient nations because of the traditional rule of domestic U.S. law that federal statutes apply only to conduct within, or having effect within the territory of the U.S. unless the contrary is clearly indicated in the statute. Id., 11 NRC at 637.

The alleged undemocratic character of the Government of the Phillipines does not relate to health, safety, environmental and non-proliferation responsibilities of the Commission and are beyond the scope of the Commission's jurisdiction. Id., 11 NRC at 656.

22.2(3) Export License Criteria

The AEA of 1954, as amended by the NNPA, provides that the Commission may not issue a license authorizing the export of a reactor, unless it finds based on a reasonable judgment of the assurances provided, that the criteria set forth in §§ 127 and 128 of the AEA are met. The Commission must also determine that the export would not be inimical to the common defense and security of or health and safety of the public and would be pursuant to an Agreement for Cooperation. Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 652 (1980).

The Commission may not issue a license for component exports unless it determines that the three specific criteria in § 109(b) of AEA are met and also determines that export won't be

inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

License applications for the export of special nuclear material for use in nuclear power stations did not meet criteria for issuance set forth in §§ 109, 127, 128 of AEA. Therefore Commission referred license applications to President pursuant to § 1266(2) of AEA. Edlow International Co. (Agents for the Government of India on Applications to Export Special Nuclear Materials and Components), CLI-80-18, 11 NRC 680, 681 (1980).

In separate opinion, Commissioner Gilinsky (with Bradford concurring) disagreed with Dept. of State's interpretation of the President's power to authorize the export by Executive Order. Commissioner Gilinsky stated that the export can take place only if the President grants a waiver from this requirement of the law if Congress allows that waiver to stand. In granting the waiver, the President must find that failure to approve the export "would be seriously prejudicial to the achievement of the U.S. non-proliferation objectives, or would otherwise jeopardize the common defense and security." id. at 685-86.

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