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NUCLEAR REGULATORY COMMISSION ISSUANCES

March 1994

U.S. NUCLEAR REGULATORY COMMISSION

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NUCLEAR REGULATORY COMMISSION ISSUANCES

March 1994

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

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

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(301/492-8925)

COMMISSIONERS

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

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

CONTENTS

Issuances of the Nuclear Regulatory Commission

Issuances of the Atomic Safety and Licensing Boards

Issuance of the Administrative Law Judge

Issuance of Director's Decision

Commission Issuances

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-312-DCOM
(Decommissioning Plan)

SACRAMENTO MUNICIPAL UTILITY DISTRICT
(Rancho Seco Nuclear Generating Station)

March 1, 1994

The Commission denies Sacramento Municipal Utility District's petition for review and motion for directed certification of LBP-93-23, 38 NRC 200 (1993), in which the Atomic Safety and Licensing Board, *inter alia*, admitted a contention filed by Environmental and Resources Conservation Organization.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (*see* 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review pursuant to section 2.786(g)(2).

MEMORANDUM AND ORDER

The Commission has before it a petition for review and motion for directed certification filed by Sacramento Municipal Utility District (SMUD) pursuant to 10 C.F.R. § 2.786(g). SMUD seeks review in the form of directed certification of certain issues arising out of an interlocutory order (LBP-93-23, 38 NRC 200), dated November 30, 1993, in which the presiding Atomic Safety and Licensing Board, *inter alia*, admitted a contention filed by Environmental and Resources Conservation Organization (ECO) concerning the adequacy of SMUD's plan for funding the decommissioning of the Rancho Seco Nuclear Generating Station. SMUD argues that the Licensing Board's acceptance of certain bases for the contention affects the basic structure of the proceeding in a pervasive and unusual manner so as to warrant interlocutory review. For the reasons stated in this Order, we deny SMUD's petition and motion.

BACKGROUND

This proceeding involves ECO's challenge to the Nuclear Regulatory Commission (NRC) Staff's proposed order approving of a decommissioning plan for, and authorizing decommissioning of, Rancho Seco. In CLI-93-3, the Commission granted intervention to ECO (as a matter of discretion) and permitted ECO to amend its funding plan contention. 37 NRC 135, 149, *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993).

ECO filed an amended funding plan contention which was supported by 14 bases. In LBP-93-23, the Licensing Board accepted six of the fourteen bases as a foundation for admitting the contention. LBP-93-23, 38 NRC at 210-19. SMUD objects to the acceptance of all but one of the bases.

SMUD does not object to acceptance of Basis 13 concerning the rate of growth of the decommissioning fund through interest earnings. SMUD objects to the acceptance of Bases 1, 5, and 11 which relate to financial assurance because, according to SMUD, ECO failed to demonstrate the materiality of the issues raised and, thus, these bases do not meet the criteria for admissibility of contentions in 10 C.F.R. § 2.714(b)(2)(iii). In this respect, SMUD argues that ECO did not reference the parts of the funding plan with which it disagreed and did not address relevant matters in the funding plan that, according to SMUD, weigh against admission of these bases. Licensee's Petition for Review of Second Prehearing Conference Order and Motion for Directed Certification at 4-6 (December 15, 1993) (hereinafter SMUD Petition).

SMUD also objects to the acceptance of Bases 2 and 14. SMUD argues that these matters are beyond the scope of this proceeding because they relate to the cost of SMUD's planned Independent Spent Fuel Storage Installation (ISFSI). In

support of its position SMUD argues that funding of spent fuel storage costs is not required to be addressed in a licensee's decommissioning plan, but is instead subject to a separate planning requirement in 10 C.F.R. § 50.54(bb). SMUD Petition at 6. SMUD maintains that licensing of the ISFSI was a separately noticed proceeding in which ECO did not choose to petition for intervention.

ANALYSIS

SMUD filed its petition and motion pursuant to 10 C.F.R. § 2.786(g).[1] Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (*see* 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. These criteria are a codification of the case-law standard that the Atomic Safety and Licensing Appeal Board developed under our former appellate structure. The Appeal Board applied these criteria in deciding as a matter of discretion whether to review interlocutory orders in response either to a presiding officer's referral of a ruling or certified question or to a party's motion for "directed certification." *See Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992). Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order — akin to a motion for directed certification — if the petitioner can satisfy one of the criteria under section 2.786(g). *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993).

SMUD argues that it meets the standard for review in section 2.786(g)(2) because the Board's rulings affect the basic structure of the proceeding in a pervasive and unusual manner, by subjecting SMUD to a broad inquiry into matters without any direct relationship to its decommissioning plan. SMUD maintains that the Board's rulings also establish a precedent affecting other decommissioning funding proposals and certifications as well as the NRC's own regulation establishing certification amounts, because such certifications and plans are not intended to include spent fuel storage costs. SMUD also believes that because the hearing was granted as a matter of discretion, the Commission should grant review as a matter of fairness to SMUD and provide instructions to keep the proceeding within appropriate bounds. SMUD Petition at 8-9. The Staff makes essentially the same arguments as SMUD. ECO did not file a reply.

SMUD has failed to demonstrate that review at this time is necessary. The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant

[1] The Licensing Board's order was not subject to appeal under 10 C.F.R. § 2.714a(c).

interlocutory review. *Safety Light Corp.*, 35 NRC at 159 (citations omitted). Although SMUD argues that the Licensing Board failed to apply the proper criteria for admissibility of contentions and incorrectly interpreted Commission regulations, these reasons have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way, where the ultimate result is that the Licensing Board simply admits or rejects particular issues for consideration. In discussing the standards for granting interlocutory review, the Appeal Board stated:

> The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987) (citations omitted).

Although we are declining review at this time, we make no judgment on the soundness of the Licensing Board's determinations on the particular issues. Our decision here today is largely influenced by our reluctance to take interlocutory review except in extraordinary situations. The Licensee argues that this case requires special attention because intervention was granted as a matter of discretion. However, this fact alone does not provide adequate support for departing from past practice and taking the unusual step of granting interlocutory review at this time. Neither SMUD nor the Staff has adequately explained why these matters cannot await final appellate review.

CONCLUSION

For the reasons stated herein, SMUD's petition and motion are *denied*.
It is so ORDERED.

For the Commission

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 1st day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of Docket No. 50-29

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station) March 18, 1994

The Commission denies the request of Petitioner, Environmentalists, Inc., for an adjudicatory hearing regarding decommissioning plans for the Yankee Nuclear Power Station. The Commission finds that the Petitioner has failed to identify any action taken by the NRC that requires the offer of a hearing. The Commission notes that even if Petitioner had identified such an action, it has failed to allege an interest to justify intervention in such a proceeding; and that, furthermore, Petitioner has not demonstrated that a discretionary hearing is warranted.

RULES OF PRACTICE: INJUNCTIVE RELIEF

The Commission will decline a grant of a petitioner's request to halt decommissioning activities where a petitioner has failed to address, much less satisfy, the four traditional criteria for injunctive relief: (1) irreparable injury, (2) probability of success on the merits, (3) lack of injury to others, and (4) the public interest. Any request for emergency relief should address those criteria.

ATOMIC ENERGY ACT (AEA): HEARING RIGHT

The only "right" to an opportunity for a hearing under section 189 of the Atomic Energy Act exists for those actions that are identified in section 189.

RULES OF PRACTICE: DECOMMISSIONING (NOTICE)

NRC regulations explicitly provide only for notice to be given to the public regarding Commission approval of a proposed decommissioning plan. 10 C.F.R. § 50.82(e).

OPERATING LICENSE: CHANGES TO FACILITY

RULES OF PRACTICE: DECOMMISSIONING

Under NRC regulations, a licensee may make changes to its facility without prior Commission approval if those changes do not involve an unreviewed safety question or do not violate the terms of the license. 10 C.F.R. § 50.59(a)(1).

RULES OF PRACTICE: INSTITUTION OF PROCEEDING (REQUEST UNDER 10 C.F.R. § 2.206)

OPERATING LICENSE: CHANGES TO FACILITY

A member of the public may challenge an action taken under 10 C.F.R. § 50.59 (changes to a facility) only by means of a petition under 10 C.F.R. § 2.206.

MATERIALS TRANSPORTATION: GENERAL LICENSE

Under 10 C.F.R. § 71.12, an NRC licensee is given a general license to ship or transport material that is subject to NRC license in an NRC-approved package without approval by the Commission.

NUCLEAR REGULATORY COMMISSION (OR NRC): JURISDICTION

Concerns regarding acceptance by a low-level waste facility regulated by an Agreement State Program of materials removed from a nuclear power plant must be directed to the state in which the facility resides, not the NRC.

MATERIALS LICENSE UNDER PART 70: WASTE DISPOSAL

A low-level waste facility can accept special nuclear material (SNM) for disposal only under an NRC license that it holds, not under a state license under which the facility has accepted reactor materials and components removed from a nuclear power plant site.

RULES OF PRACTICE: INTERVENTION PETITIONS

Assuming there exists an NRC proceeding on the issues of concern to a petitioner, that petitioner must satisfy the minimum requirements of 10 C.F.R. § 2.714 which governs intervention in NRC proceedings.

RULES OF PRACTICE: INTERVENTION PETITIONS

In order to satisfy the criteria for grant of a petition for intervention, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. 10 C.F.R. § 2.714(a)(2).

RULES OF PRACTICE: STANDING (ORGANIZATIONAL)

In order to meet the test for organizational standing, an organization must allege: (1) that the action will cause an "injury in fact" to either (a) the organization's interests or (b) the interests of its members; and (2) that the injury is within the "zone of interests" protected by either the AEA, the Energy Reorganization Act (ERA), or the National Environmental Policy Act (NEPA).

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

A petitioner's identification of four organizational members whose interests have allegedly been injured or might be injured by actions taken in relation to the decommissioning process does not satisfy the "injury in fact" prong of the organizational standing test where those members live near the proposed site for the disposal of reactor materials and components and not near the site of the nuclear power plant from which the materials are to be removed.

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

Where a petitioner's organizational address is farther than 50 miles from a nuclear power plant site, it is outside even the radius within which the NRC normally presumes standing for those actions that may have significant offsite consequences at plants that are operating at full power.

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

A hearing petition or supplementary petition that does not allege any concrete or particularized injury that would occur as a result of the transportation of reactor materials or components to a low-level waste facility, fails to demonstrate any "injury in fact."

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

A hearing petition or supplementary petition that alleges only that petitioner's members live "close" to transportation routes that will be used for shipments of reactor materials and components to a low-level waste facility and does not identify those routes or explain how "close" to those routes the petitioner's members actually live, fails to demonstrate "injury in fact."

NUCLEAR REGULATORY COMMISSION (OR NRC): DISCRETION TO INSTITUTE PROCEEDING

Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law.

NUCLEAR REGULATORY COMMISSION (OR NRC): DISCRETION TO INSTITUTE PROCEEDING

The institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified.

MEMORANDUM AND ORDER

I. INTRODUCTION

On November 15, 1993, Environmentalists, Inc. ("Petitioner"), filed a petition seeking an adjudicatory hearing regarding the "plans to decommission and dismantle" the Yankee Nuclear Power Station ("Yankee NPS"), including plans to ship radioactive components of the plant to the Barnwell waste disposal facility located in Barnwell, South Carolina.[1] Yankee Atomic Energy Company ("YAEC"), the Licensee, and the NRC Staff responded to the petition in filings dated November 23 and November 30, 1993, respectively. YAEC and the Staff both oppose the petition on the ground that there is no proceeding in existence in which an adjudicatory hearing may be held and that, in any event, Petitioner's filings are insufficient to obtain intervention even if a hearing were to be held. The Staff argues, in addition, that there are no grounds for the Commission to grant a discretionary hearing. After due consideration, we deny the petition for the reasons stated below.

II. BACKGROUND

The Commission's regulations governing the decommissioning process require the establishment of an adequate decommissioning funding mechanism, 10 C.F.R. § 50.75, and establish requirements for the termination of a license, 10 C.F.R. § 50.82. These regulations require, *inter alia*, that the licensee submit, within 2 years of the permanent cessation of operations, an application for termination of a license together with (or preceded by) a proposed decommissioning plan, 10 C.F.R. § 50.82(a), and that the Commission provide notice of the plan prior to approving it and issuing an order authorizing the decommissioning, 10 C.F.R. § 50.82(e).

The regulations do not specify what decommissioning activities the licensee may undertake prior to submission of its decommissioning plan. However, the Commission issued new guidance on this subject in January 1993. Under this guidance, the licensee may undertake preliminary decommissioning activities that do not (1) foreclose future release of the site for unrestricted use, (2) significantly increase decommissioning costs, (3) cause a significant environmental impact that has not been previously reviewed, or (4) violate the terms of either

[1] On December 16, 1993, Petitioner filed a supplement to the petition containing, *inter alia*, the names and addresses of four members of its organization living in South Carolina.

the existing license or 10 C.F.R. § 50.59.[2] In addition, the licensee may use its decommissioning funds for these activities. *See* Memorandum from Samuel J. Chilk to William C. Parler and James M. Taylor, January 14, 1993.[3]

By letter dated February 27, 1992, YAEC informed the NRC that it had ceased operations at Yankee NPS permanently. On August 5, 1992, the NRC Staff issued a "possession-only" amendment to the Yankee NPS license, removing YAEC's right to operate the facility. *See* 57 Fed. Reg. 37,579 (Aug. 19, 1992). Pursuant to the Commission's guidance described above, YAEC initiated the Component Removal Program ("CRP") under which it planned to remove the four steam generators, the pressurizer, and some reactor internals for shipment to the Barnwell low-level waste facility.[4] Shipments of this material began on November 17, 1993, and are continuing.

III. DISCUSSION[5]

A. There Is No Action Pending Concerning Yankee NPS That Gives Rise to Any Hearing Rights Under Section 189 of the Atomic Energy Act

Section 189a(1) of the Atomic Energy Act ("AEA") provides, in pertinent part:

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[2] This guidance substantially modified our previous position on this issue. *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207 n.3 (1990); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992). Under 10 C.F.R. § 50.59, a licensee may make changes to its facility as described in the Final Safety Analysis Report ("FSAR") without prior Commission approval if the change does not involve (1) a change in the facility's technical specifications or (2) an unreviewed safety question.

[3] Subsequently, the Commission determined that, in the context of a decommissioning plan review, any decommissioning activities that can be undertaken pursuant to the above criteria are not subject to further review or approval by the NRC Staff. *See* Memorandum to William C. Parler and James M. Taylor from Samuel J. Chilk, June 30, 1993. Both this memorandum and the memorandum of January 14, 1993, are available in the NRC's Public Document Room.

In addition, the Commission has issued a Draft Policy Statement requesting comments on the question of when licensees should be allowed to use the money in their decommissioning funds before approval of a decommissioning plan. *See* 59 Fed. Reg. 5216 (Feb. 3, 1994). The comment period expires April 19, 1994.

[4] By letter of July 15, 1993, the NRC Staff informed YAEC that the Staff had concluded that YAEC had suitable procedures in place, or in preparation, to ensure compliance with the Commission's guidance and that the Staff had no objection to the CRP activities.

[5] We have declined to grant Petitioner's request that we halt YAEC's implementation of the CRP and other decommissioning activities. First, the Petitioner did not address, much less satisfy, the traditional criteria for injunctive relief: (1) irreparable injury, (2) probability of success on the merits, (3) lack of injury to others, and (4) the public interest. Any request for emergency relief should address those criteria. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986). *Cf.* 10 C.F.R. § 2.788 (listing factors to be addressed when requesting a stay of a Licensing Board decision pending appeal). Second, we have reviewed the Petitioner's pleadings and find that they present no public health and safety reason to stay YAEC's decommissioning activities.

In addition, while the Staff's December 22d filing indicates that YAEC appears to have substantially completed the CRP, that same filing also indicates that YAEC intends to remove additional material that will then be shipped to the Barnwell facility for disposal during another CRP. Thus, the case before us does not appear to be "moot."

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1). The Supreme Court has noted that "[this] hearing requirement was tailored to the scope of proceedings authorized under the licensing Subchapter." *Florida Power & Light v. Lorion*, 470 U.S. 729, 739 (1985). In other words, the only "right" to an opportunity for a hearing under section 189 exists for those actions that are identified in section 189. In this case, the Petitioner has not identified any action or proposed action taken to this date in connection with the decommissioning and dismantling of Yankee NPS that constitutes an action identified in section 189a of the AEA for which an opportunity for a hearing is required. Nor do NRC regulations provide an opportunity for a hearing regarding the decommissioning actions that are the subject of the petition.[6]

Petitioner's concerns focus on three distinct types of decommissioning activities that are currently under way at Yankee NPS: (1) dismantlement activities that the licensee may undertake without the need for any NRC approval because they fall within the criteria of the Commission's guidance, *supra*; (2) transportation activities associated with transporting radioactive components from the Yankee NPS to the place of burial; and (3) activities associated with the burial of this material at the Barnwell low-level waste facility.

The dismantling and decommissioning activities currently being conducted by YAEC — the Component Removal Program — are being undertaken pursuant to 10 C.F.R. § 50.59, which allows a licensee to make changes to its facility without prior NRC approval if those changes do not involve an unreviewed safety question or do not violate the terms of the license.[7] Under 10 C.F.R. § 71.12, an NRC licensee is given a general license to ship or transport material subject to NRC license in an NRC-approved package without approval by the

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[6] In fact, our regulations explicitly provide only for notice to be given to the public regarding a proposed decommissioning plan:

> If the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission will approve the plan subject to such conditions and limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

10 C.F.R. § 50.82(e). By a letter dated December 20, 1993, after this petition was submitted, YAEC filed its decommissioning plan which is presently under review by the Staff. The Staff will issue a *Federal Register* Notice that will advise members of the public where they can review the plan and how they can submit comments on the plan. In addition, the Staff will hold a public meeting near the Yankee facility in order to receive public comments on the proposed decommissioning plan. The Staff will then issue an order that will either approve or disapprove adoption and implementation of the proposed plan.

[7] A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.

Commission. *See, e.g., State of New Jersey*, CLI-93-25, 36 NRC 289, 293-94 (1993).[8] All that is then required is that the licensee transport the materials in compliance with applicable DOT regulations. Finally, the Barnwell low-level waste facility is licensed to accept low-level waste from the Yankee NPS CRP by the State of South Carolina, not the NRC. Therefore, concerns regarding acceptance of the CRP materials by the Barnwell facility must be directed to the State of South Carolina, not the NRC.[9]

In summary, the activities that are the subject of the petition are not activities that invoke NRC actions that implicate the hearing rights afforded by section 189a.[10]

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[8] On October 28, 1993, the NRC Staff issued Certificate of Compliance No. 9256 to YAEC, approving the package in which YAEC proposed to ship the CRP material to the Barnwell facility. We do not read the petition as alleging that there is a defect in the shipping package and asking for a hearing regarding that defect. *E.g., State of New Jersey*, CLI-93-25, 38 NRC at 294.

[9] We are informed that the materials shipped to Barnwell did not include any Special Nuclear Material ("SNM"). The Barnwell facility can accept SNM for disposal only under a separate NRC license that it also holds, not under the South Carolina license under which it has accepted the CRP materials from Yankee NPS.

[10] Even if there were to be a proceeding on the issues of concern to the Petitioner, it is clear that the petition fails to satisfy the minimum requirements of 10 C.F.R. § 2.714 which governs intervention in NRC proceedings. That regulation requires that a petition for leave to intervene

> shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(2). As we recently noted in applying this standard, "[a] petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (citing cases). The petition here identifies a number of "rights" that it alleges would be endangered by "releases of radioactive waste materials into the atmosphere, water or environs[.]" However, the Petitioner did not allege that YAEC's actions or NRC's lack of objection to those actions would have the effect of causing a release of radioactive waste materials. Such an allegation would be necessary to establish the Petitioner's interest in any proceeding challenging YAEC's actions.

Nor does the petition meet the test for organizational standing. An organization must allege (1) that the action will cause an "injury in fact" to either (a) the organization's interests or (b) the interests of its members and that (2) that injury is within the "zone of interests" protected by either the AEA, the Energy Reorganization Act ("ERA"), or the National Environmental Policy Act ("NEPA"). *See, e.g., Florida Power and Light Co.* (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). In this case, the Petitioner has identified (in its supplement) four members whose interests have allegedly been injured or might be injured. However, those members live near the Barnwell facility, not near the Yankee NPS facility. As we noted above, the NRC does not regulate the disposal of low-level waste at Barnwell; instead that activity is regulated by the State of South Carolina as an Agreement State. In addition, the Petitioner's organizational address is further than 50 miles from the Yankee NPS site and thus outside even the radius within which we normally presume standing for those actions that may have significant offsite consequences at plants that are operating at full power.

The Petitioner also challenges the transportation of the CRP materials to Barnwell; however, neither the petition nor the supplement alleges any concrete or particularized injury that would occur as a result of the transportation. Furthermore, while the supplement alleges that Petitioner's members live "close" to transportation routes that will be used for the Barnwell shipments, the supplement *does* not identify those routes or explain how "close" to those routes the Petitioner's members actually live. In sum, the Petitioner has failed to identify any organizational interest within the zone of interests protected by either the AEA, the ERA, or NEPA.

B. A Discretionary Hearing Is Not Warranted

Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law. *See* 42 U.S.C. § 2201(c). And our jurisprudence has long provided for discretionary intervention in any proceeding before the Commission. *Portland General Electric Co.* (Pebble Springs Nuclear Plant), CLI-76-27, 4 NRC 610, 614-17 (1976). However, we have also held that the institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified. *Cf. Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975) (establishing criteria for instituting hearings in response to petitions under 10 C.F.R. § 2.206). The Petitioner has not raised such issues here. While the petition raises broad questions about health and safety matters inherent in the decommissioning process, the petition makes no allegations that the activities actually being conducted pose any unusual unexamined issues significant enough to warrant the grant of a discretionary hearing. In addition, the Petitioner has not even attempted to address the standards governing discretionary intervention. *See Pebble Springs*, CLI-76-27, 4 NRC at 614-17. Therefore, we find that a discretionary hearing is not warranted in this case.[11]

IV. CONCLUSION

In summary, the Petitioner has failed to identify any action taken by the Commission that requires the offer of a hearing and our review reveals that no such action has been taken. Even if such an action had been identified, the Petitioner has failed to allege an interest to justify intervention in such a proceeding. Finally, the Petitioner has failed to demonstrate that a discretionary hearing is warranted in this case. Therefore, the Petitioner's request for an adjudicatory hearing is denied.

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[11] We have directed the holding of a discretionary hearing in another case involving the general topic of decommissioning. However, that case involved Commission approval of a proposed decommissioning plan. Moreover, the NRC Staff issued a Notice of Opportunity for a Hearing when considering the plan; the only petition filed in response to that Notice raised a significant question about the standing of the persons who actually lived near the Rancho Seco facility; and the petition presented at least one litigable contention. Accordingly, we directed that the petitioner in that case be granted discretionary intervention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 141 (1993); CLI-93-12, 37 NRC 355, 358 (1993).

It is so ORDERED.

For the Commission[12]

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 18th day of March 1994.

[12] Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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Dr. Charles N. Kelber*
Dr. Jerry R. Kline*
Dr. Peter S. Lam*
Dr. James C. Lamb III
Dr. Emmeth A. Luebke
Morton B. Margulies*
Dr. Kenneth A. McCollom
Marshall E. Miller
Thomas S. Moore*
Dr. Peter A. Morris
Thomas D. Murphy*
Dr. Richard R. Parizek
Dr. Harry Rein
Lester S. Rubenstein
Dr. David R. Schink
Ivan W. Smith*
Dr. George F. Tidey
Sheldon J. Wolfe

**Permanent panel members*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment;
Transfer to Southern Nuclear)

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

March 3, 1994

RULES OF PRACTICE: DISCOVERY OF STAFF; INVESTIGATION COMPLETED

Factual information contained in a completed investigation report will be segregated and released if there is no specific allegation of how the release would hurt a future enforcement action or deter future predecisional communications within the Staff of the Commission.

The Board reviewed the Rules of Practice, 10 C.F.R. § 2.790(a)(5) and (a)(7) as well as the "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032-34 (1984). It concluded that both documents required the release both of factual information and of the Staff's opinions in the Office of Investigation Report. The Board was heavily influenced by: (1) the failure to allege any specific adverse implications for an enforcement action; and (2) the Staff's decision to release the Office of Investigation Report, thus narrowing the effect of an immediate release of requested information. The

Board reasoned that since the report would be released anyway, there would be little adverse impact on the Staff from releasing it now.

RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS; 10 C.F.R. § 2.790(a)5 AND (a)(7)

Discovery of Staff documents may be appropriate when there is no specific allegation of an adverse impact either on a future enforcement action or on intra-Staff discussions.

RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS; STATEMENT OF POLICY

The "Statement of Policy: Investigations, Inspections and Adjudicatory Procedure" requires the release of Staff documents after an investigation is complete and during the period of Staff evaluation of that investigation. Contrary language found in the Statement is by way of preliminary explanation and is not as significant as the operative language, which excludes any exemption from releasing Staff documents during a time that investigation results are being evaluated.

RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS; PROTECTIVE ORDER

When the Staff of the Commission requests that documents be treated as privileged, the Board may exercise its authority as presiding officer and may release documents. However, it should limit its ruling to what is necessary to fairly adjudicate the pending case, and it may require release pursuant to a protective order in order to satisfy a Staff request to avoid publicity during a continuing process of evaluating the results of an investigation.

MEMORANDUM AND ORDER

(Discovery Related to Office of Investigation Report)

Before us is the "NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position," January 24, 1994 (Staff Motion). The principal question is whether we should order the Staff of the Nuclear Regulatory Commission (Staff) — before it has decided whether to take possible enforcement action — to produce for discovery all or part of a report of the

Office of Investigation concerning the Mosbaugh allegations that are the kernel of this case.

The Staff of the Nuclear Regulatory Commission claims that the document sought is a privileged predecisional document. Tr. 172; Staff Motion at 1; *see* 10 C.F.R. § 2.790(a)(5) (Exemption 5 to the Freedom of Information Act). It does not claim that the document is exempt pursuant to 10 C.F.R. § 2.790(a)(7) (Exemption 7 to the FOIA), which protects information compiled for law enforcement purposes.

On January 3, 1994, the Office of Nuclear Reactor Regulation issued Board Notification No. 94-01, stating that the investigation of the Mosbaugh Allegations had been completed. The Staff stated that on December 17, 1993, the NRC Office of Investigation (OI) issued its report on OI Case No. 2-90-020R. In addition, the Staff withheld the report from public release, citing consistency with the Commission's Statement of Policy on Investigations.

Staff argues:

> The Staff is still reviewing Office of Investigations (OI) Report, Case No. 2-90-020R. The Staff requests that the proceeding be delayed and that no further Staff documents be produced so that the Staff, with the advice of the Commission, may determine whether to institute enforcement proceedings without the premature disclosure of the OI report or other aspects of the matter. Public disclosure of the OI Report and its supporting documentation, at this time, and any disclosure of contemporary internal Staff predecisional views *could adversely affect the Commission's deliberative process in determining whether to institute an enforcement action.* . . . The Commission's rules do not directly apply to the stay requested by the Staff here.[1] [Emphasis added.]

The claim of a predecisional privilege in this case is affected by the Staff's representation to us that the OI Report (Case No. 2-90-020R) has been produced by the Office of Investigations after extensive investigative work. Based on our knowledge of similar reports, we are confident that this Office of Investigation report is carefully prepared and is extensive in its documentation. It is a report that the Staff has already decided is destined to be released. Tr. 169.

THE LAW[2]

Under the NRC's Rules of Practice, if a document is relevant and not covered by an exemption under 10 C.F.R. § 2.790 and is not otherwise privileged, it must be produced. Further, even if the document is covered by an exemption, it must be produced if necessary to a proper decision in the proceeding. 10 C.F.R.

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[1] Staff Motion at 1-2.

[2] We have borrowed language for this section from "Georgia Power Company's Brief Concerning NRC Staff Release of Certain Investigatory Material," February 4, 1994 (GP Brief), at 2-5.

§ 2.744(d). Thus, the applicability of an exemption must be weighed against a litigant's need, and is equivalent to traditional privilege in civil proceedings. *Consumers Power Co.* (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119-20 (1980).

In our Rules, there is a deliberative process exemption, which protects from disclosure intragency memoranda "which would not be available by law to a party other than an agency in litigation with the Commission." *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984). The U.S. Supreme Court has observed the purposes of the exemption:

> The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decision" and "policies formulated" would be the poorer as a result. S. Rep No. 813, p. 9. See also HR Rep No. 1497, p. 10; *EPA v. Mink*, [410 U.S. 73, 87, 93 S. Ct. 827 (1973)]. As lower courts have pointed out, "there are enough incentives as it is for playing it safe and listing with the wind." *Ackerly v. Ley*, 137 US App DC 133, 138, 420 F2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the *detriment of the decision making process*."

United States v. Nixon, 418 US 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (emphasis added).

The deliberative process privilege is not absolute:

> The [deliberative process] privilege may be invoked in NRC proceedings. It is a qualified privilege, however, which can be overcome by an appropriate showing of need. A balancing test must be applied to determine whether a litigant's demonstrated need for the documents outweighs the asserted interest in confidentiality. In this respect, the government agency bears the burden of demonstrating that the privilege is properly invoked, but the party seeking the withheld information has the burden of showing that there is an overriding need for its release.

Shoreham, supra, ALAB-773, 19 NRC at 1341 (citations omitted).

It is settled law that factual material "must be segregated and released unless 'inextricably intertwined' with privileged communications, or the disclosure of such factual material would reveal the agency's decisionmaking process." *Id.* at 1342 (citations omitted).

> In determining the need of a litigant seeking the production of documents covered by the [deliberative process] privilege, an objective balancing test is employed, weighing the importance of the documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the government interest in secrecy.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164-65 (1982), citing *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658-59 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

The Staff seems to think that the "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032-34 (1984), provides some support for its position. However, the relevant portion of that document states, at p. 36,033:

> When staff or OI believes that it has a duty in a particular case to provide an adjudicatory board with information concerning an inspection or investigation, or when a board requests such information, staff or OI should provide the information to the board and parties *unless it believes that unrestricted disclosure would prejudice an ongoing inspection or investigation*, or reveal confidential sources.[3] [Emphasis added.]

CONCLUSIONS

The OI Report is central to the resolution of this case because it reflects the most exhaustive investigation that has been conducted and is highly likely to help to bring the light of truth into our deliberations. This report, and the factual information contained in it, is important to this Board. It is likewise essential that each of the parties sees this document, use it in discovery activities, and ascertain its relevance to their cases.

There is no privilege covering factual information contained in this document and not inextricably intertwined with privileged communications. This principle is settled law. We expected that the Staff would voluntarily release this factual, unprivileged information. If this had been a Freedom of Information Act case, rather than a discovery case, the Staff would have been operating under statutory deadlines to release this factual information. Its delay in not releasing this information seems to have delayed the litigation of this case unnecessarily.[4]

We also would not follow the Staff's suggestion that we apply the intraagency communication exemption to the opinions found in the Office of Investigation Report. Tr. 172. The opinions of the people who wrote the OI Report already are destined to see the light of day. Releasing them now to the parties, under protective order, would have no additional detrimental impact on discussion in the agency. Senior officials such as direct the Office of Investigation are

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[3] The cited text appears near the bottom of the Statement of Policy, following a paragraph that begins: "Until completion of the rulemaking [that the Commission directed the Staff to commence], the following will control the procedure to be followed . . . ." The quoted language differs somewhat from the following earlier language — which appears to be in the nature of a preamble and not to be operative language — in the Statement of Policy:

> However, the need to protect information developed in investigations or inspections usually ends *once the investigation or inspection is completed and evaluated for possible enforcement action*. [Emphasis added.]

[4] Georgia Power also expected the Staff to decide to release the factual information. GP Brief at 5.

performing a public function and understand, from the outset, that their work will be carefully scrutinized by their superiors and the public. Scrutiny of their work is highly unlikely to embarrass anyone or to interfere with agency deliberative processes.

What the Staff is really asserting here seems to us to be a privilege not covered by the FOIA or by the Statement of Policy. Staff does not claim that disclosure "would prejudice an ongoing inspection or investigation, or reveal confidential sources." There is no ongoing investigation.

Staff is asking for a delay in publicity to permit it to make its decision before this matter reaches the press, the public, or the Congress. Tr. 171. The Staff, in short, is asking to be able to deliberate privately about this important enforcement matter.

Since the Staff seeks this privilege and it is consistent with a fair trial of this case, we need not deny its claim. In this instance, we are able to offer some protection from public influence by requiring the production of the OI Report subject to a protective order. That order will require the parties to hold the information in confidence and will shelter the Staff (and the Commission) from the public pressures it seeks to avoid. It is our opinion that each of the parties is trustworthy and that the protective order is highly likely to be observed.

We have weighed the factors set forth in our Memorandum and Order (Motion to Compel Production of Documents by the Staff), August 31, 1993.[5] At this point, the Staff is requesting about 1 month in which to determine whether or not to take an enforcement action. After that, there is an indeterminate period of time within which the Commission may act on this same question. The reason for the delay at this time stems from the extended time consumed in a complex investigation that has been ongoing for almost 4 years. On the other side of the ledger, there is a need for a prompt determination of this proceeding. Intervenor is prepared to conduct depositions during the first week of April. The Report of the Office of Investigation could be relevant to those depositions.

After balancing these factors, we have determined that the harm to Mr. Allen L. Mosbaugh and to Georgia Power from delaying the release of the requested information is tangible. On the other hand, the harm to the Staff has never been explicitly stated so that we can understand it and can consider it to be tangible. In consequence, we have decided that, on balance, the requested information should be released. The factual information in the OI Report should be released promptly, not subject to protective order. The release of the allegedly privileged opinion portions of the OI Report shall be required by April 4, 1994,[6] thus giving

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[5] Staff Response at 2.

[6] James M. Taylor, Executive Director for Operations of the NRC, in his affidavit of February 4, 1994, attached to "NRC Brief on Release of OI Report Requested in Licensing Board Order of February 1, 1994" (at 3). *(Continued)*

the Staff an opportunity for internal deliberations before production (subject to protective order) shall occur.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 2d day of March 1993, ORDERED that:

1. The Staff of the Nuclear Regulatory Commission (Staff) shall promptly release to Georgia Power and Allen L. Mosbaugh all of the easy-to-separate[7] factual information that is contained in the Office of Investigation's Report in Case No. 2-90-020R and that is not inextricably intertwined with privileged material.

2. On April 4, 1994, the Staff shall release the remainder of the Office of Investigation's Report, subject to protective order.

3. The Staff shall promptly serve a proposed form of protective order on the parties and the Board. The parties shall sign the protective order, either as drafted by the Staff or as amended by this Board. The release provided for in ¶2 shall not occur until the signed protective orders have been served.

THE ATOMIC SAFETY AND
LICENSING BOARD

James H. Carpenter (by PBB)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

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estimated that the Staff would make its recommendations to the Commission by the end of March 1994. Our Order accommodates this estimate. If the Staff schedule is delayed, it may show cause why the estimate has been exceeded and a further extension should be granted.

[7] Since the whole report will be released, the Staff should review it and release portions that they can reasonably determine to be factual, without extensive editing and redacting.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-08681-MLA-2
(ASLBP No. 94-688-01-MLA-2)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

March 4, 1994

MEMORANDUM AND ORDER
(Request for Hearing)

This Order deals with the January 13, 1994 request of Envirocare of Utah, Inc. (Envirocare), for an informal hearing on a license amendment approved by the Nuclear Regulatory Commission Staff on August 2, 1993. The amendment, to a source materials license possessed by the UMETCO Minerals Corporation (UMETCO), authorizes that organization to receive byproduct materials from other licensed *in situ* operations and dispose of them at its White Mesa Mill near Blanding, Utah. UMETCO and the Staff oppose Envirocare's hearing request on timeliness and standing grounds.[1]

[1] UMETCO Response to Request for Hearing, January 24, 1994; NRC Staff Response to Request for Hearing, February 14, 1994. In addition to opposition based on an alleged failure to meet timeliness requirements, the Staff also argues that allegations by Envirocare of economic injury as a result of the license amendment are beyond the zone of interests protected by the Atomic Energy Act.

TIMELINESS

Under the Commission's informal hearing rules, where no notice of opportunity for hearing has been published in the *Federal Register*, 10 C.F.R. § 2.1205(c)(2) provides that requests for hearing must be filed the earlier of:

> (i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or
> (ii) One hundred and eighty (180) days after agency action granting an application.

The following subsection, 10 C.F.R § 2.1205(d)(4), requires the request for hearing to describe in detail:

> (4) The circumstances establishing that the request for a hearing is timely in accordance with paragraph (c) of this section.

The objective of timely filings for hearing requests is to facilitate the resolution of concerns on pending license applications in a timely manner.[2]

The posture of the hearing petition in this proceeding evidences a time lapse of over 5 months occurring between the NRC license amendment approval and the filing of the hearing petition request. In these circumstances, any Envirocare explanation for the timing of the filing of its hearing request must be evaluated. Here, however, Envirocare has not submitted an explanation; rather, the Petitioner merely maintains that its filing is timely. Envirocare's position is untenable.

Envirocare's petition states that "in late 1993," it became aware that NRC's Field Office, in the late summer or early fall, approved the UMETCO license amendment. The petition included, as exhibits, a copy of an Envirocare letter dated December 16, 1993, and a December 27, 1993 NRC response from the Director of NRC's Field Office. The pertinent part of Envirocare's December 16th letter requested "information on action apparently taken by NRC's Regional Office in Denver, Colorado, to authorize UMETCO Minerals Corporation to dispose of byproduct material generated at its White Mesa Mill near Blanding, Utah." The NRC Staff Director noted in his December 27th reply that, based on discussions with a Mr. Semnani (who is subsequently identified in the pleadings as Envirocare President), a copy of an October 1, 1993 UMETCO license amendment was being forwarded in response to Envirocare's request. This exchange discloses nothing relative to the license amendment of August 2, 1993 — the only matter at issue here. More relevant to the

[2] The Commission views the filing of hearing requests in the context of "the earliest possible resolution of safety issues." *See* Proposed Rule on Informal Hearing Procedures for Materials Licensing Adjudications, 55 Fed. Reg. 50,858 (Jan. 29, 1993).

question, of when Envirocare first had knowledge of the August 2, 1993 license amendment, are the exhibits filed with UMETCO's opposition to Envirocare's hearing request. These exhibits, each with a notarized certification by the custodian of the records maintained by the Utah Division of Radiation Control, reveal that among the subjects discussed in meetings between Utah officials and Envirocare representatives, including Mr. Semnani, was information concerning NRC license amendments prior to the date of the discussions. The exhibits appears to indicate that Envirocare had actual knowledge of the August 2 amendment at least some time prior to November 10, 1993 — the date of the initial meeting with the State of Utah's representatives. This is some 64 days prior to the filing of Envirocare's hearing request.[3]

Importantly, Envirocare's response does not rebut these exhibits or in any way challenge the exhibits referencing such knowledge. Rather, Envirocare supports the timeliness of its hearing request by referring to a January 12, 1994 letter to UMETCO from the Director of NRC's Field Office.[4] This communication indicates that a 30-day period from the date of the Staff's letter was available for the October 1, 1993 license amendment but that the 180-day regulatory time period for filing hearing requests was running out on the August 1993 amendment. The UMETCO reply (which attached the January 12th NRC letter as an exhibit), as well as the Staff's response, make evident the unfounded basis for Envirocare's position. *See* UMETCO Reply, February 1, 1994, at 4 and Staff Response, February 14, 1994, at 14 n.14. The 30-day time period referred to in the NRC Director's (Hall) January 12, 1994 letter was addressed to the October 1 license amendment. As Envirocare's hearing request concerns the August 1993 license amendment, the subsequent amendment is not at issue in this proceeding. In connection with the 180-day time period mentioned in the NRC Director's letter, there is no indication in the letter that the Director was aware of Envirocare's prior actual notice of the August 2, 1993 license amendment. If the Director had such knowledge, his statement regarding the 180-day filing period would have been merely erroneous but it would not authorize Envirocare to ignore the plain dictates of 10 C.F.R. § 2.1205(c)(2). It is evident that the requestor has failed to meet the timeliness requirements of section 2.1205(c)(2) and, as a consequence, its request for a hearing is denied.

STANDING

Inasmuch as the timeliness requirement is fatal to Envirocare's petition, it is unnecessary to determine the validity of Petitioner's contention that the

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[3] *See* Memoranda, Sinclair to Envirocare file (November 16, 24, and December 6, 1993), UMETCO Response to Request for Informal Hearings, January 24, 1994.

[4] Although Envirocare's Response, dated January 28, 1993, indicated the letter was attached as Exhibit A, it was not included in the Petitioner's pleading.

unfair application of NRC's regulatory requirements is a basis for standing in this proceeding. The charge is that NRC Staff permitted UMETCO to conform its operations to less stringent environmental standards than Envirocare, thus providing a significant economic advantage to a competitor. From this foundation, Envirocare argues that it has a "real stake" in the outcome of this proceeding and is within the "zone of interests" protected by section 189(a) of the Atomic Energy Act.[5]

In order to satisfy judicial standing in the Agency's adjudicative processes, a petitioner must demonstrate that its interests are protected by the statute under which intervention is sought.[6] It has been held in a number of NRC cases that economic considerations are not included in the zone of interests encompassed by the Atomic Energy Act, although these cases are generally tied to rate-paying in the electric utility industry.[7] Economic interests have been recognized under the National Environmental Policy Act (NEPA) in instances where the harm is environmentally related.[8] Although no claim of environmental damage is made by Envirocare, economic competitive disadvantages as a foundation for standing, grounded on NRC's noncompliance with regulatory standards, has not to this Presiding Officer's knowledge been tested in NRC litigation.[9] In any event, that issue cannot be evaluated here due to the Petitioner's failure in meeting regulatory timing prerequisites.

In accordance with 10 C.F.R. § 2.714a (1993), Envirocare may seek appeal on the question of whether its request for a hearing should have been wholly denied.

An appeal to the Commission may be sought by filing a petition for review, pursuant to 10 C.F.R. § 2.714a (1993), within 10 days after service of this Order.

IT IS SO ORDERED.

James P. Gleason, Presiding
Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 4, 1994

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[5] *See* Envirocare Request for an Informal Hearing at 7.

[6] *See Public Service Co. of New Hampshire* (Seabrook Station, Unit 1) CLI-91-14, 34 NRC 261, 266 (1991).

[7] *See* Staff's Response to Hearing Request at 9.

[8] *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992).

[9] It is noted that the introduction to Appendix A in 10 C.F.R. Part 40 calls for a consideration of the economic costs involved in licensing decisions affecting the disposition of tailings and wastes.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

March 22, 1994

In this proceeding concerning a Staff enforcement order issued in accordance with 10 C.F.R. § 2.202, the Licensing Board concludes that an intervenor wishing to participate in the proceeding to support the Staff's enforcement order has presented two litigable contentions.

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

NRC regulations require that an admissible contention consist of (1) a specific statement of the issue to be raised or converted; (2) a brief explanation of the bases for the contention; (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing; and (4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. *See* 10 C.F.R.

§ 2.714(b)(2). A failure to comply with any of these requirements is grounds for dismissing the contention.

RULES OF PRACTICE: CONTENTIONS (OPPORTUNITY TO FILE RESPONSE TO OBJECTIONS TO ADMISSION)

A contention's proponent must be afforded an opportunity to be heard in response to objections to the contention. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

RULES OF PRACTICE: CONTENTIONS (PLEADING IMPERFECTIONS)

The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues. A concern has been expressed in agency adjudicatory directives about not utilizing pleading "niceties" to exclude parties who have a clear, albeit imperfectly stated, interest. *See Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979). This suggests that an intervenor's identification of a legitimate issue should not be negated because of its use of somewhat imperfect phraseology.

MEMORANDUM AND ORDER

(Supplemental Petition to Intervene)

Native Americans for a Clean Environment (NACE), on February 8, 1994, filed a supplemental petition to intervene in this proceeding in which it proposed two contentions for litigation. The proceeding involves a challenge to an NRC Staff Order directing the Sequoyah Fuels Corporation (SFC) and its parent corporation, General Atomics (GA), to provide decommissioning funding for SFC's licensed facilities near Gore, Oklahoma. By prior order, the Board found that NACE had standing to intervene as a party in the case, contingent on the admission of at least one qualified contention.[1]

NRC regulations require that an admissible contention consist of (1) a specific statement of the issue to be raised or controverted; (2) a brief explanation of the bases for the contention; (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely

[1] *See* LBP-94-5, 39 NRC 54 (1994). A part of that order dealing with NACE's standing to intervene has been referred to the Commission for review.

in proving the contention at any hearing; and (4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. *See* 10 C.F.R. § 2.714(b)(2). A failure to comply with any of these requirements is grounds for dismissing the contention.

NACE has submitted the following two contentions:

1. The NRC has enforcement authority over General Atomics.
2. Guaranteed decommissioning financing by GA is required by NRC regulations, and is necessary to provide adequate protection to public health and safety.[2]

The other parties to the proceeding — SFC, GA, and the Staff — raise no objections to NACE's first contention but oppose the second.[3]

SFC, GA, and the Staff raise essentially identical challenges to the second contention in asserting that the bases proposed fail to support NACE's claim: The bases for the contention by the Petitioner are alleged SFC deficiencies in meeting regulatory requirements, but the contention is directed against GA, not SFC. In this view, by merely detailing SFC's alleged inadequacies, NACE has not provided facts to support a claim or establish the existence of a dispute with GA on a material issue of law or fact.

CONTENTIONS

NACE offers a number of bases in support of its first contention regarding NRC's alleged enforcement authority over GA. These include a showing that the agency's regulatory authority extends to nonlicensees; that oversight and other management responsibilities concerning SFC were exercised by GA; and that GA allegedly consented to guarantee decommissioning funding in exchange for resuming suspended SFC operations. According to NACE, as a result of GA's close working relationship with the licensee, NRC was entitled to claim jurisdiction and authority over GA. In addition, in support of its allegations, NACE references certain documents including a 1988 Safety Evaluation Report, SFC's license, and a previous Staff enforcement order. Based on all these items, it is evident that NACE's first contention meets the procedural requirements of the agency's regulations and, accordingly, is admitted for litigation.

In contrast, because the foundations for NACE's second contention have not been set forth with as much clarity, it is not so apparent that they establish a genuine dispute warranting further consideration in this proceeding. NACE has,

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[2] [NACE] Supplemental Petition to Intervene, February 8, 1994 [hereinafter NACE Supplemental Petition].

[3] [SFC's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994 [hereinafter SFC Answer]; [GA's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994; NRC Staff's Response to [NACE's] Supplemental Petition to Intervene, February 23, 1994.

however, filed a motion for leave to reply to the responses from the parties opposing admission of this contention and an accompanying reply in which it attempts to provide some further explanation about the bases for the contention.[4]

Agency precedent suggests that a contention's proponent must be afforded the opportunity to be heard in response to objections to the contention.[5] While we are disturbed by an otherwise experienced counsel's lack of clarity in formulating this contention initially, this authority makes it clear that proposed contentions must be dealt with fairly. This, in conjunction with the lack of any substantive opposition to NACE's reply arguments,[6] convinces us that consideration of NACE's reply is warranted. Accordingly, we grant NACE's motion for leave to file a

The basis for Petitioner's second contention is that SFC has failed to meet NRC's regulatory requirements in 10 C.F.R. §§ 40.36 and 40.42(c)(2)(iii)(D) that call for the submission of a decommissioning financing plan. NACE recites that GA has denied that SFC has any responsibility to comply with the first of these regulations and that GA alleges that SFC has complied with the second. *See* NACE Supplemental Petition at 11. Pointing to a number of purported deficiencies in the proposed costs and revenue estimates in SFC's preliminary plan for decommissioning (*id.* at 11-15) and GA's denial of the inadequacy of these revenues ([GA's] Answer and Request for Hearing, November 2, 1993, at 8 [hereinafter GA Request for Hearing]), NACE contends that GA must be held to guarantee and supplement such funding shortages. *See* NACE Reply at 2.

Inasmuch as GA denies any obligation for providing financial decommissioning assurance (GA Request for Hearing at 7), it cannot be realistically argued that NACE has failed to establish the foundation for a genuine dispute on a material issue. Because the Petitioner's first admitted contention sets forth NACE's proposition that the NRC has enforcement authority over GA, the fact that NACE omits repeating this support for its second contention should not be considered fatal to its admission. Moreover, from a reading of the allegations made by the Petitioner concerning both contentions, it is clear, although not emphatically stated, that NACE is arguing that GA must be responsible for the decommissioning funding requirements because the license holder SFC does not meet them.

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[4] *See* [NACE's] Motion for Leave to Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994; [NACE's] Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994 [hereinafter NACE Reply].

[5] *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

[6] *See* Response of [SFC] to [NACE's] Motion for Leave to File Reply to [SFC's], [GA's], and NRC Staff's Response to NACE's Supplemental Petition to Intervene, March 4, 1994; Response of [GA] to [NACE's] Motion for Leave to Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 7, 1994. For its part, the Staff did not file an objection.

The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues. A concern has been expressed in Commission adjudicatory directives about not utilizing pleading "niceties" to exclude parties who have a clear, albeit imperfectly stated, interest.[7] This suggests that NACE's identification of a legitimate issue should not be negated because of its use of somewhat imperfect phraseology. NACE's second contention is accordingly admitted to the proceeding.

One remaining matter deserves comment here. In its response, SFC argues that even if part of Contention 2 is admitted, NACE should not be permitted to contest the adequacy of SFC's $86 million cost estimate for decommissioning of the Gore site. *See* SFC Answer at 2. NACE in its reply asserts that SFC has placed this matter in contention by denying a Staff allegation that there was uncertainty concerning SFC's projected decommissioning costs. NACE Reply at 3-4. It is not apparent that there is an issue here for the Board to resolve, however, because the controversy before us involves whether the Staff Order will be sustained and that Order does not call for more financing than the current SFC decommissioning costs of $86 million. In fact, NACE's supplemental petition, even though citing that figure as the bare minimum that should be set aside for decommissioning, concludes that the measures called for by the Staff Order are required to satisfy NRC's decommissioning financing regulations. *See* NACE Supplemental Petition at 15.

For the foregoing reasons, it is, this 22d day of March 1994, ORDERED that:

1. NACE's March 2, 1994 motion for leave to file reply to SFC's, GA's, and the Staff's responses is *granted.*

2. Contentions 1 and 2 in NACE's February 8, 1994 supplemental intervention petition are *admitted.*

3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as this Memorandum and Order and the Board's February 24, 1994 Memorandum and Order, LBP-94-5, 39 NRC 54 (1994), rule upon an intervention petition,

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[7] *See Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

these rulings may be appealed to the Commission within 10 days after this Memorandum and Order is served.

THE ATOMIC SAFETY AND
LICENSING BOARD*

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III (by JPG)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 22, 1994

*Judge Klein, a Member of this Board, due to an illness, did not participate in this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket Nos. 50-275-OLA-2
50-323-OLA-2
(ASLBP No. 92-669-03-OLA-2)
(Construction Period Recovery)
(Facility Operating License
Nos. DPR-80, DPR-82)

PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)

March 23, 1994

The Licensing Board denies Intervenor's motion to reopen the evidentiary record based on an inspection report raising new unresolved items concerning implementation of the maintenance/surveillance program (an issue in the proceeding). The Board premised its ruling on an affidavit by the NRC inspector (upon whose statements the Intervenor relied) that none of the unresolved items would conflict with or undermine his prior testimony. The denial is without prejudice to the later filing of a motion to reopen by Intervenor based on any such unresolved items that are demonstrated as significant and possessing substantive implications with respect to implementation of the maintenance/surveillance program.

MEMORANDUM AND ORDER
(Ruling Upon Motion to Reopen Record)

On February 25, 1994, the San Luis Obispo Mothers for Peace (MFP), an intervenor in this construction permit recapture proceeding, filed a motion to reopen the evidentiary record, which had been closed following hearings in August 1993. On March 7, 1994, Pacific Gas and Electric Company (PG&E or Applicant) filed a timely response opposing any reopening of the record. On March 14, 1994, the NRC Staff filed a timely response likewise opposing reopening of the record. For reasons set forth herein, we are denying the motion at this time, without prejudice to its being reasserted at a later date under certain circumstances.

A. Background

The motion is based solely on NRC Inspection Report 50-275/93-36 and 50-323/93-36 ("IR 93-36"), covering an inspection conducted on December 13-17, 1993, and apparently issued on January 12, 1994. An officer of MFP was mailed a copy of this report.[1] The inspection was performed by Mr. Paul P. Narbut, Regional Team Leader, NRC Region V, who also appeared as a Staff witness in this proceeding. It involved, *inter alia*, some apparent deficiencies in the maintenance/surveillance program that is the subject of one of the contentions in this proceeding. Some of the statements in IR 93-36 (and the accompanying transmittal letter to PG&E) seem on their face to undercut (based on new information) the testimony earlier provided by Mr. Narbut.

B. Applicable Standards

For the record to be reopened, stringent criteria must be satisfied. The Commission's regulations (10 C.F.R. § 2.734) provide, in pertinent part, that a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

> (a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> (2) The motion must address a significant safety . . . issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

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[1] We are not certain when the report, dated January 14, 1994, was in fact mailed to MFP. It was not entered into the NUDOCS system until February 2, 1994, when it clearly became a publicly available document. Thus, absent any direct information, we are unsure of when MFP actually received its copy.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . .

C. PG&E Response

In its response, PG&E claims that none of the four criteria are satisfied. It claims — correctly — that we may take account of its response to IR 93-36 in reaching our conclusion about the significance of the matters for which the record is sought to be reopened. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984). It asserts that the so-called "open items" upon which MFP in large part relies cannot serve as a basis for reopening. Further, it asserts that its March 15, 1994 response to the Staff (which it provided) explained and resolved all the "open items" raised by IR 93-36.

D. Staff Response

For its part, the Staff likewise asserts that MFP has fulfilled none of the bases for reopening the record. The Staff relies primarily upon the affidavit of Mr. Narbut, the NRC inspector responsible for IR 93-36. Mr. Narbut explained that none of the items in the report would conflict with or undermine his prior testimony in the proceeding and that many of MFP's references were to "unresolved items" that had not as yet been evaluated as to their severity.

E. Licensing Board Evaluation

We need not explore each of the reopening criteria to conclude that MFP's motion cannot be granted at this time;[2] for we have determined that the standard for changing the course of the proceeding could not be currently satisfied, particularly given the status in IR 93-36 of many items as no more than unresolved items. In its motion, MFP places explicit reliance on the expertise of the Staff inspector, Mr. Narbut, who by affidavit has stated that the inferences

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[2] Given the ambiguities of when MFP actually was served with IR 93-36, we are not basing this ruling on timeliness or lack thereof. In that connection, we raise a serious question whether a matter as apparently significant as this one should not have initially been the subject of a Board Notification. A followup inspection (IR 94-08) was the subject of Board Notification 94-06, dated March 17, 1994.

drawn by MFP from some of his statements are inaccurate or unwarranted. For that reason, we are *denying* MFP's motion based on the record currently before us.

We note, however, that various unresolved items must some day become resolved. Indeed, by virtue of Inspection Report 94-08, dated March 16, 1994, transmitted to us by Board Notification 94-06, dated March 17, 1994, it appears that some former unresolved items have been escalated to the status of apparent violations. To the extent that resolution may have implications with respect to the implementation of the maintenance/surveillance program (especially to the extent that it might potentially warrant license conditions), our denial of MFP's motion is *without prejudice* to MFP's later filing of a motion to reopen based on matters that have been demonstrated as significant and possessing substantive implications with respect to implementation of the maintenance/surveillance program.[3] In that connection, for purposes of reopening the record for new information, the scope of the program should be viewed broadly — e.g., in the context of the definition appearing in INPO-90-008 (Rev. 1, March 1990), MFP Exhibit 4.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 23, 1994

[3] We note from IR 94-08 that certain of PG&E's activities identified in IR 93-36 are to be subject to an Enforcement Conference on March 23, 1994. The Board thus has properly been informed by Board Notification concerning this conference.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Harry Foreman
Ernest E. Hill

In the Matter of

Docket No. 30-16055-CivP-R
(ASLBP No. 93-682-01-CivP-R)
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row,
Geneva, Ohio 44041)

March 31, 1994

ORDER
APPROVING AND INCORPORATING STIPULATION FOR SETTLEMENT OF PROCEEDING AND SETTLING AND TERMINATING THE PROCEEDING

Upon consideration of the Joint Motion for Order Approving and Incorporating Stipulation for Settlement of Proceeding and Settling and Terminating the Proceeding, and upon consideration of the Stipulation for Settlement of the Proceeding executed by the NRC Staff and Advanced Medical Systems, Inc. (*see* Attachment), we find that settlement of this matter as proposed by the parties is in the public interest and should be approved. Accordingly, before the presentation of any testimony at trial or further adjudication of any issue of fact or law regarding Violation 2, or the amount of civil penalty, or the classification of the Severity Level contained in the NRC Staff's May 30, 1989 Order Imposing Civil Monetary Penalty Issued to AMS, and upon the consent of the parties, the Stipulation for Settlement of Proceeding is hereby approved and incorporated

into this Order, pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2111, 2201(b), and 2201(o) and is subject to the enforcement provisions of the Commission's regulations and chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* This proceeding is hereby terminated.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Harry Foreman
ADMINISTRATIVE JUDGE

Ernest E. Hill
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 31, 1994

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 30-16055-CP
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row
Geneva, Ohio 44041)

STIPULATION FOR SETTLEMENT OF THE PROCEEDING

I.

On May 30, 1989, the NRC Staff (Staff) issued to Advanced Medical Systems, Inc. (AMS), an "Order Imposing Civil Monetary Penalties" (Order) in the amount of $6,250.00, for four violations of NRC regulations, set out in a "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985. AMS requested a hearing on the Staff's Order on June 20, 1989. By Memorandum and Order dated March 19, 1991, the Atomic Safety and Licensing Board (Licensing Board) granted the Staff's motion for summary disposition of the proceeding and sustained the Staff's Order. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH), LBP-91-9, 33 NRC 212 (1991). AMS appealed the Board's decision on April 26, 1991. By Memorandum and Order dated September 30, 1993, the Commission affirmed in part, and reversed and remanded in part, the Board's decision. *Id.*, CLI-93-22, 38 NRC 98 (1993). In its decision, the Commission directed the Board to give further consideration to the evidence concerning Violation 2 (inadequate survey) and to reconsider the severity level and civil penalty imposed by the May 30, 1989 Order. Following the Commission's denial of motions for reconsideration filed by the Staff and AMS, the Licensing Board issued an order dated December 14, 1993, in accordance with the Commission's direction, requiring the Staff

to file a "motion regarding the adequacy of the AMS survey and the possible termination of this proceeding." *Id.* at 3.

In December 1993 and January 1994, the Staff and representatives for AMS discussed the possibility of reaching an agreement concerning the civil penalty order and settlement of the proceeding. These discussions resulted in a verbal agreement between the parties that AMS would pay $1800.00 in full settlement of the May 30, 1989 Order; and AMS does not admit or deny Violations 1-3 or the Severity Level classification in the Order and the "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985.

The parties have entered into this Stipulation for settlement of this proceeding, subject to the approval of the Atomic Safety and Licensing Board, in lieu of presenting testimony at trial and further adjudication of any issue of fact or law regarding Violation 2, the amount of civil penalty, or the Severity Level classification contained in the Staff's May 30, 1989 Order. The parties acknowledge that the terms and provisions of this Stipulation, once approved by the Atomic Safety and Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations.

II.

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the NRC Staff and Advanced Medical Systems, Inc. as follows:

1. Payment by Advanced Medical Systems, Inc., of a civil penalty of $1800.00, in accordance with paragraph 2 below, shall constitute full satisfaction of the "Order Imposing Civil Monetary Penalty" issued to AMS on May 30, 1989.

2. Within 30 days of the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Advanced Medical Systems, Inc., shall pay a civil penalty in the amount of $1800.00, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States. Payment by mail shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

3. Advanced Medical Systems, Inc., does not admit or deny Violations 1-3 or the Severity Level classification in the "Order Imposing Civil Monetary Penalties" dated May 30, 1989, and "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985.

4. The NRC Staff and Advanced Medical Systems, Inc., waive their rights to further hearings concerning Violation 2, the civil penalty, and the Severity Level classification described in the Staff's May 30, 1989 "Order Imposing

Civil Monetary Penalties," and waive any right to contest or otherwise appeal this Stipulation in any administrative or judicial forum, once approved by the Atomic Safety and Licensing Board.

FOR THE NRC STAFF:	FOR ADVANCED MEDICAL SYSTEMS, INC.:
Colleen P. Woodhead 2/ /94	Sherry J. Stein 2/4/94
Counsel for NRC Staff	Counsel for AMS

Administrative
Law Judge

ADMINISTRATIVE LAW JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Law Judge:

Morton B. Margulies

In the Matter of

Docket No. 93-01-PF
(ASLBP No. 93-673-01-PF)

LLOYD P. ZERR

March 9, 1994

APPEARANCES

Roger K. Davis, Esq., and **Daryl M. Shapiro, Esq.,** Rockville, Maryland, for the U.S. Nuclear Regulatory Commission, Complainant.

Timothy E. Clarke, Esq., Rockville, Maryland, for Lloyd P. Zerr, Defendant.

INITIAL DECISION

Before me for decision is a civil complaint filed by the U.S. Nuclear Regulatory Commission (NRC or Complainant) on December 10, 1992, alleging that its former employee, Defendant Lloyd P. Zerr, submitted 23 false claims, in order to obtain monies from the government to which he was not entitled, in violation of 31 U.S.C. § 3802(a)(1). The NRC seeks penalties and assessments totaling $132,771.50. Defendant, in an answer served February 22, 1993, denied the allegations.

The proceeding is within the jurisdiction of the Administrative Law Judge as prescribed by the Civil Fraud Remedies Act of 1986 (31 U.S.C. §§ 3801-3812) and Title 10, Part 13 — Program Fraud Civil Remedies, of the *Code of Federal Regulations* (10 C.F.R. §§ 13.1-13.47). The parties were served with a Notice

of Hearing on March 16, 1993, pursuant to 31 U.S.C. § 3803(g)(2)(a) and 10 C.F.R. § 13.12, informing them of the hearing issues.

On August 16, 1993, Defendant filed a motion to dismiss the proceeding on the grounds that it constitutes double jeopardy in violation of the Fifth Amendment of the United States Constitution and because the institution of the proceeding violates agreements reached with the United States government. The motion was denied by Order of September 29, 1993. ALJ-93-1, 38 NRC 151 (1993).

Hearing in the proceeding was held at Bethesda, Maryland, on November 16 through November 19, 1993.

Posthearing briefs were filed by the parties on January 10, 1994. Defendant, in his brief, renewed a pretrial motion to dismiss this proceeding on the grounds that it constitutes double jeopardy in violation of the Fifth Amendment of the United States Constitution and denies him due process. The motion will be considered below. NRC, on February 7, 1994, filed an optional reply to Defendant's posthearing brief. Defendant did not file an optional reply to Complainant's posthearing brief.

All of the proposed findings of fact and conclusions of law in the pleadings have been considered. Any such findings of fact or conclusions of law not incorporated directly or inferentially in the Initial Decision are rejected as unsupported in fact or law or unnecessary to the rendering of this Decision.

The Motion to Dismiss

Defendant, in renewing his motion to dismiss on double jeopardy grounds, relies on the previous argument that he has already been subject to a criminal sanction and that this action is identical to the criminal proceeding that resulted in a dismissal of the criminal matter under a plea agreement involving a pretrial diversion.

The record in the original motion shows that Defendant was indicted for activities charged in the subject complaint and that, under a pretrial diversion agreement, prosecution was deferred, the indictment was dismissed, and restitution was made as agreed upon. ALJ-93-1, 38 NRC at 152.

The original motion was dismissed because Defendant had never been placed in jeopardy by the prior criminal process. An essential element was lacking for successfully claiming the constitutional protection. *Id.* at 155. Even had jeopardy attached, unless the civil penalty imposed for filing false claims with the government bears no rational relationship to the government's loss, there is no double jeopardy. *Id.*

Defendant has submitted nothing in his renewed motion to cause a different result from that reached previously. Defendant's claim of double jeopardy is without merit.

In his renewed motion to dismiss, Defendant contends that the legislative intent of the Program Fraud Civil Remedies Act of 1986 was clearly intended to be applicable when no criminal proceeding takes place. He claims that the reason for the enactment of the statute was the "inability or unwillingness to criminally prosecute these changes and that therefore, this civil remedy was made available as an alternative."

The legislative history and the statute are to the contrary. The Program Fraud Civil Remedies Act is in addition to the other remedies. In the Congressional Statement of Findings and Declaration of Purposes, Pub. L. No. 99-509, § 6102, Congress did find that "present civil and criminal remedies for such claims and statements are not sufficiently responsive." To correct the situation it added a remedy "to provide Federal agencies which are the victims of false, fictitious, and fraudulent claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements. . . ."

Section 3802(a)(2)(C) provides that the presenter of a false claim shall be subject to a civil penalty of $5000 for each statement, "in addition to any other remedy that may be prescribed by law." It has long been established that Congress may impose both a criminal and a civil sanction in respect to the same act or omission. ALJ-93-1, 38 NRC at 155.

Defendant's renewed motion is not meritorious and is therefore denied.

I. INTRODUCTION

In 1989, Defendant was employed as a Technical Intern, Office of Nuclear Reactor Regulation, at NRC's headquarters in Rockville, Maryland. He was a mid-level employee with educational and work experience in nuclear engineering.[1] During the summer of 1989, he was selected for a 13-month rotational assignment at the NRC Region II office in Atlanta, Georgia. Mr. Zerr proceeded in August to Atlanta where he worked for 7 months. He was then reassigned, from April 1, 1990, through September 30, 1990, as a Resident Inspector Intern at the Hatch Nuclear Power Plant (Hatch), in Baxley, Georgia.

Complainant alleges that, in connection with this 13-month regional assignment, Defendant submitted 23 false vouchers to the NRC for reimbursement for overtime, house rental, furniture rental, car rental, and meals and incidental expenses for monies to which he was not entitled. Payments by the government for the alleged false claims were stated to total $8885. Defendant has denied

[1] At the time of hearing, he testified that he held a Bachelor of Science in Nuclear Engineering, a Bachelor of Science in Management, and a Master of Business Administration. Tr. 500.

each of the allegations. Attached and made part hereof is Appendix 1 which contains a table summarizing the alleged false claims and their amounts.

Applicable Law

Law applicable to false claims includes the following:

A false claim occurs when any person makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know — (a) is false, fictitious, or fraudulent; (b) includes or is supported by any written statement that asserts a material fact that is false, fictitious, or fraudulent; (c) includes or is supported by any written statement that — (i) omits a material fact, (ii) is false, fictitious, or fraudulent as a result of such omission, and (iii) is a statement on which the person making, presenting, or submitting such statement has a duty to include such material fact; or (d) is payment for the provision of property or services that the person has not provided as claimed. 31 U.S.C. § 3802(a)(1); 10 C.F.R. § 13.3(a)(1).

A claim is defined, in part, under 31 U.S.C. § 3801(a)(3)(A) and 10 C.F.R. § 13.2 as any request, demand, or submission made to an authority for property, services, or money.

"Know or has reason to know," as contained in 31 U.S.C. § 3802(a)(1) and 10 C.F.R.§ 13.3(a)(1), means that a person, with respect to a claim or statement (a) has actual knowledge that the claim or statement is false, fictitious or fraudulent; (b) acts in deliberate ignorance of the truth or falsity of the claim or statement; or (c) acts in reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required. 31 U.S.C. § 3801(5); 10 C.F.R. §§ 13.2, 13.3(a)(5)(c).

Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim. 31 U.S.C. § 3801(9)(b)(1); 10 C.F.R. § 13.3(2). Each claim is subject to these legal requirements regardless of whether such property, services, or money is actually delivered or paid. It is considered made when such claim is made to an agent, fiscal intermediary, or other entity acting for or on behalf of the authority. 31 U.S.C. § 3801(9)(b)(2), (3); 10 C.F.R. § 13.3(3), (4).

The complainant must prove defendant's liability and the amount of any civil penalty or assessment by a preponderance of the evidence. 31 U.S.C. § 3803(f); 10 C.F.R. § 13.30(b).

The preponderance of the evidence with respect to the burden of proof in administrative and civil actions "means the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." A definition that may be used provides that it is "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter as asserted is more

likely to be true than not true." *Hale v. Department of Transportation, Federal Aviation Administration,* 722 F.2d 882, 885 (1985).

II. THE CLAIMS

A. Claims for Overtime

Counts I, II, and III of the complaint allege that Defendant submitted false claims for overtime work, which he did not perform, and for which he was paid.

Count I covers Pay Period 9, the 2-week pay period April 8 through April 21, 1990, for which 48 hours of overtime were claimed beyond the 80 hours for regular work. Complainant alleges that the 48 hours for which Defendant was paid $938.88 constituted a false claim.

Count II covers Pay Period 10, the 2-week pay period April 22 through May 5, 1990, for which 51 hours of overtime were claimed beyond 80 hours for regular work. Complainant alleges that 33.75 hours of the overtime, for which he was paid $660.15, constituted a false claim.

Count III covers Pay Period 11, the 2-week pay period May 6 through May 19, 1990, for which 50 hours of overtime were claimed beyond 80 hours for regular work. Complainant alleges that 27 hours of the overtime, for which Mr. Zerr was paid $528.12, constituted a false claim.

Defendant was paid by the government for the overtime work he claimed. NRC Exhs. 3, 5, 7.

To determine whether the overtime claims were false it is necessary to consider the nature of Defendant's employment, its requirements, and its performance.

Mr. Zerr's assignment to Region II was to broaden his knowledge and experience in regional operations. The assignment to the Hatch facility was to permit him to get an overview of operations at a commercial nuclear power plant, to learn the agency's regulatory requirements, and how they were implemented. Tr. 680-82 (Brockman). Although not a requirement, Defendant decided that he wanted to be certified as a resident inspector during his assignment. Tr. 683 (Brockman); Tr. 843 (Merschoff). A certified resident inspector is someone who is regularly assigned to the site by the agency and conducts inspections of the licensee's operations for regulatory compliance.

Kenneth C. Brockman, Section Chief in the Division of Reactor Projects, Region II, Mr. Zerr's superior in Atlanta, considered Defendant's interest in becoming certified as a resident inspector in the time he was to be at Hatch to be rather ambitious. He authorized overtime to assist in meeting the goal. Tr. 682 (Brockman).

When Defendant reported for work at Hatch in the beginning of April 1990, there was a Senior Resident Inspector, John Menning, who left his assignment

at that location on April 20, 1990. Tr. 306 (Menning). The Resident Inspector, Randall Musser, left on military leave for 2 weeks in April, leaving no resident inspector at Hatch during the last week of April. Tr. 231 (Musser); Tr. 323 (Menning).

Mr. Zerr was not under the supervision of the resident inspectors. His superiors were in Atlanta at the regional headquarters. Defendant worked along with the resident inspectors in learning about the various plant systems and how to conduct inspections of them. Tr. 324-25, 327 (Menning); Tr. 289-90 (Musser); Tr. 712-13 (Brockman).

As part of his internship, Mr. Zerr had a manual or journal that outlined a program for learning the regulatory requirements of the agency, their application to plant operations, and determining compliance with them. The program was self-directed. A supervisor would sign off on a chapter when it was completed. Tr. 610-11 (Herdt). The end of the process required a candidate to be examined by a board. A successful candidate before the board would then be certified as a resident inspector. Tr. 651 (Herdt); Tr. 850-51 (Merschoff).

Defendant was assigned to a first-forty work schedule. It permitted him to work 40 hours per week without a set daily limit on the hours worked. After 40 hours were worked within a week, he earned overtime for any additional hours worked during that week. Tr. 237 (Musser); Tr. 614 (Herdt).

Following Mr. Zerr's submittal of his claim for 48 hours of overtime for Pay Period 9, his supervisor, Mr. Brockman, became concerned that he would burn himself out from working such long hours. He notified Defendant of this and he was assured by Defendant that it would not happen. Tr. 687-88 (Brockman).

After the submittal of a claim for 50 hours of overtime for the following pay period, Mr. Brockman again raised the matter and was advised that Mr. Zerr was basically working 12 hour days during the week starting at 6:00 a.m. or 6:30 a.m. and on weekends to observe backshift operations. Tr. 689-90 (Brockman). Backshift operations are those performed beyond plant normal weekday working hours and on weekends. The observation of backshift operations requires working in the protected area. Tr. 239-40 (Musser); Tr. 318 (Menning). Mr. Brockman certified to the hours claimed to have been worked by Mr. Zerr on the basis of Mr. Zerr's signature. Tr. 714 (Brockman).

On Friday, May 18, 1990, Leonard Wirt, who was scheduled to become the Senior Resident Inspector at Hatch several months later, visited the plant. He voiced concern to Mr. Brockman that Defendant was not working the hours he claimed after seeing him arrive after 7:00 a.m. and not seeing his car after 1:00 p.m. at the NRC parking location. Tr. 341, 344 (Wert).

The location for parking NRC vehicles on site is in front of the Simulator Building. Tr. 240 (Musser). It houses a training simulator for Hatch employees and the offices of plant management staff including the licensing compliance department. Tr. 349 (Wert). The building is outside of the protected area. The

protected area is the place where significant plant operations are conducted and is contained within a perimeter fence. Tr. 207-08 (Edge). The offices of the NRC personnel are in a trailer located within the protected area. The NRC parking spaces are outside of the protected area and visible from the trailer. Tr. 344 (Wert).

Entrance and egress from the protected area is done through a security building. Tr. 208-10 (Edge). A security system using security guards, identification cards, and card readers identify the individual each time the protected area is entered and exited. The times are recorded. Tr. 208-12 (Edge). The system was reliable and accurate during the relevant period. Tr. 211-12, 217-18 (Edge).

Following Mr. Wert's report, Mr. Brockman obtained a printout of Mr. Zerr's record of entering and exiting the protected area. Tr. 692 (Brockman). As will be discussed later, the times of the first entrance into the protected area and the last exit regularly marked the beginning and ending of the daily work period for NRC personnel at Hatch.

Mr. Brockman's supervisor, Alan Herdt, Branch Chief, Division of Reactor Projects, Region II, prepared a chart comparing Mr. Zerr's claims of time worked to the recorded times of his first entering and last exiting of the protected area and found material discrepancies between the two. Tr. 578-79 (Herdt).

Attached and made part hereof as Appendix 2 is a table showing, for each of the relevant days in the three pay periods, the recorded first entry and last exit of the protected area by Mr. Zerr, the amount of elapsed time, the elapsed time minus the time for the prescribed lunch hour and the number of hours claimed to have been worked for which he was paid.

Major differences between the times Mr. Zerr claims to have worked and his recorded first entry and last exit of the protected area include:

(a) 12 hours claimed for Friday, April 13, for which there was a recorded 7 hours and 14 minutes in the protected area.

(b) 10 hours claimed for Sunday, April 15, for which there was no recorded time in the protected area.

(c) 10 hours claimed for Sunday, April 22, for which there was no recorded time in the protected area.

(d) 10 hours claimed for Friday, April 27, for which there was a recorded 5 hours and 40 minutes in the protected area.

(e) 8 hours claimed for Sunday, April 29, for which there was a recorded 2 hours and 32 minutes in the protected area.

(f) 8 hours claimed for Friday, May 11, for which there was a recorded 4 hours and 39 minutes in the protected area.

(g) 10 hours claimed for Sunday, May 13, for which there was a recorded 4 hours and 29 minutes in the protected area.

(h) Discrepancies of more than 3 hours for the days of April 11, 12, 16, 17, 18, and 20.

Although not a requirement, the layout of the site and the nature of the NRC inspection work cause NRC employees to begin their workday with their first entry into the security building and ending it with the last exit out of the building.

Mr. Wert best described why this was the case as follows:

> The significant majority of time that an NRC inspector spends on site, whether he's qualifying or inspecting, would be within the protected area boundaries . . . where all the activities that we are tasked to observe occur . . . . [T]he resident inspectors' trailer is your home office. . . . That's where you keep your hard hat, you put your dosimetry, notebooks . . . . I can't envision a scenario in which [an inspector] wouldn't go to the trailer at the beginning of the day and at the end of the day you go to that trailer and then badge out of the protected area.

Tr. 342-43.

The evidence of record is convincing that, like the inspectors, Mr. Zerr's workday began with the time of his first entry into the protected area and was completed at the last exit and that no significant work was performed by him before or after for which he could legitimately claim compensation.

The Hatch resident inspectors' basic workdays were 7:15 a.m. to 4:00 p.m. Tr. 307 (Menning); Tr. 237 (Musser). They followed the practice as described by Wert above. Tr. 245 (Musser); Tr. 309 (Menning).

During Pay Period 9 the recorded time of Defendant's first entrance and last exit generally coincided with that of the resident inspectors working a basic 7:00 a.m. to 4:00 p.m. shift. For the next two pay periods he was shown to have generally made his first entrance into the protected area within an hour before 7:00 a.m. and to depart within two hours after 4:00 p.m. (Fridays were an exception when the recorded departure times were prior to 4:00 p.m.)

Inspectors saw and had lunch with Defendant on a daily basis. Defendant would accompany the inspectors on some system checks. Tr. 265 (Musser). The day would begin with Mr. Zerr obtaining licensee operator logs from within the protected area. They would then be reviewed and discussed. A daily meeting was held in the NRC trailer with plant management. Tr. 253-54 (Musser).

Materials for use on inspections were obtained invariably from within the NRC trailer or Documentary Control, which was within the protected area. Tr. 263-68 (Musser). Although some of the material would also have been available in the Simulator Building it was not as convenient to obtain. Tr. 346 (Wert). Further, the updated official copies were kept at Document Control. Tr. 346 (Wert); Tr. 266-68 (Musser).

Mr. Zerr kept his standard materials, training, and qualification manuals within the trailer. Tr. 261 (Musser); Tr. 311 (Menning). Materials that would have been helpful for Mr. Zerr's studies to be a resident inspector were within the protected area. Tr. 265 (Musser); Tr. 345-46 (Wert). He routinely studied in the NRC trailer. Tr. 261 (Musser).

The inspectors estimated that between 90 and 98% of their time was spent in the protected area. Tr. 232, 248, 270 (Musser); Tr. 312 (Menning).

Occasionally, inspectors would attend meetings with licensee staff personnel in the Simulator Building outside of the protected area. Tr. 232 (Musser). Hatch staff personnel in the Simulator Building regularly worked between 7:00 a.m. and 4:00 p.m. Tr. 243 (Musser). Meetings would start after 9:00 a.m. Tr. 313 (Menning); Tr. 347 (Wert). They would be of very short duration. Tr. 232 (Musser). Very infrequently, operator training was observed in the Simulator Building. Inspectors from the Region (Atlanta) had responsibility for that activity. Tr. 273-74 (Musser).

Mr. Zerr, in late April, became involved in a project concerning Licensee's regulatory compliance in the area of surveillance testing. Tr. 729 (Brockman). It required many discussions with Hatch regulatory compliance engineers. Tr. 734 (Brockman). The project consumed 40 to 60 hours over a 4- to 6-week period. Tr. 735 (Brockman). It could all be accomplished in the NRC trailer rather than in the staff regulatory compliance offices. Tr. 734 (Brockman). There was no probative evidence in the record to show that this project was worked on by Defendant outside of the 7:00 a.m. to 4:00 p.m. work schedule that was followed by Licensee staff.

The NRC does not dispute that Defendant may have performed some work outside of the protected area such as on the above project. The NRC's evidence shows that Defendant did exit the protected area on many days between his first recorded entry and last recorded exit. The basis of the complaint is that no work was done by Mr. Zerr before his first entrance into the protected area and after his last exit.

Defendant was called to a meeting in Atlanta on May 30, 1990, by supervisors Brockman and Herdt to account for the differences between the recorded time and the time claimed to have been worked. Tr. 694-95 (Brockman). The meeting was held within 2 weeks of the last of the relevant pay periods. Mr. Zerr offered very little in the way of specifics to justify the discrepancies. He stated that he charged the 45-minute lunch hour to hours worked because he discussed work or was doing work during the lunch hour. He also stated that he charged for the time it took him to travel from his "temporary quarters" in Vidalia, Georgia, to the plant and to return. Tr. 696 (Brockman). Travel time between Vidalia and the plant site is approximately one-half hour in each direction. When Mr. Zerr worked in Atlanta, he did not claim commuting time from his residence to his Atlanta workplace and return. It was less than 10 minutes in each direction. Tr. 472 (Zerr).

Defendant indicated that he could have done work outside of the protected area at the Simulator Building and administration building on the project involving surveillance testing discussed above. Tr. 697-98 (Brockman). Mr. Zerr was asked to review his records to determine what his specific activities

were and to advise Mr. Brockman of them during the following week. Tr. 698 (Brockman). During the following week Mr. Zerr advised Mr. Brockman that the days were running together and that he could not remember any specifics regarding individual blocks of time. He reiterated that he could remember no days when he had gone to the site and had not entered the protected area. Tr. 699 (Brockman).

Defendant's testimony on hearing was equally vague. Mr. Zerr was asked two questions by his counsel as to his activities at Hatch. The questions and answers follow:

> Q When you were at Hatch did you ever perform any resident inspector intern duties and were outside of the protected area?
>
> A Yes, I did.
>
> * * *
>
> Q Did you ever do work outside of the protected area?
>
> A Yes, I did. There was a lot of activity going on when I was there, or when I arrived, because of the outage. There was a lot of contractors that were located outside of the protected area, as well as all of the engineering facilities and the licensing department. All of the training was done outside of the protected area. Tr. 500.

Defendant presented no evidence that would link any work that might be performed outside of the protected area to the disputed work time that was claimed.

Mr. Zerr provided no rational explanation as to why he chose to consider his work day to begin when he left his residence and to end when he returned rather than using the plant site for that purpose. NRC does permit employees to claim time in travel status as hours of employment only for those hours "actually spent travelling between the official duty station and the point of destination or between two temporary duty points, and for usual waiting time which interrupts such travel. . . ." NRC Exh. 70 at 1837. It would not apply to him. Vidalia, Georgia, was not a duty point.

Contrary to Defendant's claim of working lunches, Mr. Musser testified that he usually ate lunch with Mr. Zerr in the NRC trailer, that various topics were discussed, and that there were no frequent interruptions for work purposes. Tr. 261-62 (Musser).

Mr. Menning, who departed the facility on April 20, 1990, frequently ate lunch with Mr. Zerr. Generally, there was no attempt to do work at the lunches and he kept away from discussing work at lunch time. Tr. 315-16 (Menning). The prescribed lunch period for a workday was 45 minutes. Tr. 237-38 (Musser).

Mr. Musser testified that during an outage, as when Defendant arrived, there was more to see in the control room (within the protected area). Tr. 270. He further testified that when he observed the work of the contractors it was at the

plant. Mr. Musser could not recall any contractors outside of the plant. Tr. 270. His testimony was supported by Mr. Menning who testified that he did not recall offices or facilities of contract personnel outside of the protected area and that they were primarily craft personnel. Tr. 314-15. He also testified that he worked on April 15, 1990, Easter Sunday, and that he did not see Mr. Zerr or his car that day. Tr. 315.

Ellis Wesley Merschoff, Deputy Director, Division of Reactor Safety, Region II, served as Defendant's coordinator for assignments in Region II. When Mr. Zerr reported to Atlanta, Mr. Merschoff reviewed job requirements with him. As part of his discussion with new employees, Mr. Merschoff advises them that in the areas of time, telephone, and travel abuse, the office will not stand behind an employee and the abuse will very easily get the employee fired. He could not specifically recall having the conversation with Mr. Zerr but he would have been surprised if he did not. Tr. 837.

Frank Gillespie was the supervisor of the Reactor Intern Program, Office of Nuclear Reactor Regulation. Tr. 919-20 (Gillespie). The program provided an orientation to interns on time and attendance requirements when Mr. Zerr entered the program. The interns all had at least 1 year's prior experience in working for the agency. The Intern Coordinator spent days with each intern individually to ensure that the travel arrangements for their assignments went smoothly. This included review of the travel regulation requirements. Tr. 921-22 (Gillespie).

Defendant denied that Messrs. Merschoff and Gillespie had ever gone over the travel regulations with him. Tr. 495-96.

Discussion and Conclusions

Complainant has presented convincing evidence that Defendant submitted false claims for overtime work that he did not perform, in the manner alleged in Counts I, II, and III. Defendant's evidence failed to rebut the showing that false claims were knowingly made by him.

NRC established through credible witnesses that its inspectors at the Hatch plant regularly began their workday when they first entered the protected area and ended it when they last exited it to end the work period. The witnesses further established that from the nature of Mr. Zerr's duties and how they were performed it also held true for him. This conclusion was bolstered by Defendant's recorded first entries and last exits from the protected area, which except for Fridays and Sundays, mainly tracked the working time of the resident inspectors.

It was Defendant's contention that the first entry into the protected area and the last exit from it did not mark the beginning and ending of his workday; that he performed additional work. Not at issue was the accuracy and reliability of

the system recording the time and identity of an employee entering and exiting the protected area, which was established.

For Defendant to prevail, it was incumbent on him to go forward and rebut Complainant's proof that he did not work the overtime he had claimed. He was bound to produce evidence to show that he was working those much longer hours. In many instances they exceeded 3 hours a workday and extended to up to 10 hours on Sundays when he showed no time in the protected area. Many of the major discrepancies occurred on Fridays and Sundays thus forming a pattern in conjunction with the weekend.

Mr. Zerr's explanation of the additional work he claims to have performed was wanting and unconvincing. When he was initially confronted with the issue, which was close in time to when the work was purportedly performed, he gave only vague allusions as to what he might have been doing outside of the protected area. He never specifically identified the work he indicated he may have done nor did he identify it with any time period. The NRC never disputed the fact that limited work was done outside of the protected area between the time of the first entry into the protected area and the last exit out of it. Defendant's explanation for the disputed work hours was void of substance. He gave similarly vague testimony at the hearing.

Following Pay Period 10, Mr. Zerr advised Mr. Brockman that he worked weekends to observe backshift operations. The observation of backshift operations requires working in the protected area. Yet, on two Sundays for which overtime claims were made of 10 hours each day, Defendant was not recorded to have been in the protected area. Discrepancies between recorded and claimed times on two other Sundays exceeded more than 5 hours each day. Because the observation of backshift operations occurs within the protected area, there should not have been any discrepancies if the work was performed. Mr. Zerr's statement that he could remember no days when he had gone to the site and had not entered the protected area does nothing to account for the differences.

Similarly lacking was a rational explanation as to why Defendant would charge commuting time to working. Mr. Zerr was not a new government employee when he went on the regional assignment. He was apprised of the need to adhere to agency time and attendance as well as the travel regulations. The testimony of Messrs. Merschoff and Gillespie was worthy of belief.

As to Mr. Zerr's claim that he charged working lunches as work time, setting aside the question of its permissibility, the credible evidence was that the lunches did not fall within that category. Two resident inspectors, with no apparent self-interest, gave corroborating testimony that they were not working lunches.

Considering the amounts of excess overtime claimed, the period of time over which it occurred, and the lack of a convincing explanation, I conclude that the claims were known by Defendant to be false when made. No proof of specific intent to defraud is required under the applicable law. 31 U.S.C. § 3801(5);

10 C.F.R. § 13.3(a)(5)(c). The record in this proceeding shows that the false overtime claims are but one area in which Mr. Zerr made false claims during his 13-month rotational assignment.

Complainant has proven Counts I, II, and III by a preponderance of the evidence.

B. Claims for Travel Expenses

The remaining counts in the complaint, Counts IV through XXIII, allege false claims for travel expenses that occurred in connection with Defendant's 13-month rotational assignment at the NRC Region II office in Atlanta, Georgia, and at Hatch in Baxley, Georgia. False claims were alleged to have been made for expenses in the areas of furniture, car and house rental, for the use of a personal vehicle for official government travel, and over claiming and doubly claiming for meals and incidental expenses. Each category of expenses, claimed to have been falsely made, will be individually reviewed.

1. Furniture Rental

Counts IV through XI exclusively pertain to alleged false claims for furniture rental. Counts XII, XIII, and XIV, in addition to furniture rental, allege false claims in regard to other expenses.

Complainant alleges that, for each of the counts, Defendant falsely claimed on vouchers reimbursement for furniture rented from Cort Furniture Rental (Cort) after he had returned the furniture to Cort and did not rent any other furniture from it.

When Mr. Zerr went on extended travel to Georgia, he was authorized travel expenses under the lodging-plus system, a system he understood. Tr. 404 (Zerr). Under the system he was permitted to claim allowable expenses actually incurred for lodging up to a predetermined limit and was entitled to a flat daily subsistence rate for meals and incidental expenses (M&IE). Tr. 403-04 (Zerr); Tr. 790-92 (Miller); Tr. 542-43 (Corvelli).

He rented an unfurnished apartment in Atlanta for $875, which left him a maximum of $535 for other lodging expenses. Tr. 396, 404-06 (Zerr).

On August 26, 1989, Defendant rented furniture from Cort at a monthly rate of $535.83. NRC Exhs. 10, 11, 13, 15; Tr. 397-98 (Zerr). He paid initial charges of $1,006.90 which included the first month's rental and a security deposit. NRC Exh. 11. He was given a receipt for the payment on a Cort receipt form which contained his name and account number. For monthly payments to Cort he was furnished with serially numbered coupons that were to be sent with the payments. Tr. 398 (Zerr).

Within the first month of the rental, Defendant cancelled his contract with Cort and on September 19, 1989, returned to it all of the furniture he had rented. NRC Exh. 11, Tr. 399-400 (Zerr). Defendant received a partial refund. NRC Exhs. 14, 15. The reason he gave for cancellation of the rental agreement was that the furniture was of substandard quality and not what he had ordered. Tr. 399, 482. He no longer rented any furniture from Cort or anyone else thereafter. NRC Exhs. 11, 14, 15; Tr. 400 (Zerr). Mr. Zerr purchased furniture for his use at his own expense and never advised any NRC official that he was no longer renting furniture. Tr. 401 (Zerr).

Defendant submitted 11 vouchers to the NRC, between September 28, 1989, and December 25, 1990, claiming reimbursement for lodging at the maximum authorized rate. NRC Exhs. 9, 16-23, 25, 30; Tr. 402 (Zerr). Each voucher is the respective subject of Counts IV through XIV.

For each month the vouchers contained supporting documentation showing an expenditure of $535.83 for furniture rental from Cort. This was done by using payment documents provided to Mr. Zerr by Cort. He had never returned the unused payment coupons to Cort when he cancelled the rental agreement in September 1989. Tr. 399 (Zerr).

Defendant supported each voucher with a photocopy of the August 29, 1989 Cort receipt for $1006.90 which had the name "Cort Furniture Rental" on it. He also attached to each voucher a Cort payment coupon (or coupons for multi-month vouchers) each in the amount of $535.83. The coupons themselves did not contain the Cort name. However, the documents related to each other in that each contained Mr. Zerr's name and Cort account number. NRC Exhs. 9, 16-23, 25, 30.

The NRC paid all of Defendant's claims for rental furniture except for the last voucher, dated December 24, 1990, which was not paid because of the NRC's inquiry into Defendant's claims. NRC Exhs. 9, 16-23, 25, 30. At the end of his assignment in Georgia, Mr. Zerr attempted to have the NRC reimburse him for moving his furniture back to his home in Maryland. NRC Exh. 30 at 178.

Defendant's explanation for the furniture rental claims was based on a telephone conversation he said he had with someone in the NRC headquarters travel office. Tr. 405-06. He said he called the travel office to inquire whether he could purchase pots, pans, and linens instead of renting them because of what were outrageous rental costs. Tr. 405, 410, 482-83. Defendant stated that he was advised by someone in the office that he could purchase the items instead of renting them and to prorate the cost over the period that he would be on extended travel. Tr. 406, 482-83. He reasoned that if it could be done for pots, pans, and linens it could be done for furniture which he purchased. Tr. 410.

Mr. Zerr testified that he never separately prorated the purchase costs on the vouchers, that the costs were rolled over into the $535 figure and that he spent

in excess of that amount, but that was all that he was authorized to claim. Tr. 406-07, 411.

At the hearing, Defendant testified that he thought that the conversation on the pots, pans, and linens was with Pat Corvelli. Tr. 405. Ms. Corvelli knew Mr. Zerr as someone who came into the travel office. Tr. 556, 558 (Corvelli). He seemed to be knowledgeable in regard to the travel regulations. Tr. 544 (Corvelli). She could not recall any telephone conversation with him in 1989. Tr. 545-46 (Corvelli). She did testify that if she had been asked a question of whether items could be purchased instead of rented, her answer would have been "no." She considered this not to be a difficult question because the government travel regulations are clear on this point. Tr. 547.

Discussion and Conclusion

By a preponderance of the evidence, the NRC has proven that Defendant submitted false claims for furniture rental as part of his lodging expenses, which he did not incur.

Defendant used fraudulent documentation to mislead the government into paying for lodging expenses, i.e., furniture rental from Cort, which was not provided and for which the government would not have paid if the truth were known.

The supporting documentation submitted by Mr. Zerr was wholly deceptive. Despite the fact that he was no longer renting furniture from Cort, for a period of more than a year he used obsolete receipt and payment forms to make it appear that he continued to rent the furniture. The government paid the false claims until such time as it began an inquiry into the practice. Defendant was never authorized by the NRC to purchase furniture as he did but only to rent it as part of his lodging expenses.

Defendant's explanation as to why he submitted the claims in the manner that he did is not credible. He stated that he had prorated the cost of the furniture as he had done with the pots, pans, and linens and that they were rolled over into the $535 amount. Yet all the vouchers he submitted failed to disclose this. Reasonably, if he believed he was authorized to purchase the items and to prorate the costs, it would be expected that he would make known the purchases and the prorating of costs in his expense vouchers. To the contrary, rather than exposing a practice for which no reimbursement would be made, if known, he concealed it with a contrived false claim for rental furniture.

The argument was made by Defendant that the government benefited from the purchase arrangement. If the purchase was made for the government's benefit, there would have been no need for the machinations in which Defendant engaged. Defendant had engaged in this practice to benefit himself. Had he been successful, he would have had the government pay for the furniture which he

would have kept. This is another instance of where Mr. Zerr falsely overstated claims for expenses on his rotational assignment.

Complainant has proven by a preponderance of the evidence Counts IV through XIV as they allege the filing of false claims for rental furniture.

2. *Car Rental*

Counts XII, XIII, and XIV contain allegations that the Defendant submitted false claims to the NRC for car rental expenses. Complainant contends that Defendant falsely claimed monthly car rental expenses in the amount of $659.77 ($686.16 including tax) instead of the actual monthly rate of $549.77 ($577.26 including tax), in the period March through September 1990.

Defendant was authorized to rent a car for his entire rotational assignment. NRC Exh. 8 at 63; NRC Exh. 30 at 173. He rented an automobile from a Hertz Corporation location in Gaithersburg, Maryland, on August 25, 1989. NRC Exh. 24 at 852, 854. The beginning monthly rate was $659.77 plus tax. *Id.*

Because a long-term rental was involved, Defendant qualified for Hertz's Multi-Month Program in which each successive month's rental rate was reduced. NRC Exh. 24 at 245-46, 854; Tr. 511-14 (Wallis). Whereas the first month's rental was $659.77 plus tax, the rate was reduced by $20.00 per month until it reached $599.77 at which point it became fixed until the expiration of the rental agreement on February 27, 1990. NRC Exh. 24 at 245-46. Then, a new rental agreement was to be executed if the car was to be retained. Tr. 517 (Wallis).

The multi-month contract requires that it be guaranteed by a credit card. The arrangement is accomplished via the Hertz reservation 800 system and entails a 48-hour wait. Tr. 530-32 (Wallis). Hertz's business practice was to explain all terms and conditions contained in rental agreements. Tr. 515-16 (Wallis).

Hertz had sent a confirmation letter dated August 28, 1989, to Defendant's home address in Gaithersburg, Maryland, detailing the declining monthly charge under the original multi-month contract. NRC Exh. 24 at 245. Mr. Zerr denied seeing the confirmation letter. He testified that it would have arrived at his apartment after he had departed Gaithersburg, Maryland, and that he did not leave a forwarding address. Tr. 438. As to his being billed by the credit card company for the monthly rental, he testified that he would remit payments to the credit card company without seeing the bills. He stated that he would make minimum payments, if he had purchased anything he would send in something, or he would have called to find out the amount of the charges owing. Tr. 440.

On February 20, 1990, Defendant entered into a second rental agreement with Hertz renting a different car at a monthly rate of $549.77 plus tax, which was to be billed directly to his credit card account. NRC Exh. 24 at LS868; Tr. 522-23 (Wallis). Defendant signed this rental contract below the following language: "You represent to have read and understand the above and all terms

and conditions contained in paragraphs 1 through 14 of this agreement and that you agree to them." NRC Exh. 24 at LS868.

On March 27, 1990, Defendant exchanged the vehicle rented on February 20, 1990, from Hertz for a replacement vehicle and signed a replacement agreement containing the monthly rental price of $549.77. NRC Exh. 24 at LS866, Tr. 24-25 (Wallis). On July 20, 1990, Defendant exchanged the vehicle received on March 27, 1990, from Hertz for a replacement vehicle and signed a second replacement agreement containing the monthly rental price of $549.77. NRC Exh. 24 at LS865; Tr. 524-25 (Wallis).

Defendant's credit card bills for the time period, starting with his second rental contract with Hertz, reflect that Hertz charged him $577.26 monthly (this figure represents $549.77 plus tax). NRC Exh. 42 at 417-22.

Defendant claimed on his vouchers for March 1990, April 1990, and May through September 1990 monthly reimbursement for car rental at the highest rate under the multi-month contract, $659.77 plus tax, which was in effect in August 1989. He attached a copy of the first rental agreement that showed this amount. The amount he paid during the subject period, which was after the second contract became effective, was $549.77, a difference in the area of $100 per month. NRC Exhs. 23 at 144, 25 at 161, 30 at 175-78.

Defendant, on his voucher of April 2, 1990, which underlies, in part, Count XII, was overpaid $91.63 for car rental expenses for March 1990, which he did not incur. NRC Exh. 23.

Defendant, on his voucher of May 1, 1990, which underlies, in part, Count XIII, was overpaid $108.90 for car rental expenses for April 1990, which he did not incur. NRC Exh. 24.

Defendant, on his voucher of December 24, 1990, which underlies in part Count XIV, overcharged 108.10 per month for monthly car rental expenses for the months of May, June, July, August, and September 1990 ($540.50) that he did not incur and for which he was not paid. NRC Exh. 30.

Discussion and Conclusion

The NRC has proven by a preponderance of the evidence that Defendant submitted false claims for car rental expenses that he did not incur.

Even if one were to accept Defendant's explanation that he was ignorant of the fact that the expenses for car rental were less than he claimed, it still must be concluded that he had reason to know that the car rental claims were false. A definition of "know" or "has reason to know," in the applicable law, means that a person with respect to a claim or statement acts in deliberate ignorance of the truth or falsity of the claim or statement. 31 U.S.C. §3801(5)(B); 10 C.F.R. §13.3(a)(5)(c). Defendant's self-described actions at the very least show a studied, deliberate attempt of not learning the cost of the monthly car rental.

This extended from not seeing the credit card billing under the original rental agreement, which he paid, to the signing of a second rental agreement and the signing of two replacement agreements, which charged him at a lesser rate.

However, there is more to Defendant's conduct in filing false claims for car rental expenses than acting in deliberate ignorance of the truth or falsity of the claims. As in the case of his filing false claims for furniture rental expenses, he used fraudulent documentation to support the claims. In this case it was the original rental agreement that was no longer effective. He had actual knowledge of this as evidenced by his signing a second agreement on February 20, 1990, for a different car. Yet he continued to claim expenses for another 7 months using an outdated contract that contained a higher rental charge than he was paying.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for car rental expenses contained in Counts XII, XIII, and XIV.

3. House Rental

Counts XIII and XIV include allegations that the Defendant submitted false claims to the NRC for house rental expenses. In August 1989, upon arriving in Region II for his rotational assignment, Defendant rented an unfurnished apartment in Atlanta, Georgia, at a monthly rate of $875.00. NRC Exh. 9 at 68S-69S; Tr. 418 (Zerr). His lease on this property expired on March 31, 1990. NRC Exh. 9 at 68S-69S. As of April 1, 1990, Defendant was reassigned to serve as a resident inspector intern at the Hatch plant in Baxley, Georgia. Tr. 411, 415 (Zerr). The assignment necessitated that the Defendant obtain new lodgings. Tr. 412 (Zerr).

Beginning April 1, 1990, Defendant entered into a 6-month rental agreement for a four-bedroom, single-family residence with an in-ground swimming pool located in Vidalia, Georgia. NRC Exh. 26 at 300-02; Tr. 412-13 (Zerr). The monthly rental rate in the lease was $600.00. NRC Exh. 26 at 300-02.

During the 6 months that Defendant rented this house, he submitted two vouchers to the government, one dated May 1, 1990, for the period April 1, 1990, to April 30, 1990, and another dated December 24, 1990, for the period May 1, 1990, to September 30, 1990. NRC Exhs. 25, 30. The vouchers respectively underlie Counts XIII and XIV.

The voucher for the period April 1, 1990, to April 30, 1990, contained a $875 claim for rent. It was supported by a copy of a portion of the expired lease agreement for the apartment in Atlanta, Georgia, rented to Defendant at a monthly rate of $875. The portion of the copy submitted omitted the identification of the property rented in Atlanta but included the monthly rental amount of $875. NRC Exh. 25 at 162-63. Defendant did not live in Atlanta

during this time period; he resided in Vidalia, Georgia, at the house he was renting for $600 per month. Tr. 415 (Zerr). Mr. Zerr was paid for the claimed $875. NRC Exhs. 50 at 10, 51 at 9.

In support of his voucher for the period May 1, 1990, to September 30, 1990, in which he claimed $875 per month for rental expenses, he submitted a copy of the lease he signed for the Vidalia house but altered the rental amount in the lease from $600 a month to $875 a month. NRC Exh. 30 at 175-79, 185-87; Tr. 421-24 (Zerr). Defendant admitted that he altered the copy of the lease. Tr. 425 (Zerr). During the time period, Defendant paid to the rental agent of the property $600 rent for each month relevant to the voucher. NRC Exh. 27; Tr. 416 (Zerr).

Defendant's explanation was that because he was incurring expenses for obligations he had relating to the house rental in addition to rent, such as lawn care, extermination, and maintenance, he altered the lease amount to $850 per month, which represented his total expenses. He claimed that he received no money from the NRC in excess of that to which he was entitled. Tr. 423, 425 (Zerr).

His explanation was inconsistent with his claim for the month of May 1990, which not only claimed rental expenses of $875 but additional expenses for extermination service of $15 and for lawn care for $35. NRC Exh. 30 at 175; Tr. 426-27 (Zerr).

Investigation by Senior Criminal Investigator Ronald G. Fields disclosed an oral agreement between Defendant and the realtor handling the Vidalia house. Under the agreement, Mr. Zerr was responsible for grass-cutting services, swimming pool maintenance, and extermination services. The investigator was able to establish payments by Mr. Zerr in the amount of $350 for grass-cutting services, $255 for swimming pool maintenance, and $45 for extermination services. NRC Exh. 60, Tr. 880-84 (Fields).

Defendant testified that the reason he prepared a single voucher to cover the 5-month period May 1, 1990, to September 30, 1990, was that he was advised that unless he submitted a voucher by December 24, 1990, the travel funds advanced to him would be taken out of his salary. He did not testify as to why he was so many months behind in submitting vouchers. Defendant testified that he did not rely on calendars, day timers, or receipt books to complete the voucher. He stated that he followed the practice that he used throughout the rotational assignment of duplicating in format the first voucher that successfully passed through the NRC travel office examination. He would itemize successive vouchers in the same manner. Tr. 491-92.

Discussion and Conclusions

By a preponderance of the evidence, the NRC has established that the Defendant submitted false claims for house rental expenses he did not incur.

Again Defendant used false documentation to support the false claims. For the false claim in Count XIII it was an expired lease for another location. That the lease was for another location was concealed. For the false claims in Count XIV, Defendant altered the amount of the monthly rental in the lease by increasing it by $275.

Although Defendant claimed that $275 was paid by him monthly for other expenses in connection with the 6-month rental for a total of $1650, there is no convincing probative evidence of record that he spent more than $650 for such expenses, as established by the investigator. Indeed, if Defendant had incurred $1650 in authorized expenses, there would have been no reason for him to falsify the supporting documentation. He could have submitted evidence of the $600 a month rental payments and the additional expenses incurred. Evidently, he could not justify the claim for an additional $1000 and instead relied on false documents to obtain it.

Defendant's explanation that his current situation arose in part from relying on and following previously submitted vouchers is disingenuous. There was legitimacy to some initial claims, but it is apparent the followups were false because of changed circumstances that Defendant was aware of and concealed.

Defendant initially rented furniture from Cort but continued to file vouchers for furniture rental after he stopped renting. Defendant initially rented a car from Hertz for a monthly charge of $659 but continued to file vouchers for that amount after contracting for and paying a $557 rate. Defendant initially rented housing for $875 a month but continued to file vouchers in that amount after leasing for less.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for house rental contained in Counts XIII and XIV except to the extent in Count XIV that the amount of the false claim for house rental shall be reduced from $1375 to $725 to give Defendant credit for $650 in expenses for grass-cutting services, swimming pool maintenance, and exterminating services that he did incur.

4. Meals and Incidental Expenses

Counts XIII and XIV include allegations that the Defendant submitted false claims to the NRC for meals and incidental expenses (M&IE). The federal government pays to its employees who are on official travel a daily subsistence rate in lieu of requiring its employees to submit individual receipts for food and other expenses. Tr. 543 (Corvelli); Tr. 791-92 (Miller). This

rate varies according to the city to which an employee travels and is published in government travel regulations kept in each NRC office. It is reduced for employees on extended travel. Tr. 791-93, 798, 821 (Miller).

Having been on official government travel several times before starting his rotational assignment in Georgia, Defendant was familiar with the system's varying per diem rates among cities. Tr. 452-56 (Zerr). When Defendant began his rotational assignment he claimed on his vouchers the $27 M&IE rate (reduced due to long-term travel) for Atlanta, Georgia. *See, e.g.*, NRC Exhs. 8 at 54, 9 at 62. Defendant, however, upon moving from Atlanta to Vidalia, Georgia, which had a $26 rate, nor continued to claim and was paid the higher Atlanta rate even though he resided in a lower M&IE rate city. NRC Exhs. 25 at 161, 30 at 175-79, 56 at 395, 69 at 2209. No reduced rate was ever calculated for Vidalia because by the time the NRC discovered that Defendant was residing in a different city his rotation had ended. NRC Exh. 56 at 395.

Discussion and Conclusions

The NRC has failed to establish by a preponderance of the evidence that the Defendant submitted false claims for M&IE because he charged $27 a day instead of $26 on two vouchers. The difference of $1 a day is so small that it could have been overlooked. The evidence is not convincing that it was not more than mere negligence, which is not chargeable under the Program Fraud Civil Remedies Act.

Counts XIII and XIV were not proven insofar as they allege the filing of false claims for M&IE, where the authorized rate was $26 a day and Defendant charged $27.

5. Use of a Personal Car and Double Billing

Counts XV through XXIII each allege that Defendant submitted false claims to the NRC in charging mileage expenses for the use of a personal vehicle that he never provided and for billing for M&IE for which he had been paid.

While on rotational assignment at Region II in Atlanta, Georgia, Defendant made trips on official travel to such places as Tennessee, South Carolina, and Florida. He submitted nine travel vouchers to cover the period September 1989 to March 1990 when he made the trips. The vouchers respectively underlie Counts XV through XXIII. They were submitted to the NRC at Region II in Atlanta and he was paid for mileage for the use of a "POA" (privately owned automobile) and for the M&IE as claimed. NRC Exhs. 31-39.

Defendant acknowledged that the only vehicle he employed for the subject transportation was the rented vehicle from Hertz for which he was reimbursed by

NRC Headquarters at Rockville, Maryland. He testified that he did not possess a personal vehicle while on rotation in Atlanta although he filed vouchers for such use. Tr. 457-59.

For the same days he submitted travel expense claims for M&IE to Region II in Atlanta, for which he was paid, he had submitted claims for M&IE to NRC Headquarters at Rockville, Maryland, for which he was also paid. Tr. 459; NRC Exhs. 8, 9, 16-25, 31-39.

Defendant's explanation for what occurred was that he was told that for accounting arrangements he was to keep regional travel expenses separate from Headquarters travel. Tr. 497. He did not consider that he had twice billed the government for M&IE and car use. He stated that the claims for the regional travel were for mileage which he equated to merely being a cost for gasoline. He claimed not to have billed Headquarters for the same gasoline. Tr. 498-99.

In conjunction with the use of the Hertz rental car, Defendant regularly claimed expenses for the cost of additional gasoline. NRC Exhs. 8, 9, 16-23. For his claimed mileage for the alleged POA he was paid in excess of 20 cents per mile. NRC Exhs. 31-39.

Discussion and Conclusions

By a preponderance of the evidence, the NRC has established that the Defendant submitted false claims for mileage expenses and for M&IE that he did not incur.

Any accounting requirement to separate regional and Headquarters travel expenses is not a license to bill both for the same M&IE expenses and to pocket the payments from both accounts. The requirement to separate the expenses means just that, an allocation of the same expenses between the two accounts. Defendant's interpretation that he could charge each for the same expenses is not rational or credible. He seized the opportunity to bill and be paid by both.

His explanation that he did not twice bill the government for car use is similarly not credible. Defendant's claim for mileage for a POA was a complete fabrication that misled the government into paying for the use of a vehicle that it was already providing. Had Defendant factually reported that he was using the Hertz rental vehicle for transportation, no payment for mileage would have been made to him.

Defendant disingenuously equated mileage expenses to gasoline costs. If Defendant believed that they were of equivalent value, as he claims, there would have been no need for him to prevaricate that he provided his own vehicle for the transportation.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for mileage expenses and for M&IE contained in Counts XV through XXIII.

III. ULTIMATE FINDINGS AND CONCLUSIONS ON THE FALSE CLAIMS

Complainant has proven by a preponderance of the evidence that Defendant submitted false claims to the government for expenses he did not incur, as set forth in Appendix 1, except to the extent that (1) no false claim was established for M&IE for Count XIII (in the amount of $30) and for Count XIV (in the amount of $153); and (2) the amount of the false claim for housing rental in Count XIV shall be reduced to $725 giving credit to Defendant for $650 in additional expenses.

The total amount of the false claims proven is $12,800.33. The total amount of false claims paid was $8855.68. The false claim proven in Count XIV, in the amount of $3944.65, was not paid by the government.

Defendant knew at the time he submitted the false claims that they were false, fictitious, or fraudulent. The false claims violate 31 U.S.C. § 3802(a)(1) and 10 C.F.R. § 13.3(a)(1).

IV. CIVIL PENALTY AND ASSESSMENT TO BE IMPOSED

The law provides that for a false claim a defendant shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5000 for each such claim. 31 U.S.C. § 3802(a)(1); 10 C.F.R. § 13.3(a)(1). Additionally, if the Government has made any payment on a claim, a person subject to a civil penalty shall also be subject to an assessment of not more than twice the amount of such claim or that portion that is believed to be in violation of the Act. 31 U.S.C. § 3802(a)(1), (3); 10 C.F.R. § 13.3(a)(5). The NRC's implementing regulations provide that, ordinarily, double damages and a significant civil penalty should be imposed. 10 C.F.R. § 13.31(a). They also contain sixteen factors that may influence the Judge in determining the amount of penalties and assessments to be imposed. 10 C.F.R. § 13.31(b).

Complainant's Position

Complainant seeks the maximum civil penalty and assessment in this proceeding. It works out to $115,000 in civil penalties ($5000 on each of the 23 counts) and $17,711 in assessments (two times the $8855.68 in false claims paid to Defendant by the NRC). Complainant seeks a grand total of $132,711. No payment was made to Defendant on the false claim found in Count XIV in the amount of $3944.65 so that it is not subject to an assessment. 31 U.S.C. § 3802(a)(1), (3); 10 C.F.R. § 13.31(a)(5).

Complainant would reduce the $132,711 by $7454.57 which represents the monies that it has recovered from Defendant. NRC Exh. 65; Tr. 785-88 (Miller). The restitution resulted from the pretrial diversion in connection with the disposition of *United States v. Zerr*, Indictment No. 291-018, Southern District of Georgia. NRC Exhs. 58, 59, 61; Tr. 894-95 (Fields).

Complainant relies on a number of the factors under 10 C.F.R. § 13.31(b) in calling for the maximum in penalties and assessments.

(a) The Number, Time Period, and Amount of the Claims

See 10 C.F.R. § 13.31(b)(1), (2), (4). NRC points to the fact that there were 23 false claims, supported by fraudulent documents, involving thousands of dollars that were submitted over a 16-month period.

(b) The Degree of Culpability, the Pattern of Such Conduct, and the Concealment of the False Claims

See 10 C.F.R. § 13.31(b)(3), (8), (9). Complainant characterizes Defendant's activities as a well-thought-out program of illegal salary supplementation that was cleverly disguised. NRC states that Defendant took every opportunity to enrich himself through false claims that constitute a pattern of the same or similar misconduct. It points to the deliberate concealment of the truth by using an expired lease for an apartment rental in Atlanta as a basis to claim higher rental costs for a house in Vidalia, the retention of payment coupons for furniture no longer rented and the submission of such coupons with travel vouchers over a period of 15 months, and the routine submission of the initial Hertz document as evidence of the payment of charges in excess of those incurred.

(c) The Complexity of the Program and Degree of Defendant's Sophistication

See 10 C.F.R. § 13.31(14). Complainant asserts that Defendant's argument that, at most, he made some mistakes is wholly without merit. The NRC's position is that it was not a mistake considering Defendant's education, the responsible position he held, his experience in performing travel, and that the matters at issue were not complex. The matters at issue were posed as a question of whether Defendant incurred the expenses and worked the hours he claimed or he did not. Complainant asserts that Defendant's fraudulent scheme in filing the false claims was complex and displayed sophistication on Defendant's part.

(d) The Actual Loss, Including the Cost of Investigation

See 10 C.F.R. § 13.31(b)(5). It is Complainant's position that the amount of the actual payments of false claims to the Defendant and the cost of the government's investigation also support the imposition of a double assessment and substantial penalties.

The NRC placed the cost of the investigation, covering a 3-year period, at $28,514.04. It represents the hours of work and cost of travel of Ronald G. Fields, Senior Criminal Investigator of the Office of the Inspector General at the NRC. The total of $28,514.04 was broken down into $24,693.18 for wages and $3,830.86 for Mr. Field's travel. The figures were derived from the investigator's time reports, logs, and travel vouchers. Some of the expenses involved estimates in that a single trip by the investigator could involve as many as three separate investigations. NRC Exhs. 44, 47, 73-74; Tr. 747, 751-56, 867-69, 872-74, 879 (Fields).

(e) The Need for Deterrence and the Potential Impact on Government Programs

See 10 C.F.R. § 13.31(b)(16). Complainant argues that, if there is nothing more imposed than a small penalty in addition to restitution, there would be no real penalty for flagrant misconduct. It calls for a substantial penalty to deter other NRC employees who may be similarly tempted.

Complainant is concerned that false claims and the cost of their investigation deplete agency funds that can be better used for agency programs.

It considers the filing of false claims to be such misconduct that diminishes the credibility and integrity of the resident inspection program. Complainant stated that the program relies heavily on the reliability of the word of its inspectors. It states that a significant penalty will give notice to those in the resident inspector program that the independence and responsibility associated with the positions may not be abused without certain and strong sanction. NRC asserts that a maximum sanction would foster public confidence in the agency's efforts to control waste, fraud, and abuse.

(f) The Relationship of the NRC's Loss to the Potential Penalty

See 10 C.F.R. § 13.31(a), (b)(6). Complainant argues that the imposition of the maximum sanction, which would be more than three times the NRC direct losses, is reasonable because (1) the maximum sanction is "ordinarily" warranted where liability is shown, and (2) the applicable factors strongly favor imposition of the maximum penalties.

Defendant's Position

Defendant in his posthearing brief does not focus on the issue of penalties and assessments. The focus is on Defendant's position that he never filed false claims and that he was not engaged in any wrongdoing. The defenses are repeated that he lacked knowledge of the travel regulations, that he had limited experience in the travel area and had to fend for himself under difficult circumstances on a new assignment. He contends that he never intended to defraud anyone, that there was no failure on his part to disclose information, that he attempted to save the government money and that it got full value for the expenses claimed.

Defendant attributes part of his problem to being told on December 24, 1990, that he had only that day to complete a voucher covering the period May 1, 1990, through September 30, 1990, and that he had to put together 6 months of travel documentation to the best of his ability.

Defendant, in his brief, stated that he had suffered immensely and enough over this matter. He contended that he had never been paid for hours he had worked and was never reimbursed for expenses he incurred. Mr. Zerr claims to be owed substantial sums by the government.

Other matters to be considered in determining an appropriate sanction include the following:

In Defendant's original motion seeking dismissal of this proceeding on the grounds of double jeopardy he argued that the subject complaint is punitive in nature in seeking restitution and monetary penalties. 38 NRC at 152. He based this on the May 1992 "Agreement for Pretrial Diversion" with the United States Attorney for the Southern District of Georgia which provided for the prosecution to be deferred for 18 months, the dismissal of the indictment on meeting the agreement's conditions and making restitution in the amount of $7454.57. *Id.* NRC Exh. 60, 61; Tr. 898-900 (Fields). Defendant also relies on his leaving of government employment in lieu of other action, which was the equivalent of being discharged. 38 NRC at 152, 157.

Defendant, in making restitution under the pretrial diversion agreement, was credited with the time he claimed for travel between his residence and Hatch. The value was calculated at $645.48 (33 hours × $19.56 per hour). NRC Exh. 60.

Discussion and Conclusions

The purpose of the Program Fraud Civil Remedies Act of 1986 is: (1) to provide federal agencies that are the victims of false claims with an administrative remedy to recompense such agencies for losses resulting from such claims, (2) to deter the making and presenting of such claims in the future, and (3) to provide due process protection to all persons who are subject to the adminis-

trative adjudication. Congressional Statement of Findings and Declaration of Purposes, Pub. L. No. 99-509, § 6102.

The NRC's implementing regulations provide that "ordinarily double damages and a significant civil penalty should be imposed." The regulations do provide that in determining an appropriate amount of civil penalties and assessments the Judge should evaluate any circumstances that mitigate or aggravate the violation. 10 C.F.R. § 13.31(a). The regulations provide a nonexhaustive list of sixteen factors that may influence the determination. 10 C.F.R. § 13.31(b). However, they do not limit the Judge from considering any other factors that may mitigate or aggravate the offense for which sanctions are imposed. 10 C.F.R. § 13.31(c).

Complainant, in seeking the maximum sanction, correctly characterized the nature of the offenses, that Defendant seized all opportunities to inflate his overtime and travel expenses throughout his 13-month rotational assignment and employed various deceptive means to accomplish his purpose.

The Act provides for recompense to the agency and the imposition of a sufficient sanction to deter any such future conduct. The NRC relates the maximum sanction to the cost of the investigation which it places at $28,514. I find this sum to have been established by the preponderance of the evidence. Although estimates had to be made to arrive at the figure, the evidence was sufficient to conclude that the figure is more likely to be true than not true.

In determining the appropriate penalty and assessment to be imposed, Complainant's position must be weighed with Defendant's that he has already been sanctioned for the acts cited in the Complaint. Defendant was indicted. He was subject to the criminal justice system for a period of time. He made restitution in the amount of $7454.57 and he lost his position with the NRC.[2]

Although the sanction in the criminal matter was not of a type that enabled Defendant to claim successfully the constitutional protection against double jeopardy it must be considered in arriving at a civil penalty and assessment that accomplishes the purposes of the law and is fair and just.

Based on all of the record, I find that a proper sanction that is proportional to what occurred requires that Defendant pay a civil penalty of $4000 on Count XIV, which is not otherwise subject to an assessment because the $3944 false claim was not paid by the government. A penalty is in order whether or not the false claim succeeds. Defendant should pay on the remaining 22 counts a double assessment of the $8855.68 in false claims paid by the government. The $17,711 assessment should be reduced by the $7454.57 in restitution, leaving a sum of $10,256. The combined civil penalty and net assessment that should be paid total $14,256.

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[2] In making restitution, Defendant was not charged for the time he claimed for commuting between Vidalia and Baxley, Georgia. The record in this proceeding warranted a different result.

The amount is less than the government's investigation costs. However, Defendant has paid significantly otherwise. A price has been established for such conduct that should deter others from filing false claims.

The civil penalty and assessments were supported by a preponderance of the evidence.

V. ORDER

Based upon the entire record, it is hereby ordered that Defendant shall pay to the Complainant $14,254, for a civil penalty and assessments for filing false claims with the government, as hereinbefore found.

Pursuant to 10 C.F.R. § 13.37(c), notice is hereby given that unless this Initial Decision is timely appealed to the authority head, or a motion for reconsideration of the Initial Decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the Administrative Law Judge. 10 C.F.R. § 13.37(d).

Defendant may file a motion for reconsideration of the Initial Decision within 20 days of the receipt of the Initial Decision. If service was made by mail, receipt will be presumed to be 5 days from the date of mailing in the absence of contrary proof. 10 C.F.R. § 13.38(a).

Defendant may appeal the initial decision to the authority head by filing a notice of appeal with the authority head in accordance with 10 C.F.R. § 13.39. A notice of appeal may be filed at any time within 30 days after the Administrative Law Judge issues the initial decision. 10 C.F.R. § 13.39(a) and (b)(1).

If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the Administrative Law Judge denies the motion or issues a revised initial decision, whichever applies. 10 C.F.R. § 13.39(b)(2).

Morton B. Margulies
CHIEF ADMINISTRATIVE LAW
JUDGE

March 9, 1994
Bethesda, Maryland

APPENDIX 1

TABLE SUMMARIZING ALLEGED FALSE CLAIMS

Count	Date of Claim	Voucher	Subject of Claim	Amount of Claim ($)
I	04 20 90	Form 145	Overtime	938.88
II	05 05 90	Form 145	Overtime	660.15
III	05 19 90	Form 145	Overtime	528.12
IV	09 28 89	R905842	Furniture rental	154.33
V	10 12 89	R000002	Furniture rental	267.91
VI	11 01 89	R000002	Furniture rental	267.92
VII	11 08 89	R000002	Furniture rental	267.91
VIII	11 29 89	R000002	Furniture rental	267.92
IX	12 13 89	R000002	Furniture rental	267.91
X	01 01 90	R000002	Furniture rental	267.92
XI	03 21 90	R000002	Furniture rental	1089.52
XII	04 02 90	R002305	Furniture rental	517.90
			Car rental	91.63
XIII	05 01 90	R002305	Furniture rental	535.83
			Car rental	108.90
			Housing rental	275.00
			Meals & incidental expenses (M&IE)	30.00
XIV	12 24 90	R002305	Furniture rental	2679.15
			Car rental	540.50
			Housing rental	1375.00
			M&IE	153.00
XV	01 02 90	R9B3154	M&IE	123.50
			Mileage for personal vehicle use	155.25
XVI	01 02 90	R0B0011	M&IE	130.00
			Mileage for personal vehicle use	218.40
XVII	01 02 90	R0B0027	M&IE	221.00
			Mileage for personal vehicle use	261.60
XVIII	01 02 90	R0B0393	M&IE	102.00
			Mileage for personal vehicle use	12.00
XIX	01 02 90	R0B0656	M&IE	123.50
			Mileage for personal vehicle use	12.00
XX	01 16 90	R0B0841	M&IE	123.50
			Mileage for personal vehicle use	208.80

Count	Date of Claim	Voucher	Subject of Claim	Amount of Claim ($)
XXI	01 29 90	R0B0993	M&IE	117.00
			Mileage for personal vehicle use	12.00
XXII	02 12 90	R0B1098	M&IE	123.50
			Mileage for personal vehicle use	216.00
XXIII	04 02 90	R0B1505	M&IE	65.00
			Mileage for personal vehicle use	122.88

APPENDIX 2

COMPARISON OF THE RECORDED TIME OF THE FIRST ENTRY AND LAST EXIT OF THE PROTECTED AREA BY DEFENDANT

PAY PERIOD 9

Date		First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
4/9	(Mon)	7:39 a.m. – 4:46 p.m.	9:07	8:22	12
4/10	(Tue)	7:25 a.m. – 4:58 p.m.	9:33	8:48	12
4/11	(Wed)	7:56 a.m. – 4:21 p.m.	8:48	8:03	12
4/12	(Thu)	7:56 a.m. – 4:21 p.m.	8:25	7:40	12
4/13	(Fri)	8:03 a.m. – 3:18 p.m.	7:14	6:30	12
		TOTAL	43:08	39:23	60
4/15	(Sun)	NONE			
4/16	(Mon)	7:26 a.m. – 4:02 p.m.	8:36	7:51	12
4/17	(Tue)	7:15 a.m. – 3:54 p.m.	8:39	7:54	12
4/18	(Wed)	7:52 a.m. – 4:12 p.m.	8:20	7:35	12
4/19	(Thu)	7:43 a.m. – 5:41 p.m.	9:58	9:13	12
4/20	(Fri)	7:31 a.m. – 2:03 p.m.	6:32	5:47	10
		TOTAL	42:05	38:20	68

PAY PERIOD 10

Date		First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
4/22	(Sun)	NONE			
4/23	(Mon)	7:05 a.m. – 4:26 p.m.	9:21	8:36	12
4/24	(Tue)	6:37 a.m. – 6:48 p.m.	12:11	11:26	12
4/25	(Wed)	6:49 a.m. – 6:30 p.m.	11:41	10:56	12
4/26	(Thu)	6:48 a.m. – 5:44 p.m.	10:56	10:11	12
4/27	(Fri)	6:56 a.m. – 12:36 p.m.	5:40	—	10
		TOTAL	49:49	46:49	68
4/29	(Sun)	3:02 p.m. – 5:34 p.m.	2:32	—	8
4/30	(Mon)	6:31 a.m. – 5:51 p.m.	11:20	10:35	12
5/1	(Tue)	6:39 a.m. – 5:30 p.m.	10:51	10:06	12
5/2	(Wed)	6:49 a.m. – 5:50 p.m.	11:01	10:16	12
5/3	(Thu)	6:43 a.m. – 5:28 p.m.	10:45	10:00	12
5/4	(Fri)	3:56 a.m. – 11:34 a.m.	7:38	6:53	7
		TOTAL	54:07	50:22	63

PAY PERIOD 11

Date		First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
5/6	(Sun)	12:27 p.m. – 5:52 p.m.	5:25	—	8
5/7	(Mon)	6:03 a.m. – 5:32 p.m.	11:29	10:44	12
5/8	(Tue)	6:43 a.m. – 5:49 p.m.	11:06	10:21	12
5/9	(Wed)	6:05 a.m. – 5:39 p.m.	11:34	10:49	12
5/10	(Thu)	6:30 a.m. – 4:34 p.m.	10:04	9:19	12
5/11	(Fri)	7:02 a.m. – 11:41 a.m.	4:39	—	8
		TOTAL	54:17	51:17	64
5/13	(Sun)	2:40 p.m. – 7:09 p.m.	4:29	—	10
5/14	(Mon)	6:46 a.m. – 6:01 p.m.	11:15	10:30	12
5/15	(Tue)	6:55 a.m. – 5:44 p.m.	10:49	10:04	12
5/16	(Wed)	7:03 a.m. – 5:50 p.m.	10:47	10:02	12
5/17	(Thu)	6:15 a.m. – 6:09 p.m.	11:54	11:09	12
5/18	(Fri)	7:32 a.m. – 12:55 p.m.	5:23	—	8
		TOTAL	54:37	51:37	66

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

in the Matter of Docket No. 50-289

GENERAL PUBLIC UTILITIES
NUCLEAR CORPORATION
(Three Mile Island Nuclear
Station, Unit 1) March 31, 1994

The Director of the Office of Nuclear Reactor Regulation denies a Petition dated July 10, 1992, filed with the Nuclear Regulatory Commission (NRC) by Robert Gary, on behalf of the Pennsylvania Institute for Clean Air (PICA), requesting that the NRC take action with respect to GPU Nuclear Corporation (GPUN). The Petitioner alleged discrepancies in the Dauphin County Radiological Emergency Response Plan (RERP) and that the Pennsylvania Emergency Management Agency (PEMA) and the Dauphin County RERPs fail to provide for the use of military vehicles in the event of a radiological emergency, and requested that the NRC order GPUN to "power down" Three Mile Island Nuclear Station Unit 1 (TMI-1) until a workable emergency evacuation plan is in place. In various supplements to the Petition, the Petitioner alleged additional deficiencies in emergency preparedness planning and drills, and requested that the 10-mile plume exposure pathway for TMI-1 be expanded to include the City of Harrisburg, that the NRC conduct an independent *de novo* investigation of Petitioner's concerns, that the NRC require GPUN to remit $1 million per year to the Commonwealth of Pennsylvania for emergency planning around TMI-1, or in the alternative that the NRC federalize the collection and distribution of emergency preparedness funds, and that the NRC require that the RERP for Dauphin County be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency, and include all implementing procedures. After an evaluation of the PEMA and Dauphin County RERPs by the Federal Emergency Management Agency, the Director concludes that Pe-

titioner raised no substantial public health or safety concerns and that there is reasonable assurance that adequate offsite protective measures can and will be taken to protect the health and safety of the public in the event of a radiological emergency at TMI-1.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated July 10, 1992, Robert Gary, on behalf of the Pennsylvania Institute for Clean Air (Petitioner or PICA), submitted a Petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206) to Ivan Selin, Chairman, U.S. Nuclear Regulatory Commission (NRC or staff), requesting that the NRC take action with respect to General Public Utilities Nuclear Corporation (GPUN or Licensee). The Petitioner requested that as soon as possible (preferably within 5 working days) (1) the Federal Emergency Management Agency (FEMA) examine certain alleged transportation-related discrepancies in the Dauphin County Radiological Emergency Response Plan (RERP), and (2) the NRC order GPUN to "power down" Three Mile Island Nuclear Station Unit 1 (TMI-1) and not permit the plant to generate power until the discrepancies are corrected and a valid, workable emergency evacuation plan is in place. Dauphin County is one of five risk counties that lie partially or wholly within the 10-mile plume exposure pathway emergency planning zone (EPZ) for TMI-1.

The Petition alleged a number of deficiencies in the Dauphin County RERP. The Petitioner raised three major areas of concern, as follows:

1. The Dauphin County emergency operations center (EOC) fails to adequately maintain letters of intent for the county's transportation providers.
2. The Dauphin County RERP lists out-of-date names and telephone numbers for the bus providers and lacks after-hours telephone numbers for those providers, and fails to account for approximately 60 of the 450 required buses.
3. The Pennsylvania Emergency Management Agency (PEMA) and the Dauphin County RERPs fail to provide for the use of military vehicles in the event of a radiological emergency.

II. BACKGROUND

Because the concerns raised by the Petitioner relate to state and local emergency response plans, the Staff requested assistance from FEMA in a letter

dated July 22, 1993, in accordance with 10 C.F.R. § 50.47(a)(2), as well as the memorandum of understanding (MOU) between the NRC and FEMA, as updated on June 17, 1993, *see Federal Register* at 58 Fed. Reg. 47,996 (Sept. 14, 1993). FEMA is the federal agency with primary responsibility for offsite emergency planning for nuclear power plants. Exec. Order No. 13,657 (*see* 53 Fed. Reg. 47,513), *reprinted in* 50 U.S.C.A. § 2251, app. at 199 (1988).

By letter dated August 5, 1992, to Mr. Gary, the Staff acknowledged receipt of the Petition and informed the Petitioner of the NRC's request for assistance from FEMA.

Mr. Gary submitted information supplementing the Petition in letters to the NRC dated December 2, 1992, January 15, 1993, February 14, 1993, and October 7, 1993. Mr. Gary also provided supplemental information in a telephone call to the Staff on July 10, 1992, as documented in a letter to Mr. Gary dated October 28, 1992. The Staff forwarded this correspondence to FEMA to consider in evaluating the concerns raised in the Petition.

In two letters to the NRC, one undated letter received on July 18, 1993, and one dated January 6, 1994, the Petitioner submitted additional information supplementing the Petition, which did not require further assistance from FEMA to evaluate, and which has been considered in this Decision.

On February 2, 1994, Mr. Gary made additional requests on behalf of PICA at a public meeting with the NRC Staff.

FEMA Interim Report

By letter dated October 27, 1992, FEMA provided the NRC with an interim report of the actions that FEMA had taken to date in response to the Petition. On September 4, 1992, FEMA Region III Staff met with representatives of PEMA and the Dauphin County Emergency Management Agency to discuss the issues raised by the Petitioner. As a result of the meeting and FEMA's initial review of the Dauphin County plans, FEMA found that:

1. The letters of intent at the Dauphin County emergency operations center were not current. However, in early August 1992, Dauphin County sent out new letters of intent to the county transportation providers for their signatures. FEMA reviewed the content of these letters and determined that they did not include pertinent information on the number and capacity of transportation vehicles available. Amended letters requesting the number and capacity of vehicles were sent to these transportation providers, but these letters had not yet been signed and returned.
2. A review of the Dauphin County RERP indicated that all groups (general and special populations) requiring transportation had been identified and were current as of September 1992. However, there were discrepancies between sections of the Dauphin County RERP that concerned the

number of buses available for general population evacuation. PEMA and Dauphin County were revising the Dauphin County RERP to include more accurate, up-to-date numbers concerning buses.

3. Both the State and Dauphin County RERPs contained provisions for the deployment of the Pennsylvania Army National Guard (PAARNG) to Dauphin County, if necessary, during a radiological emergency. However, FEMA requested further information from PEMA regarding (a) the general type and amount of resources that are available to the county through the PAARNG during such an emergency, and (b) the extent to which PAARNG personnel have been trained and exercised in responding to radiological emergencies.

FEMA informed the NRC that additional time would be required to (1) give PEMA and Dauphin County adequate time to complete the activities that were undertaken to address the Petitioner's concerns, and (2) allow FEMA time to review the plan revisions, signed letters of intent, and other materials to ensure that the Petitioner's concerns had been adequately addressed and alleviated.

By letter dated November 24, 1992, the NRC forwarded FEMA's initial findings to Mr. Gary.

Letter from R. Gary to T. Murley, Director, Office of Nuclear Reactor Regulation, Dated December 2, 1992

By letter dated December 2, 1992, to the NRC, the Petitioner acknowledged receipt of FEMA's interim report and submitted the following additional questions:

- If there is a plan for use of the PAARNG to evacuate people using military trucks, where is it?
- What are the names and telephone numbers of the PAARNG Commanding Officers or Duty Officers who would be called to activate the evacuation trucks? On what page of the Dauphin County RERP can that information be found?
- What military units are tasked with responding to an evacuation need involving those trucks? Are there designated drivers and company commanders? What kind of briefings have these people had? Where is a list of their names?
- Are there any particular military trucks that are designated for the task of evacuating Harrisburg or any other area of Dauphin County?
- Are there routes and staging areas for these trucks? Does deployment of the PAARNG intend an evacuation procedure or a law-and-order-keeping mission?
- What about coordination between the PAARNG and local officials?

Licensee Response

By letter dated December 30, 1992, the Licensee responded to the Petition. GPUN contends that PICA failed to proffer any evidence of a violation of NRC regulations or of a substantial health and safety issue warranting institution of an enforcement proceeding against GPUN. Additionally, GPUN asserts that the relevant issue for the NRC is whether there is reasonable assurance that adequate protective steps can and will be taken in the event of a radiological emergency, not whether continued improvements in offsite emergency planning could be made.

In addition, GPUN contests three of the Petitioner's allegations. GPUN disputes that emergency preparedness in Dauphin County is substandard because of a lack of letters of agreement with transportation providers. GPUN states that three bus companies have participated in biennial emergency preparedness exercises which FEMA has consistently approved, and GPUN submitted "Statements of Understanding" between the Dauphin County Emergency Management Agency and the Capital Area Transit Bus Company, the Hegins Valley Lines, Inc., Bus Company, and the Capitol Bus Company, all executed in September and October 1992. Secondly, GPUN disagrees that the name and telephone numbers of contact personnel at the bus companies must be in the Dauphin County RERP (the plan). GPUN states that the names and telephone numbers of contact personnel are in the implementing procedures, which is the appropriate location, and that the names and telephone numbers are updated quarterly. Thirdly, GPUN contends that although PEMA has the authority to use military vehicles in radiological emergencies, PEMA does not presently contemplate doing so because of the excessive time required to mobilize military vehicles.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated January 15, 1993

By letter dated January 15, 1993, to the NRC, the Petitioner provided a "rejoinder" to the Licensee's response to the Petition and expressed the following concerns:

- PICA's position is that scheduled bus drills show only that walkie-talkies work and that people can be directed to go through a choreography when everyone has been notified prior to the drill. These bus drills would not meet military standards.
- Names and phone numbers of emergency response personnel and organizations should be placed in the RERP for ease of reference by responders in an emergency. Placing this information in implementing procedures may take it out of the public domain in which it could be reviewed by public-interest organizations.

- In addition, the Petitioner posed several questions directed at PEMA:
  - Why aren't the letters of intent for private bus companies on file at PEMA where they are supposed to be?
  - What is PEMA doing to supervise the counties and to ensure that they are in compliance with standard procedures for emergency readiness?
  - Why does PEMA feel that its role is confined to communications, coordination, and liaison?
  - Is PEMA in violation of its founding statute which calls for it to:
    (a) backstop the counties,
    (b) build two warehouses and stock them with emergency supplies?
  - What are the names and telephone numbers of current executives at the bus companies and are there any other deficiencies in the county plans that PEMA doesn't know about, and if there are such deficiencies, what steps are being taken to screen these plans for adequacy?
  - Why is Dauphin County 50 school buses short?
  - Why hasn't PEMA aggressively sought more resources from the Pennsylvania General Assembly? Why doesn't PEMA obtain more resources from the General Assembly or the nuclear utility licensees to make distributions to the counties that would be commensurate with their task in the event an evacuation was required?
  - Does the Dauphin County PERP meet the standards in terms of its goal of evacuating those persons within the 10-mile EPZ?
  - Is a 10-mile EPZ reasonable for Three Mile Island, considering that a highly populated area, the City of Harrisburg, is just outside the 10-mile limit and is, therefore, excluded from PEMA's evacuation plans?
  - Are school bus drills, conducted in the middle of workdays when everyone involved has been put on notice ahead of time, adequate tests of emergency preparedness? What standard does PEMA seek to meet its emergency preparedness drills? Are the drills purporting to test the equipment or the emergency responders? If the drills are to test the responders, then they should be unannounced and held at various times of the day and night and, therefore, more closely approximate an actual emergency event.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated February 14, 1993

By letter dated February 14, 1993, to the NRC, the Petitioner supplemented his rejoinder of the Licensee's response to the Petition. This supplement included a letter from Stephen R. Reed, Mayor, City of Harrisburg, Pennsylvania, to Mr. Gary, dated February 8, 1993. The following concerns were presented or reiterated in Mr. Gary's and Mayor Reed's letters:

- PEMA should request more funding from the General Assembly, at least $5 million dollars per year, not $500,000, to protect all the citizens in the Commonwealth of Pennsylvania in the event of a radiological emergency.
- It is appropriate to use Department of Defense (DOD) equipment to evacuate people from the EPZ, and from the other 90% of Harrisburg as well.
- Mayor Reed states that the City of Harrisburg "remains of the strong view" that the Dauphin County Emergency Management Plan must include specific details for the use of military vehicles from the New Cumberland Army Depot and Indiantown Gap and vehicles and personnel from Mechanicsburg Ships Parts and Control Center.
- The City of Harrisburg opposes the removal of "critical operational data" from the Dauphin County RERP. The data referred to are the names and phone numbers of emergency response personnel and organizations that appear in the implementing procedures.
- Mayor Reed's position is that the entire City of Harrisburg should be included in the 10-mile EPZ around Three Mile Island.

PEMA's Response

By letter dated July 12, 1993, from Mr. Joseph LaFleur, Director, PEMA, to Mr. Robert Adamcik, Chief, Natural and Technological Hazards Division, FEMA Region III, PEMA provided its response to FEMA regarding the concerns raised in the Petition and supplements to the Petition. PEMA has also engaged in direct dialogue and correspondence with Mr. Gary to answer his questions and concerns. PEMA's response is discussed below in addressing Petitioner's concerns.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Received July 18, 1993 (Undated)

The NRC received a letter from the Petitioner (undated) on July 18, 1993, requesting, "at a minimum, . . . the NRC to take over the investigation and complete it with dispatch" due to the length of time that had expired since

submittal of the original Petition. The Petitioner's request for the NRC and/or independent counsel or commission to conduct an independent investigation of the concerns raised in the Petition was reiterated in letters to the NRC dated October 7, 1993, and January 6, 1994. The Petitioner also made this request during a February 2, 1994 meeting with NRC and FEMA staff.

Letter from R. Gary to I. Selin, Dated October 7, 1993

By letter dated October 7, 1993, to the NRC, the Petitioner reiterated several concerns that had been forwarded to the NRC in previous correspondence. Specifically:

- It makes sense to include the residents of Harrisburg in the 10-mile EPZ around Three Mile Island because they would have to evacuate anyway.
- The use of trains and military trucks from New Cumberland and Indiantown Gap should be fully integrated into the county, state, and federal plans for evacuation of the population around TMI-1.
- Emergency preparedness drills should be conducted on an unscheduled basis.
- The evacuation plan based on school buses and private buses is 50 buses short.

FEMA's Final Report

FEMA issued its final report evaluating the State of Pennsylvania and Dauphin County RERPs on December 16, 1993, in response to the concerns raised in the Petition and the supplements to the Petition. FEMA's December 16, 1993 report is discussed below in addressing the Petitioner's concerns.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated January 6, 1994

By letter dated January 6, 1994, to the NRC, the Petitioner commented on FEMA's findings and requested that the comments be considered as a supplement to the Petition. The Petitioner's comments are as follows:

- Military vehicles could be activated much faster than buses and much more reliably. The NRC should obtain a "certificate" from the PAARNG stating that they could not respond in less than 6 hours. The NRC should also confirm that there are no other military forces of any kind that could contribute to an emergency evacuation of Harrisburg. A "certificate" from the Secretary of Defense would be appropriate evidence to indicate

that DOD has no forces that could respond in less than 6 hours. A military unit that can respond in 1 hour should be found.

- NRC should determine whether PEMA has complied with Pennsylvania law by stockpiling emergency supplies at Torrence State Hospital and Pike Center, rather than building two warehouses. Lack of funds is not an excuse for PEMA's failure to comply.
- PEMA's conclusion that $500,000 per year is adequate for radiological emergency preparedness for the entire State of Pennsylvania is unjustified. The NRC should determine the needs and resources for emergency preparedness.
- The NRC should investigate PEMA assertions of the availability of emergency supplies at Torrence State Hospital and Pike Center. The NRC should inventory those stockpiles and prepare a "certificate" stating that PEMA is in compliance with Pennsylvania statutory requirements regarding emergency supplies.
- Both PICA and the Mayor of Harrisburg propose that the size of the plume exposure pathway EPZ for Three Mile Island be 20 miles in radius, rather than 10 miles.
- Congress relied on witnesses who promised military standards of preparedness in authorizing the civilian nuclear power program. PEMA's use of unannounced drills only once every 6 years does not meet military standards.
- Although no deficiencies were identified during the May 19, 1993 full-participation exercise for Three Mile Island, it cannot be said that there are no deficiencies in overall emergency preparedness; TMI was cited by the NRC for a delay in staffing of their emergency response facilities during an unauthorized intrusion event on February 7, 1993.

Meeting with Mr. Gary on February 2, 1994

At the request of the Petitioner, the NRC and FEMA held a meeting with the Petitioner on February 2, 1994. This meeting was open to the public and was attended by representatives from GPUN, PEMA, the Nuclear Management and Resources Council, the Union of Concerned Scientists, and the Associated Press. Mr. Gary discussed four concerns at the meeting and stated that he believed that all "other matters raised by PICA are either dependent on these . . . main issues, or they have already been satisfactorily dealt with . . . ." The four issues were:

- Evacuation planning for the City of Harrisburg should be in place. To this end, a contingency planning area (CPA) could be established for Harrisburg that would allow for a layered response if the City would be required to be evacuated.

- Use of military vehicles to evacuate the EPZ and the balance of Harrisburg is an option and should not be rejected without a study on its efficacy.
- The $500,000 per year budget for the state and local radiological emergency preparedness programs is inadequate. The Petitioner believes $5 million to be a more appropriate amount, or an assessment of $1 million per year for each nuclear power facility in the state.
- The RERP for Dauphin County should be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency. Additionally, the RERP should include the implementing procedures.

Petitioner requested that the NRC perform a *de novo* investigation to resolve these issues. Specifically, Petitioner requested that the NRC should contact the appropriate military authorities and investigate the availability and type of military vehicles and personnel, and military response times. Petitioner also suggested a survey of county executives and mayors to determine the level of funding appropriate to meet their emergency preparedness needs.

III. DISCUSSION

The Commission's regulation governing emergency plans for nuclear power reactor applicants seeking operating licenses states in 10 C.F.R. § 50.47(a)(1) that no operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. In accordance with 10 C.F.R. § 50.47(a)(2), the NRC will base its finding, in part, on a review of FEMA's findings and determinations as to whether state and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. FEMA, in making its determinations, evaluates the state and local plans against the criteria established in NUREG-0654/FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980), in accordance with 44 C.F.R. § 350.5(a).

By memoranda to the NRC, dated June 16, 1981, and September 18, 1981, FEMA provided its interim findings and determinations relating to the status of state and local emergency preparedness around Three Mile Island. FEMA concluded that state and local plans possess an adequate "capability to protect the public in the event of a radiological emergency."

For operating reactors, the conditions of the license are delineated in 10 C.F.R. § 50.54. Concerning emergency planning and preparedness, 10 C.F.R. § 50.54(s)(2)(ii) in part, requires the following:

> If . . . the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency . . . and if the deficiencies . . . are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate. In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation.

In accordance with 10 C.F.R. § 50.54(s)(3), the NRC will base this finding, in part, on a review of FEMA's findings and determinations as to whether state and local emergency plans are adequate and capable of being implemented. In accordance with 44 C.F.R. § 350.13(a), FEMA may withdraw its approval of state or local emergency plans if it finds that the state or local plan is no longer adequate to protect public health and safety by providing reasonable assurance that appropriate protective measures can be taken, or is no longer capable of being implemented. The basis for FEMA's withdrawal of approval is the same basis used for making its initial determinations, i.e., the criteria in NUREG-0654/FEMA-REP-1. Subsequent to its interim findings of June and September 1981, FEMA has continued to confirm, through exercise observations and plan reviews, its reasonable assurance finding for the offsite emergency plans and preparedness around Three Mile Island.

A. The July 10, 1992 Petition

Summarized below for each of the three major areas of concern raised in the original Petition is NRC's evaluation of those concerns, based upon FEMA's final report dated December 16, 1993, and PEMA's response to FEMA in a letter dated July 12, 1993.

1. *The Dauphin County EOC failed to maintain letters of intent for the county's transportation providers.*

PEMA has begun to place more emphasis on such documentation and to obtain letters of intent, in the form of statements of understanding (SOUs), from their resource providers. PEMA provided FEMA with SOUs dated September 1992 and October 1992 between Dauphin County and the three bus transportation providers. FEMA finds that these SOUs meet the requirement of demonstrating the provider's intent to respond to emergencies.

In subsequent correspondence the Petitioner questioned why these SOUs were not on file at PEMA. In a letter to Mr. Gary, dated July 15, 1992, PEMA answered this by stating that the SOUs are negotiated and maintained by the

cognizant risk county where the resources are to be used. There is no federal requirement to maintain copies of agreements between local governmental jurisdictions and private resource providers at the state level. Accordingly, Petitioner has neither raised a substantial safety concern, nor demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

2. *The Dauphin County RERP lists out-of-date names and telephone numbers for the bus providers, lacks after-hours telephone numbers for those providers, and does not account for some buses required by the RERP.*

The Dauphin County RERP has been revised as of February 1993. Contact names and telephone numbers for bus providers have been updated. Because telephone numbers are not needed or intended to be shown in the Dauphin County RERP, PEMA moved them to the standard operating procedures (SOPs) for the applicable county staff personnel.

FEMA Region III staff telephoned the three bus providers listed for Dauphin County and verified the names and telephone numbers of the contacts, including the phone numbers for off-hours. The FEMA Region III staff subsequently reviewed this information in the SOPs and verified its accuracy. In addition, during the May 1993 exercise, FEMA observed the Dauphin County transportation staff make actual telephone calls to the three bus companies. The FEMA staff ascertained the number of buses available from these companies and notified the municipalities that their unmet needs would be met. According to the plan, 56 buses would be needed to fill the municipalities' unmet needs, in addition to the 96 buses already available from county resources. PEMA was apprised of the county's unmet need of 56 buses and demonstrated that 56 buses could be supplied from state resources.

In subsequent correspondence the Petitioner questioned the removal of contact names and phone numbers from the Dauphin County RERP and their relocation into the SOPs; thus, according to the Petitioner, taking them out of the public domain. The Petitioner also presented a letter from Mayor Reed of Harrisburg supporting the position that this type of information should remain in the RERP.

The Dauphin County RERP is intended to provide a broad perspective of its objectives and of the organization's concept of operations, including a description of the emergency response organization, facilities, responsibilities and authorities, and interorganizational relationships. It is not intended to contain details that are subject to change, such as names, phone numbers, step-by-step procedures, etc. These details are maintained in procedures (SOPs) that are used by specific response organization personnel to implement the plan objectives. Therefore, it is reasonable and appropriate to place information such as names and phone numbers in the applicable SOPs.

Petitioner has not raised a substantial safety concern or demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

3. *The PEMA and the Dauphin County RERPs fail to provide for the use of military vehicles for evacuation in the event of a radiological emergency.*

In a letter to Mr. Gary dated September 23, 1992, Stephen R. Reed, Mayor of Harrisburg, Pennsylvania, supported the "view that military vehicles, of which there are plenty in the immediate Harrisburg area, be a part of the Dauphin County Plan." In subsequent correspondence with the NRC, the Petitioner submits that military trucks could also be used to evacuate the balance of Harrisburg that is outside the established 10-mile EPZ.

PEMA states in its letter dated July 12, 1993, that Pennsylvania's emergency response plans do not rely upon military vehicles for the initial response during an emergency, because to do so would be more time-consuming than the process currently outlined in emergency response plans. Rather, the PAARNG will support counties on a contingency basis for radiological and other emergencies. The PAARNG provides a battalion to assist each risk and support county. Dauphin County is actually supported by one primary battalion with backup, as necessary, by a second specified battalion. The units are directed to forward assembly areas (to be determined 2 hours after notification). Each battalion takes approximately 6 hours to assemble and be prepared to move from their armories. The specific tasks of each battalion will be determined when the units become available and the needs of the county emergency management agency are solidified in light of the events as they unfold. The PAARNG is equipped with combat, combat support, combat service support vehicles, and aircraft that do not lend themselves to the safe and orderly movement of civilians. According to PEMA, the depots referenced by the Petitioner and Mayor Reed do not have assigned to them Table of Organization and Equipment truck companies. Instead, they rely primarily on commercial trucking companies and, occasionally, U.S. Army Reserve truck companies using flatbed trailers. Therefore, PEMA does not plan to utilize National Guard trucks to evacuate civilians. Moreover, PEMA states that it has identified sufficient civilian bus assets to evacuate that portion of the population that may not have a method of personal transportation.

The NRC has no requirements that specify the precise means and methods to be used in carrying out prompt protective actions for the public, including evacuation, in the event of a radiological emergency. The choice of such means and methods is at the discretion of the cognizant state and local authorities. Once such means and methods have been selected and proceduralized, FEMA will review and evaluate their adequacy. FEMA's evaluation of the state and local plans is based upon the criteria established in NUREG-0654/FEMA-REP-1, in accordance with 44 C.F.R. § 350.5. FEMA has evaluated the offsite

emergency plans for the 10-mile EPZ surrounding Three Mile Island Nuclear Station, including the provisions for evacuating the EPZ, and found them to be adequate. Accordingly, Petitioner has failed to raise a substantial safety concern or to provide evidence that offsite emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

B. Additional Questions Raised by Mr. Gary

As discussed in Section II, *supra*, Mr. Gary supplemented the July 10, 1992 Petition in subsequent correspondence to the NRC. The NRC forwarded this supplemental information to FEMA for its consideration in reviewing Mr. Gary's concerns. FEMA provided its response in a report to the NRC, dated December 16, 1993.

1. *Why is Dauphin County 50 school buses short and what does this mean for the affected residents?*

The February 1993 Dauphin County plan reflects an overall unmet need for 56 buses. The county plan states that unmet county needs will be reported to PEMA. The state plan requires the Pennsylvania Department of Transportation to develop and maintain an inventory of statewide transportation assets for use in evacuating risk counties. PEMA states that information about transportation providers is maintained in computerized data banks at the state EOC and that procedures for meeting the unmet county needs are part of the state and county SOPs. During the May 19, 1993 biennial radiological emergency preparedness (REP) exercise, FEMA observed that the procedures for reporting and meeting the unmet county transportation needs for Dauphin County were successfully exercised. Accordingly, Petitioner has neither raised a substantial safety concern, nor demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

2. *What are the telephone numbers of the PAARNG commanding officer and/or duty officers who would be called to activate the evacuation trucks? Where in the Dauphin County RERP can this information be found? Which military units are tasked with supplying vehicles for evacuation? Are designated drivers and company commanders designated by name? What type of briefings have these personnel received? Have specific trucks been designated for use in evacuating Harrisburg or other Dauphin County jurisdictions? Have staging area locations and evacuation routes for these trucks been delineated on Dauphin County maps?*

PEMA concluded that since Pennsylvania plans rely entirely upon civilian vehicles for evacuation in the event of a radiological emergency, and military vehicles are only used if the PAARNG has been activated and evacuation assistance is specifically requested, it is not necessary for the Dauphin County plan to include this type of information. FEMA agrees.

With concern to training, PEMA concluded that due to the PAARNG's limited mission in radiological emergency response, their full training schedule, and turnover rate, PAARNG personnel need not receive "civilian radiological" training beyond that provided in their Army annual training program. FEMA agrees. This training satisfies NRC requirements for radiological emergency response training of personnel who may be called upon to assist in an emergency. *See* 10 C.F.R. § 50.47(b)(15).

Accordingly, Petitioner has not raised a substantial safety concern or demonstrated that there is a lack of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

3. *Has a mechanism been set up to coordinate the activation and use of the PAARNG with local officials?*

FEMA's review of the state plan identified two different procedures to be followed when a county requests PAARNG's assistance; however, the plan fails to clearly identify the circumstances for triggering each procedure. In addition, the Dauphin County plan does not reference a specific procedure to be followed by the County when requesting PAARNG assistance. The state plan calls for a Department of Military Affairs (DMA) representative to be dispatched to each of the risk counties to coordinate requests for PAARNG assistance. However, the Dauphin County plan does not reiterate this requirement. Instead, the County plan specifies that, after PAARNG activation, the PAARNG will send liaison personnel to the County EOC. FEMA concluded that the Dauphin County RERP should be revised to specify greater detail regarding county requests for PAARNG assistance and PAARNG response.

While FEMA continues to work with PEMA in resolving this issue, FEMA has concluded that the state and county plans are adequate and continue to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

In view of the above, the NRC Staff concludes that the state and county plans make adequate provision for coordinating with the PAARNG, and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

4. *Are there any maps that indicate that the PAARNG will be activated for evacuation purposes, rather than for peace-keeping purposes?*

FEMA reports that Appendix 8 of the February 1993 Dauphin County plan states that the PAARNG, once activated, will provide direct support to Dauphin County by performing a variety of radiological emergency response missions as a supplement to the County's resources. Most of these missions, such as traffic control, emergency transportation, emergency fuel on evacuation routes, and emergency clearing of roads, are evacuation-related, not peace-keeping, missions. A specific PAARNG battalion is assigned to Dauphin County for these potential missions.

5. *What is PEMA doing to supervise the counties and to ensure that they are in compliance with standard procedures for emergency readiness? Is PEMA in violation of its founding statute (Title 35, Pennsylvania Consolidated Statutes, § 101) which calls for PEMA to backstop the counties and build two warehouses and stock them with emergency supplies?*

PEMA's letter dated July 12, 1993, states that during an October 2, 1992 meeting attended by Mr. Gary, Senator Schumaker of the Pennsylvania General Assembly, Commissioner Scheaffer (Chairman of the Dauphin County Board of Commissioners), and Mr. Joseph LaFleur, (Director of PEMA), the level of supervision by PEMA of the counties, and PEMA's actions to provide supplies and equipment to the counties during emergencies, were discussed with Mr. Gary.

In a letter to Mr. Gary, dated July 15, 1992, PEMA's General Counsel stated that the legislature had not allocated funds for the construction and stockpiling of two regional warehouses, and that such expensive facilities would be ill-advised because PEMA has adequate stockpiles of emergency supplies at other departmental facilities located at Torrence State Hospital and Pike Center. Although Petitioner requested that the NRC examine stockpiles at Torrence State Hospital and Pike Center, Petitioner presented no evidence to question the validity of PEMA's conclusion regarding the adequacy of those stockpiles. Accordingly, Petitioner's request for an NRC audit of emergency stockpiles at Torrence State Hospital and Pike Center is denied. The NRC requires that emergency response plans provide for maintenance of adequate emergency equipment and supplies. *See* 10 C.F.R. § 50.47(b)(8). Based upon FEMA's review of emergency stockpiles maintained by Dauphin County and the Commonwealth of Pennsylvania, the NRC Staff concludes that the offsite emergency response plans for TMI-1 are in compliance with section 50.47(b)(8), and that offsite emergency plans and preparedness for TMI-1 provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

In regard to Petitioner's concern as to whether PEMA is in compliance with Pennsylvania State law, the NRC and FEMA do not make determinations of

compliance by state and local emergency response plans with state requirements. This is a matter Petitioner must raise with appropriate state authorities.

6. *Are there deficiencies in the county plans, similar to the foilure to maintain current information on bus company contacts, that PEMA does not know about? If there might be such deficiencies, what steps are being taken to review these plans for adequacy?*

As a result of the Petitioner's inquiries, FEMA reviewed the February 1993 Dauphin County plan and identified some omissions and discrepancies with respect to the plan's transportation and ambulance resource numbers. However, given the nature of emergency plans as living documents that are continuously being revised and updated, FEMA concluded that these discrepancies do not adversely impact the adequacy of the county plan.

PEMA explained the cycle of plan reviews and updates to Mr. Gary at the October 2, 1992 meeting. FEMA also reviews annual plan revisions to identify areas of required and recommended plan improvements. In addition, FEMA will thoroughly review all the plans related to TMI-1, including the Dauphin County RERP, when they are submitted to FEMA for formal plan review and administrative approval under 44 C.F.R. Part 350.

7. *In order to assist the counties in planning for and executing evacuation logistics, why does PEMA not obtain more resources from the General Assembly or nuclear licensees and make distributions of these resources to the counties?*

At the October 2, 1992, meeting, the Director of PEMA explained to Mr. Gary that there is insufficient justification from the counties to ask the utility ratepayers to assume the cost of the total $5 million annual expenditure advocated by Mr. Gary to support county radiological emergency response activities. Senator Schumaker of the Pennsylvania General Assembly, also in attendance at the meeting, stated that he would not place such a burden on the ratepayers due to the state's economic situation.

Mr. Gary, in subsequent correspondence with the NRC, and at the February 2, 1994 meeting with representatives of the NRC and FEMA, reaffirmed his claim that additional monies to support offsite emergency planning are necessary. During the February 2, 1994 meeting, the Petitioner proposed that the NRC require that GPUN remit $1 million per year to the Commonwealth of Pennsylvania to be earmarked for emergency planning around TMI-1. The Petitioner requested that in the alternative the NRC federalize the collection and distribution of these funds.

The NRC has no requirements concerning the size and allocation of budgets for offsite emergency response organizations. Since FEMA has evaluated offsite planning and preparedness for TMI-1 and concluded that they are adequate, there is no basis under NRC regulations to address the funding of state and local

radiological emergency preparedness programs. Moreover, the Petitioner has not presented any information to demonstrate that current funding is inadequate. Accordingly, Petitioner's request for NRC action to require additional funding through the Commonwealth of Pennsylvania's statutory mechanism or a federal scheme is denied.

8. *Is a strictly delineated 10-mile emergency planning zone (EPZ) reasonable for Three Mile Island, considering that a highly populated area, the capital city of Harrisburg, is just outside the 10-mile limit?*

In PEMA's letter dated July 12, 1993, PEMA states that the 10-mile EPZ for TMI-1 is based upon NRC and EPA studies in NUREG-0396, "Planning Basis for the Development of state and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," December 1978. When evacuation is called for, the Commonwealth of Pennsylvania will direct the immediate evacuation of the entire 10-mile EPZ. PEMA also states that the emergency response organization within 10 miles of TMI-1 can be expanded beyond 10 miles if conditions warrant. FEMA is in agreement with PEMA's interpretation of the requirements governing the size of the 10-mile EPZ.

In a letter from Stephen R. Reed, Mayor of Harrisburg, to Mr. Gary, dated February 8, 1993, Mayor Reed agreed with Mr. Gary's concern that the City of Harrisburg should be included in evacuation plans for TMI-1. To this end the Mayor noted that although the city is not "officially recognized" as part of the 10-mile EPZ, the city has identified, and would be able to mobilize, sufficient resources to support evacuation of both Harrisburg's portion of the 10-mile EPZ and the contiguous areas of Harrisburg to the north.

In the February 2, 1994 meeting, Mr. Gary suggested that a "contingency planning area" could be established for the City of Harrisburg to provide for a preplanned layered response that would not require rulemaking for an expansion of the established EPZ around TMI-1. Mr. Gary did not explain how a contingency planning area differs from expansion of the 10-mile EPZ, nor is any difference apparent.

The size of the EPZ for a commercial nuclear power plant is established by the NRC in 10 C.F.R. §50.33(g) and Appendix E to 10 C.F.R. Part 50. The choice of the size of the EPZs (about 10 miles in radius for the plume exposure pathway and about 50 miles in radius for the ingestion pathway), as discussed in NUREG-0396, represents a judgment that a 10-mile EPZ provides sufficiently detailed planning that must be performed to ensure an adequate emergency response. In a particular emergency, protective actions might well be restricted to a small part of the planning zones. On the other hand, the response measures established for the 10-mile and 50-mile EPZs can and will be expanded if the conditions of a particular accident warrant it. Although an

EPZ is generally circular in shape, the actual shape is established based on local factors such as demography, topography, access routes, and governmental jurisdictional boundaries.

The Commission reaffirmed the reasonableness of the 10-mile EPZ in 1989. The Commission stated:

> Implicit in the concept of "adequate protective measures" is the fact that emergency planning will not eliminate, in every conceivable accident, the possibility of serious harm to the public. Emergency planning can, however, be expected to reduce any public harm in the event of a serious but highly unlikely accident. Given these circumstances, it is entirely reasonable and appropriate for the Commission to hold that the rule precludes adjustments on safety grounds to the size of an EPZ that is "about 10 miles in radius." In the Commission's view, the proper interpretation of the rule would call for adjustment to the exact size of the EPZ on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions. The goal is merely planning simplicity and avoidance of ambiguity as to the location of the boundaries.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 384-85 (1987).

The 10-mile EPZ for the TMI-1 facility has been determined to satisfy NRC requirements. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 NRC 1211, 1553-69 (1981), *aff'd*, ALAB-697, 16 NRC 1265 (1982), *aff'd*, CLI-83-22, 18 NRC 299 (1983). Moreover, the City of Harrisburg, Pennsylvania, filed a petition under 10 C.F.R. § 2.206 on May 30, 1984, to include the city in evacuation plans for TMI-1. The Director's Decision in response to that petition concluded that "the currently configured plume exposure pathway EPZ is in conformance with emergency planning requirements and is adequate to provide a basis for emergency response efforts including evacuation in the event of an emergency at the TMI-1 facility," and denied the request to include the City of Harrisburg in the 10-mile EPZ. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), DD-84-18, 20 NRC 243 (1984). Petitioner has presented no information to justify disturbing these decisions.

9. *What standard does PEMA seek to meet in its emergency preparedness drills? Are the drills purporting to test the equipment or the emergency responders? If the drills are to test the responders, then they should be unannounced and held at various times of the day and night and, therefore, more closely approximate an actual event.*

FEMA-REP-14, "Radiological Emergency Preparedness Exercise Manual," and FEMA-REP-15, "Radiological Emergency Preparedness Exercise Evaluation Methodology," outline the standards that should be met by state and local emergency response organizations, including PEMA, during full-scale emer-

gency preparedness exercises. Those standards apply to personnel and equipment.

During an October 2, 1992 meeting, PEMA explained to Mr. Gary that, due to funding limitations, the state relies heavily on volunteers to staff the county and municipal EOCs, and schedules the biennial REP exercises in the late afternoon to accommodate these volunteers. Although the volunteers would be willing to respond to an actual emergency at any time, they cannot afford to leave their regularly scheduled work activities for an exercise. In its July 12, 1993 letter to FEMA Region III, PEMA states that military standards, as suggested by the Petitioner, cannot be applied to a civilian system that relies to any significant degree on volunteers. FEMA agrees with the reasonableness of PEMA's position and notes that under FEMA-REP-14, all offsite response organizations are required to demonstrate their emergency response capabilities in an unannounced mode and in an off-hours mode once every 6 years through an unannounced and off-hours exercise or drill. TMI-1 last conducted an unannounced, off-hours exercise with state and local participation on June 26, 1991.

Petitioner has presented no evidence to contradict FEMA's conclusion that the scheduled biennial REP exercise and the unannounced drill or exercise every 6 years are adequate and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The NRC Staff concludes that the Petitioner has presented no evidence that the standard of 10 C.F.R. § 50.47(b)(14) is not being met. Accordingly, Petitioner has not demonstrated any substantial safety concern.

10. *PICA requests an inquiry to DOD about the use of military vehicles. Is it possible? What would be the response time? How many people could be moved? What other services could be provided?*

The DOD is a participating agency in the Federal Radiological Emergency Response Plan (FRERP). The FRERP was developed by FEMA and eleven other federal agencies, including DOD, pursuant to Executive Order 12241, for use in responding to peacetime radiological emergencies. The FRERP outlines the federal government's concept of operations and responsibilities for providing assistance to state and local governments with jurisdiction in an emergency. Under the FRERP, DOD will provide assistance in accordance with DOD policies subject to essential operational requirements. DOD may provide assistance in the form of manpower, logistics, and telecommunications, including airlift services. However, DOD is not intended to be a first responder and, therefore, would not be called upon for such immediate protective measures as evacuation of the 10-mile EPZ. Further information on the FRERP is provided at 50 Fed. Reg. 46,559 (Nov. 8, 1985). Petitioner has presented no evidence

to justify disturbing this multiagency federal scheme for emergency response. (*See also* Section III.A.3, *supra*.)

11. *The population numbers in the Dauphin County plan do not reflect current (1990 census data) population figures.*

The Dauphin County plan was updated with 1990 census data in February 1993.

12. *Evacuation time estimates have not been revised since the early 1980's.*

Revised evacuation time estimates, based upon 1990 census data, were recently completed by a contractor to the Licensee and have been approved by PEMA. The new evacuation time estimates will be incorporated in the 1994 update of the TMI-1 plans and procedures.

13. *It is misleading to cite the success of the May 19, 1993 exercise and conclude that the plant is in great shape. TMI was given a violation based on taking too long to mobilize its emergency response organization during a security event in early 1993.*

A notice of violation was issued to the Licensee following the security event of February 7, 1993, specifically relating to onsite planning and preparedness, and is unrelated to the issues raised by the Petitioner concerning offsite emergency preparedness. The violation does not in any way demonstrate any inadequacy in offsite emergency preparedness. Additionally, the Severity Level III violation was issued to the Licensee due to a delay in staffing of its emergency response facilities, and the violation was self-identified by the Licensee, and prompt corrective actions were taken. The NRC did not conclude, as a result of this enforcement action, that the Licensee's onsite emergency response plans were inadequate.

14. *Petitioner requested an independent investigation of Petitioner's concerns by the NRC Staff, or an independent commission, rather than reliance upon FEMA.*

NRC regulations require that the NRC will base its finding of whether offsite emergency planning and preparedness provide reasonable assurance that adequate protective measure can and will be taken in the event of a radiological emergency upon a review of the FEMA findings concerning offsite emergency planning and preparedness. *See* 10 C.F.R. § 50.47(a)(2) and 10 C.F.R. § 50.54(s)(3). Moreover, although Petitioner has claimed in various submissions that FEMA is either biased or unable to conduct an adequate review, Petitioner has presented no evidence to warrant such a conclusion. Accordingly, Petitioner's request for an investigation by some entity other than FEMA is denied. The NRC, however, is not precluded from considering information in

addition to the FEMA review, before reaching a decision regarding the adequacy of offsite emergency planning and preparedness for TMI-1, and the NRC has considered the additional information submitted by Petitioner.

15. *Petitioner requested that the NRC require that the RERP for Dauphin County be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency. Additionally, Petitioner requested that the RERP should physically include all implementing procedures and that implementing procedures should be publicly available.*

There are no NRC requirements concerning the size, organization, typeface, tabbing, or impermeability of offsite emergency response plans. Nor are there any requirements concerning physical organization of implementing procedures for offsite emergency response plans.

The RERP is a publicly available document providing a broad overview of the emergency response organization's concept of operations. The implementing procedures provide detailed instructions to emergency response personnel who need not and do not use the publicly available RERP. Accordingly, there is no reason to require offsite emergency response organizations to maintain the RERP and implementing procedures together physically. Additionally, NRC regulations require that the Licensee submit the emergency response plans of cognizant state and local entities. *See* 10 C.F.R. § 50.33(g). There is no NRC requirement to submit implementing procedures for offsite emergency plans or to make them publicly available. Accordingly, Petitioner's requests are denied.

FEMA's Findings and Conclusions

Recognizing that (1) RERPs are dynamic, living documents that are always being changed and updated through the annual review process to reflect changes in the EPZ, emergency management policies, and organizational relationships, and (2) PEMA is actively engaged in the development and refinement of RERPs for all of its sites in compliance with established FEMA/NRC planning standards, FEMA reports that the offsite emergency planning issues raised by Mr. Gary are being satisfactorily addressed. FEMA concluded in its report, dated December 16, 1993, that "the offsite radiological emergency response plans and preparedness for TMI-1 are adequate to provide reasonable assurance that appropriate measures can be taken offsite to protect the public health and safety." FEMA based its conclusion on the following factors:

1. PEMA's continuing efforts in the development, revision, and refinement of the RERPs for TMI-1,
2. FEMA's review of the concerns identified in the 10 C.F.R. § 2.206 Petition, related correspondence, and PEMA's response to those concerns, and

3. the results of the May 19, 1993, TMI-1 exercise in which FEMA did not identify any deficiencies but did identify some areas recommended for improvement, areas requiring corrective action, and planning issues that were unrelated to the concerns raised by the Petition. The Commonwealth of Pennsylvania received a copy of the FEMA draft report for the May 19, 1993, exercise and responded to the inadequacies identified in the report. FEMA Region III staff will monitor the state and local governments' correction of all exercise inadequacies.

Petitioner has presented no evidence to prevent the NRC from concluding, as did FEMA, that the offsite emergency response plans and preparedness for TMI-1 provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only if substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner, or other enforcement action, is warranted.

FEMA, as the federal agency primarily responsible for oversight of offsite emergency planning for nuclear power plants, has evaluated the concerns raised by the Petitioner and concluded, for the reasons discussed above, that the emergency response plans for the Commonwealth of Pennsylvania and Dauphin County continue to be adequate and that there is reasonable assurance that adequate protective measures can and will be taken offsite in the event of a radiological emergency at TMI-1.

Based upon the above, the NRC Staff concludes that Petitioner has not raised any substantial health or safety concern. After review of FEMA's findings and conclusions and the material submitted by the Petitioner, the NRC Staff also concludes that there is reasonable assurance that adequate offsite protective measures can and will be taken to protect the health and safety of the public in the event of a radiological emergency at TMI-1. Accordingly, based on the above, Petitioner's requests for an independent *de novo* investigation of Petitioner's concerns, for a shutdown of TMI-1, for the inclusion of the City of Harrisburg in the 10-mile EPZ or its addition to the 10-mile EPZ as a contingency planning area, for NRC action to require $5 million annual expenditure for radiological emergency preparedness in the Commonwealth of Pennsylvania or to determine the needs and resources of the Commonwealth regarding emergency planning,

for NRC to impose specifications upon the physical characteristics and length of the Dauphin County RERP, and for inclusion of implementing procedures in the publicly available RERP are denied.

A copy of this Decision will be filed with the Secretary for the Commission to review as provided in 10 C.F.R. § 2.206(c). The Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of March 1994.