

NUREG-0750

Vol. 39

Index 1

# INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January – March 1994



**U.S. NUCLEAR REGULATORY COMMISSION**

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U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(301/415-6844)

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Prepared by the  
Division of Freedom of Information and Publications Services  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(301/415-6844)

## Foreword

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

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

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

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

### 1. Case Name Index

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

### 2. Digests and Headers

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

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

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

### **3. Legal Citations Index**

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

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

### **4. Subject Index**

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

### **5. Facility Index**

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

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- CLI-94-1    TRANSNUCLEAR, INC. (Export of 93.15% Enriched Uranium), Docket No. 11004649 (License No. XSNM02748); EXPORT LICENSE; January 19, 1994; MEMORANDUM AND ORDER
- A    The Commission denies a petition to intervene and request for a hearing on a license application for the export of 280 kilograms of high-enriched uranium, in the form of mixed uranium and thorium carbide fabricated as unirradiated fuel, to COGEMA in France to be processed for recovery of the uranium and thorium. The Commission determines that the Petitioner is not entitled to intervene as a matter of right under the Atomic Energy Act and that a hearing, as a matter of discretion, would not be in the public interest and is not needed to assist the Commission in making the determinations required by the Atomic Energy Act of 1954, as amended, for issuance of the export license.
- B    Institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient for an organization to establish standing under section 189a of the Atomic Energy Act of 1954, as amended.
- C    Section 304(b)(2) of the Nuclear Non-Proliferation Act of 1978 mandates that the Commission establish procedures for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the Atomic Energy Act of 1954, as amended. The criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing in export licensing cases as a matter of discretion accommodate this mandate.
- D    The focus of section 134 of the Atomic Energy Act of 1954, as amended, is on discouraging the continued use of high-enriched uranium ("HEU") as reactor fuel and not on prohibiting the exportation, per se, of HEU.
- CLI-94-2    SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312-DCOM, DECOMMISSIONING; March 1, 1994; MEMORANDUM AND ORDER
- A    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.
- B    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.
- C    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).
- CLI-94-3    YANKEE ATOMIC ELECTRIC COMPANY (Yankee Nuclear Power Station), Docket No. 50-29; REQUEST FOR ACTION; March 18, 1994; MEMORANDUM AND ORDER
- A    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.
- B    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.

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- (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.
- C 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.
- D 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).
- E 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).
- F 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.
- G 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.
- H 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.
- I 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.
- J 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.
- K 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).
- L 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).
- M 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.
- N 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.
- O 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."
- P 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."
- Q Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law.
- R The institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified.

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- LBP-94-1 INNOVATIVE WEAPONRY, INC. (Albuquerque, New Mexico), Docket No. 030-30266-EA (ASLBP No. 93-697-05-EA) (Byproduct Material License No. 30-23697-01E) (EA 93-067); ENFORCEMENT; January 11, 1994; MEMORANDUM AND ORDER (Terminating Proceeding)
- LBP-94-2 ONCOLOGY SERVICES CORPORATION, Docket No. 030-31765-EA (ASLBP No. 93-674-03-EA) (EA 93-006) (Order Suspending Byproduct Material License No. 37-28540-01); ENFORCEMENT; January 24, 1994; MEMORANDUM AND ORDER (Ruling on Parties' Prediscovery Motions to Dismiss or for Summary Disposition)
- A In this license suspension proceeding, the Licensing Board rules on prediscovery motions to dismiss or for summary disposition regarding a dozen of the litigation issues specified by licensee Oncology Services Corporation.
- B As a creature of the Congress, the agency can only wield that enforcement authority it has been given by legislative enactment. See 5 U.S.C. § 558(b).
- C Previous judicial interpretation makes it clear that the Commission's enforcement authority under sections 161b, 161i(3), and 186a of the Atomic Energy Act (AEA), 42 U.S.C. §§ 2201(b), 2201(i)(3), 2236(a), is wide-ranging, perhaps uniquely so. See Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).
- D The Commission's broad authority under AEA section 182, 42 U.S.C. § 2232(a), to define regulatory requirements likewise has received judicial recognition. See Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C. Cir. 1989) (determination of what constitutes "adequate protection" of the public health and safety for reactor facilities under section 182 is a matter congressionally committed to the Commission's sound discretion).
- E A valid agency order mandating requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally. See AEA § 161b, 42 U.S.C. § 2201(b). See also Wrangler Laboratories, ALAB-951, 33 NRC 505, 518 & n.39 (1991).
- F The choice of whether to use a general rule or an individual order to establish a standard is one within "the informed discretion" of the agency. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). This principle recognizes that in the face of a broad congressional mandate such as that given to the NRC, an agency simply cannot be expected to anticipate and promulgate a rule relative to each activity that a regulated entity undertakes. Therefore, to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders. See Chenery, 416 U.S. at 203. In the words of the Supreme Court, to do otherwise "is to exalt form over necessity." *Id.* at 202.
- G There may be instances when an agency's determination to proceed by order rather than rulemaking would amount to an abuse of discretion. See Bell Aerospace, 416 U.S. at 294.
- H A general "due process" concern about the agency's failure to give explicit prior notice of the standards set forth in an order generally is not sufficient to establish an agency abuse of discretion in making a choice to proceed by order rather than by regulation, given the Supreme Court's recognition of the discretion afforded agencies to utilize individual orders to establish binding standards. See Beazer East, Inc. v. EPA, Region III, 963 F.2d 603, 609 (3d Cir. 1992).
- I In determining whether an agency has abused its discretion in choosing to proceed by order rather than regulation, the critical factor appears to be whether the challenged agency order "fill[s] interstices in the law" or whether it creates a new standard, either because the order overrules past precedents relied

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upon by the party subject to the ruling or because it is an issue of first impression. See *United Food & Commercial Workers International Union, Local No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993). Only in the latter instance is a concern about the retroactive application of the order warranted.

J When it relies on the agency's general statutory mandate to "protect the public health and safety" instead of a specific, previously issued regulation, order, regulatory guide, or license condition as the basis for imposing an enforcement sanction, the Staff must be prepared to establish with specificity the health and safety consequences of the licensee action or inaction about which it complains. Ultimately, the Staff must show how the standard to which it would hold the licensee (and presumably others similarly situated) regarding those matters is a reasonable component of agency's general statutory mandate to protect the public health and safety.

K After all factual allegations in an issue specified in an enforcement proceeding are presumed to be true and all reasonable inferences are made in favor of the party sponsoring the issue, if there is no set of facts that would entitle that party to relief on the issues, dismissal is appropriate. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

L Consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), it is within the Licensing Board's authority in an enforcement proceeding to entertain a Staff motion seeking dismissal of issues specified by the opposing party. See 10 C.F.R. § 2.718.

M The Commission intended to define the scope of an enforcement proceeding under 10 C.F.R. § 2.202 to limit the Licensing Board to a determination regarding the sufficiency of the legal and factual predicates outlined in the Staff's enforcement order as of the time the order was issued. The extent to which subsequent circumstances warrant agency action to modify or withdraw a suspension order generally is a matter that is within the discretion of the Staff and is not subject to consideration in an agency adjudication. Cf. *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), vacated in part and rehearing en banc granted on other grounds, 760 F.2d 1320 (1985), aff'd en banc, 789 F.2d 26, cert. denied, 479 U.S. 923 (1986).

N The question of the presiding officer's authority to consider whether the Staff should act to revise or withdraw a challenged suspension order can be distinguished from instances in which the Staff actually has acted (1) to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order, or (2) to enter into an agreement to take such actions to settle a proceeding. In both of the latter instances, agency rules provide that the Staff's action is subject to scrutiny by the presiding officer. See 10 C.F.R. §§ 2.203, 2.717(b).

LBP-94-3 GULF STATES UTILITIES COMPANY, et al. (River Bend Station, Unit 1), Docket No. 50-458-OLA (ASLBP No. 93-680-04-OLA); OPERATING LICENSE AMENDMENT; January 27, 1994; MEMORANDUM AND ORDER (On Petition to Intervene)

A In this Decision, the Licensing Board grants a petition to intervene and request for a hearing. Standing was granted on the basis that the property interest of a petitioner in a nuclear facility, who was a co-owner of the facility, might be jeopardized by potential unsafe operation of the facility caused by underfunding. The Board accepted one of seven contentions. The accepted contention was based on potential unsafe operation of the facility caused by a lack of funding.

B License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings are not subject to review by licensing boards.

C In past NRC cases, standing based on injury to property has been denied because the property interests in question were too far removed from the purpose of the underlying statutes governing those proceedings. Those cases primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility's impact on local utility rates and the local economy. Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing since the Atomic Energy Act affords radiological protection for both human life and property. There is standing in this proceeding since the Petitioner's stated interest is to protect its property, the nuclear facility, from radiological hazards arising from the facility's unsafe operation.

D Injury-in-fact in this proceeding was based upon potential damage to a co-owner's property interest in a nuclear facility. Potential property damage included loss of the co-owner's share of the facility, loss of plant power and revenue, and potential liability to third parties from radiological accidents.

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- E A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action.
- F Licensee's argument that a lack of funding could not adversely affect plant safety because the plant would be safely shut down is rejected by the board. This argument contradicts the rationale of 10 C.F.R. 50.33(f) (2993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses.
- G Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings, this exemption does not apply to operators of a nuclear facility that are not electric utilities.
- H Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.
- I Contractual disputes among electric utilities regarding interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related operational agreements are matters that fall within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities.
- J Licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). The petitioner's only recourse in this instance is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).
- LBP-94-4 BABCOCK AND WILCOX COMPANY (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), Docket No. 70-364-ML-Ren (ASLBP No. 94-687-01-ML-Ren) (Materials License No. SNM-414); MATERIALS LICENSE; February 2, 1994; MEMORANDUM AND ORDER (Authorizing Amendment to Hearing Request)
- LBP-94-5 SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS (Gore, Oklahoma Site Decontamination and Decommissioning Funding), Docket No. 40-8027-EA (ASLBP No. 94-684-01-EA) (Source Material License No. SUB-1010); ENFORCEMENT; February 24, 1994; MEMORANDUM AND ORDER (Granting Intervention Motion; Referring Ruling to the Commission)
- A In this proceeding concerning a Staff enforcement order issued in accordance with 10 C.F.R. § 2.202, the Licensing Board grants a petition for leave to intervene, concluding that (1) intervention in support of a Staff enforcement order is permitted; (2) the Petitioner established its standing to intervene in this particular proceeding; and (3) the intervention motion was timely filed. Additionally, the Licensing Board refers its ruling on the first matter to the Commission for its review.
- B Once a party to whom a Staff enforcement order is directed requests a hearing, a person favoring the order is presented with the likelihood that an adjudicatory proceeding would be conducted that could have two possible outcomes: the presiding officer would fully sustain the order or it would not, either because the presiding officer would reject the order in whole or in part or because the order would be modified or withdrawn by some unilateral Staff action or by a settlement between the Staff and the parties contesting the order. Given these two possible outcomes, only if the person supporting the enforcement order is permitted to participate in the proceeding can it protect its interest in seeing that the order and the requirements the order imposes are sustained. Therefore, if the person supporting the order also can establish a particularized injury that it or its members will suffer in the event the order is not sustained, it is entitled to intervene as of right as a "person whose interest may be affected by the proceeding" under section 189a(1) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a)(1), and/or 10 C.F.R. § 2.714(a)(1).
- C A Staff action to relax or rescind the conditions in an enforcement order that is the subject of an ongoing adjudication would be subject to review by the presiding officer with input from all parties to the proceeding. See Oncology Services Corp., LBP-94-2, 39 NRC 11, 26 n.12 (1994).
- D Pursuant to 10 C.F.R. § 2.203, any settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the presiding officer. In such a circumstance, a participant intervening in support of the order would have an opportunity to vindicate its interest in having the order sustained fully by demonstrating why the settlement proposal would not be in the public interest.
- E In assessing whether an intervenor has made the necessary showing of particularized injury to establish its right to intervene in a proceeding, the presiding officer is constrained to apply contemporaneous judicial concepts of standing. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1),

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- CLI-93-21, 38 NRC 87, 92 (1993). This requires that the presiding officer assess whether the intervenor will suffer any "injury in fact" relative to its interests in the proceeding and whether those alleged interests are within the "zone of interests" protected by the pertinent statutes and regulations under which the petitioner seeks to participate in the proceeding. See *id.*
- F To establish the requisite injury in fact, a petitioner must allege a concrete and particularized injury that is fairly traceable to the action at issue and is likely to be redressed by a favorable decision in the proceeding. See Perry, CLI-93-21, 38 NRC at 92.
- G In reviewing affidavits on the issue of whether a petitioner has established its injury in fact so as to have standing to intervene, the presiding officer must bear in mind the often-repeated admonition to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted).
- H If, on the basis of the presentations by the participants, the presiding officer is unable to conclude relative to an intervenor's property, that there is "no potential for offsite consequences" from contamination from a licensee's site, see Perry, CLI-93-21, 38 NRC at 95, then there has been a sufficient demonstration of injury in fact to provide standing to intervene as of right in a proceeding.
- I Although 10 C.F.R. § 2.714(a)(1) has been interpreted to require that the late-filed factors be addressed in the initial late intervention petition, it is within a presiding officer's discretion to permit an intervenor to make a belated lateness showing. See *Boston Edison Co. (Pilgrim Nuclear Power Station)*, ALAB-816, 22 NRC 461, 466-68 (1985).
- J In interpreting a statute or regulation, the usual inference is that different language is intended to mean different things. See *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984).
- K The inference regarding differing meanings for differing language might be negated by a showing that the purpose or history behind the language demonstrates that no difference was intended. See *Stauffer Chemical Co.*, 684 F.2d at 1186.
- L For an intervenor who wishes to become a party to a hearing to protect its interest in seeing that the Staff enforcement order challenged in a proceeding is sustained, the matter adversely affecting the petitioner's interest is not the "order," with which it agrees, but the agency's "proceeding" relative to that order, which carries the potential for overturning or modifying the order in derogation of the petitioner's interests. Therefore, the language of 10 C.F.R. § 2.202(a)(3) establishing a 20-day deadline for hearing requests by any person "adversely affected by the order" is not applicable to such a petitioner. Instead, the petitioner's intervention is governed by the terms of 10 C.F.R. § 2.714(a)(1), which is applicable to "[a]ny person whose interest may be affected by a proceeding," and is subject to any time limits that are established in accordance with that section.
- M If the only agency issuance providing constructive notice of a filing deadline for hearing requests is a Staff enforcement order issued in accordance with 10 C.F.R. § 2.202(a)(3) that, by its terms, is not applicable to persons who wish to intervene in support of the order, then an intervention petition filed by such a person cannot be deemed untimely for failing to meet an appropriately noticed filing deadline.
- N Even in the absence of any constructive notice of when an intervention petition must be filed, the possibility remains that an intervenor had actual notice of the pendency of an enforcement proceeding and failed to make a timely intervention request following that notice. See 54 Fed. Reg. 8269, 8272 (1989).
- O Because it is their interest in the "proceeding" rather than the "order" that is relevant for a person wishing to intervene in support of a Staff enforcement order, the pertinent actual notice was that affording the intervenor knowledge that an adjudicatory proceeding would be commenced. Receipt of the hearing request of a person adversely affected by the order constitutes such notice. By filing an intervention motion within 10 days after receipt of such a hearing request, an intervenor acts seasonably relative to that actual notice. Compare 10 C.F.R. § 2.1205(c)(2)(i) (hearing request must be filed within 30 days of actual notice).
- P Until a determination is made that an intervenor has proffered a litigable contention, a presiding officer's ruling that the petitioner has established its standing is not final so as to be appealable pursuant to 10 C.F.R. § 2.714a. See *Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station)*, ALAB-595, 11 NRC 860, 864-65 (1980).

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- Q Because the question of whether intervention as of right exists for a petitioner that wants to enter a 10 C.F.R. § 2.202 enforcement order proceeding to support the Staff's order is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally, and in order to alleviate any delay in Commission consideration of this matter pending the Licensing Board's determination regarding the admissibility of the intervenor's contentions, in accordance with 10 C.F.R. § 2.730(f) it is appropriate for the Board to refer its ruling on the petitioner's right to intervene to the Commission for its immediate review. Cf. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981) (in licensing hearings, licensing boards should seek Commission guidance on significant legal or policy questions and should do so in a manner that will avoid delay in the proceeding).
- LBP-94-6 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); OPERATING LICENSE AMENDMENT; March 3, 1994, MEMORANDUM AND ORDER (Discovery Related to Office of Investigation Report)
- A 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.
- B 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.
- C 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.
- D 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.
- E 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.
- LBP-94-7 UMETCO MINERALS CORPORATION, Docket No. 40-08681-MLA-2 (ASLBP No. 94-688-01-MLA-2) (Source Materials License No. SUA-1358); MATERIALS LICENSE AMENDMENT; March 4, 1994; MEMORANDUM AND ORDER (Request for Hearing)
- LBP-94-8 SEQUOYAH FUELS CORPORATION (Gore, Oklahoma Site Decontamination and Decommissioning Funding), Docket No. 40-8027-EA (ASLBP No. 94-684-01-EA) (Source Material License No. SUB-1010); ENFORCEMENT; March 22, 1994, MEMORANDUM AND ORDER (Supplemental Petition to Intervene)
- A 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.
- B 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.

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- C        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. (Aliens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).
- D        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.
- LBP-94-9    PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 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); OPERATING LICENSE AMENDMENT; March 23, 1994; MEMORANDUM AND ORDER (Ruling upon Motion to Reopen Record)
- A        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.
- LBP-94-10    ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16655-CivP-R (ASLBP No. 93-682-01-CivP-R) (Civil Penalty); ENFORCEMENT; March 31, 1994; ORDER APPROVING AND INCORPORATING STIPULATION FOR SETTLEMENT OF PROCEEDING AND SETTLING AND TERMINATING THE PROCEEDING

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ALJ-94-1 LLOYD F. ZERR, Docket No. 93-01-PF (ASLBP No. 93-673-01-PF); PROGRAM FRAUD; March  
9, 1994; INITIAL DECISION

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DD-94-1      NORTHEAST NUCLEAR ENERGY COMPANY, Docket No. 50-423; REQUEST FOR ACTION; February 9, 1994; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A      The Director, Office of Enforcement, denies a Petition filed by Paul M. Blanch (Petitioner) pursuant to 10 C.F.R. § 2.206. The Petition requested that the NRC take enforcement action, in addition to that taken in a May 4, 1993 enforcement action, against Northeast Nuclear Energy Company for certain activities that he alleged constituted violations of 10 C.F.R. §§ 50.7 and 50.5.

B      In view of the NRC's limited resources, it is normally more appropriate to focus on new enforcement actions, rather than reopen closed actions.

DD-94-2      U.S. DEPARTMENT OF ENERGY (Hanford Site); REQUEST FOR ACTION; February 22, 1994; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A      The Director, Office of Nuclear Material Safety and Safeguards, denies a Petition filed by F. Robert Cook requesting that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy with respect to certain high-level radioactive wastes, consisting of spent nuclear fuel generated at Nuclear Regulatory Commission-licensed nuclear reactors, stored in hot cells and the 200 Area Burial Ground at the Hanford Site in the State of Washington. As basis for this request, the Petitioner asserts that the hot cells and 200 Area at the Hanford Site are storage facilities for high-level radioactive wastes subject to section 202(3) of the Energy Reorganization Act of 1974 and the regulatory authority of the Nuclear Regulatory Commission (NRC).

B      Research and development, rather than receipt and storage of high-level radioactive waste, is the primary use of hot cells in Buildings 324, 325, and 327 at the Pacific Northwest Laboratory (PNL) with respect to NRC- licensee-generated materials. Accordingly, these PNL buildings are not subject to regulation by the NRC pursuant to section 202(3) of the Energy Reorganization Act of 1974.

C      Neither the Hanford 200 Area Burial Ground nor either of its subareas (200 East and 200 West) is used primarily for receipt and storage of high-level radioactive waste from NRC-licensed activities. Accordingly, these facilities are not subject to regulation by the NRC pursuant to section 202(3) of the Energy Reorganization Act of 1974.

DD-94-3      GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289; REQUEST FOR ACTION; March 31, 1994; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A      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

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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 Petitioner 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.

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