

**INDEXES TO  
NUCLEAR REGULATORY  
COMMISSION ISSUANCES**

**July - December 1983**



**U. S. NUCLEAR REGULATORY COMMISSION**

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**INDEXES TO  
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U. S. NUCLEAR REGULATORY COMMISSION

Digests and indexes for issuances of the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions of Rulemaking 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 Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking.

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 alphanumerical 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

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DIGESTS  
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-83-20 GENERAL PUBLIC UTILITIES (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289, 50-720; CIVIL PENALTY; July 22, 1983; STATEMENT OF THE COMMISSION

A The Commission authorizes the NRC staff to issue a Notice of Violation and Proposed Imposition of Civil Penalties against the Licensee for its (1) material false statements concerning the qualifications of an individual operator and (2) failure to properly implement its operator re-training program.

CLI-83-21 MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Station), Docket No. 50-309; FINANCIAL QUALIFICATIONS; August 2, 1983; MEMORANDUM AND ORDER

A The Commission affirms the Director's denial of a petition seeking an order to show cause why the licensee should not be ordered to discontinue operation of the Maine Yankee facility for alleged financial incapability to operate the plant safely and dispose of spent fuel stored and to be generated there. The Commission also decides as a matter of discretion to direct the staff to review whether there are any safety problems at the plant which might stem from financial difficulties.

B The Commission's concern with financial problems of a licensee is limited to the relation which these problems may have to the protection of public health and safety. See *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 000 U.S. 000, 75 L. Ed. 2d 752, 767 (1983).

C A showing that a licensee is undergoing financial difficulties does not by itself require that the Commission halt operations of the licensee's plant. Allegations, however, that defects in safety practices have in fact occurred or are imminent would form a basis for enforcement action, whether or not the root cause of the fault was financial.

D Proceedings will not generally be instituted in response to a 10 C.F.R. § 2.206 petition to consider an issue the Commission is treating generically through rulemaking.

E There is reasonable assurance that, until the availability of geologic repositories for safe, permanent disposal, spent fuel can be stored safely in storage basins at reactor sites for up to thirty years beyond the expiration date of operating licenses. See 48 Fed. Reg. 22,730 (1983).

F Under the Nuclear Waste Policy Act, utilities are required to contract with the Department of Energy (DOE) and provide prepayment for waste disposal services they will ultimately require. *Id.*

CLI-83-22 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP; RESTART; September 8, 1983; DECISION

A Upon review of the Appeal Board's decision in ALAB-698, 16 NRC 1290 (1982), addressing emergency preparedness at TMI-1, the Commission reverses a holding of the Appeal Board relating to the placement of responsibility for making protective action recommendations to the Commonwealth of Pennsylvania, and directs that the TMI-1 emergency plan provide that the responsibility for radiological assessment and the making of protective action recommendations be transferred from the Emergency Director in the control room to the Emergency Support Director in the Emergency Operations Facility (EOF) no later than one hour following the declaration of an emergency. With that change and subject to certain conditions, the Commission finds emergency planning for TMI-1 to be adequate.

B NRC emergency planning regulations require licensees to establish an onsite technical support center (TSC) and a nearby Emergency Operations Facility (EOF) from which effective direction can be given during an emergency. 10 C.F.R. Part 50, Appendix E, § IV.E.8.

- C The responsibility for radiological assessment and the making of protective action recommendations is to be transferred from a senior official in the control room to a senior official in the Emergency Operations Facility no later than one hour following the declaration of a Site Area Emergency or General Emergency.
- CLI-83-23 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL; SPECIAL PROCEEDING; September 19, 1983; MEMORANDUM AND ORDER
- A The Commission decides against undertaking sua sponte review of the Appeal Board's decision in ALAB-734 denying an intervenor's petition for directed certification of a licensing board dismissal of one of its contentions. The Commission, however, takes the opportunity to reaffirm its statements in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), that the admissibility of a late-filed contention must be determined by balancing all five of the factors in 10 C.F.R. § 2.714(a).
- CLI-83-24 GENERAL PUBLIC UTILITIES CORPORATION (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320; SPECIAL PROCEEDING; September 21, 1983; MEMORANDUM AND ORDER
- A The Commission denies a motion to quash subpoenas issued at the request of the NRC Office of Investigations (OIA) to a number of individuals, directing them to appear and give testimony in connection with OIA's investigation of certain allegations concerning falsification of reactor system leak rate data at TMI-2. The Commission, however, orders that the subpoenas be made returnable in the federal judicial district where each individual resides.
- B Under section 161(c) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(c), the Commission is authorized to conduct such investigations as it may deem necessary or proper to assist it in exercising any authority provided in the Act and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place.
- C The NRC's authority to conduct an investigation under the Atomic Energy Act does not cease upon referral of a matter to the Department of Justice.
- D The NRC's pursuit of its own civil investigation for civil enforcement purposes will not necessarily hamper the role of the Grand Jury or broaden the Government's opportunities for criminal discovery, because the Grand Jury's subpoena powers are as great as, if not greater than, those of the NRC. See *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1378-79 (D.C. Cir. 1980) (en banc), cert. denied, 101 S.Ct. 529 (1980).
- E To carry out its public health and safety mandate the NRC must be able to investigate matters expeditiously, regardless of whether there is a parallel criminal investigation underway into the same matter. See *Dresser*, *ibid.*
- F Where an NRC investigation is being conducted for a lawful purpose and the information sought is relevant to the investigation, to stop such investigation at the threshold of inquiry because of a parallel Grand Jury investigation would render substantially impossible the agency's effective discharge of its duties of investigation. See *United States v. McGovern*, 87 F.R.D. 582 (1980); *United States v. McGovern*, 87 F.R.D. 584 (1980); *United States v. McGovern*, 87 F.R.D. 590 (1980).
- G While ordinarily civil and criminal actions can proceed simultaneously, a court may in its discretion stay civil proceedings, postpone civil discovery or impose protective orders or conditions when required in the interests of justice; for example, where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. See *Dresser*, *supra*, 628 F.2d at 1375-76. Otherwise, "[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Id.* at 1376 (footnote omitted).
- CLI-83-25 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289; RESTART; September 21, 1983; MEMORANDUM AND ORDER
- A The Commission denies for failure to meet the requirements for late intervention the motion of a legal foundation for leave to intervene under 10 C.F.R. § 2.714 for the avowed pur-

- pose of seeking the disqualification of a Commissioner or, alternatively, for leave to make a limited appearance under 10 C.F.R. § 2.715. In view of the Commission's denial of party status to the legal foundation, the Commission summarily dismisses a second motion of the foundation calling for disqualification of the Commissioner from the proceeding.
- B A petition for leave to intervene which is untimely will not be entertained by the Commission unless a balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1) supports late intervention. These factors are:
- (1) Good cause, if any, for failure to file on time
  - (2) The availability of other means whereby the petitioner's interest will be protected.
  - (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
  - (4) The extent to which the petitioner's interest will be represented by existing parties.
  - (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.
- Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).
- C In ruling on a petition for leave to intervene that is untimely, the Commission must consider, in addition to the factors set forth in 10 C.F.R. § 2.714(a)(1), the following factors set forth in 10 C.F.R. § 2.714(d):
- (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
  - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
  - (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- D A petition for leave to intervene must, *inter alia*, set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, and the specific aspect of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2).
- E The burden to satisfy intervention requirements is on the petitioner. 10 C.F.R. § 2.732.
- F Judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189 of the Atomic Energy Act of 1954. *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610 (1976).
- G Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury in fact," and (b) the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *Ibid.*
- H Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. *Cf.*, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).
- I Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. *Pebble Springs*, *supra*, at 614. See also, *Northern States Power Co. (Tyronne Energy Park, Unit 1)*, CLI-80-36, 12 NRC 523 (1980) (separate views of Chairman Ahearne and Commissioner Hendrie).
- J In Commission practice, a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. *Transnuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977), citing *Warth v. Seldin*, 422 U.S. 490 at 499 (1975).
- K Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. A petitioner seeking such intervention, however, should address the factors set out in *Pebble Springs*, *supra*, at 614-17.
- L Pursuant to 10 C.F.R. § 2.715(a), limited appearance statements may be permitted at the discretion of the presiding officer, but the person admitted may not otherwise participate in the proceeding.



**DIGESTS**  
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-83-26 NRC CONCURRENCE IN HIGH-LEVEL WASTE REPOSITORY SAFETY GUIDELINES UNDER THE NUCLEAR WASTE POLICY ACT OF 1982, Pub. L. 97-425, Proposed 10 C.F.R. Part 960; NUCLEAR WASTE REPOSITORY SITING, August 24, 1983, MEMORANDUM AND ORDER

A In response to a petition requesting the institution of a notice-and-comment rulemaking proceeding on the Commission's statutory concurrence in the Department of Energy's Guidelines for Recommendation of Sites for Nuclear Waste Repositories contained in proposed 10 C.F.R. Part 960, the Commission finds that there is no legal obligation to provide such opportunity for notice and comment on its concurrence in the guidelines. Nonetheless, the Commission decides to provide an opportunity to representatives of interested groups to present their views on the guidelines to the Commission at a public meeting.

B The Commission's concurrence under Section 112(a) of the Nuclear Waste Policy Act of 1982 does not constitute a rulemaking action under either the Atomic Energy Act of 1954, as amended, or the Administrative Procedure Act.

CLI-83-27 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275, 50-323; OPERATING LICENSE; November 8, 1983; MEMORANDUM AND ORDER

A Upon consideration of (1) the licensee's request for partial reinstatement of its low-power license for Unit 1 (suspended in CLI-81-30, 14 NRC 950 (1981)) to allow it to load fuel and perform pre-criticality testing at that unit; (2) the licensee's request for an extension of the term of its low-power license; and (3) the intervenors' request for a separate adjudicatory hearing on both matters, the Commission decides to reinstate the license to authorize fuel loading and pre-criticality testing and deny both hearing requests. Also, the Commission announces that with regard to criticality and low-power operation, the license suspension will continue.

CLI-83-28 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; November 18, 1983; ORDER

A The Commission determines, pursuant to its immediate effectiveness review under 10 C.F.R. § 2.764(f), that the Licensing Board's resolution of the issues in LBP-83-47, 18 NRC 228 (1983) related to the applicants' compliance with 10 C.F.R. § 50.47(b)(12) regarding arrangements for medical services for members of the public, does not present the type of safety problem which would require a stay of the decision's effectiveness. The Commission, therefore, rules that the decision may go into effect.

CLI-83-29 WISCONSIN ELECTRIC POWER COMPANY (Point Beach Nuclear Plant, Unit 1), Docket No. 50-266-OLA-2; OPERATING LICENSE AMENDMENT; November 22, 1983; ORDER

CLI-83-30 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; November 29, 1983; ORDER

A The Commission dismisses for mootness its grant of review of ALAB-714, 17 NRC 86 (1983), and vacates ALAB-714 and all underlying Licensing Board orders and decisions ordering the staff to disclose the identities of individuals interviewed in the course of a particular investigation.

CLI-83-31 DUKE POWER COMPANY, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413, 50-414; OPERATING LICENSE; December 6, 1983; ORDER

A The Commission denies the applicant's request for stay of an Appeal Board order that modified a Licensing Board's order allowing Intervenor's counsel limited access to applicant's employee-witnesses.

B Under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), an employer may under appropriate circumstances treat communications from employees to corporate counsel as privileged under the attorney-client privilege. That does not mean, however, that every employee from whom a privileged communication is obtained is thereby a "client" represented by corporate counsel, or a "party" to any pending legal disputes for purposes of ABA Disciplinary Rule 7-104.

**DIGESTS**  
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

C It is a well-established principle that counsel should be at liberty to approach witnesses for an opposing party. *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977). That principle is not overturned by *Upjohn*, supra.

CLI-83-32 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275, 50-323; OPERATING LICENSE; December 9, 1983; ORDER



**DIGESTS**  
**ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS**

ALAB-733 DAIRYLAND POWER COOPERATIVE (La Crosse Boiling Water Reactor), Docket No. 50-409; OPERATING LICENSE; July 13, 1983; DECISION

A The Appeal Board in this consolidated proceeding (involving, inter alia, the conversion of the long-standing La Crosse provisional license to a full-term operating license) affirms, sua sponte, three Licensing Board decisions: LBP-81-7, 13 NRC 257 (1981); LBP-82-58, 16 NRC 512 (1982); and LBP-83-23, 17 NRC 655 (1983).

ALAB-734 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL; OPERATING LICENSE; July 19, 1983; MEMORANDUM AND ORDER

A The Appeal Board denies an intervenor's petition for directed certification of a May 11, 1983 Licensing Board ruling granting summary disposition against one of intervenor's contentions in this operating license proceeding.

B Interlocutory appellate review of a licensing board's ruling will not be granted absent a showing that the ruling (1) is not only legally erroneous but, additionally, "affect[s] the basic structure of the proceeding in a pervasive or unusual manner," or (2) threatens the petitioner with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

C An opposition to a directed certification petition should include at least some discussion of the petitioner's claim of Licensing Board error. How comprehensive the discussion of the merits need be will depend upon the totality of the circumstances of the particular case. Where the Licensing Board has summarily disposed of a principal contention of a party on a subject having as much potential safety significance as does quality assurance, the respondents to the petition should treat the merits in reasonable detail.

D The mere fact that legal error may have occurred below does not justify interlocutory appellate review in the teeth of the long-standing articulated Commission policy generally disfavoring such review. See 10 C.F.R. 2.730(f). Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981).

ALAB-735 COMMONWEALTH EDISON COMPANY (Byron Nuclear Power Station, Units 1 and 2), Docket Nos. STN 50-454-OL, STN 50-455-OL; OPERATING LICENSE; July 27, 1983; MEMORANDUM AND ORDER

A The Appeal Board dismisses the NRC staff's appeal from, and denies its alternative motion for directed certification of, the Licensing Board's unpublished July 1, 1983 memorandum and order in which the Board, inter alia, directed the staff to present evidence that the staff asserts would require it to disclose information about confidential investigations that could result in their compromise.

B Almost without exception, an appeal board will undertake discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

C Questions of fact are not susceptible of resolution on the basis of nothing more than the generalized representations of counsel who are unequipped to attest on the basis of their own personal knowledge to the accuracy of the representations. See, e.g., Charles River Park "A" Inc. v. Department of Housing and Urban Development, 519 F.2d 935, 939 (D.C. Cir. 1975). See

also *Cohen v. Massachusetts Bay Transportation Authority*, 647 F.2d 209, 213-14, (1st Cir. 1981); *Stokes v. United States*, 652 F.2d 1 (7th Cir. 1981). Cf. Fed. R. Civ. P. 56(e); 10 C.F.R. § 2.749(b).

D In the absence of evidence to support a belief of a risk of breach, a licensing board may assume a protective order will be obeyed. *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-535, 9 NRC 377, 400 (1979).

E The "collateral order doctrine" in federal practice permits the immediate appeal of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

ALAB-736 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE; August 24, 1983, MEMORANDUM AND ORDER

A The Appeal Board dismisses, as an impermissible interlocutory appeal, the intervenor's exceptions to the Licensing Board's grant of an NRC staff motion for summary disposition on one of a number of contentions in the proceeding.

B Appeals from licensing board orders that do not eliminate a party to a proceeding or dispose of a major segment of the case — such as a grant of summary disposition — are interlocutory and must await the issuance of the initial decision (or partial initial decision). *Cincinnati Gas & Electric Co. (William H. Zimmer Station)*, ALAB-633, 13 NRC 94 (1981); *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1)*, ALAB-629, 13 NRC 75, 77 n.2 (1981); *Toledo Edison Co. (Davis-Besse Nuclear Power Station)*, ALAB-300, 2 NRC 752, 758 (1975).

C The only procedural vehicle by which a party may seek review of interlocutory matters is a request for directed certification. The exercise of the appeal board's discretionary authority to grant directed certification, however, is reserved for those important licensing board rulings that, absent immediate appellate review, threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding. See, e.g., *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-706, 16 NRC 1754, 1756 (1982).

ALAB-737 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL, OPERATING LICENSE; August 26, 1983, MEMORANDUM AND ORDER

A The Appeal Board denies petitions for directed certification of a Licensing Board order (LBP-82-32A, 17 NRC 1170 (1983)) granting partial summary disposition in applicant's favor on two contentions dealing with evacuation time estimates.

B Under 10 C.F.R. § 2.718(i) and § 2.785(b), appeal boards have the power to direct the certification of legal issues raised in proceedings pending before licensing boards. Exceptional circumstances must be demonstrated, however, before they will exercise that authority. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-271, 1 NRC 478, 483 (1975).

C An appeal board will undertake interlocutory review, in its discretion, where the ruling below either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-405, 5 NRC 1190, 1192 (1977).

D Commission's regulations direct that contentions be filed in advance of a prehearing conference. 10 C.F.R. § 2.714(b).

E Under 10 C.F.R. § 2.714(a), good cause may exist for a late-filed contention if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into existence and is accessible for public examination. The contention, however, is amenable to rejection on

the strength of a balancing of all five of the late intervention factors set forth in that section. CLI-83-19, 17 NRC 1041, 1045 (1983).

F No operating license may be issued unless a finding is made that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. 10 C.F.R. § 50.47(a)(1).

G Both notification time and preparation time are now considered to be components of evacuation time estimates under Rev. 1 of NUREG-0654/FEMA REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (January 1980), at Appendix 4, Table 2; Section IV.B; and Figure 2; and NUREG/CR-2504, "CLEAR (Calculates Logical Evacuation And Response): A Generic Transportation Network Model for the Calculation of Evacuation Time Estimates" (March 1982).

H An argument that future litigation may be required does not satisfy the test for directed certification. See *Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB-641, 13 NRC 550 (1981); *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1)*, ALAB-635, 13 NRC 309, 310 (1981).

ALAB-738 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP (Management Phase), SPECIAL PROCEEDING; August 31, 1983, MEMORANDUM AND ORDER

A Upon consideration of the motions of several intervenors to reopen the record in the management phase of this proceeding, the Appeal Board grants the motions in part (insofar as they deal with certain allegations concerning leak rate data) and remands the matter to the Licensing Board for further hearing.

B A motion to reopen a record must satisfy a tripartite test: (1) is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-598, 11 NRC 876, 879 (1980). See *Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1)*, ALAB-462, 7 NRC 320, 338 (1978); *Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, ALAB-138, 6 AEC 520, 523 (1973).

C The proponent of a motion to reopen a record bears a heavy burden. *Wolf Creek, supra*, 7 NRC at 338.

D The pendency of a criminal investigation by the Department of Justice does not necessarily preclude other types of inquiry into the same matter by the NRC. See *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc), cert. denied, 449 U.S. 993 (1980); *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2)*, CLI-80-22, 11 NRC 724, 729-30 (1980).

E A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. *Vermont Yankee, supra*, 6 AEC at 523.

F Commission policy recognizes that ongoing NRC investigations and adjudicatory proceedings that involve the same subject matter can proceed simultaneously, subject to specified procedures to deal with conflicts concerning public disclosure of investigatory information. 48 Fed. Reg. 36,358 (1983).

G The staff's communication of the results of its reviews, through public filings served on all parties and the adjudicatory boards, does not constitute an ex parte communication.

H All parties, including the staff, are obliged to bring any significant new information to the boards' attention. *Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3)*, ALAB-677, 15 NRC 1387, 1394 (1982).

I The untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement. See *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2)*, CLI-76-22, 4 NRC 480, 488-93 (1976).

ALAB-739 WISCONSIN ELECTRIC POWER COMPANY (Point Beach Nuclear Plant, Units 1 and 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; September 7, 1983; DECISION

- A The Appeal Board affirms the Licensing Board's authorization of a license amendment that allows the applicant to repair degraded steam generator tubes by sleeving.
- B The Commission's Rules of Practice governing appellate briefs are not mere niceties, rather, they were drafted to insure that the arguments and positions of all parties would be spread fully upon the record in order to permit fair rebuttal by those holding opposing views and to facilitate our ultimate evaluation of the competing contentions. Disregard of the Rules frustrates those salutary purposes and burdens rather than assists the adjudicator's task. *Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB-693, 16 NRC 952, 955 (1982), quoting *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-270, 1 NRC 473, 476 (1975).
- C At a minimum, briefs must identify the particular exceptions addressed and the precise portions of the record relied upon in support of the assertion of error. 10 C.F.R. § 2.762(a); *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1255 (1982); *Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1)*, ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. *Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732 (3d Cir. 1982).
- D In a license amendment proceeding, a licensing board has only limited jurisdiction: it may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the Commission's notice of hearing on the licensing action. *Portland General Electric Co. (Trojan Nuclear Plant)*, ALAB-534, 9 NRC 287, 289 n.6 (1979); *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-316, 3 NRC 167, 170-71 (1976). See *Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, ALAB-616, 12 NRC 419, 426 (1980).
- E The appeal board's practice is to review, sua sponte, "any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues." *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, ALAB-655, 14 NRC 799, 803 (1981), quoting *Washington Public Power Supply System (WPPSS Nuclear Project No. 2)*, ALAB-571, 10 NRC 687, 692 (1979).
- F The following technical issues are discussed: Steam generator tube repair by sleeving; Eddy current testing of steam generator tubes; Steam generator tube failure (single and multiple); Leak-before-break phenomenon in steam generator tube cracking.
- ALAB-740 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. STN 50-483-OL; OPERATING LICENSE, September 14, 1983; DECISION
- A The Appeal Board affirms the Licensing Board's partial initial decision, LBP-82-109, 16 NRC 1826 (1982), addressed to quality assurance and quality control contentions, in which the Licensing Board found that there had been no general breakdown in quality assurance procedures, that the various identified construction defects had been remedied and that there was reasonable assurance that the Callaway plant could be operated safely.
- B Neither the Atomic Energy Act of 1954, as amended, nor the Commission's implementing regulations mandate a demonstration of error-free construction. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(4)(i). See *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 407 (1961); *Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station)*, ALAB-161, 6 AEC 1003, 1004 (1973), aff'd sub nom. *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975).
- C A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing a licensing board's disposition of issues, is of little value in appellate review. *Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1)*, ALAB-650, 14 NRC 43, 50 (1981), aff'd sub nom. *Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732 (3d Cir. 1982).

- D The use of officially noticeable material is unobjectionable in proper circumstances. 10 C.F.R. § 2.743(i). See, e.g., *Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 154 n.3 (1982). Interested parties, however "must have an effective chance to respond to crucial facts." *Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979). See also *Administrative Procedure Act*, § 7(d), 5 U.S.C. § 556(e).
- E American Welding Society (AWS) Code requirements simply constitute conservative guidelines, with exceptions permitted.
- F A decisionmaking body must confront the facts and legal arguments presented by the parties and articulate the reasons for its conclusions on disputed issues, i.e., take "a 'hard look' at the salient problems." *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-422, 6 NRC 33, 41 (1977), aff'd, *CLI-78-1*, 7 NRC 1 (1978), aff'd sub nom. *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).
- G A licensing board decision need not refer individually to every proposed finding as long as it sufficiently informs a party of the disposition of its contentions. *Seabrook*, supra, 6 NRC at 41.
- H The following technical issues are discussed: Quality assurance program for construction; Honeycombing of the reactor building base mat; Sonoscopic examination of the base mat; Embedded plates (embeds); Adequacy of welding (manual and machine) of studs to embeds; Welding in accordance with applicable codes; SA-358 Piping: American Society of Mechanical Engineers (ASME) material specification for a type of welded stainless steel pipe greater than eight inches in diameter (Weld defect and its repair and testing); SA-312 Piping: ASME specification for both seamless and welded stainless steel pipe (Hydrostatic testing, Leak before break, Design hoop stress, ASME Code requirements); Centerline lack-of-penetration (CLP); longitudinal pipe welding defect (Ultrasonic examination, Effect on pipe strength, Effect of arc misalignment); Welding deficiencies in piping subassemblies.
- ALAB-741 VIRGINIA ELECTRIC AND POWER COMPANY (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338-OLA-1, 50-339-OLA-1; OPERATING LICENSE AMENDMENT; September 15, 1983; MEMORANDUM AND ORDER
- A The Appeal Board denies the applicant's motion for directed certification of an interlocutory ruling of the Licensing Board directing exploration of the health and safety aspects of spent fuel transportation at a license amendment hearing. The applicant seeks an amendment to its operating licenses for the North Anna facility which would authorize it to store there spent fuel from another of its facilities.
- B Opposition to a directed certification petition should include some discussion of the petitioner's claim of licensing board error. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-734, 18 NRC 11, 14 n.4 (1983).
- C The mere fact that legal error may have occurred in an interlocutory licensing board ruling does not per se justify directed certification. See *Seabrook*, ALAB-734, supra, 18 NRC at 15, citing *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1)*, ALAB-635, 13 NRC 309, 310-11 (1981); 10 C.F.R. 2.730(f).
- D Although generally precluding interlocutory appeals, Section 2.730(f) of 10 C.F.R. does allow a licensing board to refer a ruling to an appeal board. The appeal board need not, however, accept the referral. In deciding whether to do so, the appeal board applies essentially the same test as it utilizes in acting upon directed certification requests filed under Section 2.718(i). See *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 464 (1982), vacated in part on other grounds, *CLI-83-19*, 17 NRC 1041 (1983), and cases there cited.
- E The Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings, *CLI-81-8*, 13 NRC 452, 456, does not call for a marked relaxation of the Marble Hill standard; rather, it simply exhorts the licensing boards to put before the appeal board legal or policy questions that, in their judgment, are "significant" and require prompt appellate resolution.
- F The fact that the error of a licensing board may lead to delay and increased expense is not a controlling consideration in favor of interlocutory review. *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-675, 15 NRC 1105, 1113-14 (1982).

- citing Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).
- ALAB-742 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 2 and 3), Docket Nos. STN 50-529, STN 50-530; OPERATING LICENSE; September 19, 1983; MEMORANDUM AND ORDER
- A The Appeal Board denies intervenor's petition for directed certification of the Licensing Board's rulings relating to the adequacy of the environmental impact statements for the Palo Verde facility and stay of those rulings.
- B Interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. 10 C.F.R. 2.730(f); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).
- C An appeal board will exercise its directed certification authority only upon a clear and convincing showing that the licensing board ruling under attack either: (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual matter. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).
- D The policy expressed by the Commission in its 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, to the effect that, a board should promptly refer or certify a significant legal or policy question to the Atomic Safety and Licensing Appeal Board or the Commission, was not intended to bring about a marked relaxation of the Marble Hill standard. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983).
- ALAB-743 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; September 29, 1983; DECISION
- A In this appeal under 10 C.F.R. § 2.714a from the Licensing Board's memorandum and order (LBP-83-42, 18 NRC 112 (1983)) denying a petition for leave to intervene in this operating license proceeding of a petitioner who supports the grant of the license, the Appeal Board affirms the result below on the ground of the petitioner's lateness, eschewing ruling (as did the Licensing Board) on the questions of the petitioner's standing to intervene and its ability to meet the tests for discretionary intervention.
- B In passing upon an untimely intervention petition, the Licensing Board is to consider and balance the following five factors:
- Good cause, if any, for failure to file on time.
  - The availability of other means whereby the petitioner's interest will be protected.
  - The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
  - The extent to which the petitioner's interest will be represented by existing parties.
  - The extent to which the petitioner's participation will broaden the issues or delay the proceeding.
- 10 C.F.R. § 2.714(a)(1).
- C Opinions that, in the circumstances of the particular case, are essentially advisory in nature should be reserved (if given at all) for issues of demonstrable recurring importance. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 463 (1978).
- D In the absence of good cause for tardiness in seeking intervention, "a petitioner must make a 'compelling showing' on the other four factors [of 10 C.F.R. § 2.714(a)(1)] in order to justify late intervention." Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982), and cases there cited.

- E In addressing the third lateness factor of 10 C.F.R. § 2.714(a)(1) the extent to which the petitioner's participation might reasonably be expected to assist in developing a sound record — a petitioner "should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-462, 13 NRC 881, 894 (1981), aff'd sub nom. Field United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978).
- F The fifth and final factor of 10 C.F.R. § 2.714(a)(1) — potential for delay — is also of immense importance in the overall balancing process. See, e.g., Greenwood, ALAB-476, supra, 7 NRC at 761-62; Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 400 (1975).
- G A late intervenor may be required to take the proceeding as it finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 773, 276 (1975).
- ALAB-744 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP (Design Issues); SPECIAL PROCEEDING; October 6, 1983; MEMORANDUM AND ORDER
- A The Appeal Board denies an intervenor's request for reconsideration of its ruling in ALAB-729, 17 NRC 814 (1983), affirming the Licensing Board's determination that the issue of environmental qualification of safety-related equipment must be resolved outside the adjudicatory context.
- ALAB-745 DUKE POWER COMPANY (Cherokee Nuclear Station, Units 1, 2 and 3), Docket Nos. STN 50-491, STN 50-492, STN 50-493; CONSTRUCTION PERMIT; October 12, 1983; MEMORANDUM AND ORDER
- A The Appeal Board grants the applicant's motion to terminate the Board's jurisdiction over the single remaining issue pending in this construction permit proceeding, upon being advised that the applicant had cancelled all three units of the facility and surrendered previously issued construction permits to the Director of the NRC Office of Nuclear Reactor Regulation.
- ALAB-746 SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312-SP; SPECIAL PROCEEDING; October 24, 1983; DECISION
- A Upon receipt of the additional information it had requested, the Appeal Board completes its sua sponte review of the record and affirms the Licensing Board's initial decision (LBP-81-12, 13 NRC 557 (1981)), in this special proceeding, subject to the imposition of a license condition requiring additional radiographic inspections of certain high pressure injection nozzles.
- B Technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to public health and safety. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979). See 47 Fed. Reg. 13,369 (1982).
- C The following technical issues are discussed: Radiographic examination of high pressure injection (HPI) nozzles; Auxiliary Feedwater (AFW) system reliability.
- ALAB-747 WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al. (WPPSS Nuclear Project No. 3), Docket No. 50-508-OL; OPERATING LICENSE; November 15, 1983; DECISION
- A The Appeal Board vacates the Licensing Board's grant of a late-filed petition to intervene and remands the matter to the Licensing Board for the purpose of requiring a further showing on the extent to which intervention by the petitioner may reasonably be expected to assist in developing a sound record.
- B The five factors governing the acceptance of a late-filed intervention petition are as follows:
- Good cause, if any, for failure to file on time.
  - The availability of other means whereby the petitioner's interest will be protected.
  - The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.



- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. 2.714(a)(1).

- C The licensing boards have broad discretion in determining whether to grant an untimely intervention petition. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).
- D One who seeks to overturn a licensing board's grant of a late petition to intervene has a substantial burden on appeal. It is not enough for that party to establish simply that the licensing board might justifiably have concluded that the totality of the circumstances bearing upon the five lateness factors tipped the scales in favor of denial of the petition. In order to decree that outcome, the appeal board must be persuaded that a reasonable mind could reach no other result.
- E A lawyer citing legal authority to an adjudicatory board in support of a position, with knowledge of other applicable authority adverse to that position, has a clear professional obligation to inform the board of the existence of such adverse authority. See Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct (1983).
- F A petition under 10 C.F.R. 2.206 is not an adequate substitute for participation in an adjudicatory proceeding concerned with the grant or denial *ab initio* of an application for an operating license.
- G A late petitioner for intervention should set forth in the petition, with as much particularity as possible, the precise issues it plans to cover, its prospective witnesses and a summary of their proposed testimony. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing *Summer*, ALAB-642, 13 NRC 881, 894 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C. Cir. 1982); *Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3)*, ALAB-476, 7 NRC 759, 764 (1978).
- H The question under the fifth factor of 10 C.F.R. 2.714(a) is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Cf. *Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2)*, ALAB-292, 2 NRC 631, 650 n.25 (1975).
- I Although the ability to contribute to the development of a sound record is important in the determination of all late petitions, it assumes greater importance in cases in which the grant or denial of the petition will also decide whether there is to be any adjudicatory hearing. See *Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2)*, ALAB-413, 5 NRC 1418, 1422 (1977).
- ALAB-748 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL, DISQUALIFICATION, November 16, 1983; MEMORANDUM AND ORDER
- A The Appeal Board affirms an order by a Licensing Board judge denying a party's motion for recusal of the judge for bias or the appearance of partiality.
- B A motion seeking recusal of a member of the Commission or one of its adjudicatory boards is to be determined by the individual rather than by the Commission or the full board. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-80-6, 11 NRC 411 (1980); *Houston Lighting & Power Co. (South Texas Project, Units 1 and 2)*, ALAB-672, 15 NRC 677, 683 (1982), *rev'd on other grounds*, CLI-82-9, 15 NRC 1363 (1982).
- C Disqualifying bias or prejudice in administrative proceedings, as in the federal courts, must generally be extrajudicial. *Houston Lighting and Power Co. (South Texas Project, Units 1 & 2)*, CLI-82-9, *supra*, at 1365.
- D There may be an exception to the general rule that disqualifying bias must be extrajudicial where judicial conduct demonstrates "pervasive bias and prejudice." Pervasive bias and prejudice, however, involves more than "stares, glares and scowls" or "occasional outbursts toward counsel during a long trial" or intemperate and impatient remarks by the judge. *Id.* at 1366.
- E A disqualification or recusal motion must also be based on an invasion of the movant's own rights. One cannot seek the disqualification or recusal of a judge to protect the interests of

- another party. *Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2)*, ALAB-556, 10 NRC 30, 32-33 (1979). A party requesting disqualification or recusal may attempt to establish by reference to a judge's overall conduct that a pervasive climate of prejudice exists in which a fair hearing cannot be obtained by the movant.
- ALAB-749 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL, DISQUALIFICATION, November 28, 1983; MEMORANDUM AND ORDER
- A The Appeal Board affirms the decision by a Licensing Board judge denying a second motion for recusal or disqualification of the judge in this operating license proceeding.
- B The standard for disqualification, enunciated by the Commission in *Houston Lighting and Power Co. (South Texas Project, Units 1 & 2)*, CLI-82-9, 15 NRC 1363 (1982), is that a disqualifying bias must ordinarily stem from an extrajudicial source, rather than a judge's conduct during the course of a proceeding.
- C Section 2.704(c) of 10 C.F.R. requires a licensing board judge who denies a motion for disqualification of the judge to refer the motion to the Commission or Appeal Board.
- D Motions for disqualification or recusal must be filed in a timely fashion — i.e., once the information giving rise to such a claim is available to the movant. *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-101, 6 AEC 60, 63 (1973); *Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976). See also *Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2)*, ALAB-556, 10 NRC 30, 32 n.6 (1979).
- E To demonstrate bias flowing from extrajudicial sources, a party must identify a personal connection, relationship or extrajudicial incident which accounts for the alleged personal animus of the judge. In re *IBM Corp.*, 618 F.2d 923, 928 (2d Cir. 1980).
- F Rulings, conduct, or remarks in response to matters that arise during administrative proceedings are not extrajudicial. ALAB-748, 18 NRC 1188 (1983).
- ALAB-750 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. STN 50-483-OL, OPERATING LICENSE, November 29, 1983; MEMORANDUM AND ORDER
- A Treating a petition for reconsideration of an Appeal Board decision as a motion to reopen the record, the Appeal Board denies the motion for failure to satisfactorily demonstrate that the supporting information is likely to lead to a different result in the case.
- B To justify a reopening of the record, a petitioner must satisfy a tripartite test as follows: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, ALAB-738, 18 NRC 177, 180 (1983), quoting *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-598, 11 NRC 876, 879 (1980).
- C Parties in an appellate proceeding are obligated to submit to the Appeal Board new information that is relevant and material to the matters being adjudicated. *Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3)*, ALAB-677, 15 NRC 1387, 1394 (1982).
- D If a party has doubts about whether to disclose information to the Appeal Board, it should do so because the ultimate decision with regard to materiality is for the decisionmaker, not the parties. *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-691, 16 NRC 897, 914 (1982).
- E The responsibility for the examination of safety issues is divided between the Commission's adjudicatory boards and its staff. Generally speaking, at the operating license stage the role of the boards is limited to resolving contested matters properly placed in issue in a case. *Consolidated Edison Co. of New York (Indian Point, Units 1, 2 and 3)*, ALAB-319, 3 NRC 188, 189-90 (1976). The staff must make decisions on a wide range of safety matters not placed in litigation, and has a further responsibility to superintend the safety of individual applicants and licenses on an ongoing basis.

- F A party that wishes to raise health, safety or environmental issues but is unable to do so in a pending adjudication may file a request with the Director of Nuclear Reactor Regulation under 10 C.F.R. 2.206 asking the Director to institute a show-cause proceeding to address those issues. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).
- ALAB-750A UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. STN 50-483-OL; OPERATING LICENSE, December 9, 1983; MEMORANDUM
- A The Appeal Board supplements its previous memorandum denying the intervenors' reopening motion (ALAB-750, 18 NRC 1205), in response to a letter from the applicant suggesting possible misunderstanding by the Appeal Board of an affidavit submitted earlier by the applicant in connection with its motion.
- ALAB-751 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL; DISQUALIFICATION, December 6, 1983; MEMORANDUM AND ORDER
- A The Appeal Board denies a third motion seeking the recusal or disqualification of the Chairman of the Licensing Board. The Appeal Board finds that the motion is untimely and further that, as in the earlier recusal motions by other parties, the alleged examples of bias neither stemmed from sources outside the proceeding nor demonstrated pervasive bias.
- B Ordinarily, disqualifying bias must stem from an extrajudicial source unless there is a demonstration of pervasive bias. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363 (1982).
- ALAB-752 TENNESSEE VALLEY AUTHORITY (Phipps Bend Nuclear Plant, Units 1 and 2), Docket Nos. STN 50-553, STN 50-554; CONSTRUCTION PERMIT, December 6, 1983; MEMORANDUM AND ORDER
- A The Appeal Board grants the applicant's motion to terminate the Board's jurisdiction over the single remaining issue pending in this construction permit proceeding, based upon the facility's cancellation.
- B Parties to appeal board proceedings have an obligation to keep the board informed of all significant developments that may bear on decisions in the proceeding. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1388 (1982).
- ALAB-753 LOUISIANA POWER AND LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE, December 9, 1983; DECISION
- A The Appeal Board in this operating license proceeding denies as not now presenting a significant safety concern a motion to reopen the record on an issue relating to basement cracks, denies a second motion to reopen on the synergism issue because of a lack of jurisdiction, and, on sua sponte review, affirms the Licensing Board's partial initial decision on the adequacy of applicant's emergency planning brochure.
- B A motion to reopen must satisfy the following three-part test: (1) Is the motion timely? (2) Does it address significant safety (or environmental) issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983), and cases cited.
- C The proponent of a motion to reopen bears a heavy burden. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).
- D A successful movant must provide with its motion to reopen more than bare allegations or simple submission of new contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981). Any supporting material should be provided with the motion so that the test for reopening can be meaningfully applied.
- E A party that seeks to raise a new, previously uncontested issue through a motion to reopen the record must satisfy both the reopening criteria and the late contention criteria set forth in 10 C.F.R. § 2.714(a)(1). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982).

- F A party seeking summary disposition has the burden of proving the absence of a material issue of genuine fact; an opposing party's failure to respond is thus not necessarily fatal.
- G Appeal boards are without jurisdiction to consider a party's request to reopen the record on an issue specifically addressed in an earlier decision that has become administratively final. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-96 (1978). See generally Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704 (1979).
- H Undocumented newspaper articles on matters with no apparent connection to the facility under consideration do not provide a legitimate basis on which to make an evidentiary finding or to reopen a record.
- I The following technical issues are discussed: Cracking and moisture in concrete.
- ALAB-754 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. STN 50-483-OL; OPERATING LICENSE; December 9, 1983; DECISION
- A The Appeal Board affirms on sua sponte review the Licensing Board's second partial initial decision in this operating license proceeding which accepted the State of Missouri's determination that the distribution of potassium iodide and instructions for its use is not necessary for adequate emergency planning.
- B The NRC's emergency planning regulations require that a range of protective actions be developed for the public in the area surrounding a nuclear power plant. See 10 C.F.R. § 50.47(b)(10).
- C There is no express mandate under emergency planning regulations that protective action include the use of radioprotective drugs. Id. and NUREG-0654, FEMA-REP-1, Rev. 1.
- D Generally, the Commission bases its decision regarding the adequacy of emergency plans on a review of the findings and determinations made by the Federal Emergency Management Agency (FEMA). 10 C.F.R. § 50.47(a)(2).
- ALAB-755 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant), Docket No. 50-537-CP; OPERATING LICENSE; December 15, 1983; ORDER
- A After the discontinuance of funding for this facility by Congress, the Appeal Board in this construction permit proceeding, upon motion of the intervenors, terminates as moot all appellate proceedings and vacates the Licensing Board partial initial decision paving the way for issuance of a limited work authorization (LWA). Revocation of the LWA is left to the Licensing Board to determine what conditions, if any, are needed to ameliorate the environmental impacts of site preparation activities.
- B Appeal boards traditionally terminate their proceedings on the ground of mootness and vacate the decisions under review when a project is cancelled. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-656, 14 NRC 965 (1981); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980). Cf. Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980).
- ALAB-756 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE; December 19, 1983; MEMORANDUM AND ORDER
- A The Appeal Board sets out the reasons for its earlier order denying the motions of the intervenors and the Governor of California to reopen the record on the issue of construction quality assurance in this operating license proceeding.
- B Proponents of a motion to reopen the record in a licensing proceeding carry a heavy burden. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).
- C A motion to reopen the record in an operating license proceeding, to succeed, must be timely presented, addressed to a significant safety or environmental issue and must establish that a different result would have been reached initially had the material submitted in support of the motion been considered. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear

## DIGESTS

### \* ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

Power Station), ALAB-138, 6 AEC 520, 523 (1973); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).

D Perfection in plant construction and the facility construction quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, is able to and will be operated without endangering the public health and safety. 42 U.S.C. 2133(d), 2232(a); 10 C.F.R. 50.57(a)(3)(i); *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 407 (1961); *Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station)*, ALAB-161, 6 AEC 1003, 1004 (1973), *aff'd sub nom. Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975).

E To determine what constitutes a "significant safety issue" for reopening motions predicated on alleged deficiencies in an applicant's construction quality assurance program, the new evidence must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. See *Union Electric Co. (Callaway Plant, Unit 1)*, ALAB-740, 18 NRC 343, 346 (1983).

ALAB-757 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL; OPERATING LICENSE; December 20, 1983; MEMORANDUM AND ORDER

A The Appeal Board in this operating license proceeding declines to reconsider its earlier denial of an intervenor's motion requesting recusal by a Licensing Board judge on the ground of bias.

B A claim for disqualification must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. *Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976). See also *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976).

C The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for disqualification. *Smith v. Danyo*, 585 F.2d 83 (3d Cir. 1978).

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-83-33 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; July 6, 1983; MEMORANDUM AND ORDER

A The Licensing Board rules that although pipe supports expand when heated by environmental conditions that occur in the containment during a loss-of-coolant accident, the stresses that occur within those supports due to thermal stress are not required either by the staff guidance or applicable code provisions to be considered in designing the supports. However, intervenors are not barred from introducing evidence that failure to consider thermal stress would lead to design instabilities that are unacceptable under the Commission's general design criteria. Although thermal stress need not be considered, the expansion of a pipe support under loss-of-coolant accident conditions will place stress on its end points. These stresses on anchors, concrete and pipes must be considered during the design of these systems.

B Stress that would be placed on supports and pipes by the expansion of pipe supports under LOCA conditions must be considered in the design of those supports and pipes. However, under applicable staff guidance and industry codes, design consideration need not be given to thermal stress that occurs within the pipe supports because the expansion of the support is constrained. Intervenors may, however, introduce evidence that casts doubt on the stability of individual supports as a result of thermal stress not having been considered in the design of those supports.

C When the American Society of Mechanical Engineer's (ASME) Code is applicable to a nuclear plant pursuant to Commission regulations, the Board must interpret the Code to determine its applicability to the licensing proceeding. The general principle of the Code that only ASME may interpret its Code is not binding on licensing boards.

D It is appropriate for a licensing board to interpret a Regulatory Guide that applies an ASME Code section. To the extent that the Guide applies a Code provision in a setting for which it was not originally intended, interpretation of the Guide does not constitute a Board interpretation of a Code provision.

E The following technical issues are discussed: Thermal stress in pipe supports (under LOCA conditions), LOCA (thermal stress in pipe supports), Free-end displacement, Expansion stresses, Self-balancing stress, Design conditions (meaning under the ASME Code), Repetitive loads, Elastic action, Shakedown into elastic action.

LBP-83-34 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; July 6, 1983; MEMORANDUM AND ORDER

A The Licensing Board holds that a decision of the Secretary of Labor, concerning discharge of a whistleblower by a major contractor of the applicant, is binding on the applicant by operation of the doctrine of collateral estoppel. Accordingly, facts necessary to the Secretary's decision and relevant to the licensing action are binding on the Licensing Board.

B There is sufficient identity of interest between applicant and a major contractor that an administrative decision by the Secretary of Labor against the contractor is binding against the applicant.

LBP-83-35 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; July 6, 1983; MEMORANDUM

A The Licensing Board responds to a Commission request by stating that it will no longer pursue evidence concerning the identity of individuals who cooperated with a staff investigation



but that its record is incomplete concerning whether or not applicant has discouraged the filing of non-conformance or deficiency reports. The Board designates a participating party, the State of Texas, to play an important role in pursuing that issue. It also asks the Commission's Staff to play a role in investigating the problem.

- B Under circumstances where public doubt has been cast on the efficacy of an investigation conducted by the Staff of the Commission, it is appropriate to appoint an interested State as lead intervenor for the purpose of conducting discovery related to a portion of an admitted contention to which the questioned staff investigation was addressed. The interested state may also pursue questions concerning weave welding and downhill welding, questions within the knowledge of witnesses to which it will be speaking.

LBP-83-36 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 2 and 3), Docket Nos. STN 50-529-OL, STN 50-530-OL (ASLBP No. 80-447-01-OL); OPERATING LICENSE; July 11, 1983; MEMORANDUM AND ORDER

- A The Licensing Board denies motions by West Valley Agricultural Protection Council, Inc. which ask the Board to rule that the NRC Staff's Final Environmental Statement (FES) does not meet the requirements of the National Environmental Policy Act (NEPA) and that the reopened proceeding on Palo Verde Units 2 and 3 be continued until a supplemental environmental statement is published.

- B Defects in an FES can be cured subsequent to its issuance by the receipt of additional evidence.

- C A licensing board decision based on the evidentiary record before it shall be deemed to modify the FES.

- D West Valley's request that a supplement to the FES-OL be prepared is beyond the Board's jurisdiction. New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978).

- E At the least, it must be determined that there is significant new information before the need for a supplemental environmental statement can arise. Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981). A resolution of the significance of the allegedly missing information and its need to be circulated in a supplemental environmental statement must await the outcome of a hearing.

LBP-83-37 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; July 14, 1983; MEMORANDUM AND ORDER

- A The Licensing Board denies a motion by an intervenor to add a new financial qualifications contention to the proceeding. The Board also declines to recommend to the Commission, pursuant to 10 C.F.R. § 2.758, that the regulation prohibiting consideration of the financial qualifications of regulated utilities be waived for this proceeding.

- B Financial qualifications to "construct" a facility is not — and was not prior to the 1982 amendment to the rule governing consideration of an applicant's qualifications — a subject open to consideration at the operating license stage of review.

- C Given a proceeding that was initially noticed in 1978 and for which the Special Prehearing Conference was held early in 1979, any contentions filed in 1983 would perforce be untimely and could be admitted only upon a balancing of the factors listed in 10 C.F.R. § 2.714(a)(1).

- D Ability to contribute to the record is relevant to the admissibility of late-filed contentions (as distinguished from timely contentions, where the factors in 10 C.F.R. § 2.714(c) are not applicable).

- E The sole ground for obtaining an exception or waiver to a Commission regulation is that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. 10 C.F.R. § 2.758(b). Unusual and compelling circumstances must be shown.

- F The following technical issue is discussed: Financial Qualifications.

LBP-83-38 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; July 12, 1983; MEMORANDUM AND ORDER

- A The Licensing Board holds that it would have jurisdiction to decide issues raised in an operating license proceeding that would control whether or not it was appropriate to issue a license to receive unirradiated fuel at the reactor (a Special Nuclear Material License), but that intervenors must first raise an admissible contention that calls into question applicant's ability to receive and care for spent fuel safely. It finds that no such issue has been raised, and the filing of an application for a special nuclear material license does not give intervenors a fresh opportunity to raise questions that have been available to them since the Notice of Hearing in this case was issued. Consequently, the Board denies the admission of a contention concerning the Special Nuclear Material License.

- B A Board in an operating license case has jurisdiction over properly raised contentions and may enter orders concerning a related special nuclear material license application providing that the orders are related to the admitted contentions. However, the filing of an application for a special nuclear material license does not create an opportunity to file fresh contentions about matters that have previously been part of the public record.

- C A late-filed contention concerning issuance of a special nuclear material license must meet all the criteria for a late-filed contention, including a showing of good cause for late filing. If the questions raised were already available in the record prior to the filing of the application for a special nuclear material license, the filing of the application does not by itself create good cause for late filing.

- D It is sufficient that an environmental impact statement is prepared concerning the granting of an operating license; it is not necessary to prepare a separate statement concerning the receipt of unirradiated fuel or of other plant components, on the assumption that receipt of the component will not be followed by completion of the plant. A single environmental impact statement covering the entire construction and operation of the plant includes within it the component steps involved in the project.

LBP-83-39 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; July 26, 1983; SECOND SPECIAL PREHEARING CONFERENCE ORDER

- A In a special prehearing conference order, the Licensing Board rules on the admissibility of pending safety contentions, admitting three contentions and excluding nineteen. Before addressing the admissibility of specific contentions, the Board concludes that safety contentions concerning the probabilistic risk assessment (PRA) done for Limerick would be admissible only if they alleged that the PRA identified a particular design problem for Limerick. The Board leaves open the question of how PRA contentions should be litigated when they relate to the National Environmental Policy Act, 42 U.S.C. § 4332, review of plant operations.

- B Good cause for the untimely filing of a contention based on a newly available document may be lost by waiting to see what action another party will take in reaction to the document.

- C When a document becomes available, contentions based upon it must be filed promptly to preserve good cause for an untimely contention although the document may be incomplete.

- D In the context of health and safety (as opposed to environmental) issues, litigation related to the choice of methodology used to develop the PRA would not be profitable. However, if the PRA indicates a particular design problem with the plant, that may be litigated.

- E "Postulated accidents" as used in General Design Criterion 64 is a term of art meaning design basis accidents.

- F A contention which merely recites unrelated adverse findings in reports of quality assurance inspections and audits performed by the Staff and Applicant is not admissible.

LBP-83-40 COMMONWEALTH EDISON COMPANY (Byron Nuclear Power Station, Units 1 and 2), Docket Nos. STN 50-454-OL, STN 50-455-OL (ASLBP No. 79-411-04-PE); OPERATING LICENSE; July 26, 1983; MEMORANDUM AND ORDER DENYING STAY APPLICATION

- A The Licensing Board denies the NRC Staff's application for a stay pending appeal from a part of a Board order directing the parties to present a full evidentiary showing and explanation



of certain investigations and subsequent reinspections related to the quality assurance program of one of Applicant's contractors.

- B The criteria for determining whether to grant a stay pending appeal have been codified in § 2.788(e) of the Commission's Rules of Practice (10 C.F.R. § 2.788(e)).
- C It is appropriate for a party seeking a stay pending appeal of a licensing board order to petition the licensing board first. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186 n.2 (1977). However, it is also appropriate for a licensing board to place relatively little weight on the first criteria for determining a stay pending appeal, i.e., whether the moving party has a strong showing that it is likely to prevail on the merits of the appeal.
- D In considering whether the NRC Staff will be irreparably injured by an order to produce relevant documents even though germane to a pending inspection or investigation, the licensing board cannot determine the applicability of the "investigatory record" exemption to the NRC codification of the Freedom of Information Act, 10 C.F.R. § 2.790(a)(7), without at least a discussion of the various protections afforded by § 2.744 of the Commission's Rules of Practice (10 C.F.R. § 2.744).
- E The Staff may not unilaterally and summarily declare that the "investigatory records" exemption (10 C.F.R. 2.790(a)(7)) applies to information in its possession. Pursuant to 10 C.F.R. 2.744(c) this determination must be made by the presiding officer after examination of the information.
- F Although § 2.744 by its terms refers only to the production of NRC documents, it also sets the framework for providing protection for NRC Staff testimony where disclosure would have the potential to threaten the public health and safety.
- G With respect to safeguards information, the Commission has declined to permit any presumption that a party who has demonstrated standing in a proceeding cannot be trusted with sensitive information.
- H If there are persons who might be privy to sensitive information who are not trustworthy, that fact can be made known exclusively for the licensing board's consideration in fashioning suitable protection under the various means available to the board. The fact that persons employed by Applicant or its contractors cannot be trusted to receive information on a quality assurance issue is itself relevant to the issue and must be provided to the board.
- I Where the NRC Staff has failed to show that the provisions of 10 C.F.R. § 2.744(c) do not provide sufficient protection for the information ordered to be disclosed by the board, it has failed to demonstrate the potential for irreparable injury that would justify the granting of its application for a stay of the board's order pending appeal.
- J If, with respect to an uncompleted inspection and investigation, an explanation of the nature of the allegation and a description of the evidence so far gathered can put a matter to rest or indicate a need for further inquiry, the licensing board has the responsibility to inquire timely into the significance and relevance of the pending inquiries to the issues in the proceeding.
- LBP-83-41 COMMONWEALTH EDISON COMPANY (Byron Nuclear Power Station, Units 1 and 2), Docket Nos. STN 50-454-OL, STN 50-455-OL (ASLBP No. 79-411-04-PE), OPERATING LICENSE; July 28, 1983, MEMORANDUM AND ORDER DENYING INTERVENORS' MOTION TO SUPPLEMENT THE QA/QC RECORD
- A The Licensing Board denies Intervenor's motion to reopen the record for the purpose of receiving certain inspection reports.
- B A motion to reopen the record must be timely, must demonstrate that significant new evidence of a safety question exists and that the new evidence might materially affect the outcome of the proceeding.
- C Where Intervenor's do not seek a general reopening of the evidentiary record, but only to supplement the record with certain inspection reports, it is readily possible to settle the matter by considering the factual responses of the Applicant and Staff to determine if the significant safety problem actually existed and, if so, whether it has been resolved.
- D Because each motion to reopen the record must be evaluated on its merits, and because the Applicant's burden of proof and the Staff's oversight responsibilities give strong leverage to

Intervenors, the board will examine carefully the Intervenor's pleadings for detail of factual analysis as one of the factors in determining how seriously the matter is viewed by Intervenor.

- E The following technical issue is discussed: Integrated Hot Functional Testing.
- LBP-83-42 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3; EMERGENCY PLANNING; July 28, 1983, MEMORANDUM AND ORDER DENYING PETITION TO INTERVENE OF CITIZENS FOR AN ORDERLY ENERGY POLICY, INC.
- A The Licensing Board denies a petition to intervene in the separate emergency planning hearing in this proceeding by a petitioner supporting Applicant's offsite emergency plan and favoring issuance of an operating license to Applicant. The Board finds that the petition was nonunimely, and that a balancing of factors pursuant to 10 C.F.R. § 2.714(a)(1) requires that it be denied.
- B When a new licensing board is established to conduct a separate hearing in an ongoing operating license proceeding, the establishment of such a new Board does not constitute a new Notice of Hearing, the timeliness of petitions to intervene will be evaluated in light of the initial notice of hearing.
- C Where a licensing board finds that a nontimely petition to intervene is inexcusably late, that it would significantly delay the proceeding if admitted, that the petitioner has made no showing of its ability to make a substantial contribution to the record, and that the petitioner's interest is adequately represented by another party to the proceeding, the petition will be denied notwithstanding the fact that there are no other means available to protect petitioner's interest. 10 C.F.R. § 2.714(a)(1).
- LBP-83-43 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-060), OPERATING LICENSE; July 29, 1983, PROPOSED INITIAL DECISION
- A A party that does not file required findings is in default on the related issues. The Board may examine those issues to determine whether they should be raised by it sua sponte; otherwise, the issues are excluded from the case.
- B Rather than issuing an initial decision in its finished form, a Board may choose to obtain comments from parties on a "proposed" decision before it makes its final choice. This is particularly appropriate when two of the Board's members were recently appointed and the record was complex.
- C The following technical issues are discussed: Quality assurance, Quality assurance, number of inspectors; Quality assurance, operational; Non-conformance reports, number of; Emergency planning, Rock overbreak; Dental concrete; Limestone (susceptibility to fracture during blasting); Settlement crack, concrete; Concrete settlement crack; Morale, low; Water stops, improper tacking; Polar crane, gaps in rails; Discouragement of non-conformance reports; Harassment, quality assurance inspectors; Surface preparation, near white blast; Maximum roughness, steel substrate; Pain, force-curing with smoking heaters; Welding; Welding, heat numbers only on structural members; Welding, weave-beading; Welding, downhill; Welding, heating of weld rods; Welding, plug welding inspection; Welding, control of welding rods; Torque Seal; Quality assurance, interpretation of Torque Seal by inspectors; Traceability of materials, Torque values, procedures; Quenching welds; Flange bolt-up joints, inspection delayed; Piping, wall thickness; Piping, cold springing; Hydrogen control; Recombiners, electrical, ATWS, Salem Unit 1 analogy; Boron injection tank, deletion of; Departure from nucleate boiling ratio (D<sup>2</sup>/BR); Boron crystals.
- LBP-83-44 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; SPENT FUEL POOL AMENDMENT, August 1, 1983, SUPPLEMENTARY INITIAL DECISION
- A The Licensing Board determines that applicant has complied with the Board's earlier initial decision (LBP-82-77, 16 NRC 1096 (1982)) concerning emergency planning. The Board also decides that it is not necessary to conduct a hearing before making this determination.
- B Applicant satisfied the Board that it had demonstrated sufficient compliance with the applicable emergency planning requirements of the Commission for the purpose of a proceeding concerning a license amendment to expand a spent fuel pool.

- C A hearing is not required to determine whether applicant has complied with a Board order if the written submissions fail to raise any serious deficiencies that the Board might remedy. Considering the circumstances, a hearing is very unlikely to be productive and need not be held.
- D The following technical issues are discussed: Radiological training, Transportation of people without access to personal vehicles, Evacuation for schoolchildren, Compilation of a list of invalids.
- LBP-83-44A CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155, SPENT FUEL POOL AMENDMENT, August 15, 1983, MEMORANDUM (Addendum to Supplemental Initial Decision)
- LBP-83-45 NIAGARA MOHAWK POWER CORPORATION, et al. (Nine Mile Point Nuclear Station, Unit 2), Docket No. 50-410-OL (ASLBP No. 83-484-03-OL), OPERATING LICENSE PROCEEDING, August 4, 1983, MEMORANDUM AND ORDER
- A The Licensing Board rules that no hearing is required in this operating license proceeding.
- B The mere filing by a state of a petition to participate in an operating license application pursuant to 10 C.F.R. § 2.715(c) as an interested state is not cause for ordering a hearing. The application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues.
- C No hearing is required on an operating license application without a request for a hearing made in accordance with section 189a of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. § 2.714.
- LBP-83-46 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, August 9, 1983, MEMORANDUM AND ORDER
- A The Licensing Board holds that intervenors did not raise any genuine issue of fact concerning the adequacy of the interim program, adopted by the applicant and required by the staff, for inspecting and maintaining turbines to prevent the generation of missiles. Consequently, summary disposition of the turbine missile issue is granted. The fact that General Electric Company is conducting a study that could alter this conclusion is not grounds for granting a continuance.
- B Summary disposition must be granted unless a party demonstrates the existence of a genuine issue of fact by setting forth "specific facts such as would be admissible in evidence." Since an article, not accompanied by a supporting affidavit, would not be admissible in evidence, the article cannot be the ground for establishing the existence of a genuine issue of fact.
- C Summary disposition may not be denied on speculation that an ongoing study might produce results helpful to the party opposing summary disposition. Nor can a continuance be granted when, after a sufficient period of discovery, a party seeks additional time to obtain an expert witness.
- D The following technical issues are discussed: Turbine missiles (inspection and maintenance), Ultrasonic tests, turbines, Turbine missiles, risks; Overspeed protection system, turbines, General Electric nuclear turbines.
- LBP-83-47 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL (ASLBP No. 78-365-01-OL), OPERATING LICENSE, August 12, 1983, MEMORANDUM AND ORDER
- A The Licensing Board grants the Applicants' motion to supplement the record, holding that they had met their burden of demonstrating a reasonable assurance that medical services arrangements had been made for the offsite public in the event of a serious accident.
- B The Commission has interpreted 10 C.F.R. § 50.47(b)(12) on a generic basis to require only that existing medical facilities be identified with respect to risks of radiation injury to the offsite public. Boards are not to go beyond lists of existing facilities to determine whether those facilities are adequate to cope with various accidents in the site-specific setting.
- LBP-83-48 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446, OPERATING LICENSE, August 15, 1983, MEMORANDUM AND ORDER
- A The Licensing Board holds that it is not appropriate to supplement the record of an ongoing proceeding with unsolicited filings. Parties have an obligation to assist the Board by present-

- ing evidence in a controlled, organized fashion and should await an appropriate opportunity to submit evidence rather than submitting documents in dribs and drabs.
- B Parties should present evidence in a controlled, organized fashion and the Board will not grant attempts to supplement the record on pending issues by making filings in dribs and drabs.
- LBP-83-49 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL), OPERATING LICENSE, August 16, 1983, MEMORANDUM AND ORDER
- A The Licensing Board denies a motion by an intervenor for reconsideration of LBP-83-37, which declined to admit a financial qualifications contention or to recommend to the Commission (pursuant to 10 C.F.R. § 2.758) that the rule prohibiting consideration of financial qualifications contentions be waived.
- B To make a prima facie showing under 10 C.F.R. § 2.758 that a regulation should be waived, a stronger showing than would be required to introduce a new contention must be made. Evidence would have to be presented demonstrating that the facility under review is so different from other projects that the rule would not serve the purposes for which it was adopted.
- LBP-83-50 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL (ASLBP Nos. 78-389-03-OL, 80-429-02-SP), MODIFICATION ORDER AND OPERATING LICENSE, August 17, 1983, MEMORANDUM AND ORDER
- A The Licensing Board denies a motion by an intervenor to reopen the record, on the grounds that the facts asserted to justify reopening do not fall within the scope of an admitted contention and, in addition, are not of sufficient safety significance to warrant a reopening of the record.
- B Where the entire record of a proceeding is not closed and an initial decision has not been issued, a party seeking to reopen the record on issues the adjudication of which have been completed must demonstrate that the matter it wishes to have presented is (1) timely presented, and (2) addressed to a significant issue. The timeliness inquiry is subsidiary to the significance of the material to be considered. Where an initial decision has been issued, a party must additionally demonstrate that the matter is susceptible of altering the result previously reached.
- C A party moving to reopen a record must offer significant new evidence and not merely "bare allegations" or new contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362-63 (1981).
- LBP-83-51 COMMONWEALTH EDISON COMPANY (Byron Nuclear Power Station, Units 1 and 2), Docket Nos. STN 50-454-OL, STN 50-455-OL (ASLBP No. 79-411-04-PE), OPERATING LICENSE, August 17, 1983, MEMORANDUM AND ORDER
- A The Licensing Board reports on its in camera receipt of information concerning pending investigations and inspections.
- B Pursuant to 10 C.F.R. § 2.744(c) and the Commission August 5, 1983 Statement of Policy - Investigations and Adjudicatory Proceedings, 48 Fed. Reg. 36,358, the Licensing Board may receive exclusively in camera information from the Office of Inspection and Enforcement and the Office of Investigations concerning pending inspections and investigations.
- C Although 10 C.F.R. § 2.744(c) refers only to NRC documents which may be presented for the presiding officer's exclusive in camera inspection for relevancy and exemption under 10 C.F.R. § 2.790, the Commission's August 5, 1983 Statement of Policy, Investigations and Adjudicatory Proceedings, 48 Fed. Reg. 36,358, authorizes the presiding officer also to inspect non-documentary information in camera and exclusive of other parties.
- LBP-83-52 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, August 18, 1983, MEMORANDUM AND ORDER
- A The Licensing Board reopens its record on quality assurance on its own motion, in order to receive written filings concerning a document that was filed by an intervenor and that apparently indicates serious problems not covered in prior testimony. Intervenor's motion to reopen the record is denied because the failure to introduce this evidence into the record at an earlier time was due to intervenor's failure to pursue its discovery rights in a timely fashion.

B When the entire record has not been closed, the record on a single issue may be reopened on a showing that the motion to reopen is timely and raises an issue of substance. However, a motion is not timely if it is based on information that should have been discovered prior to an evidentiary hearing.

C When an intervenor brings important information to light, the Board must inquire further in order to have a complete record even if the information should have been filed at an earlier time. This action is particularly appropriate when the new information casts new light on earlier testimony.

LBP-83-52A GULF STATES UTILITIES COMPANY, et al. (River Bend Station, Units 1 and 2), Docket Nos. 50-458-OL, 50-459-OL (ASLBP No. 82-468-01-OL); OPERATING LICENSE; August 26, 1983; MEMORANDUM

A In this memorandum the Licensing Board rules on the admissibility of contentions in this operating license proceeding and establishes procedures for further proceedings.

B The Commission eliminated the review of financial qualifications from power plant licensing hearings in part because it could not find any reason to consider, in a vacuum, the general ability of utilities to finance the construction of new generation facilities. Only when joined with the issue of adequate protection of the public health and safety does this issue become pertinent.

C Contentions attacking the Commission's regulations are prohibited unless the petitioner can make a prima facie showing of "special circumstances" such that applying the regulation in the specific case would not serve the purposes for which it was adopted. 10 C.F.R. § 2.758 (1983).

D The mere allegation of financial problems, three unrelated inspection reports, and an openly requested deviation from standards do not constitute a safety problem so as to permit a finding of "special circumstances" as required by 10 C.F.R. § 2.758 for the waiver of the prohibition of 10 C.F.R. § 50.40(b) barring the review of financial qualifications in licensing hearings.

E Where intervenors have not identified a single chemical or effluent of any kind that might interact with some unspecified level or quantity of ionizing radiation, contentions alleging that emissions may cause health hazards either alone or in combination with industrial effluents already present in the area's air and water are too vague and lacking in specificity to permit meaningful litigation.

F The flexibility in the 10-mile EPZ regulatory requirement does not contemplate including so remote a chain of speculative circumstances as that posited by intervenors in a contention alleging that inmates of a prison located 18 miles from the plant might effect a mass, armed escape and disrupt the orderly implementation of the emergency plan.

LBP-83-53 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL (ASLBP Nos. 78-389-03-OL, 80-429-02-SP); MODIFICATION ORDER AND OPERATING LICENSE; August 31, 1983; MEMORANDUM AND ORDER

A The Licensing Board grants one motion to quash subpoenas, denies another motion to quash subpoenas and enters a protective order to govern the enforcement of the subpoenas.

B An attorney's representation, that all communications between the attorney and the party were for the purpose of receiving legal advice, is sufficient for an assertion of attorney-client privilege.

C A party's need for discovery outweighs any risk of harm from the potential release of information when the NRC Staff has indicated that no ongoing investigation will be jeopardized, when all identities and identifying information are excluded from discovery, and when all other information is discussed under the aegis of a protective order.

D Even where a First Amendment or common law privilege is found applicable to a party (or nonparty) resisting discovery, that privilege is not absolute. A licensing board must balance the value of the information sought to be obtained with the harm caused by revealing the information.

LBP-83-55 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; September 1, 1983; MEMORANDUM AND ORDER

A Intervenor's motion to reopen the record on a portion of a contention, after findings had been required to be filed on that portion, is denied as untimely. The Board further decides that

it will not reopen the record itself, in the interest of compiling a complete record, because intervenor had not persuaded it that the material raises a serious safety matter that would not otherwise be considered.

B In a separate matter, a motion to strike non-record material is denied because the Board may ignore materials that are not in the record and nothing is gained by striking those materials.

C When findings have been required concerning an aspect of an admitted contention, a motion to reopen may be granted only if it is timely and raises an issue of substance. The Board may take up late matters itself, but it must first be persuaded that they are essential to the determination of an important safety issue.

D Unexpected events in the course of a hearing do not provide grounds for late-filing documents two months after the close of the hearing.

E Extra-record materials need not be struck from the Board's files, as the Board may merely ignore those materials in reaching its decision.

LBP-83-56 DUKE POWER COMPANY, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413-OL, 50-414-OL (ASLBP No. 81-463-01-OL); OPERATING LICENSE; September 6, 1983; MEMORANDUM AND ORDER

A The Licensing Board denies motions for summary disposition of a contention relating to safe operation of the spent fuel pool at the Catawba facility. The Board grants a related motion concerning the environmental effects of the spent fuel pool. The Board denies a motion for sanctions based merely upon one party's impermissibly narrow reading of a contention.

LBP-83-57 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL; OPERATING LICENSE; September 21, 1983; PARTIAL INITIAL DECISION

A The Licensing Board issues a Partial Initial Decision deciding all issues before it, except the emergency diesel generator contentions on which litigation was deferred at the request of all parties. (Offsite emergency planning issues are pending for litigation before a separate licensing board.) The Board decides all issues in Applicant's favor, with the exception of portions of two issues involving Mark II containment loads due to RHR discharge mode operation and the testing and inspection program for undetected check valve failure. However, the Board finds that the pendency of those two issues, over which jurisdiction has been retained, would not prevent issuance of a low-power (up to 5%) operating license, if and when the pending diesel issues are resolved in LHCO's favor.

B The decision (in Section V) includes several conditions involving the implementation of the recent rule governing environmental qualification of electrical equipment (10 C.F.R. § 50.49), and the agreement by LHCO to the NRC Staff's definition and application of the terms "important to safety" and "safety-related" insofar as safety classification and qualification of plant structures, systems and components are concerned. The Board also recommends that the Commission consider whether the ECCS Appendix K factors should be updated for the current BWR 8 x 8 fuel array; and whether the Staff should provide detailed guidance for the identification of "important to safety" equipment required for environmental qualification by 10 C.F.R. § 50.49(b)(2). The Chairman of the Board also recommends that the Commission consider whether present and projected progress and management by the Staff of Unresolved Safety Issue A-17 (Systems Interaction) is proper.

C The Board also denies, on the basis of the Commission's previous ruling in this case, Suffolk County's motion that a low-power license could not be issued unless a revised NEPA cost-benefit analysis was performed to consider the circumstance of denial of a full-power license due to inadequate offsite emergency preparedness. (See Section IV.)

D The following technical issues are discussed: Water Hammer, ECCS Core Spray, Passive Mechanical Valve Failure, Anticipated Transients Without Scram, Seismic Design, Mark II Containment, Safety Relief Valve Tests and Challenges, Post-Accident Monitoring, Environmental Qualification, Systems Interaction and Safety Classification, Quality Assurance and Quality Control.

LBP-83-58 CINCINNATI GAS & ELECTRIC COMPANY, et al. (William H. Zimmer Nuclear Power Station, Unit 1), Docket No. 50-358-OL (ASLBP No. 76-317-01-OL); OPERATING LICENSE, September 15, 1983; MEMORANDUM AND ORDER

- A Intervenor petitioned for reconsideration of the Licensing Board's ruling in LBP-83-54, 16 NRC 210 (1982) that it had failed to satisfy the requirements of 10 C.F.R. § 2.714(a) to have eight late-filed contentions admitted in this proceeding. Alternatively, Intervenor petitioned to have those contentions admitted on the basis of new information which furnished "good cause" for their late filing. After Intervenor abandoned the petition for reconsideration, the Licensing Board again denied the admission of the eight contentions, holding that new information which was outside the scope of the contentions ruled on in LBP-82-54 had not been presented and that the five criteria of 10 C.F.R. § 2.714(a) balanced against admission of the contentions.
- B Intervenor must diligently uncover and apply all available information to the prompt formulation of contentions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).
- C Where intervenor does not show good cause for the nontimely submission of contentions, it must make a compelling showing on the other four criteria of 10 C.F.R. § 2.714(a). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).
- D Despite the fact that nontimely contentions raise matters which have not previously been litigated, the requirements for reopening records must be satisfied in addition to the requirements of 10 C.F.R. § 2.714(a). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982).

LBP-83-59 WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al. (WPPSS Nuclear Project No. 1), Docket No. 50-460-CPA (ASLBP No. 83-485-02-CPA); CONSTRUCTION PERMIT, September 21, 1983; MEMORANDUM AND ORDER

- A Upon uncontested motion of intervenor organization and without balancing the five factors of 10 C.F.R. § 2.714(a)(1), the Licensing Board accepts the withdrawal of affidavit of the only authorizing member with standing, accepts the authorizing affidavit of a new member with standing, and affirms the continuation of the proceeding.
- B The representation in the petition that the interests of the organization are predicated on the interests of members with standing, but not the identities of those members, is a material part of the petition.
- C A change in the identities of the authorizing members of an organization is not a material change that requires an amendment of the petition to which the five-factor test of 10 C.F.R. § 2.714(a)(1) would be applicable.
- D Once an organizational petition to intervene is granted, it is presumed that the class of authorizing members with standing continues to exist.

LBP-83-60 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE, September 23, 1983; MEMORANDUM AND ORDER

- A In this decision the Licensing Board resolves objections that the Board had invited from the parties to help it to resolve correctly the issues covered in its Proposed Initial Decision of July 29, 1983 (LBP-83-43, 18 NRC 122). The Board dismisses the emergency planning contention but establishes a procedure that will permit it to decide whether the emergency plans are so incomplete that the Board will declare their adequacy to be a sua sponte issue.
- B Although several of applicant's objections are sustained, causing fewer adverse findings to remain, the Board makes the following findings adverse to the applicant: (1) a supervisor, who called a meeting about "nit-picking" by quality assurance inspectors, was willing to have quality assurance inspectors do a less thorough job of reporting deficiencies; (2) quality assurance inspectors were harassed by the paint craft; (3) a quality assurance inspector, who apparently was too careful for management's liking, was dismissed from his job on a pretext; (4) the availability of a recent procedural change does not rebut testimony that applicant's quality assurance procedures for verifying "near white blast" were inadequate during an extended period of time; (5) sufficient reasons have not been provided to demonstrate the adequacy of protective coatings on

Westinghouse equipment; (6) applicant apparently had inadequate knowledge of code authorization for the use of plug welds and consequently did not institute a hold point that would have been required for adequate inspection of such welds; (7) applicant has not adequately demonstrated that improper downhill welds are not a problem at Comanche Peak; (8) applicant has not adequately demonstrated that it has kept incidents of uncontrolled weld rods to an acceptable number; (9) there was an incident in which a quality assurance inspector, Mr. Aichison, was pressured into approving a report against his own best judgment; and (10) the applicant's Final Safety Analysis Report should have been amended to reflect accurately the rock overbreak problem that occurred and failure to correct the report constitutes a material false statement.

- C A Board may declare a default for failure to file required findings. This default does not, however, prohibit the Board from inquiring into the defaulted matters if necessary to compile a complete record on a contention that is still part of the case. Nor does the default prohibit the Board from eliciting help from the defaulting intervenor in pursuing the Board's continuing concerns.
- D When the Board finds review of the emergency plan by the Federal Emergency Management Agency to be cursory, it may establish a procedure by which it may determine whether or not to raise this matter sua sponte.
- E Applicant must provide a reasoned response to allegations of an individual who had an opportunity to observe conditions to which he objects, even if the witness has had previous convictions for violent crimes.
- F When a Board has invited objections to a proposed decision, parties must make specific objections or waive their rights to continue to pursue the issues involved.
- G The following technical issues are discussed: Quality assurance; Emergency planning; Protective coatings; Intimidation of quality assurance inspectors; Harassment of quality assurance inspectors; Protected activity — discharge on a pretext; Firing quality assurance inspector on a pretext; Maximum roughness of protective coatings; Adhesion testing of protective coatings; Smoke on protective coatings; Weave welding; Plug welds; Plug welds (inspection of); Downhill welding; Weld rod control; Hilti bolt inspection; Fillet weld, gap; Water quenching of welds, austenitic stainless steel; Rock overbreak; Blast damage to foundation rock; Rock damage in foundation; Dental concrete; Concrete as part of a foundation; Radiation, cracks in reactor shield wall.

LBP-83-61 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3; EMERGENCY PLANNING, September 27, 1983; MEMORANDUM AND ORDER DENYING SUFFOLK COUNTY MOTION TO COMPEL DISCOVERY FROM FEMA

- A The Licensing Board denies a motion to compel production of a certain FEMA employee for deposition regarding the FEMA review of an emergency plan.
- B Pursuant to interagency Memorandum of Understanding, the Federal Emergency Management Agency (FEMA) is acting as consultant to NRC in emergency planning matters, its employees are thus entitled to limitations on discovery afforded NRC consultants by 10 C.F.R. §§ 2.720(h)(2)(i) and 2.4(p). Where party requesting production for deposition of a certain FEMA employee fails to show "exceptional circumstances," request is denied.
- C The role of the Federal Emergency Management Agency (FEMA) in emergency plan review is that of "consultant" to NRC. FEMA submits its expert advice concerning emergency plans to NRC, which evaluates that advice in conjunction with all other evidence of record. (Interagency Memorandum of Understanding, 45 Fed. Reg. at 82,714 (1980)).

LBP-83-62 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; SPENT FUEL POOL AMENDMENT, September 30, 1983; MEMORANDUM AND ORDER

- A The Board denies intervenor's motion to reopen the record based on new information it had obtained about the appropriate standards to be applied in determining whether applicant has complied with the NRC Staff's criticality requirements (neutron multiplication factor requirements) for a spent fuel pool. The Board holds that the alleged difference in standards is moot. Since applicant is now required to show that the water in its spent fuel pool will not rise above 150°F, the maximum temperature at which the integrity of the concrete pool can be



assured, it is no longer necessary for applicant to show that the neutron multiplication factor ( $k_{eff}$ ) would not exceed 0.95 at temperatures higher than the 150°F.

B The Licensing Board has jurisdiction over issues remanded to it by the Appeal Board even if the decision ordering the remand has been appealed to the Commission.

C When applicant must show that the water in its fuel pool will not rise above 150°F in order to retain the integrity of the pool concrete, that maximum temperature value establishes the maximum temperature at which applicant must show that the neutron multiplication factor ( $k_{eff}$ ) in its fuel pool must not rise above 0.95.

D The following technical issue is discussed: Neutron multiplication factor ( $k_{eff}$ ).

LBP-83-63 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; October 6, 1983; PARTIAL INITIAL DECISION

A The Licensing Board decides that applicant is committed to the 1974 version of the ASME Boiler and Pressure Vessel Code and is not committed to subsequent versions that modified the design allowable for A500 Steel. However, the Code allowable was materially reduced because it was discovered that welding temperatures cause this cold-rolled steel to lose 17% of the strength previously allowed by the Code. Consequently, applicant should complete an analysis of whether Code safety margins have been unduly eroded because of the 17% reduction in material strength for A500 Steel used in welded pipe supports.

B Although applicant's only commitment was to the 1974 version of the ASME Code, applicant must show (pursuant to General Design Criteria 1 and 4) why it considers its pipe supports to be safe in light of a subsequent discovery that one of the 1974 Code allowables was in error.

C Applicant's compliance with applicable Code provisions is not a complete defense to an allegation that margins of safety have been unduly eroded because of an error that has been discovered in a Code allowable.

D The following technical issues are discussed: Cold-rolled steel; A500 Steel; ASME Code Case N-71-10; Margins of safety; Ratcheting, regulatory.

LBP-83-64 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL (ASLBP Nos. 78-389-03-OL, 80-429-02-SP); MODIFICATION ORDER AND OPERATING LICENSE; October 6, 1983; MEMORANDUM AND ORDER

A The Licensing Board denies a motion for reconsideration of that portion of LBP-83-53 which denied a motion by deponents to quash deposition subpoenas.

B Where an applicant's attorneys receive information subject to a protective order, both the applicant and the attorneys could be subject to "serious sanction" if any of the information were revealed by those attorneys (absent further order by the Board).

C Questions asked on deposition must be relevant to matters at issue in a proceeding. 10 C.F.R. § 2.743(b)(1).

D The Licensing Board's authority to "condition denial of [a motion to quash a subpoena] on just and reasonable terms" (10 C.F.R. § 2.720(f)(2)) permits it to allow a deponent to decline in good faith to answer questions on grounds of lack of relevance, with disagreements settled through the filing of a motion to compel further responses.

LBP-83-65 ROCKWELL INTERNATIONAL CORPORATION (Energy Systems Group Special Nuclear Materials License No. SNM-21), Docket No. 70-25 (ASLBP No. 83-488-01-ML); SPECIAL NUCLEAR MATERIALS LICENSE RENEWAL; October 7, 1983; MEMORANDUM AND ORDER

A In this Memorandum and Order the Licensing Board terminates the proceeding on the ground that none of the submissions received from prospective intervenors fulfilled the requirements for intervention by an "interested person" so as to mandate that a hearing be convened.

B In the absence of at least one submission fulfilling the requirements for intervention by interested persons so as to mandate that a hearing be convened, there is no authority to hold a hearing.

LBP-83-66 WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al. (WPPSS Nuclear Project No. 1), Docket No. 50-460-OL (ASLBP No. 82-479-06-OL); OPERATING LICENSE; October 14, 1983; MEMORANDUM AND ORDER

A The Licensing Board issues a memorandum and order admitting a number of contentions and an organizational petitioner which had been held to have standing in a prior order. Because of a hiatus in construction, anticipated to last for up to five years, and the NRC Staff's allocation of resources to the license application only on a "manpower available" basis, the proceeding is held in abeyance.

LBP-83-67 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA Research Reactor), Docket No. 50-142-OL (ASLBP No. 80-444-05-OL); OPERATING LICENSE RENEWAL; October 24, 1983; MEMORANDUM AND ORDER

A The Licensing Board rules on Staff's Motion for Reconsideration of LBP-83-25A. The Board reverses that portion of its ruling which held that sealed plutonium-beryllium neutron sources are to be considered for purposes of determining whether a formula quantity of strategic special nuclear material exists for purposes of 10 C.F.R. § 73.60. Staff's Motion is denied in all other respects.

B The republished version of a proposed amendment to Part 73 (48 Fed. Reg. 34,056 (1983)) indicates that the Commission intends that the § 73.67(b)(1)(ii) exemption for plutonium-beryllium neutron source be included in § 73.60.

LBP-83-68 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit 2) and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit 3), Docket Nos. 50-247-SP, 50-286-SP (ASLBP No. 81-466-03-SP); SPECIAL PROCEEDING; October 24, 1983; RECOMMENDATIONS TO THE COMMISSION

A In this issuance the Licensing Board reports its findings and recommendations addressing seven questions originally presented by the Commission and related contentions proffered by intervenors. The Board concludes that with the implementation of certain safety improvements recommended by it, Indian Point Units 2 and 3 may operate with reasonable assurance that the public health and safety will be protected.

B Risk estimates based on the Maximum Likelihood Principle are more realistic and less intuitive than those obtained using Bayes' Theorem.

C Risk estimates for an existing multiple-plant site are appropriately expressed as the combined risk from all units, i.e., a per-site-year rather than a per-reactor-year risk.

D In assessing societal risk, the Board recommends that the Commission consider not only expected risks, defined as the arithmetical product of probability consequences, but also the absolute value of the consequences. It may be desirable to require the expected risk value to decrease for low-probability, high-consequence accidents.

E In assessing overall societal risk from the operation of the Indian Point plants, the Commission should consider not only the expected annual risk obtained by multiplying probability per year times consequences but also the cumulative risk to the population of continued plant operation.

F It appears that filtered, vented containment systems and separate containment systems are costly and ineffective safety measures at present.

G The fears that emergency workers will not respond to a radiological emergency and that the general public will not comply with instructions are unwarranted provided proper training and improved planning can be implemented.

H The evidence in support of the predistribution of potassium iodide to the public does not outweigh the medical risk of its possible misuse. Potassium iodide should be stockpiled for use by emergency workers and persons who cannot be evacuated.

I Because so few comprehensive probabilistic risk assessments have been made to date, and because those probabilistic risk assessments that have been made lack comparability, there does not exist a body of statistics upon which dependable risk comparisons of different plants can be based.

LBP-83-69 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446, OPERATING LICENSE, October 25, 1983, MEMORANDUM AND ORDER

A In this Memorandum and Order, the Licensing Board reconsiders its decision (LBP-83-60, 18 NRC 672 (1983)) to require filings on Emergency Planning and decides that it should abandon its interest because the matter was not of sufficient safety importance to become a sua sponte issue.

B Although a Board may make preliminary inquiries to determine whether or not to pursue an issue sua sponte, preliminary inquiries should not substantially burden the parties. In order to impose substantial burdens, a Board must first declare a sua sponte issue.

C Even though the Board has declared that a party has defaulted by not filing findings on portions of an admitted issue, the Board may continue to pursue those portions of issues in order to compile a reasonably complete record. If the Board decides to pursue those portions of issues, it may permit the defaulted party to assist it by participating in questions the Board pursues.

D The following technical issues are discussed: Quality assurance (intimidation of inspectors); Quality assurance (pranks played on inspectors); Plug welds; Downhill welding.

LBP-83-70 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL (ASLBP Nos. 78-389-03-OL, 80-429-02-SP), MODIFICATION ORDER AND OPERATING LICENSE, October 28, 1983, MEMORANDUM AND ORDER

A The Licensing Board reconsiders and affirms a prior bench ruling in which it found that the attorney-client privilege is available to protect the substance of a meeting which was attended by one attorney and officers of two corporations with certain shared interests in acquisition of an NRC operating license for the Midland plant.

B To claim the attorney-client privilege, it must be shown that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom a communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) legal assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort, and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

C The attorney-client privilege was not waived by presence of third persons at a meeting between client and attorney, where the situation involved representatives of two joint clients seeking advice from the attorney of one such client about common legal problems.

D Protection of the attorney-client privilege was not waived as to the substance of a certain meeting by revelation of the date of the meeting, its attendees, its purpose and its broad general subject matter.

E The attorney-client privilege is available to protect communications made at a meeting the primary purpose of which was the receipt of legal advice, even if some commonly known factual matters were included in the discussion, or incidental non-legal advice was exchanged.

F The Licensing Board will not infer that advice provided by an attorney at a certain meeting with his client was of a non-legal (hence, unprivileged) nature where: (1) an affidavit by the client states that the purpose of the meeting was the receipt of legal advice, and (2) no showing is made which would provide a basis to infer that the attorney would have been or was consulted in any role other than that of legal advisor.

G Where legal advice is sought from an attorney in good faith by one who is or is seeking to become a client, the fact that the attorney is not subsequently retained in no way affects the privileged nature of the communications between them.

LBP-83-71 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. STN 50-483-OL (ASLBP No. 81-449-01-OL), OPERATING LICENSE, October 31, 1983, INITIAL DECISION

A In this Initial Decision the Licensing Board resolves all remaining matters in controversy in favor of Applicant, and authorizes the Director of Nuclear Reactor Regulation, upon making the requisite findings with respect to matters not resolved in either the Board's Partial Initial De-

cision of December 13, 1982 (LBP-82-109, 16 NRC 1826) or this Initial Decision, to issue to Applicant a license to operate Callaway Plant, Unit 1.

B No specific federal regulatory requirement exists for the distribution of KI to any particular group of individuals: the matter is left to state and local officials to determine. Federal Emergency Management Agency guidelines provide that each state has a responsibility for formulating guidance to define if and when potassium iodide is to be distributed for use as a thyroid blocking agent for emergency workers, institutionalized persons, and the general public.

C It is not a governmental requirement that emergency response plans formulate protective actions for every conceivable development during a radiological release. Where the state has exercised its responsibility reasonably deciding against the distribution of KI for use by members of the public, that action meets current federal guidelines.

LBP-83-72 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3, EMERGENCY PLANNING, November 1, 1983, MEMORANDUM AND ORDER

A Licensing Board sustains FEMA's claim of "executive privilege" protection from compelled production of certain documents created by that agency, while granting motion to compel as to certain factual portions of the documents.

B Claim for protection of "executive privilege" for certain Federal Emergency Management Agency (FEMA) documents was not properly invoked where it: (1) was not asserted by the head of the agency; (2) did not specifically describe the documents sought to be withheld; (3) did not state precise reasons for preserving confidentiality as to the specific documents; and (4) was not accompanied by the documents themselves, under seal, for possible in camera inspection by the Board. *United States v. Capital Service, Inc.*, 89 F.R.D. 578 (E.D. Wis. 1981). However, FEMA was given a fifteen-day extension of time to properly assert the privilege.

C Regardless of whether certain documents created by FEMA for internal use can be characterized as "policy formulation," where the documents consist of advisory opinions, recommendations or deliberations in the agency's decision-making process they are entitled to "executive privilege" protection from compelled production pursuant to discovery request.

D Where Federal Emergency Management Agency (FEMA) claims protection of "executive privilege" for certain of its documents because their disclosure would have a "chilling effect" on the Agency's decision-making process, the available privilege is a qualified one subject to balancing of FEMA's need for the privilege against the requesting party's need for the documents. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982).

LBP-83-73 ROCHESTER GAS & ELECTRIC CORPORATION (R.E. Ginna Nuclear Plant, Unit 1), Docket No. 50-244-OLA (ASLBP No. 79-427-07-OLA), OPERATING LICENSE AMENDMENT, November 7, 1983, MEMORANDUM AND ORDER

A The Licensing Board determines that a further notice of opportunity for intervention should be issued to supersede one issued over ten years before in this proceeding which had been held in abeyance pending a lengthy NRC Staff review mostly conducted under the Systematic Evaluation Program. The Board further denies Intervenor's requests for sanctions against Applicant and NRC Staff, and a reimbursement of Intervenor's future expenses, which he based upon not being notified in advance of certain Applicant-Staff technical meetings.

B Under the authority of *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-87 (1979) and ALAB-539, 9 NRC 422 (1979), a proceeding held in abeyance pending a lengthy Staff review must be renoticed where the original notice of an opportunity for hearing had been issued over ten years before.

C In the absence of any willful violations of Applicant's or Staff's obligations to the Licensing Board or Intervenor with regard to giving advance notice of Applicant-Staff technical meetings and transmitting relevant documents, no sanctions will be imposed.

D The Commission lacks the legal authority to provide financial assistance to intervenors, having been barred from doing so in successive appropriations acts. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 (1980), Pub. L. 97-88, § 502 (Dec. 4, 1981), Pub. L. 97-377, § 512(f) (Dec. 21, 1981).

LBP-83-74 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, November 10, 1983; MEMORANDUM AND ORDER

A The Licensing Board examines filings submitted in response to a Board decision reopening the record to receive written evidence on two quality assurance allegations. The Board concludes that the new filings place the Board's concerns in perspective and persuade it that: (1) L.K. Comstock did not have a pervasive practice of using uncertified quality assurance inspectors, and (2) that although the frequency of meeting of the applicant's Quality Assurance Advisory Committee did not fulfill applicant's own internal guidelines, this deficiency does not cast serious doubt on the adequacy of applicant's quality assurance program.

B Applicant must meet each of its quality assurance commitments, even if some of the elements of its program might initially have been "add-ons" that were not required by the regulations.

C The record on quality assurance may not be held open because a party hopes to be able to obtain witnesses in the future.

D The following technical issue is discussed: Quality Assurance (Inspector Certification).

LBP-83-75 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, November 15, 1983; MEMORANDUM

A After making preliminary inquiries, the Licensing Board decides not to raise sua sponte the question of whether or not reactor operators are adequately trained to discriminate between reactor failures and different kinds of instrument failures. The Board is satisfied that measures presently applied to operator training by the applicant are satisfactory to avoid substantial safety problems at this time and that high-priority research programs are under way in order to improve the operator's ability to discriminate reactor failures from instrument failures.

B When applicant's and staff's filings persuade the Board that it was not justified in its preliminary concerns about a possible serious safety issue, the Board should dismiss its own concern and not declare a sua sponte issue.

LBP-83-75A TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446, OPERATING LICENSE, November 25, 1983; SPECIAL PREHEARING CONFERENCE ORDER

A The Licensing Board declines to admit a late-filed contention on hot functional testing because: (1) the five criteria for late-filing, on balance, are not satisfied, and (2) the contention is not concrete or litigable because it fails to specify any safety problem related to the hot functional testing program that is the focus of the contention.

B Even though four of the five criteria for late-filing were satisfied, a late contention shall not be admitted if it is so poorly organized that its consideration in the proceeding would cause undue delay.

C A contention about hot functional testing is not admissible merely because it lists dozens of items omitted from the plant's system during testing and dozens of other items found to be problems during the test. These omissions and problems were known to and documented by the applicant. Merely listing these items does not give rise to any safety issue concerning the plant. Hence, the list, unsupported by any basis for believing a safety problem exists, does not establish the basis for a contention.

LBP-83-76 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (ASLBP No. 83-491-04-OLA) (Steam Generator Repair), OPERATING LICENSE AMENDMENT, November 29, 1983; MEMORANDUM AND ORDER

A The Licensing Board issues a memorandum and order which, inter alia, rules upon the admissibility of contentions.

B There are five purposes for the basis-for-contention requirement in 10 C.F.R. § 2.714.

C The degree of specificity required involves the exercise of judgment by Licensing Boards on a case-by-case basis.

D 10 C.F.R. § 2.714 does not require the petitioner to detail the evidence which will be offered in support of the contentions. Once admitted, a contention may be the subject of a motion for summary disposition pursuant to § 2.749.

E The qualifications of those individuals who prepared documents are not proper subjects of contentions. The thrust of a contention should be directed to contesting the analyses and conclusions of those individuals.

F A contention lacks bases if it is premised upon a misunderstanding or error with respect to the details which are being contested.

G Even if a matter is under consideration as a generic issue, that matter as a subject of a contention is not precluded in a contested proceeding.

H A Licensing Board does not have jurisdiction to explore matters beyond those which are embraced by the notice of opportunity for hearing.

I If a regulation provides that, as a minimum, certain requirements must be met and those requirements have been met, a contention asserting that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations.

LBP-83-77 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL (ASLBP No. 81-457-04-OL); OPERATING LICENSE, December 2, 1983; PARTIAL INITIAL DECISION

A The Licensing Board dismisses a quality assurance contention, finding that there were no quality assurance deficiencies that seriously call into question applicant's ability to control its electrical contractor, its commitment to the quality of its plant, or the safety of any plant component.

B Appendix B to 10 C.F.R. Part 50 requires prompt resolution of quality assurance deficiencies. This standard should be interpreted as requiring reasonably prompt resolution of deficiencies.

C If a quality assurance deficiency is serious, it must be resolved immediately. On the other hand, less serious deficiencies or minor deficiencies in written procedures may be resolved "promptly" in a matter of days or months.

D Furthermore, in reviewing a very large number of deficiencies, a reasonableness standard considers the possibility that there will be some laggards in the race to resolution.

E The number of quality assurance deficiencies identified at a plant is an ambiguous measure of the program's adequacy, in the absence of other interpretive information.

F Although applicant has been found responsible for certain severity Level IV and Level V quality assurance violations, this may merely represent perturbations within an essentially sound system.

G The Board considered testimony concerning applicant's attitude and its responsiveness to adverse staff findings to be relevant.

LBP-83-78 PUGET SOUND POWER AND LIGHT COMPANY, et al. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), Docket Nos. STN 50-522, STN 50-523 (ASLBP No. 75-279-08-CP); CONSTRUCTION PERMIT WITHDRAWAL, December 13, 1983; MEMORANDUM AND ORDER

A The Licensing Board grants Applicants' motion to withdraw their application and terminate the proceedings.

LBP-83-79 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE, December 20, 1983; MEMORANDUM AND ORDER

A The Licensing Board denies intervenor's motion to reopen discovery.

B Reasonable discovery deadlines, subject to good cause for subsequent filing of discovery requests, may be established and adhered to. Delay between a deadline and a hearing is not by itself ground for generally reopening discovery.

LBP-83-80 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE, December 23, 1983; MEMORANDUM AND ORDER

A The Licensing Board admits a late-filed contention concerning the reliability of diesel generators.

B An intervenor that has demonstrated its ability to contribute to the development of the record on a particular contention need not also promise to provide expert witnesses or outline their testimony.

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- C By adopting a schedule for discovery, the Board may minimize the potential for delay of the proceeding and reduce the negative impact of this criterion for late-filing.
- LBP-83-81 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; December 28, 1983; MEMORANDUM AND ORDER
- A The Licensing Board finds that applicant has not demonstrated the existence of a system that promptly corrects design deficiencies and has not satisfactorily explained several design questions raised by the intervenor. The Board suggests the need for an independent design review and requires applicant to file a plan that may help to resolve the Board's doubts.
- B Appendix B to Part 50 of the regulations requires that there be a quality assurance system that will promptly identify and correct deficiencies in the design of the plant. Applicant may not delay design review until the plant is nearly complete and claim that it is thereby complying with this regulatory requirement.
- C The Board issues criteria for an independent design review that would satisfy it, including specifications governing the independence and qualifications of the review group, rules assuring organizational independence during the review, reliability measures for the review, sampling concerns, the scope of the review (including in-depth consideration of each of the intervenor's concerns), methods of documenting and presenting findings, provisions for review of findings and provisions for hearings concerning the findings.
- D Allegations should be responded to in a reasoned manner. General assurances by experts, even if the experts be better qualified, are not satisfactory responses to detailed engineering arguments by a qualified engineer.
- E A statement by an engineer that a matter need not be considered because of unexplained and otherwise unsupported "engineering judgment" is an unsatisfactory explanation in response to an engineering argument.
- F Unless the Board has required that arguments be previously filed or disclosed, there is no prohibition restricting a party from making new arguments in findings of fact.
- G Because of the potential expense of complying with an order suggesting the need for an independent design review, the Board expressed a willingness to refer its decision to the Appeal Board. It also established a deadline for motions for reconsideration.
- H The following technical issues are discussed: U-bolts in pipe supports, cinching down; SA-307 steel in friction connections; U-bolts, local stresses on pipes; Pipe support stability; Stability of pipe supports; American Welding Society Code, applicability to nuclear plant; AWS Code, applicability to nuclear plant; Free-end displacement, pipes and pipe supports; Thermal stresses in pipe supports; U-bolts, failure from overtorquing; Torquing of U-bolts; Over-tensioning of U-bolts, adequacy of field inspection; Field inspection of U-bolt tensioning; Stiff pipe supports; Beta factor for tube-to-tube welds; Recapping of welds; Engineering error, significance of; Calculation error, significance of; Concrete stresses, allowable; LOCA forces on upper lateral restraint beam; Wall-to-wall supports, expansion stresses; Slab-to-wall supports, expansion stresses; Floor-to-ceiling supports, expansion stresses; Expansion stresses, pipe supports; Richmond inserts, Axial torsion, Richmond inserts; Quality assurance, organizational interfaces.

## DIGESTS

### ISSUANCES OF DIRECTORS' DECISIONS

- DD-83-11 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; OPERATING LICENSE; August 19, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Inspection and Enforcement denies a petition pursuant to 10 C.F.R. § 2.206 which requested that the licensees produce certain design documents or, in the alternative, show cause why they should not be found in violation of NRC regulations if the documents are not in their possession.
- B A petition is not properly brought under 10 C.F.R. § 2.206 which requests the Director to grant relief which is within the power of the presiding officer in an NRC adjudicatory proceeding to grant.
- C NRC regulations do not require licensees to maintain all quality assurance documentation pertaining to facility design within their immediate possession. Licensees may delegate the establishment and execution of its quality assurance program to contractors and other agents but the licensee retains responsibility for the quality assurance program.
- DD-83-12 SHIPMENTS OF HIGH-LEVEL NUCLEAR POWER PLANT WASTE THROUGH AND TO ILLINOIS; TRANSPORTATION OF RADIOACTIVE MATERIALS, September 13, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Material Safety and Safeguards denies a request from Edward Gogol to postpone all shipments of high-level waste through and to Illinois and to hold a series of public hearings on the radioactive waste shipments.
- B The transportation of radioactive materials, including the transport of irradiated reactor fuel, is governed by a comprehensive set of regulations established by both the NRC and the Department of Transportation.
- DD-83-13 WISCONSIN ELECTRIC POWER COMPANY (Point Beach Nuclear Plant, Units 1 and 2), Docket Nos. 50-266, 50-301; OPERATING LICENSE; September 23, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Inspection and Enforcement denies a petition submitted by Wisconsin's Environmental Decade requesting issuance of an order to the Wisconsin Electric Power Company to show cause why the operating license for the Point Beach Nuclear Plant should not be modified, suspended, or revoked due to serious deterioration of operator performance at the facility.
- DD-83-14 COMMONWEALTH EDISON COMPANY, NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, and WISCONSIN ELECTRIC POWER COMPANY (Shipment of Irradiated Nuclear Fuel from West Valley, N.Y.), Docket Nos. 50-10, 50-237, 50-249, 50-201, 50-266, 50-301; SPENT FUEL TRANSPORTATION, September 30, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Material Safety and Safeguards denies petitions by Marvin Resnikoff, on behalf of the Sierra Club, and the State of Ohio, through its Attorney General, requesting that, among other actions, the Commission stay the transport of irradiated nuclear fuel from the Western New York Nuclear Service Center in West Valley, New York to the Point Beach and Dresden power reactor sites. The decision also forms the basis for the unpublished October 28, 1983 denial of the petition of Fred Millar, on behalf of the Environmental Policy Institute.
- B Authority of NRC licensees to deliver spent fuel to a carrier for transport is provided by 10 C.F.R. § 71.72, which provides a general license to any licensee of the Commission to transport or deliver to a carrier for transport certain radioactive material, including irradiated reactor fuel in packages for which a Certificate of Compliance has been issued by the NRC.



**DIGESTS**  
**ISSUANCES OF DIRECTORS' DECISIONS**

- C The operating licenses of reactor licensees, pursuant to the Atomic Energy Act and 10 C.F.R. §§ 30.34 and 70.41, authorize possession of such byproduct and special nuclear material as may be produced by the operation of their facilities, including the receipt of byproduct and special nuclear material originated at their facilities.
- D To the extent that the petitioners' concern as to the routes selected for transport of the spent fuel arises from questions of highway safety, that concern is within the jurisdiction of the Department of Transportation.
- E The Commission is taking no major federal action significantly affecting the quality of the human environment such that preparation of an environmental impact statement is required.
- F Questions of physical security concerning movement of spent fuel are within the jurisdiction of the Nuclear Regulatory Commission.
- G The Safety Analysis Reports for the Point Beach and Dresden facilities covered the proper functioning of fuel handling equipment and spent fuel movement, including the possibilities of malfunction and a fuel drop accident. The Commission's regulations at 10 C.F.R. § 50.59 permit licensees to change procedures described in the safety evaluation report unless the change involves a change in the technical specifications of the license or on an unreviewed safety question. The actions involved in the receipt of spent fuel, and the potential accidents and consequences, are similar to those involved in the packaging and loading of spent fuel for transport away from a reactor. Since these actions, potential accidents and consequences have been evaluated, there is no need for a new safety evaluation to address the receipt of spent fuel at the reactor site.
- DD-83-15 MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Station), Docket No. 50-309; EMERGENCY PLANNING; September 30, 1983; INTERIM DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Inspection and Enforcement grants in part, denies in part and defers in part, a petition submitted by David Santee Miller on behalf of Sensible Maine Power and others requesting that the Commission take action to ensure correction of emergency planning deficiencies identified by the Federal Emergency Management Agency and evaluate the adequacy of State Route 27 as an evacuation route. Pending the resolution of these matters, the petitioners had requested that the NRC institute proceedings to discontinue operation of the Maine Yankee Atomic Power Station.
- B The Federal Emergency Management Agency is responsible for evaluating the status of offsite emergency preparedness for nuclear power plants, including the adequacy of evacuation routes that may be used in taking protective measures during an emergency.
- C The Commission has adopted a graduated approach to emergency planning in which evacuation is only one of several possible responses to an emergency.
- DD-83-16 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330; MODIFICATION ORDER AND OPERATING LICENSE; October 6, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206
- A The Director of the Office of Inspection and Enforcement grants in part and denies in part, a petition submitted by Billie Pirner Garde of the Government Accountability Project, on behalf of the Lone Tree Council and others, requesting that the NRC take action with regard to the Midland project.
- DD-83-17 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440; ENFORCEMENT ACTION; November 15, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A In response to a request by the Ohio Citizens for Responsible Energy that substantial enforcement action be taken against Cleveland Electric Illuminating Company for material false statements made during the licensing review for the Perry Nuclear Power Plant, the Director of Inspection and Enforcement concluded that a material false statement had been made but that, given the severity level of the violation, the appropriate sanction was a Notice of Violation.

**DIGESTS**  
**ISSUANCES OF DIRECTORS' DECISIONS**

- DD-83-18 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289, 50-320; REQUEST FOR ACTION; November 18, 1983; INTERIM DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Reactor Regulation denies a petition by Randy King, on behalf of the Three Mile Island Public Interest Resource Center and others to the extent that the petitioners' request sought to have the NRC prohibit the licensee from conducting a load test of the TMI Unit 2 polar crane or otherwise qualifying the crane for use.
- DD-83-19 CINCINNATI GAS AND ELECTRIC COMPANY (William H. Zimmer Nuclear Power Station), Docket No. 50-358; ENFORCEMENT ACTION; December 16, 1983; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Inspection and Enforcement denies a petition submitted by Thomas Devine of the Government Accountability Project, on behalf of the Miami Valley Power Project, requesting that the Commission take certain actions with respect to the William H. Zimmer Nuclear Power Station.

**DIGESTS**  
**ISSUANCES OF DENIALS OF PETITIONS FOR RULEMAKING**

DPRM-83-3 STATES OF TEXAS, WISCONSIN, MINNESOTA, NEVADA, AND UTAH, Docket No. PUM-60-1, RULEMAKING, December 9, 1983, DENIAL OF PETITION FOR RULEMAKING

- A** The Commission denies a petition for rulemaking by several States who proposed that the NRC adopt certain formal procedures for Commission concurrence in siting guidelines proposed by the Department of Energy for high-level radioactive waste repositories. The Commission finds that the proposed procedures are not required by the Administrative Procedure Act or the Nuclear Waste Policy Act of 1982 and that petitioners' concerns are addressed adequately by the opportunity to publicly address the Commission on DOE's siting guidelines.
- B** Neither the Nuclear Waste Policy Act nor the Administrative Procedure Act requires the Commission to adopt any particular procedures in determining whether to concur in DOE's siting guidelines.
- C** Nothing in the Nuclear Waste Policy Act suggests that States have a special role in the NRC concurrence process that would mandate the use of formal procedures.
- D** NRC concurrence in DOE siting guidelines is not rulemaking under the Administrative Procedure Act.
- E** Under the Nuclear Waste Policy Act, DOE must obtain NRC concurrence in any proposed amendments to the DOE siting guidelines.

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