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PRACTICE AND PROCEDURE DIGEST**

**Commission, Appeal Board and Licensing Board Decisions
July 1972 - March 1991**

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U.S. Nuclear Regulatory Commission
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UNITED STATES NUCLEAR REGULATORY COMMISSION

STAFF PRACTICE AND PROCEDURE DIGEST

(The January, 1992 Update includes Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through March 31, 1991.)

NOTE TO USERS

On June 27, 1991, the Commission completed final rulemaking which involved major changes in the structure and procedures of the Commission's adjudicatory hearing system. In light of its decision to abolish the Atomic Safety and Licensing Appeal Panel, the Commission issued a final rule which provides for direct discretionary appellate review by the Commission of all appeals (and other appellate and related matters) from initial decisions of presiding officers in all formal and informal adjudicatory proceedings. 56 Fed. Reg. 29403 (June 27, 1991).

Effective July 29, 1991, a petition for review of an initial adjudicatory decision must be filed with the Commission, which will exercise its discretion whether to take review of the initial decision.

All matters pending before the Appeal Boards on June 27, 1991 will be decided by the Appeal Boards under the regulations in effect prior to October 24, 1990.

Initial adjudicatory decisions issued prior to the July 29, 1991 effective date of the final rule will be reviewed by the Commission, acting in place of the Appeal Boards, under the regulations in effect prior to October 24, 1990.

In the notice of proposed rulemaking, the Commission stated that it "does not intend to abrogate the existing body of appeal board case law and begin writing on a clean slate." 55 Fed. Reg. 42947 (October 24, 1990). Existing appeal board precedent, to the extent it is consistent with any future changes in the Rules of Practice, "may still be cited and relied upon, and will be modified only on a case-by-case basis as issues arise...." Id.

KRC STAFF PRACTICE AND PROCEDURE DIGEST

UPDATE, JANUARY 1992

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PREFACE

This Revision 1 of the sixth edition of the NRC Staff Practice and Procedure Digest contains a digest of a number of Commission, Atomic Safety and Licensing Appeal Board, and Atomic Safety and Licensing Board decisions issued during the period from July 1, 1972 to March 31, 1991 interpreting the NRC's Rules of Practice in 10 CFR Part 2. This Revision 1 replaces in part earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules of Practice effective through March 31, 1991.

The Practice and Procedure Digest was originally prepared by attorneys in the NRC's Office of the Executive Legal Director (now, Office of the General Counsel) as an internal research tool. Because of its proven usefulness to those attorneys, it was decided that it might also prove useful to members of the public. Accordingly, the decision was made to publish the Digest and subsequent editions thereof. This edition of the Digest was prepared by attorneys from Aspen Systems Corporation pursuant to Contract number 18-91-336.

Persons using this Digest are placed on notice that it may not be used as an authoritative citation in support of any position before the Commission or any of its adjudicatory tribunals. Persons using this Digest are also placed on notice that it is intended for use only as an initial research tool, that it may, and likely does, contain errors, including errors in analysis and interpretation of decisions, and that the user should not rely on the Digest analyses and interpretations but must read, analyze and rely on the user's own analysis of the actual Commission, Appeal Board and Licensing Board decisions cited. Further, neither the United States, the Nuclear Regulatory Commission, Aspen Systems Corporation, nor any of their employees makes any expressed or implied warranty or assumes liability or responsibility for the accuracy, completeness or usefulness of any material presented in the Digest.

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

This edition of the Digest will be updated in the future. The updates will be prepared in the form of replacement pages.

We hope that the Digest will prove to be as useful to the members of the public as it has been to the members of the Office of the General Counsel. We would appreciate from the users of the Digest any comments or suggestions which would serve to improve its usefulness.

Office of the General Counsel
U.S. Nuclear Regulatory Commission

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There is nothing in 10 CFR § 2.714 or the case law interpreting that rule which permits Licensing Boards to exclude certain groups because of their opinions on nuclear power, either generally or as related to specific plants, nor is there a Commission rule prescribing the conduct of any party (other than licensees or others subject to its regulatory jurisdictions) outside adjudicatory proceedings. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 31, 32 (1982).

The testimony of experts sponsored by petitioner may make a valuable contribution to the record, but the merits of that testimony need not be decided in order to admit a petitioner as a party. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2029 (1982).

In past operating license cases, petitions to intervene were sometimes considered and ruled upon by an ASLB especially appointed for that purpose, and a separate ASLB conducted separate proceedings if intervention were permitted. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). In construction permit cases, a single ASLB usually performed both tasks. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 n.2 (1973).

In ruling on a petition to intervene, the Licensing Board must consider, *inter alia*, the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any Order which may be entered in the proceeding on the petitioner's interests. 10 CFR § 2.714(d); Washington Public Power Supply System (WPPSS Nuclear Project: No. 3 and No. 5), LBP-77-16, 5 NRC 650 (1977). These standards also apply to a petition to intervene in a materials licensing proceeding. Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 164, 166 (1991), *citing*, 10 CFR § 2.1205(g).

An intervention petition must, under 10 CFR § 2.714(a)(2), set forth with particularity certain factors regarding the petitioner's interest in the proceeding and address the criteria set forth in 10 CFR § 2.714(d). Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

A petition for leave to intervene must 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 CFR § 2.714(a)(2); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 88, 89, 90 (1990). The burden is on the petitioner to satisfy these requirements. 10 CFR § 2.732, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34 (1987). A petition to intervene in a materials licensing proceeding must satisfy similar requirements. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d).

Petitioners for intervention are required by Commission regulations to set forth in their petitions their interest in the proceeding, how that interest might be affected by the result of the proceeding, the reasons why they should be permitted to intervene, and the specific aspects of the subject matter as to which intervention is sought. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431 (1982), citing, 10 CFR § 2.714(a)(2). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

The ASLB must make specific determinations as to whether the petition is proper and meets the requirements for intervention and must articulate in reasonable detail the basis for its determination. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-105, 6 AEC 181 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 (1973). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 722 (1989) (rulings on intervention petitions should be in writing), *aff'd*, CLI-90-5, 31 NRC 337, 341 (1990).

Assuming that the requisite personal interest of the intervenor is shown, if the ASLB determines that there is present at least one contention which meets applicable requirements, intervention will be permitted. The ASLB has no duty to consider additional contentions for the purpose of determining whether intervention should be permitted. Mississippi Power & Light Co., ALAB-130, *supra*, 6 AEC at 424; Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

Although 10 CFR § 2.714 has been amended with regard to the time for filing contentions, the "one good contention" rule remains. 10 CFR § 2.714(b). Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 571 (1980).

10 CFR § 2.714 now permits the amendment of petitions to intervene and contentions up to 15 days prior to the first prehearing conference. The presiding board may, of course, set a different time period pursuant to 10 CFR § 2.711. General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983). A petitioner has an unlimited right to amend its intervention petition until 15 days prior to the first prehearing conference. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 52 NRC 89, 91, 93 (1990), citing, 10 CFR § 2.714(a)(3).

A petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1432 (1982), citing, 10 CFR § 2.714(a)(2). Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

Pro se petitioners will be held to less rigid standards of clarity and precision with regard to the petition to intervene. Nevertheless, a totally deficient petition will be rejected. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973).

In NRC proceedings in which a hearing is not mandatory but depends upon the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon the intervention petition. If the petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978). See also Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981), citing, Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977).

Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission is authorized to establish reasonable regulations on procedural matters like the filing of petitions to intervene and on the proffering of

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contentions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983), citing, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Easton Utilities Commission v. AEC, 424 F.2d 847 (D.C. Cir. 1970).

The identity of specific individual members of a petitioner organization whose interests are being represented by that organization is not viewed as an integral and material portion of the petition to intervene. Any change in membership, therefore, does not require an amendment of the petition. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

While it is true that a petitioning organization must disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979), there is no requirement that the identification of such a member or members be made in the petition to intervene or in an attached affidavit. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

The provision in original 10 CFR § 2.714(a), that a petition to intervene be accompanied by a supporting affidavit setting forth the facts pertaining to the petitioner's interest, was abolished effective May 26, 1978. 43 Fed. Reg. 17,798 (1978). Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

Once a member has been identified sufficiently to afford verification by the other parties and the petition to intervene has been granted, it is presumed that the organizational petitioner continues to represent individual members with standing to intervene who authorize the intervention. It is doubtful that the death or relocation outside the geographical zone of interest of the only named members upon whom standing was based would defeat this presumption and require a further showing of standing. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

2.9.3.1 Pleading Requirements

Under 10 CFR § 2.714, a petition to intervene must:

- (1) be in writing;
- (2) identify the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene;

- (3) set forth with particularity the interest of the petitioner in the matter, the manner in which that interest may be affected by the proceeding, and the reasons why the petitioner should be permitted to intervene with particular reference to the petitioner's right to be made a party under the Atomic Energy Act, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any order entered in the proceeding on petitioner's interest.

In addition, prior to the first prehearing conference, the petitioner must file a supplement to his petition to intervene which sets forth the contentions the petitioner seeks to have litigated and the basis for each contention set forth with reasonable specificity. 10 CFR § 2.714(b). Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982). Where a contention is made up of a general allegation which, standing alone, would not be admissible under 10 CFR § 2.714(b), plus one or more alleged bases for the contention set forth with reasonable specificity, the matters in controversy raised by each such contention are limited in scope to the specific alleged basis or bases set forth in the contention. Clinton, *supra*, 14 NRC at 1737.

Under 10 CFR § 2.714 and 10 CFR § 2.714(b) an intervention petition must not only set forth with particularity the interest of the petitioner and how that interest may be affected by the proceeding, but must also include the bases for each contention, sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986).

In general, these elements have been construed as requiring the petitioner to show:

- (a) that he has a personal interest in the matter (e.g., residence in proximity to the reactor - see Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188 (1973);
- (b) how that interest may be adversely affected;
- (c) the specific contentions as to which the petitioner desires to participate.

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Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973); Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia Circuit upheld various aspects of 10 CFR § 2.714, including the requirement that contentions be specified, and the requirement that the basis for contentions be set forth.

Section 189a of the Atomic Energy Act does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem without regard to the scope of the enforcement action actually proposed or taken. In order to be granted leave to intervene, one must demonstrate an interest affected by the action, as required by 10 CFR § 2.714. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), citing, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

Petitions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity. In contrast, Licensing Boards are to be lenient in this respect for petitions drawn pro se or by counsel new to the field or to the bar. Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975). For a more recent case acknowledging that a pro se petitioner for intervention should not be held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere in the petition to intervene, see Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 82 (1978).

Although a totally deficient pleading may not be justified on the basis that it was prepared without the assistance of counsel, a pro se petitioner is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), cited in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982).

A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, his contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

A petition to intervene which seeks to raise antitrust contentions must comply with the requirements of 10 CFR § 2.714 and must also set forth with particularity:

- (1) facts which describe a situation inconsistent with the antitrust laws or their underlying policies;
- (2) facts which describe the existence of a meaningful nexus between the activities under the nuclear license and the aforementioned anticompetitive "situation";
- (3) the specific relief sought, including whether, how and to what extent any license conditions imposed by the attorney general fail to provide the requested relief.

Wolf Creek, ALAB-279, supra; see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

Petitions to intervene must initially specify the "aspect or aspects" of the subject matter of the proceeding as to which the petitioner wishes to intervene. An "aspect" is broader than a "contention" but narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 278 (1978). A Board lacks jurisdiction to consider an intervention petition in which the aspect of the proposed intervention is not within the scope of the proceeding. Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986). Until the petitioner files a list of contentions, the publication in the Federal Register of a notice of opportunity for a hearing on proposed operating license amendments may serve to sufficiently specify the aspects as to which the petitioner wishes to intervene. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 159 (1991).

Under 10 CFR § 2.714 it is no longer necessary for petitioners for intervention to advance at least one viable contention when initially filing a petition to intervene. The petition may later be supplemented to include contentions. There is no single date when the petition must be supplemented. Pursuant to 10 CFR § 2.714(b), the supplement may be submitted without leave of the presiding officer 15 days prior to the special prehearing conference or, if none is held, the first prehearing conference. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 74 (1978).

Where an original notice of hearing is overly narrowly drawn, a requirement that those who subsequently seek to intervene state that they did not intervene before because of limitations in the original notice was not an abuse of discretion.

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Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

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

2.9.3.2 Defects in Pleadings

Although the requirements of 10 CFR § 2.714 must ultimately be met, the Appeal Panel has made it clear that every benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural pleading defects. As such, petitioners will usually be permitted to amend petitions containing curable defects. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631 (1973). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991). A Licensing Board itself has no duty to recast contentions offered by a petitioner to make them acceptable under the regulations. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1660 (1982). Refusal to do so cannot constitute error. Seabrook, *supra*, citing, Zion, *supra*.

Intervention petitions and requests for hearing cannot properly raise antitrust issues and health and safety issues in the same proceedings. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

2.9.3.3 Time Limits/Late Petitions

The Commission's regulations at 10 CFR § 2.714(a)(1) provide that nontimely filings of petitions to participate as a party will not be entertained absent a determination that the petition should be granted based upon a balancing of five factors. (See 2.9.3.3.3 for five factors). Out of the five factors enumerated in 10 CFR § 2.714(a), the factors involving the availability of other means to protect petitioner's interest and the ability of other parties to represent petitioner's interest are entitled to less weight than the other three. (See 2.9.3.3.3). Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1381, 1384 (1982); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984), citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).

Regarding a Petition to intervene, some weight may be attached to the fact that lateness, though not justified, is not extreme. It is permissible to consider the fact that a petition was filed only two months late if the start of the proceeding will not be substantially delayed. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, Duke Power Co. (Amendment to Materials License SNM - 1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

If the lateness of a Petition to intervene is not egregious, and will not cause substantial delay to the parties, those considerations will outweigh the fact that the balance of the five factors required under 10 CFR § 2.714(a)(1) tips slightly against the petitioner. Skagit/Hanford, supra, 16 NRC at 985.

The exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), it must be viewed in conjunction with the equally important policy favoring the observance of established time limits. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983).

2.9.3.3.1 Time for Filing Intervention Petitions

Petitions to intervene or requests for hearing must be filed not later than the time specified in the notice for hearing or as provided by the Commission, the presiding officer or the Licensing Board designated to rule on petitions and/or requests for hearing, or as provided in 10 CFR § 2.102(d)(3) (with regard to antitrust matters); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983).

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

2.9.3.3.2 Sufficiency of Notice of Time Limits on Intervention

Although the Appeal Board has stated that it would leave open the question as to whether Federal Register notice without more is adequate to put a potential intervenor on notice for filing intervention petitions, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), the Board tacitly assumed that

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such notice was sufficient in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976) (claims by petitioner that there was a "press blackout" and that he was unaware of Commission rules requiring timely intervention will not excuse untimely petition for leave to intervene).

2.9.3.3.3 Consideration of Untimely Petitions to Intervene

Section 10 CFR 2.714(a) provides that nontimely petitions to intervene or requests for hearing will not be considered absent a determination that the petition or request should be granted based upon a balancing of the following factors:

- (1) good cause, if any, for failure to file on time;
- (2) the availability of other means for protecting the petitioner's interests;
- (3) the extent to which petitioner's participation might reasonably assist in developing a sound record;
- (4) the extent to which the petitioner's interest will be represented by existing parties; and
- (5) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1429 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.3 (1983), citing, 10 CFR § 2.714(a)(1); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1170 n.3 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 883 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1643-1644 (1984); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.3 (1985), affirmed, ALAB-816, 22 NRC 461 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 278 n.6 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 76 (1990).

This consideration must be weighed against the petitioner's strong interest in the proceeding under 10 CFR § 2.714(d). Skagit/Hanford, supra, 16 NRC at 984.

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 CFR § 2.714(a)(1), the following factors set forth in 10 CFR § 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; and (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983).

The burden of proof is on the petitioner. Thus, a person who files an untimely intervention petition must affirmatively address the five lateness factors in his petition, regardless of whether any other parties in the proceeding raise the tardiness issue. Even if the other parties waive the tardiness of the petition, a Board, on its own initiative, will review the petition and weigh the five lateness factors. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

A late petitioner who fails to address the five lateness factors in his petition does not have a right to a second opportunity to make a substantial showing on the lateness factors. However, a Board, as a matter of discretion, may give a late petitioner such an opportunity. Pilgrim, supra, 22 NRC at 468.

A late petitioner's obligation to affirmatively address the five lateness factors is not affected by the extent of the tardiness. However, the length of the delay, whether measured in days or years, may influence a Board's assessment of the lateness factors. Pilgrim, supra, ALAB-816, 22 NRC at 468 n.27.

Amendments to Section 2.714 make it clear that a showing of good cause for the untimeliness of a petition is only one factor to be considered and balanced. Prior to these amendments, the "good cause" factor was given special treatment, although a showing of good cause would not relieve a Licensing Board of its obligation to consider the other factors. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460 (1977); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199 (1982); Arizona Public Service Co. (Palo Verde

Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2026 (1982). In addition, it has been held that even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined, Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975), although the burden of justifying intervention on the basis of the other factors is considered to be greater when the petitioner fails to show good cause. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 1 NRC 395, 398 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986).

Absent a showing of good cause for a very late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. 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-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764 (1982), citing, Grand Gulf, supra, 16 NRC at 1730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1645 (1984).

A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late-filed intervention petition. The additional four factors specified under 10 CFR § 2.714(a) must also be considered. However, where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 CFR § 2.714(a) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

The five factors listed in 10 CFR § 2.714(a) are to be considered in determining whether to allow late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 213-214 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989). Newly acquired standing by moving to the vicinity of a plant is not alone enough to justify belated intervention. Nor does being

articulate show a contribution can be made in developing the record. Other parties having the same interest weigh against allowing late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241 (1980).

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

The burden of showing good cause is on the late petitioner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

The Appeal Board has held that whether there is "good cause" for a late filing depends entirely upon the substantiality of the reasons assigned for not having filed at an earlier date. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-64?, 13 NRC 881, 887 n.5 (1981).

Although a concrete definition as to what constitutes "good cause" has not been established, certain excuses for delay have been held to be insufficient to justify late filing. For example, in Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330 (1974), aff'd, ALAB-238, 8 AEC 656 (1974), it was held that neither the fact that the corporate citizens' group seeking to intervene was not chartered prior to the cutoff date for filing, nor the fact that the applicant changed its application by dropping one of the two units it intended to build, gave good cause for late filing. Similarly, claims by a petitioner that there was a "press blackout" and that he was unaware of the Commission's rules requiring timely intervention will not excuse an untimely petition for leave to intervene. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), nor will failure to read the Federal Register. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), citing, New England Power and Light Co. (NEP Units 1

and 2), LBP-78-18, 7 NRC 932, 933-934 (1973); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990). The showing of good cause is required even though a petitioner seeks to substitute itself for another party. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause." Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980) and South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80-81 (1990). Nor does preoccupation with other matters afford a basis for excusing a nontimely petition to intervene. Poor judgment or imprudence is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. Such a consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence. On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

The Licensing Board will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117, aff'd, ALAB-743, 18 NRC 387 (1983); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990).

Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980)

Before admitting a contention based on new information, factors must be balanced such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted. However, in balancing those factors, the same weight given to each of them is not required. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

Confusing and misleading letters from the Staff to a prospective pro se petitioner for intervention, and failure of the Staff to respond in a timely fashion to certain communications from such a petitioner, constitute a strong showing of good cause for an untimely petition. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978). And where petitioner relied to its detriment on Staff's representations that no action would be immediately taken on licensee's application for renewal, elementary fairness requires that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered even after the license has been issued. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982).

A petitioner's claim that it was lulled into inaction because it relied upon the State, which later withdrew, to represent its interests does not constitute good cause for an untimely petition. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990). A petitioner who has relied upon a State participating pursuant to 10 CFR § 2.715(c) to represent her interests in a proceeding cannot rely on her dissatisfaction with the State's performance as a valid excuse for a late-filed intervention petition where no claim is made that the State undertook to represent her interests specifically, as opposed to the public interest generally. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440,

6 NRC 642 (1977). See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); Comanche Peak, supra, 28 NRC at 610 (a petitioner's previous reliance on another party to assert its interests does not by itself constitute good cause), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80 (1990). Nor will an explanation that full-time domestic and other responsibilities was the reason for filing an intervention petition almost three years late suffice. Cherokee, supra.

Just as a petitioner may not rely upon interests being represented by another party and then justify an untimely petition to intervene on the others' withdrawal, so a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify a late petition on that reliance when the other petition fails to represent those interests. A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). It must be established that petitioners were furnished erroneous information on matters of basic fact and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028.

Employees of an applicant or licensee are not exempt from the Commission's procedural rules. Thus, an employee's mere assertions of fears of retaliation from the employer do not establish good cause for late intervention. To encourage employees to raise potentially significant safety concerns or information, Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851(a), prohibits employer retaliation against any employee who commences or participates in any manner in an NRC proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 77-79 (1990).

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Nuclear Fuel Services, Inc. and New York State Atomic and Space

Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. 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-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990).

In determining how compelling a showing a petitioner must make on the other four factors, a Licensing Board need not attach the same significance to a delay of months as to a delay involving a number of years. The significance of the tardiness, whether measured in months or years, will generally depend on the posture of the proceeding at the time the petition surfaces. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 398-399 (1983).

With regard to the second factor - other means to protect petitioner's interest - the question is not whether other parties will adequately protect the interest of the petitioner, but whether there are other available means whereby the petitioner can itself protect its interest. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975).

The second factor in 10 CFR § 2.714(a) points away from allowing late intervention if the interest which the petitioner asserts can be protected by some means other than litigation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1433 (1982).

The suggestion that an organization could adequately protect its interest by submitting a limited appearance statement gives insufficient regard to the value of participational rights enjoyed by parties - including the entitlement to present evidence and to engage in cross-examination. Similarly, assertions that the organization might adequately protect its interest by making witnesses available to a successful petitioner or by transmitting information in its possession to appropriate State and local officials are without merit. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee

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Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.7 (1979).

Until the parties to a proceeding that oppose a late intervention petition suggest another forum that appears to promise a full hearing on the claims petitioner seeks to raise, a petitioner need not identify and particularize other remedies as inadequate. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 n.6 (1982).

A petition under 10 CFR § 2.206 for a show cause proceeding is not an adequate alternative means of protecting a late petitioner's interests. The Section 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial ab initio of an application for an operating license. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990).

Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervenor. WPPSS, id. By analogy, the availability of nonadjudicatory Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor two under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985). But see Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 21-22 (1986).

As to the third factor with regard to "assistance in developing the record," a late petitioner placing heavy reliance on this factor and claiming that it has substantial technical expertise in this regard should present a bill of particulars in support of such a claim. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 764 (1978). At the same time, it is not necessary that a petitioner have some specialized education, relevant experience or ability to offer qualified experts for a favorable finding on this factor to be made. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212-213 (1978).

When an intervention petitioner addresses the 10 CFR § 2.714(a)(3) criterion for late intervention requiring a showing of how its participation may reasonably be expected to assist in developing a sound record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit

1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-767, 19 NRC 984, 985 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1644 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990).

Vague assertions regarding petitioner's ability or resources are insufficient. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing, Grand Gulf, supra, 16 NRC at 1730.

It is the petitioner's ability to contribute sound evidence rather than asserted legal skills that is of significance in determining whether the petitioner would contribute to the development of a sound record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 888 (1984), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982).

The ability to contribute to the development of a sound record is an even more important factor in cases where the grant or denial of the petition will also decide whether there will be any adjudicatory hearing. There is no reason to grant an inexcusably late intervention petition unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue, but is also able to make a worthwhile contribution on it. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1190-1181 (1983). See also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

With regard to the fourth factor of 10 CFR § 2.714(a), the extent to which petitioner's interest will be represented by existing parties, the fact that a successful petitioner has advanced a contention concededly akin to that of a late petitioner does not necessarily mean that the successful

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petitioner is both willing and able to represent the late petitioner's interest. Duke Power Company (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

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

- (1) In St. Lucie and Turkey Point the Licensing Board decided that the fourth factor was not directly applicable, noting that without the petitioner's admission there would be no other party to protect petitioner's interest. Florida Power and Light Co. (St. Lucie Plant, Units 1 and 2 and Turkey Point, Units 3 and 4), LBP-77-23, 5 NRC 789, 800 (1977).
- (2) In Summer the Licensing Board acknowledged uncertainty as to the applicability of factor four, but indicated that if the factor were applicable it would be given no weight because of the particular circumstances of that case. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213-214 (1978).
- (3) In Kewaunee, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the fourth factor weighed in favor of admitting them as intervenors. Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

The Licensing Board ultimately ruled that the Commission intended that all five factors of 10 CFR § 2.714(a) should be balanced in every case involving an untimely petition. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979). The Board also ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." The fourth factor therefore, was held to weigh in favor of the late petitioners. Id.

In weighing the fourth factor, a board will not assume that the interests of a late petitioner will be adequately represented by the NRC Staff. The general public interest, as interpreted by the Staff, may often conflict with a late petitioner's private interests or perceptions of the public interest. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-1175 n.22 (1983). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986). Contra Consolidated Edison Co. of New York (Indian Point, Unit 2), LBP-82-1, 15 NRC 37, 41 (1982).

In balancing the factors in 10 CFR § 2.714(a), the Licensing Board may take into account the petitioner's governmental nature as it affects the extent to which petitioner's interest will be represented by existing parties (fourth factor of 10 CFR § 2.714(a)) although the petitioner's governmental status in and of itself will not excuse untimely petitions to intervene. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976).

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

The fifth factor includes only that delay which can be attributed directly to the tardiness of the petition. Jamesport, supra, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 425 (1981).

The fifth and final factor of 10 CFR § 2.714(a)(1), potential for delay, is also of immense importance in the overall balancing process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983).

While this factor is particularly significant, it is not dispositive. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In considering the factor of delay, the magnitude of threatened delay must be weighed since

not every delay is intolerable. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-77-9, 5 NRC 474 (1977). In addition, in deciding whether petitioners' participation would broaden the issues or delay the proceeding, it is proper for the Licensing Board to consider that the petitioners agreed to allow issuance of the construction permit before their antitrust contentions were heard, thereby eliminating any need to hold up plant construction pending resolution of those contentions. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 23 (1977).

An untimely intervention petition need not introduce an entirely new subject matter in order to "broaden the issues" for the purposes of 10 CFR § 2.714(a); expansion of issues already admitted to the proceeding also qualifies. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981).

The mere fact that a late petitioner will not cause additional delay or a broadening of the issue does not mean that an untimely petition should necessarily be granted. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977). However, from the standpoint of precluding intervention, the delay factor is extremely important and the later the petition to intervene, the more likely it is that the petitioner's participation will result in delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question 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. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. The greater the tardiness, the greater the likelihood that the addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976); Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

The permissive grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. Although Section 2.714(c) of the Rules of Practice may not shut the door firmly against unjustifiably

late petitions, it does reflect the expectation that, absent demonstrable good cause for the late filing, an individual so interested in the outcome of a particular proceeding will act to protect his interest within the established time limits. Skagit, supra, 10 NRC at 172-173.

A late intervenor may be required to take the proceeding as it finds it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). Licensing Boards have very broad discretion in their approach to the balancing process required under 10 CFR § 2.714(a). Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Given this wide latitude with regard to untimely petitions to intervene, a Licensing Board has the discretion to permit intervention, even though an acceptable excuse for the untimely filing is not forthcoming, if other considerations warrant its doing so. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977).

A petitioner whose late-filed petition to intervene has met the five-part test of 10 CFR § 2.714(a)(1) need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015 (1984).

In evaluating intervention petitions to determine whether the requisite specificity exists, whether there has been an adequate delineation of the basis for the contentions, and whether the issues sought to be raised are cognizable in an individual licensing proceeding, Licensing Boards will not appraise the merits of any of the assertions contained in the petition. But when considering untimely petitions, Licensing Boards are required to assess whether the petitioner has made a substantial showing of good cause for failure to file on time. In doing so, Boards must necessarily consider the merits of claims going to that issue. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978).

Non-parties, participating under 10 CFR § 2.715(c), need not comply with the requirements of 10 CFR § 2.714 that mandate that intervenors either file their contentions in a timely fashion or show cause for their late intervention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 688 (1981).

The key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and

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orderly conduct of our proceedings." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979), citing Nuclear Fuel Services, Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

A Licensing Board has no latitude to admit a new party, i.e., an "eleventh hour" intervenor, to a proceeding as the hearing date approaches in circumstances where: (1) the extreme tardiness in seeking intervention is unjustified; (2) the certain or likely consequence would be prejudice to other parties as well as delaying the progress of the proceeding, particularly attributable to the broadening of issues; and (3) the substantiality of the contribution to the development of the record which might be made by that party is problematic. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 900 (1981). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 82-83 (1990).

2.9.3.3.4 Appeals from Rulings on Late Intervention

Two considerations play key roles in Appeal Board deliberations on appeals from rulings on untimely intervention. The first is the Commission's admonition in Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975), that 10 CFR § 2.714(a) was purposely drafted with the idea of "giving the Licensing Boards broad discretion in the circumstances of individual cases." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-396 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-769, 19 NRC 995, 1000 n.13 (1984). Consequently, an Appeal Board is free to reverse a decision granting a tardy intervention petition only where it can fairly be said that the Licensing Board's action was an abuse of the discretion conferred by Section 2.714(a). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). The second consideration flows from the principle that the propriety of the Board's action must be measured against the backdrop of the record made by the parties before it. Accordingly, on review the Appeal Board must generally credit the facts recounted in the papers supporting the petition to intervene to the extent that they deal with the merits of the issues. Insofar as the facts relate to the excuse for untimely filing, where they are not controverted by opposing affidavits they must be taken as true. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 13 (1977).

In view of all of this, the chances of overturning a Licensing Board's finding that intervention, although late, would be valuable are slight. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), ALAB-223, 8 AEC 241 (1974).

In a decision vacating a Licensing Board's grant of late intervention because the grant was based on improper criteria, the Appeal Board refused to examine whether the petitioner had met the regulatory requirements for intervention (i.e., 10 CFR § 2.714). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63-64 (1979), petition for review denied, Puget Sound Power & Light Co. (Skagit Nuclear Project, Units 1 and 2), unreported, (January 16, 1980).

Appeal Boards may closely scrutinize factual and legal components of the analysis underlying the Licensing Board's conclusion in reviewing Board decisions on untimely intervention petitions. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Plant, Unit 1), ALAB-642, 13 NRC 881, 885 (1981).

It is for the Licensing Boards to make the initial assessment of how late intervention petitions fare in light of the intervention criteria. Skagit, supra, 9 NRC at 63. An Appeal Board will not overturn a Licensing Board's denial of a late intervention petition under the criteria specified in 10 CFR § 2.714(a) unless the Board has abused its discretion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763, 1764 (1982). It is not sufficient for a party to establish that the Licensing Board might justifiably have concluded that the five lateness factors listed in 10 CFR § 2.714(a)(1) favored the denial of the untimely intervention petition. An Appeal Board must be persuaded that a reasonable mind could reach no other result. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

2.9.3.3.5 Mootness of Petitions to Intervene

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

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2.9.3.4 Amendment of Petition Expanding Scope of Intervention

In order to expand the scope of a previously filed petition to intervene, an intervenor carries the burden of persuading the Licensing Board that the information upon which the expansion is based: (a) was objectively unavailable at the time the original petition was filed, and (b) had it been available, the petition's scope would have been broader. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

2.9.3.5 Withdrawal of Petition to Intervene

Voluntary withdrawal of a petition to intervene is without prejudice to reinstate the petition, although reinstatement can only be done on a showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973).

Where only a single intervenor is party to an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. However, according to NRC procedure, it does serve to eliminate the withdrawing party's contentions from litigation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990). Acceptance of contentions at the threshold stage of a licensing proceeding does not validate them as cognizable issues for litigation independent of their sponsoring intervenor. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981); South Texas, *supra*, 21 NRC at 383; Seabrook, *supra*, 31 NRC at 430-31, aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

Where a lay person sought to withdraw both as an individual intervention petitioner and as the person on whom an organization relied for standing, a Licensing Board denied the motion to withdraw as the basis for the organization's standing in order to give the petitioner an opportunity to reconsider, since granting the motion would lead to dismissal of the entire proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 514 (1990). The organizational intervenor was subsequently dismissed from the proceeding when the individual upon whom it relied for standing was terminated from his employment.

in the geographical zone of interest of the plant, thereby losing the basis for his standing. Although the organization earlier had been given ample opportunity to establish its standing on other grounds, it failed to do so. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 14-15 (1990).

Safety or environmental matters which may be left as outstanding issues by a withdrawing intervenor may be raised by a Board sua sponte or be subject to nonadjudicatory resolution by the NRC Staff. South Texas, *supra*, 21 NRC at 383 n.100. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 189-90 (1976).

The test that should be applied to determine whether one intervenor may be permitted to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding, is the five-factor test ordinarily used to determine whether to grant a nontimely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. South Texas, *supra*, 21 NRC at 381-82. See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor, test, see Sections 2.9.3.3.3 and 2.9.5.5.

2.9.3.6 Intervention in Antitrust Proceedings

In addition to meeting the requirements of 10 CFR § 2.714, a petitioner seeking to intervene in an antitrust proceeding must:

- (1) describe the situation allegedly inconsistent with the antitrust laws which is the basis for intervention;
- (2) describe how that situation conflicts with the policies underlying the Sherman, Clayton or Federal Trade Commission Acts;
- (3) describe how that situation would be created or maintained by activities under the proposed license;
- (4) identify the relief sought; and
- (5) explain why the relief sought fails to be satisfied by license conditions proposed by the Department of Justice.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981) (and cases cited therein). Note that for antitrust intervention, Catawba implies that the interest of a ratepayer or consumer of electricity may be within the zone of interests protected by Section 105 of the Atomic Energy Act. The petitioner, however, must still demonstrate that an injury to its interests

would be the proximate result of anticompetitive activities by the applicant or licensee and such injury must be more than remote and tenuous. Id. at 13 NRC 30-32.

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws - however well pleaded - accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22, 29 (1982), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-575 (1975) and Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

When neither the Attorney General nor the NRC Staff has discerned antitrust problems warranting review under Section 105c, potential antitrust problems must be shown with reasonable clarity to justify granting a petition that would lead to protracted antitrust litigation involving a pro se petitioner. Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), LBP-78-13, 7 NRC 583, 595 (1978).

Although Section 105 of the Atomic Energy Act encourages petitioners to voice their antitrust claims early in the licensing process, reasonable late requests for antitrust review are not precluded so long as they are made concurrent with licensing. Licensing Boards must have discretion to consider individual claims in a way which does justice to all of the policies which underlie Section 105c and the strength of particular claims justifying late intervention. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit -- the time when the advice of the Attorney General is sought -- and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978). The criteria of 10 CFR

§ 2.714 for late petitioners are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but Section 2.714 criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor, *Id.* Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. *Id.*

Where a late petition for intervention in an antitrust proceeding is involved, the special factors set forth within 10 CFR § 2.714(a)(1) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-28, 14 NRC 333, 338, 342 (1981).

2.9.3.7 Intervention in High-Level Waste Licensing Proceedings

The standards for intervention in high-level waste licensing proceedings are specified in 10 CFR § 2.1014.

2.9.4 Interest and Standing for Intervention

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. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192 (1991).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193 (1991).

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. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), citing, Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977); Florida Power and Light Co. (St. Lucie

Nuclear Power Plant, Unit 2), LRP-87-2, 25 NRC 32, 34-35 (1987).

Both the Atomic Energy Act of 1954, as amended, and the Commission's regulations permit intervention only by a "person whose interest may be affected." The term "person" in this context includes corporate environmental groups which may represent members of the group provided that such members have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Standing to intervene as a matter of right does not hinge upon a petitioner's potential contribution to the decisionmaking process. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Nevertheless, a petitioner's potential contribution has a definite bearing on "discretionary intervention." See Section 2.9.4.2. *infra*.

In Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976), the Appeal Board certified the following questions to the Commission:

- (1) Should standing in NRC proceedings be governed by "judicial" standards?
- (2) If no "right" to intervene exists under whatever standing rules are found to be applicable, what degree of discretion exists in a Board to admit a petitioner anyway?

The Commission's response to the certified question is contained in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). Therein, the Commission ruled that judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189 of the Atomic Energy Act. As to the second question referred by the Appeal Board, the Commission held that Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, make some contribution to the proceeding.

Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978).

"There is no question that, in an operating license proceeding, the question of a potential intervenor's standing is

a significant one. For if no petitioner for intervention can satisfactorily demonstrate standing, it is likely that no hearing will be held." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978).

2.9.4.1 Judicial Standing to Intervene

The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

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. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

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 statutes governing the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

In order to establish standing, a petitioner must show: (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Shoreham-Wading River Central School District v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28-29 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192, 194-95 (1991).

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

2.9.4.1.1 "Injury-In-Fact" and "Zone of Interest" Tests for Standing to Intervene

Although the Commission's Pebble Springs ruling (CLI-76-27, 4 NRC 610) permits discretionary intervention in certain limited circumstances, it stresses that, as a general rule, the

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propriety of intervention is to be examined in the light of judicial standing principles. The judicial principles referred to are those set forth in Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Such standards require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing, and (2) such injury is arguably within the zone of interests protected by the statute governing the proceeding. Wisconsin Electric Power Co. (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Nuclear Fuel Services, Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431, 1432 (1982), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.6 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 165, 166 (1991).

Purely academic interests are not encompassed by 10 CFR § 2.714(a) which states that any person whose interest is affected by a proceeding shall file a written petition for leave to intervene. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 185 (1982). See generally, CLI-81-25, 14 NRC 616 (1981), (guidelines for Board).

Two tests must be satisfied to acquire standing: (1) petitioner must allege "injury-in-fact" (that some injury has occurred or will probably result from the action involved); (2) petitioner must allege an interest "arguably within the zone of interest" protected by the statute. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Warth v. Selden, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-77-20, 10 NRC 108, 113 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 428 (1984).

A petitioner must allege an "injury-in-fact" which must be within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2),

LBP-83-45, 18 NRC 213, 215 (1983). See Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989).

An alleged injury to a purely legal interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990).

With respect to "zone of interest," the Appeal Board, in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 103 n.6 (1976), rejected the contention that the Atomic Energy Act includes a "party aggrieved" provision which would require for standing purposes simply a showing of injury-in-fact. The Commission agreed with this analysis in its Pebble Springs decision. As such, zone of interest requirements are not met simply by invoking the Atomic Energy Act but must be satisfied by other means. The following should be noted with regard to "zone of interest" requirements:

- (1) The directness of a petitioner's connection with a facility bears upon the sufficiency of its allegations of injury-in-fact, but not upon whether its interests fall within the zone of interest which Congress was protecting or regulating. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976).
- (2) The Atomic Energy Act and its implementing regulations do not confer standing but rather require an additional showing that interests sought to be protected arguably fall within the zone of interests protected or regulated by the Act. Virginia Electric & Power Co., ALAB-342 supra; accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).
- (3) While potential loss of business reputation is a cognizable "injury-in-fact," an interest in protecting business reputation and avoiding possible damage claims is not arguably within the zone of interest which the Act seeks to protect or regulate. Virginia Electric & Power Co., ALAB-342, supra (business reputation of reactor vessel component fabricator clearly would be injured if components failed during operation; however, fabricator's interest in protecting his reputation by intervening in hearing on adequacy of vessel supports was not within the zone of interests sought to be protected by the Atomic Energy Act).

- (4) The economic interest of a ratepayer is not sufficient to allow standing to intervene as a matter of right since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-1421 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977); Public Service Co. of Oklahoma (Black Fox Nuclear Power Station, Units 1 & 2), LBP-77-17; 5 NRC 657 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991). Nor is such interest within the zone of interests protected by the National Environmental Policy Act. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976).
- (5) A person's interest as a taxpayer does not fall within the zone of interests sought to be protected by either the Atomic Energy Act or the National Environmental Policy Act. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).
- (6) Economic injury gives standing under the National Environmental Policy Act only if it is environmentally related. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). See also Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 640 (1975).

The test is a cognizable interest that might be adversely affected by one or another outcome of the proceeding. No interest is to be presumed. There must be a concrete demonstration that harm could flow from a result of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

A petitioner must allege an "injury-in-fact" which he will suffer as a result of a Commission decision. He may not derive standing from the interests of another person or organization, nor may he seek to represent the interests of others without their express authorization. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

An individual alleging that violation of constitutional provisions by governmental actions based on a statute will cause him identifiable injury should have standing to

challenge the constitutionality of those actions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1445 (1982), citing, Chicago Police Officer's Association v. Stover, 526 F.2d 431, 436 (10th Cir. 1975), vacated and remanded on other grounds, 426 U.S. 994 (1976), holding on standing reaffirmed, 552 F.2d 918 (10th Cir. 1977); 3 K. Davis Administrative Law Treatise 22.08, at 240 (1958).

The courts have not resolved the issue of whether an individual who suffers economic injury as a result of a Board's decision to bar him from working in a certain job would be within the zone of interests protected by the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). See, e.g., Consumers Power Co. (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).

Allegations that a plant will cause radiologically contaminated food which a person may consume are too remote and too generalized to provide a basis for standing to intervene. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1449 (1982); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

For antitrust purposes, the interest of a ratepayer or consumer of electricity is not necessarily beyond the zone of interests protected by Section 105 of the Atomic Energy Act. However, the petitioner must still demonstrate that an injury to its economic interests as a ratepayer would be the proximate result of anticompetitive activities by the licensee. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 592-593 (1978).

Antitrust considerations to one side, neither the Atomic Energy Act nor the National Environmental Policy Act includes in its "zone of interests" the purely economic personal concerns of a member/ratepayer of a cooperative that purchases power from a prospective facility co-owner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474-475 (1978). See also Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 744 (1982).

General economic concerns are not within the proper scope of issues to be litigated before the boards. Concerns about a facility's impact on local utility rates, the local economy, or a utility's solvency, etc., do not provide an adequate basis for standing of an intervenor or for the admission of an intervenor's contentions. Such economic concerns are more

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appropriately raised before state economic regulatory agencies. Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 194 (1991).

For an amendment authorizing transfer of 20% of the ownership of a facility, allegations that a petitioner would "receive" only 80% of the electricity produced by the plant rather than the 100% "assumed in the 'NEPA balance'" were insufficient to give standing as a matter of right because it was an economic injury outside the zone of interests to be protected and the NEPA cost-benefit analysis considers the overall benefits to society rather than benefits to an isolated portion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 390-90, aff'd, ALAB-470, 7 NRC 473 (1978).

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

A mere academic interest in the outcome of a proceeding will not confer standing. The petitioner must allege some injury that has or will occur from the action taken as a result of the proceeding. Skaqit/Hanford, supra, 15 NRC at 743.

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, that is, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or

restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

An alleged injury to health and safety, shared equally by all those residing near a reactor, can form the basis for standing. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982).

A petitioner may base its standing upon a showing that his or her residence, or that of its members, is within the geographical zone that might be affected by an accidental release of fission products. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Close proximity has always been deemed enough standing alone, to establish the requisite interest for intervention. In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984), citing, South Texas, supra, 9 NRC at 443-44; Enrico Fermi, supra, 9 NRC at 78; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979).

An intervention petitioner who resides near a nuclear facility need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

A legislator lacks standing to intervene on behalf of the interests of his constituents who live near a nuclear facility. However, the legislator may participate in a proceeding in a private capacity if he can establish his own personal standing. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989).

In a materials license renewal proceeding under 10 CFR Part 30, as in construction permit and operating license proceedings under 10 CFR Part 50, proximity to a large source of

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radioactive material is sufficient to establish the requisite interest for standing to intervene. Whether a petitioner's stated concern is in fact justified must be left for consideration when the merits of the controversy are reached. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982). See generally, LBP-82-24, 15 NRC 652 (1982), (decision reversed regarding petitioner's request to intervene). However, postcards and letters from individuals allegedly living near nuclear fuel element manufacturing and fuel element decladding facilities which make only vague and generalized allusions to danger or potential injury from radiation do not constitute a proper intervention statement. Rockwell International Corp. (Energy Systems Group Special Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777 (1983).

Although residence within 50 miles is not an explicit requirement for intervention by right, that limit is consistent with precedent. Without a showing that a plant has a far greater than ordinary potential to injure outside a 50 mile limit, a person has a weak claim to the protection of a full adjudicatory proceeding; rule-making or lobbying Congress are available to protect public interests of a general nature. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178-179 (1981).

However, the fact that a petitioner may reside within a 50-mile radius of a facility will not always be sufficient to establish standing to intervene. A Board will consider the nature of the proceeding, and will apply different standing considerations to proceedings involving construction permits or operating licenses than to proceedings involving license amendments. Thus, in a license amendment proceeding involving an existing facility's fuel pool, a Board denied intervention to a petitioner who resided 43 miles from the facility because the petitioner failed to demonstrate that the risk of injury from the fuel pool extended that far from the facility. Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-2, 22 NRC 97, 98-99 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

A petitioner's residence within 50 miles of a nuclear facility was insufficient, by itself, to establish standing to intervene in an exemption proceeding where the exemption at issue involved the protection of workers in the facility and did not have the clear potential for offsite consequences affecting the general population. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 156-57 (1991) (proposed license amendments involved

potential offsite safety consequences). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193, 194 (1991).

Residence more than 75 miles from a plant will not alone establish an interest sufficient for standing as a matter of right. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982), citing Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Public Service Co. of Oklahoma (Black Fox Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977).

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

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

2.9.4.1.2 Standing of Organizations to Intervene

A party may intervene as of right only when he asserts his own interests under either the Atomic Energy Act or NEPA, and not when he asserts interests of third persons. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). Commission practice requires each party to separately establish standing. 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981). An organization may meet the injury-in-fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-113 (1979). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). Thus, a corporate environmental group has standing to intervene and represent members who have an interest which will be affected.

Public Service Co. of Indian, (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Note, however, that a member's mere "interest in the problem" without a showing that the member will be affected is insufficient to give the organization standing. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). An organization does not have independent standing to intervene in a licensing proceeding merely because it asserts an interest in the litigation. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976). In this vein, for national environmental groups, standing is derived from injury-in-fact to individual members. South Texas, *supra*, 9 NRC at 647, citing, Sierra Club v. Morton, 405 U.S. 727 (1972). However, an organization specifically empowered by its members to promote certain of their interests has those members' authorization to act as their representative in any proceeding that may affect those interests. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1334 (1982); see Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-345 (1977); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-396 n.25 (1979).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). The petitioning organization must identify the members whose interests it represents, and state the members' places of residence and the extent of the members' activities located within close proximity to the plant. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991).

For a case holding that a petitioner cannot assert the rights of third parties as a basis for intervention, see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, *aff'd*, ALAB-470, 7 NRC 473 (1978) (mother attempted to assert the rights of her son who attended medical school near a proposed facility).

"[I]t is clear that an organization may establish its standing through the interest of its members; but, to do so, it must identify specifically the name and address of at least one

affected member who wishes to be represented by the organization." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it. Fermi, supra, 8 NRC at 583. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).

If an official of an organization has the requisite personal interests to support an intervention petition, her signature on the organization's petition for intervention is enough to give the organization standing to intervene. However the organization is not always necessarily required to produce an affidavit from a member or sponsor authorizing it to represent that member or sponsor. The organization may be presumed to represent the interests of those of its members or sponsors in the vicinity of the facility. (Where an organization has no members, its sponsors can be considered the equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization). Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 728-729, 734-736 (1982).

An organization which bases its standing upon the interests of its sponsors must: (1) identify at least one sponsor who will be injured; (2) describe the nature of that injury; and (3) provide an authorization for the organization to represent the sponsor in the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 314 (1989). To establish injury-in-fact, an organization must show a causal relationship between the alleged injury to its sponsor and the proposed licensing activity. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 42-44 (1990).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979). See Dellums v. NRC, 863 F.2d 968, 972-73 (D.C. Cir. 1988).

An organization seeking to obtain standing in a representative capacity must demonstrate that a member has in fact authorized such representation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444 (1979), aff'd, ALAB-549, 9 NRC 644 (1979); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 185 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); see generally, CLI-81-25, 14 NRC 616 (1981), (Guidelines for Board); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 216 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991). Where the affidavit of the member is devoid of any statement that he wants the organization to represent his interests, it is unwarranted for the Licensing Board to infer such authorization, particularly where the opportunity was offered to revise the document and was ignored. Beaver Valley, supra, 19 NRC at 411.

To have standing, an organization must show injury either to its organizational interests or to the interests of members who have authorized it to act for them. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739-740 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91-92 (1990).

An organization depending upon injury to the interests of its members to establish standing, must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1976); Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 149 (1989); Northern

States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315-16 (1989); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 565 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29 (1991); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192-93 (1991). The alleged injury-in-fact to the member must be within the purpose of the organization. Curators, supra, 31 NRC at 565-66.

Absent express authorization, an organization which is a party to an NRC proceeding may not represent persons other than its own members. Since there are no Commission regulations allowing parties to participate as private attorneys general, an organization acting as an intervenor may not claim to represent the public interest in general in addition to representing the specialized interests of its members. In this vein, a trade association of home heating oil dealers cannot be deemed to represent the interests of employees and customers of the dealers. Similarly, an organization of residents living near a proposed plant site cannot be deemed to represent the interests of other residents who are not members. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481 (1977); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982), citing, Shoreham, supra, 5 NRC at 481, 483. In a Subpart L proceeding, an organization lacked standing to litigate the consequences of a possible accident in a research laboratory where the health risks from the accident would be confined within the laboratory and the organization had not demonstrated that any of its members were workers inside the laboratory. Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103 (1990).

An organization must, in itself, and through its membership, fulfill the requirements for standing. Skagit/Hanford, supra, 16 NRC at 984, citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

An organization has sufficiently demonstrated its standing to intervene if its petition is signed by a ranking official of the organization who himself has the requisite personal interest to support the intervention. An organization seeking intervention need not demonstrate that its membership had voted to seek intervention on the matter raised by a submitted contention, and had authorized the author of the intervention petition to represent the organization. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979).

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

Where the petitioner organization's membership solicitation brochure demonstrates that the organization's sole purpose is to oppose nuclear power in general and the construction and operation of nuclear plants in the northwest in particular, mere membership by a person with geographic standing to intervene, without specific representational authority, is sufficient to confer standing. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 482 (1983).

A petitioner organization cannot amend its petition to satisfy the timeliness requirements for filing without leave of the Board to include an affidavit executed by someone who became a member after the due date for filing timely petition. WPPSS, supra, 17 NRC at 483.

It is not necessary for the individual on whom organizational standing is based to be conversant with, and able to defend, each and every contention raised by the organization in pursuing his interest. Litigation strategy and the technical details of the complex prosecution of a nuclear power intervention are best left to the resources of the organizational petitioners. WPPSS, supra, 17 NRC at 485.

2.9.4.1.3 Standing to Intervene in Export Licensing Cases

In Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission dealt with the question as to whether the Natural Resources Defense Council and the Sierra Club could intervene as of right and demand a hearing in an export licensing case. The case involved the export of fuel to India for the Tarapur project. The petitioners contended that at least one member of the Sierra Club and several members of NRDC lived in India and thus would be subject to any hazards created by the reactor.

In rejecting the argument that there was a right to intervene, the Commission stated:

If petitioners allege a concrete and direct injury their claim of standing is not impaired merely because similar harm is suffered by many others. However, if petitioners' 'asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction'. 3 NRC at 576.

The Commission held that the alleged interests were de minimis (3 NRC at 575), noting that, while in domestic licensing cases claims of risk that were somewhat remote have been recognized as forming a basis for intervention, Section 189(a) of the Act (42 U.S.C. § 2239(a)) would not be given such a broadly permissive reading (3 NRC at 571) in export licensing cases.

Consistent with its decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission has held that a petitioner is not entitled to intervene as a matter of right where its petition raises abstract issues relating to the conduct of U.S. foreign policy and protection of the national security. The petitioner must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. In the Matter of Ten Applications, CLI-77-24, 6 NRC 525, 531 (1977). Nevertheless, the Commission may, in its discretion, direct further public proceedings if it determines that such proceedings would be in the public interest even though the petitioner has not established a right under Section 189 of the Atomic Energy Act to intervene or demand a public hearing. Id. at 532. See also Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987), citing, 10 CFR § 110.34(a).

The contention that a major Federal action would have a significant environmental impact on a foreign nation is not cognizable under NEPA, and cannot support intervention. Babcock & Wilcox (Application for Considerations of Facility Export License), CLI-77-18, 5 NRC 1332, 1348 (1977).

Judicial precedents will be relied on in deciding issues of standing to intervene in export licensing. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 258 (1980).

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

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to allow standing and the inability to disseminate information. Id. at 259.

2.9.4.1.4 Standing to Intervene in Specific Factual Situations

Residence within 30-40 miles of the plant site has been held to be sufficient to show the requisite interest in raising safety questions. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631, 633-634 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372, n.6 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1978); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Similarly, a person whose base of normal, everyday activities is within 30 miles of a nuclear facility can fairly be presumed to have an interest which might be affected by reactor construction and/or operation. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974). A petitioner must affirmatively state his place of residence and the extent of his work activities which are located within close proximity to the facility. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991). A person who regularly commutes past the entrance of a nuclear facility while conducting normal activities is presumed to have the requisite interest for standing. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990). Moreover, persons who allege that they use an area whose recreational benefits may be diminished by a nuclear facility have been found to possess an adequate interest to allow intervention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973). On the other hand, it is proper for a Board to dismiss an intervention petition where the intervenor changes residence to an area not in the proximity of the reactor and totally fails to assume any significant participatory role in the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558 (1976).

A petitioner who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility but who is not a minor or otherwise under a legal disability which would preclude his own participation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978).

"A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental

release of fission products.' Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 371 n.6 (1973)." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973) (40 miles); Fermi, supra (35 miles).

A petitioner which bases its standing on its proximity to a nuclear facility must describe the nature of its property or residence and its proximity to the facility, and should describe how the health and safety of the petitioner may be jeopardized. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

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

A petitioner owning and renting out farmland 10 to 15 miles from the site and visiting the farm occasionally was held not to meet standing requirements. WPPSS, supra, 9 NRC at 336-338.

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

The fact that the petitioner is an intervenor with respect to the same issue in another proceeding does not give him standing to intervene for the purpose of protecting himself from adverse precedent in the proceeding in question. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Power Station, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 4 (1976).

A petitioner's standing in a non-NRC proceeding is insufficient to establish standing in an NRC proceeding, at least in the absence of a showing of the equivalence of applicable standards and an overlap of relevant issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990).

Where a license amendment grants a co-licensee precisely the relief which the co-licensee seeks as a party to a

pending proceeding, the co-licensee loses its standing to assert its claim in the proceeding. Nuclear Fuel Services and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982).

For the views of various Appeal Board members on whether a petitioner has the requisite interest where he has an economic interest which competes with nuclear power in generating electricity, see the three opinions in Long Island Lighting Co. (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631 (1975).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

In a license amendment proceeding to allow two electric cooperatives to become co-owners of a nuclear plant, interests of a petitioner which stemmed from membership in the cooperative ("loss of equity," "threat of bankruptcy," "higher rates," "cost of replacement power," or "loss of property taxes") were insufficient to support standing as a matter of right. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Those persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for an extension of an existing construction permit, would have standing to intervene in [extension proceedings] to show that no good cause existed and, consequently, that new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-80-22, 12 NRC 191, 195, affirmed, ALAB-619, 12 NRC 558, 563-565 (1980).

Economic injury to ratepayers is not sufficient to confer standing upon State Commissions to challenge proposed license revocation because such injury results from termination of the project and not Commission "action," and because such injury cannot be redressed by favorable Commission action. Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-527 (1980) (views of Chairman Ahearn and Commissioner Hendrie).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979). Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

2.9.4.2 Discretionary Intervention

Although a petitioner may lack standing to intervene as of right under judicial standing concepts, he may nevertheless be admitted to the proceeding in the Licensing Board's discretion. In determining whether discretionary intervention should be permitted, the Commission has indicated that the Licensing Board should be guided by the following factors, among others:

- (a) Weighing in favor of allowing intervention --
 - (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - (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.
- (b) Weighing against allowing intervention --
 - (4) The availability of other means whereby petitioner's interest will be protected.
 - (5) The extent to which the petitioner's interest will be represented by existing parties.
 - (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976). See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1435 (1982); Florida Power and Light Co. (St.

Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 35 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 17 n.16 (1990). The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979).

The primary factor to be considered is the significance of the contribution that a petitioner might make. Pebble Springs, supra. Thus, foremost among the factors listed above is whether the intervention would likely produce a valuable contribution to the NRC's decisionmaking process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 n.2 (1978). The need for a strong showing as to potential contribution is especially pressing in an operating license proceeding where no petitioners have established standing as of right and where, absent such a showing, no hearing would be held. Watts Bar, supra, 5 NRC at 1422.

For a case in which the Commission's discretionary intervention rule was applied, see Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976), where, despite petitioner's lack of judicial standing, intervention was permitted based upon petitioner's demonstration of the potential significant contribution it could make on substantial issues of law and fact not otherwise raised or presented and a showing of the importance and immediacy of those issues.

For discretionary intervention, the burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the petitioner's ability to contribute to development of a sound record include:

- (1) a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;
- (2) the specificity of such ability to contribute on those substantial issues of law or fact;
- (3) justification of time spent on considering the substantial issues of law or fact;

- (4) provision of additional testimony, particular expertise, or expert assistance;
- (5) specialized education or pertinent experience.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990).

Where a petitioner failed to respond to a Licensing Board order seeking clarification following presentation of evidence casting shadow on his purported qualifications, the Board was entitled to conclude that a petitioner would not help to create a sound record, and that the veracity of his other statements were suspect, leading to denial of his petition. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 457-458 (1979).

As to the second and third factors to be considered with regard to discretionary intervention (the nature and extent of property, financial or other interests in the proceeding and the possible effect any order might have on the petitioner's interest), interests which do not establish a right to intervention because they are not within the "zone of interests" to be protected by the Commission should not be considered as positive factors for the purposes of granting discretionary intervention. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, aff'd, ALAB-470, 7 NRC 473 (1978).

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

2.9.5 Contentions of Intervenors

Contentions constitute the method by which the parties to a licensing proceeding frame issues under NRC practice, similar to the use of pleadings in their judicial counterparts. Such contentions may be amended or refined as a result of additional information gained by discovery. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

The basis for a contention may not be undercut, and the contention thereby excluded, through an attack on the credibility of the expert who provided the basis for the contention. Cleveland Electric Illuminating Co. (Perry

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Nuclear Power Plant, Units 1 and 2), LBP-82-98, 16 NRC 1459, 1466 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

The admission of a contention does not require anticipation of the contents of a document that has not been filed. A contention may address any current deficiency of the application, providing the contention is specific. Perry, supra, 16 NRC at 1469.

The Commission could not have intended that prior to admitting a contention advocating a safety measure, the Board should have found that a significant risk surely existed without such a safety measure. Such a finding should reflect the outcome of that litigation rather than its starting point. Consolidated Edison Co. of N.Y. (Indian Point, Unit 3) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, 16 NRC 1629, 1634 (1982).

A contention about a matter not covered by a specific rule need only allege that the matter poses a significant safety problem. That would be enough to raise an issue under the general requirement for operating licenses [10 CFR § 50.57(a)(3)] for finding of reasonable assurance of operation without endangering the health and safety of the public. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

An intervenor's failure to particularize certain contentions or even, arguendo, to pursue settlement negotiations, when taken by itself, does not warrant the out-of-hand dismissal of intervenors' proposed contentions. There is a sharp contrast between an intervenor's refusal to provide information requested by another party on discovery, even after a Licensing Board order compelling its disclosure, and the asserted failure of intervenors to take advantage of additional opportunity to narrow and particularize their contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 990 (1982).

Pursuant to 10 CFR § 2.707, the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order, "to make such orders in regard to the failure as are just." The just result, where intervenors have not fully availed themselves of an opportunity to further particularize their contentions, is to simply rule on intervenors' contentions as they stand, dismissing those proposed contentions which lack adequate bases and specificity. Shoreham, supra, 16 NRC at 990; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 (1985).

The Licensing Board may limit the time for the filing of contentions to less than that normally allotted by the rules, 10 CFR § 2.714(a)(3) and (b), so that all participants know before they arrive at the special prehearing conference, what position the proponents of the plant are taking on the various contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). See also General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983) and Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

A Licensing Board should not address the merits of a contention when determining its admissibility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982), citing, Allens Creek, *supra*, 11 NRC at 542; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 933 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 446 (1988), *reconsidered on other grounds*, LBP-89-6, 29 NRC 127 (1989), *rev'd on other grounds*, ALAB-919, 30 NRC 29 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990), *request for clarification*, ALAB-938, 32 NRC 154 (1990), *clarified*, CLI-90-7, 32 NRC 129 (1990); Sierra Club v. NRC, 862 F.2d 222, 862 F.2d 222 (9th Cir. 1988). See Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984), citing, Allens Creek, *supra*, 11 NRC 542; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974), *rev'd on other grounds*, CLI-74-12, 7 AEC 203 (1974); and Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244-45 (1973). What is required is that an intervenor state the reasons for its concern. Seabrook, *supra*, citing, Allens Creek, *supra*.

Relevance is not the only criterion for admissibility of a contention. 10 CFR § 2.714 requires that the bases for each contention must be set forth with reasonable specificity. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1821

(1982). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-84, (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617, 627 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 187 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 188 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 851 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 842, 847 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 162, 165 (1987), aff'd, ALAB-880, 26 NRC 449, 456 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 292-94 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, 458 (1988), aff'd, ALAB-893, 27 NRC 627 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 45-47 (1989) (documents cited by intervenors did not provide adequate bases for proposed contention), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). A long and detailed list of omissions and problems does not, without more, provide a basis for believing that there is a safety issue. Discovered problems are not in themselves grounds for admitting a contention. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 240 (1986).

The purposes of the basis-for-contention requirement are: (1) to help assure that the hearing process is not improperly invoked, for example, to attack statutory requirements or regulations; (2) to help assure that other parties are sufficiently put on notice so that they

will know at least generally what they will have to defend against or oppose; (3) to assure that the proposed issues are proper for adjudication in the particular proceeding-- i.e., generalized views of what applicable policies ought to be are not proper for adjudication; (4) to assure that the contentions apply to the facility at bar; and (5) to assure that there has been sufficient foundation assigned for the contentions to warrant further explanation. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987); Sierra Club v. NRC, 862 F.2d 222, 227-28 (9th Cir. 1988).

The fact that the Office of Investigation and the Office of Inspector and Auditor are investigating otherwise unidentified allegations is insufficient basis for admitting a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 857-858 (1986).

Neither the Commission's Rules of Practice nor the pertinent statement of consideration puts an absolute or relative limit on the number of contentions that may be admitted to a licensing proceeding. See 10 CFR § 2.714(a), (b); 43 Fed. Reg. 17798, 17799 (April 26, 1978). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982).

Pro se intervenors are not held in NRC proceedings to a high degree of technical compliance with legal requirements and, accordingly, as long as parties are sufficiently put on notice as to what has to be defended against or opposed, specificity requirements will generally be considered satisfied. However, that is not to suggest that a sound basis for each contention is not required to assure that the proposed issues are proper for adjudication. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-83-5, 17 NRC 134, 136 (1983).

Agency procedural requirements simply raising the threshold for admitting some contentions as an incidental effect of regulations designed to prevent unnecessary delay in the hearing process are reasonable. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983).

Should the subsequent issuance of the SER lead to a change in the FSAR and thereby modify or moot a contention based on that document, that contention can be amended or promptly disposed of by summary disposition or a stipulation. However, the

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possibility that such a circumstance could occur does not provide a reasonable basis for deferring the filing of safety-related contentions until the Staff issues its SER. Catawba, supra, 17 NRC at 1049.

NRC has the burden of complying with NEPA. The adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing proceeding. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. That does not mean that no environmental contentions can be formulated before the Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. Just as the submission of a safety-related contention based on the FSAR is not to be deferred simply because the Staff may later issue an SER requiring a change in a safety matter, so too, the Commission expects that the filing of an environmental concern based on the applicant's environmental report will not be deferred simply because the Staff may subsequently provide a different analysis in its DES. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). See 10 CFR § 2.714(b)(2)(iii), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

2.9.5.1 Pleading Requirements for Contentions

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the U.S. Court of Appeals for the D.C. Circuit upheld, in part, the pleading requirements of 10 CFR § 2.714 governing petitions to intervene. Specifically, the Court ruled that:

- (a) the requirement that contentions be specified does not violate Section 189(a) of the Act; and
- (b) the requirement for a basis for contentions is valid.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982), citing, BPI v. Atomic Energy Commission, 502 F.2d 424, 428-429 (D.C. Cir.

1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 n.5 (1985).

A petitioner who satisfies the interest requirement will be granted intervention if he states at least one contention within the scope of the proceeding with a proper factual basis. The Licensing Board has no duty to consider additional contentions for the purpose of determining the propriety of intervention once it has found that at least one good contention is stated. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 220 (1976). Although these cases predate amendments to 10 CFR § 2.714, those amendments retain, and in fact specifically recite, the "one good contention rule." See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622 (1981); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), LBP-84-6, 19 NRC 975, 978 (1984); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 916 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 261 (1986).

Since a mandatory hearing is not required at the operating license stage, Licensing Boards should "take the utmost care" to assure that the "one good contention rule" is met in such a situation because, absent successful intervention, no hearing need be held. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 227, 226 n.10 (1974).

Note that a State participating as an "interested State" under 10 CFR § 2.715(c) need not set forth in advance any affirmative contentions of its own. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-393 (1976).

Reasonable specificity requires that a contention include a reasonably specific articulation of its rationale. If an applicant believes that it can readily disprove a contention admissible on its face, the proper course is to move for summary disposition following its admission, not to assert a lack of specific basis at the pleading stage. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070-2071 (1982).

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An intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984), citing, Catawba, supra, 16 NRC at 468. In Catawba, supra, the Board dealt with the question of whether the intervenor had provided sufficient information to support the admission of its contentions. An Appeal Board has rejected an applicant's claim that Catawba imposes on an intervenor the duty to include in its contentions a critical analysis or response to any applicant or NRC Staff positions on the issues raised by the contentions which might be found in the publicly available documentary material. Such detailed answers to the positions of other parties go, not to the admissibility of contentions, but to the actual merits of the contentions. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629-31 (1988).

The basis and specificity requirements are particularly important for contentions involving broad quality assurance and quality control issues. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 634 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1985).

Nor is a Licensing Board authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 635 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). The Braidwood Board permitted the intervenor to conduct further discovery and to amend its late-filed contention in order to comply with the basis and specificity requirements. The Board was willing to accommodate the intervenor because its contention involved potentially serious safety issues concerning the applicant's QA/QC program. Braidwood, supra,

21 NRC at 634-636, citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 509-511 (1984). According to the Board, its decision was not a conditional admission of a contention in violation of the Catawba ruling. The Board explained that it did reject the intervenor's late-filed contention, and that it properly exercised its discretion by giving the intervenor the opportunity to file an amended contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1737-39 (1985), rev'd and remanded, CLI-86-8, 23 NRC 241 (1986). The precedential value of the Licensing Board's allowance of further discovery and the subsequent filing of an amended contention is in doubt because of the Commission's reversal of the Licensing Board's admission of the contention for failure to satisfy the 10 CFR § 2.714(a)(1) standards for late-filed contentions. Braidwood, supra, 23 NRC 241. See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 476-79 (1985) (Moore, J., dissenting).

A Licensing Board has defined the failure to demonstrate the existence of a genuine dispute on a material issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of applicant's documents or that provide supporting reasons that tend to show that there is some specified omission from applicant's documents. The intervention petitioner in this case did not advance an independent basis for any of its contentions, and instead relied on alleged omissions and errors in the applicant's documents and analyses. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 515, 521 & n.12 (1990), citing, 10 CFR §§ 2.714(b)(2)(ii) and (iii).

A recent amendment to the Commission's regulations has superceded prior NRC caselaw which held that 10 CFR § 2.714 did not require a petitioner to detail the evidence which would be offered in support of its proposed contentions. 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 3972P (Sept. 28, 1989). 10 CFR § 2.714(b)(2)(ii) now specifically requires a petitioner to provide a concise statement of the alleged facts or expert opinion which support its proposed contention, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii).

Contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the

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requirements of 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 188-190, 193 (1982); see generally, CLI-81-25, 14 NRC 616 (1981) (guidelines for Board).

A simple reference to a large number of documents does not provide a sufficient basis for a contention. An intervenor must clearly identify and summarize the incidents being relied upon, and identify and append specific portions of the documents. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

When a broad contention (though apparently admissible) has been admitted at an early stage in the proceeding, intervenors should be required to provide greater specificity and to particularize bases for the contention when the information required to do so has been developed. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-28, 20 NRC 129, 131 (1984).

The Commission's Rules of Practice do not require that a contention be in the form of a detailed brief; however, a contention, alleging an entire plan to be inadequate in that it fails to consider certain matters, should be required to specify in some way each portion of the plan alleged to be inadequate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 906, 993 (1982).

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

Extraneous matters such as preservation of rights, statements of intervention, and directives for interpretation which accompany an intervenor's list of contentions will be disregarded as contrary to the Commission's Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-690 (1980).

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

It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116-117 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987). However, a party is bound by the literal terms of its own contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 505 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 242 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-5, 27 NRC 245, 254 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988).

In order to determine the scope of an otherwise admissible contention, a Board will consider the contention together with its stated bases to identify the precise issue which the intervenor seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988).

A contention must be rejected where: it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be; it seeks to raise an issue which is not proper for adjudication in the proceeding; or it does not apply to the facility in question; or it seeks to raise an issue which is not concrete or litigable. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1

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and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1268-1269 (1983).

At the pleading stage all that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1193 n.39 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 23-24 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 282 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990).

In pleading for the admission of a contention, an intervenor is not required to prove the contention, but must allege at least some credible foundation for the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984), citing, Peach Bottom, *supra*, 8 AEC at 20-21; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1742 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427-28 (1990).

2.9.5.2 Requirement of Oath from Intervenors

Amendments to 10 CFR § 2.714, effective on May 26, 1978, eliminated the requirement that petitions to intervene be filed under oath.

2.9.5.3 Requirement of Contentions for Purposes of Admitting Petitioner as a Party

10 CFR § 2.714 requires that there be some basis for the contentions set forth in the supplement to the petition to intervene and that the contentions themselves be set forth with particularity. In deciding whether these criteria are met, Licensing Boards are not to decide whether the proposed contentions are meritorious. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-183, 7 AEC 210, 216 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973). The Appeal Board has prohibited Licensing Boards from dismissing contentions on the merits at the pleading stage even if demonstrably insubstantial. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 789 (1963), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).

For a petitioner who supports a license application, all that need be initially asserted to fulfill the contention requirement of 10 CFR § 2.714 is that the application is meritorious and should be granted. After contentions opposing the license application have been set forth, however, the Licensing Board is free to require intervenors supporting the application to take a position on those contentions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978).

Where intervenors have been consolidated, it is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 637 (1981).

Recent amendments of 10 CFR § 2.714 have raised the threshold for the admission of a petitioner's proposed contentions. 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). A petitioner must provide a concise statement of the alleged facts or expert opinion which support its proposed contentions, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. 10 CFR § 2.714(b)(C)(ii). The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of

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the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a "regulatory gap," the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing, 10 CFR § 2.758.

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

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. Aliens Creek, supra, 10 NRC at 524.

2.9.5.4 Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the applicant's Environmental Report for factual material in support of a proposed contention. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979). A petitioner must file contentions based on any environmental issues raised by the applicant's Environmental Report. However, the petitioner may be permitted to file new or amended contentions based on new information contained in subsequent NRC environmental documents. 10 CFR § 2.714(b)(2)(iii), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

The specificity and basis requirements for a proposed contention under 10 CFR § 2.714(b) can be satisfied where the contention is based upon allegations in a sworn complaint filed in a judicial action and the applicable passages therein are specifically identified. This holds notwithstanding the fact that the allegations are contested. Consumers Power Co.

(Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292-94 (1984).

An intervenor can establish a sufficient basis for a contention by referring to a source and drawing an assertion from that reference. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740 (1985), rev'd and remanded on other grounds, CLI-86-C, 23 NRC 241 (1986), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 69-70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991). However, where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, a Licensing Board will dismiss the contention if the intervenor cannot offer another independent source of information on which to base the contention. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

2.9.5.5 Timeliness of Submission of Contentions

Not later than 15 days before a special prehearing conference or, where no special prehearing conference is held, 15 days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of his contentions. Additional time for filing the supplement may be granted based upon a balancing of the factors listed in 10 CFR § 2.714(a)(1). 10 CFR § 2.714(b); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67-68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 40 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NPC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

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In considering the admissibility of late-filed contentions, the Licensing Board must balance the five factors specified in 10 CFR § 2.714(a) for dealing with nontimely filings.

Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 214 (1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985).

A late filed contention must meet the requirements concerning good cause for late filing pursuant to 10 CFR § 2.714(a)(1). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-90, 16 NRC 1359, 1360 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983).

The factors which must be balanced in determining whether to admit a late filed contention pursuant to 10 CFR § 2.714(a)(1) 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. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1141 (1983); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261-1262 (1983), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1405 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1291 (1984), citing, Catawba, supra, 17 NRC 1041; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 526 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 909, 913-14 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579-80 (1986), aff'd, ALAB-868, 25 NRC 912, 921 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 74 n.4 (1987); Public Service Co. of

New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 447-48 & n.9 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC 127 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

A Board must perform this balancing of the five lateness factors, even where all the parties to the proceeding have waived their objections and agreed, by stipulation, to the admission of the late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 251 (1986). See Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

The required balancing of factors is not obviated by the circumstances that the proffered contentions are those of a participant that has withdrawn from the proceeding. South Texas, supra, 16 NRC at 1367, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977).

In balancing the lateness factors, all factors must be taken into account; however, there is no requirement that the same weight be given to each of them. South Texas, supra, 16 NRC at 1367, citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). A Board is entitled to considerable discretion in the method it employs to balance the five lateness factors. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976).

When there are no other available means to protect a petitioner's interests, that factor and the factor of the extent to which other parties would protect that interest are entitled to less weight than the other three factors enumerated in 10 CFR § 2.714(a). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 118 (1983); Houston Lighting and Power Co. (South Texas Project,

Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 245 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

Where good cause for failure to file on time has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner without a good excuse for lateness may be required to take the proceeding as he finds it. South Texas, supra, 16 NRC at 1367, 1368, citing, Nuclear Fuel Services, Inc. and N.Y.S. Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975).

Where good cause for a late filing is demonstrated, the other factors are given lesser weight. Midland, supra, 16 NRC at 589; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984).

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

Withdrawal of one party has been held not to constitute good cause for the delay of a petitioner in seeking to substitute itself for the withdrawing party, or, comparably, to adopt the withdrawing party's contentions. South Texas, supra, 16 NRC at 1369, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977). The same standards apply to an existing intervenor seeking to adopt the abandoned contentions of another intervenor as to a

"newly arriving legal stranger." South Texas, *supra*, 16 NRC at 1369. However, if under the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 350, 384 (1985), *citing*, River Bend, *supra*, 6 NRC at 796.

The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982). *Compare*, LBP-82-53, 16 NRC 196, 200-01 (1982) (Up-to-date journals demonstrate good cause) and LBP-82-15, 15 NRC 555, 557 (1982).

An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available several months prior to the filing of the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628-629 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

The determination whether to accept a contention that was susceptible of filing within the period prescribed by the Rules of Practice on an untimely basis involves a consideration of all five 10 CFR § 2.714(a) factors and not just the reason, substantial or not as the case may be, why the petitioner did not meet the deadline. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 470 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

The proponent of a late contention should affirmatively address the five factors and demonstrate that, on balance, the contention should be admitted. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), *citing*, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

Section 189a of the Atomic Energy Act of 1954, as amended ("Atomic Energy Act" or "Act") does not require the Commission to give controlling weight to the good cause factor in 10 CFR § 2.714(a)(1)(i) in determining whether to admit a late-filed contention, based on licensing documents which were not required to be prepared early enough to provide a basis for a timely-filed contention. The unavailability of those documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate

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for that contention is available from other sources in a timely manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983).

The institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 436-37 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84-85 (1985). Section 189a of the Act is not offended by a procedural rule that simply recognizes that the public's interest in an efficient administrative process is not properly accounted for by a rule of automatic admission for certain late-filed contentions. Catawba, supra, 17 NRC at 1046. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045-47. Cf. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

10 CFR § 2.714(a)(1) requires that all five factors enumerated in that regulation should be applied to late-filed contentions even where the licensing-related document, upon which the contentions are predicated, was not available within the time prescribed for filing timely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045. The Commission has held that any refiled contention would have to meet the five-factor test of 10 CFR § 2.714(a)(1), if not timely filed, even if the specifics could not have been known earlier because the documents on which they were based had not yet been issued. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 796 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

Even where an applicant does not comply with a standing order to serve all relevant papers on the Board and parties, the admissibility of an intervenor's late-filed contention directed toward such papers must be determined by a balancing of all five factors. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 657 (1984), overruling in part, LBP-84-16, 19 NRC 857, 868 (1984).

Under 10 CFR § 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. Nevertheless, such a contention is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in that section. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991). However, an intervenor is not required to file contentions based upon a draft licensing-related document. West Chicago, supra, 29 NRC at 514.

An intervenor who has previously submitted timely contentions may establish good cause for the late filing of amended contentions by showing that the amended contentions: restate portions of the earlier timely-filed contentions; and were promptly filed in response to a Commission decision which stated a new legal principle. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579 (1986), aff'd, ALAB-868, 25 NRC 912, 923 (1987).

A submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

The fact that a party may have delayed the filing of a contention in the hopes of settling the issue without resorting to litigation in an adjudicatory proceeding does not constitute good cause for failure to file on time. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

The admissibility of a late-filed contention must be determined by a balancing of all five of the late intervention factors in 10 CFR § 2.714(a). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

When an intervenor does not show good cause for the non-timely submission of contentions, it must make a compelling showing on the other four criteria of 10 CFR § 2.714(a). Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 244 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

With respect to the second factor of 10 CFR § 2.714(a) (availability of other means of protecting late petitioners' interest) and the fourth factor (the extent to which late petitioners' interest will be represented by existing parties), the applicants in Zimmer, supra, 10 NRC at 215, claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless an issue was raised in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra, 10 NRC at 215; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-528 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173-77 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 913-14 (1985).

When considering the second factor of 10 CFR § 2.714(a)(1), the availability of other means to protect an intervenor's interests, a Board may only inquire whether there are other forums in which the intervenor itself might protect its

interests. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.13 (1982).

Informal negotiations among parties, even under a Board's aegis, is not an adequate substitute for a party's right to pursue its legitimate interest in issues in formal adjudicatory hearings. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1191 (1985).

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra, 10 NRC at 216 n.4, citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

In determining what other means are available to protect a petitioner's interests, a board will consider the issues sought to be raised, the relief requested, and the stage of the proceeding. There may well be no alternative to providing a petitioner with an opportunity to participate in an adjudicatory hearing. However, in some circumstances, such as where the proposed contention deals with routinely filed post licensing reports by an applicant, a 10 CFR 2.206 petition may be sufficient to protect the petitioner's interests. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

A contention based on a Draft Environmental Statement (DCS) which contains no new information relevant to the contention, lacks good cause for late filing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982).

Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an

explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but applicant will be permitted to respond. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982).

The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Ability to contribute to the record is relevant to the admissibility of late-filed contentions. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 56 n.5 (1983). An intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991). An intervenor must demonstrate special expertise concerning the subjects which it seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-35 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990). An intervenor need not present expert witnesses or indicate what testimony it plans to present if it has established its ability to contribute to the development of a sound record in other ways. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1408 n.14 (1983). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-1183 (1983).

Nevertheless, an intervenor should provide specific information from which a Board can infer that the intervenor will contribute to the development of a sound record on the particular issue in question. An intervenor's bare assertion of past effectiveness in contributing to the development of a sound record on other issues in the current proceeding and in past proceedings is insufficient. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985), citing, WPPSS, supra, 18 NRC at 1181, and Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station),

ALAB-919, 30 NRC 29, 40-41 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In determining an intervenor's ability to assist in the development of a sound record, it is erroneous to consider the performance of counsel in a different proceeding. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986). Contra Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926-27 (1987).

The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984).

The extent to which an intervenor may reasonably be expected to assist in developing a sound record is the most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985).

Given a proceeding initially noticed in 1978 for which a Special Prehearing Conference was held early in 1979, any currently filed contentions would be untimely. That does not mean, after balancing the factors in 10 CFR § 2.714(a) that the untimeliness should bar admission of the contention. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 55 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982).

A party seeking to add a new contention after the close of the record must satisfy both standards for admitting a late-filed contention set forth in 10 CFR § 2.714(a)(1) and the criteria, as established by case law, for reopening the record, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), despite the fact that nontimely contentions raise matters which have not been previously litigated. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Diablo Canyon, supra, 16 NRC at 1714-15.

In evaluating the extent to which admission of a late-filed contention would delay the proceeding, a Board must determine

whether, by filing late, the intervenor has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987).

Where the delay in filing contentions is great and the issues are serious, the seriousness of an issue does not imply that the party raising it is somehow forever exempted from the Rules of Practice. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

The fifth criteria for admission of a late-filed contention requires a board to determine whether the proceeding, and not the issuance of a license or the operation of a plant, will be delayed. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986).

The admission of any new contention may broaden and delay the completion of a proceeding by increasing the number of issues which must be considered. A Board may consider the following factors which may minimize the impact of the new contention: how close to the scheduled hearing date the new contention was filed; and the extent of discovery which had been completed prior to the filing of the new contention. A Board will not admit a new contention which is filed so close to the scheduled hearing date that the parties would be denied an adequate opportunity to pursue discovery on the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 509, 630-631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

A Board may refuse to admit a late-filed contention where it determines that the contention is so rambling and disorganized that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983).

An intervenor's voluntary withdrawal of other, unrelated contentions may not be used to counterbalance any delays which might be caused by the admission of a late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

In evaluating the potential for delay, it is improper for the Board to balance the significance of the late-filed contention against the likelihood of delay. Such a balancing of factors is made in the overall evaluation of the five criteria for the

admission of a late-filed contention. Braidwood, supra, 23 NRC at 248.

The Licensing Board's general authority to shape the course of a proceeding, 10 CFR § 2.718(e), will not be utilized as the foundation for the Board's acceptance of a late-filed contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984).

2.9.5.6 Contentions Challenging Regulations

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978).

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.758. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18 (1989).

When a Commission regulation permits the use of a particular analysis or technique, a contention which asserts that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1273 (1983).

Although Commission regulations may permit a board in some situations to approve minor adjustments to Commission-prescribed standards, a board will reject as inadmissible a contention which seeks major changes to those standards. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 147-48 (1986) (intervenor's sought major expansion of the emergency planning zone), rev'd in part, CLI-87-12, 26 NRC 383, 395 (1987) (the Appeal Board incorrectly admitted contentions which involved more than just minor adjustments to the emergency planning zone). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 507 n.48 (1986).

Under 10 CFR § 2.758, the Commission has withheld jurisdiction from Licensing Boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain "special circumstances." Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974);

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Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444 (1985).

10 CFR § 2.758 sets out those special circumstances which an intervenor must show to be applicable before a contention attacking the regulations will be admissible. Further, 10 CFR § 2.758 provides for certification to the Commission of the question of whether a rule or regulation of the Commission should be waived in a particular adjudicatory proceeding where an adjudicatory board determines that, as a result of special circumstances, a prima facie showing has been made that application of the rule in a particular way would not serve the purposes for which the rule was adopted and, accordingly, that a waiver should be authorized. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-585 (1978); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546 (1986).

Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR § 2.758. It is not, however, enough merely to allege the existence of special circumstances; such circumstances must be set forth with particularity. The petition should be supported by proof, in affidavit or other appropriate form, sufficient for the Licensing Board to determine whether the petitioning party has made a prima facie showing for waiver. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

2.9.5.7 Contentions Involving Generic Issues

Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985). They appear to be permitted to accept "generic issues" which are not and are not about to become the subject of rulemaking, however. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1271 (1983). In order for a party or interested State to introduce such an issue into a proceeding, it must do more than present a list of generic technical issues being studied by the Staff or point to newly issued Regulatory Guides on a subject. There must be a nexus established between the generic issue and the particular permit or application in question. To establish such a nexus, it must be shown that (1) the generic issue has

safety significance for the particular reactor under review, and (2) the fashion in which the application deals with the matter is unsatisfactory or the short term solution offered to the problem under study is inadequate. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1608 (1982), citing, River Bend, supra, 6 NRC at 773; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1657 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 418, 420 (1984), citing, River Bend, supra, 6 NRC at 773, and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 (1978).

Parties interested in litigating unresolved safety issues must do something more than simply offer a checklist of unresolved issues; they must show that the issues have some specific safety significance for the reactor in question and that the application fails to resolve the matters satisfactorily. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43 (1982), the Licensing Board rejected the applicant's contention that Douglas Point, supra, requires dismissal whenever there is pending rulemaking on a subject at issue. The Board distinguished Douglas Point on several grounds: (1) In Douglas Point, there were no existing regulations on the subject, while in Perry, regulations do exist and continue in force regardless of proposed rulemaking; (2) The issue in Perry -- whether Perry should have an automated standby liquid control system (SLCS) given the plant's specific characteristics -- is far more specific than the issues in Douglas Point (i.e., nuclear waste disposal issues); (3) The proposed rules recommend a variety of approaches on the SLCS issue requiring analysis of the plant's situation, so any efforts by the Board to resolve the issue would contribute to the analysis; (4) The Commission did not bar consideration of such issues during the pendency of its proposed rulemaking, as it could have. Unless the Commission has specifically directed that contentions be dismissed during pendency of proposed rulemaking, no such dismissal is required.

Where the Commission has explicitly barred Board consideration of the subject of a contention on which rulemaking is pending, the Board may not exercise jurisdiction over the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 350 (1982). Where the

Commission has held its own decision whether to review an Appeal Board opinion in abeyance pending its decision whether or not to initiate a further rulemaking, and has instructed the Licensing Boards to defer consideration of the issue, a contention involving the issue is unlitigable and inadmissible. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 417-18 (1984), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

A brief suspension of consideration of a contention will not be continued when it no longer appears likely that the Commission is about to issue a proposed rule on the matter which was the subject of the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 846-847 (1981).

While a Licensing Board should not accept contentions that are or are about to become the subject of general rulemaking, where a contention has long since been admitted and is still pending when notice of rulemaking is published, the intent of the Commission determines whether litigation of that contention should be undertaken. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Before a contention presenting a generic issue can be admitted, the intervenor must demonstrate a specific nexus between each contention and the facility that is the subject of the proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 165 (1987), aff'd on other grounds, ALAB-880, 26 NRC 449, 456-57 n.7 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

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

2.9.5.8 Contentions Challenging Absent or Incomplete Documents

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later

refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980). Note, however, that the absence of licensing documents does not justify admission of contentions which do not meet the basis and specificity requirements of 10 CFR § 2.714. That is, a non-specific contention may not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Rulings on contentions concerning undeveloped portions of emergency plans may be deferred. To admit such contentions would be to risk unnecessary litigation. But to deny the contentions would unfairly ignore the insufficient development of these portions. Fairness and efficiency seem to dictate that rulings on such contentions be deferred. The objectives of such deferrals are to encourage negotiation, to avoid unnecessary litigation, and to make necessary litigation as focused as possible. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). Cf. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 775-76 (1983).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

2.9.5.9 Contentions re Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974).

An intervenor may not introduce a contention which questions the adequacy of an applicant's security plan "against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense

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activities." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 135-36, 138 (1985), citing, 10 CFR § 50.13.

Where an intervenor seeking to challenge an applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982).

2.9.5.10 Defective Contentions

Contentions are defective, for whatever reason, if Licensing Boards have no duty to recast them to make them acceptable under 10 CFR § 2.714. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

However, although a Licensing Board is not required to recast contentions to make them acceptable, it also is not precluded from doing so. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979).

It is the responsibility of the intervenor, not the Licensing Board, to provide the necessary information to satisfy the basic requirement for the admission of its contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

A Licensing Board has consolidated otherwise inadmissible contentions with properly admitted contentions involving the same subject matter where such consolidation would not require the applicant to mount a defense that is substantially different or expanded from that which would be required by the admitted contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989).

2.9.5.11 Discovery to Frame Contentions

A petitioner is not entitled to discovery to assist him in framing the contentions in his petition to intervene. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

An intervenor may not file a vague contention and place the burden upon the applicants and Staff to obtain further details through discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990).

2.9.5.12 Stipulations on Contentions

(RESERVED)

2.9.5.13 Appeals of Rulings on Contentions

Appellate review of a Licensing Board ruling rejecting some but not all of a party's contentions is available only at the end of the case. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978).

An Appeal Board may grant interlocutory review of a Licensing Board's rejection of one or more contentions only if the effect of the rejection is to wholly deny a petition to intervene. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-873, 26 NRC 154, 155 (1987), citing, 10 CFR § 2.714a.

Appeal Boards grant Licensing Boards broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 2.714(a)(1). However, an Appeal Board may overturn a Licensing Board's decision where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing, Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481-82 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991).

2.9.6 Conditions on Grants of Intervention

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

2.9.7 Appeals of Rulings on Intervention

The regulations contain a special provision allowing an interlocutory appeal from a Licensing Board order on petitions to intervene. The appellant must file a notice to appeal and supporting brief within 10 days after service of the Licensing Board's order. 10 CFR § 2.714a. Other parties may file briefs in support of or in opposition to the appeal within 10 days of service of the appeal.

An Appeal Board will not review the grant or denial of an intervention petition unless an appeal has been taken under 10 CFR § 2.714a. Once the time prescribed in that Section for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

It is settled under the Commission's Rules of Practice that a petitioner for intervention may not take an interlocutory appeal from Licensing Board action on his petition unless that action constituted an outright denial of the petition. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 82 (1983). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but denying certain contentions. 10 CFR § 2.714(b); Power Authority of the State of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a, which provides for interlocutory review of denials of petitions to intervene. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A State seeking to participate as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation. However, the State's special status does not confer any right to seek review of an order which allows the State to participate but excludes an issue which it seeks to raise. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested State may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested State may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested State from participating in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 589-90 (1986).

The applicant, the Staff and any party other than the petitioner can appeal an intervention order only on the ground that the petition should have been denied in whole. 10 CFR § 2.714a(c). An appeal from an intervention order carries with it a mandatory briefing requirement. Failure to file a brief will result in dismissal of the appeal. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973).

For a reaffirmation of the established rule that an appeal concerning an intervention petition must await the ultimate grant or denial of that petition, see Houston Lighting & Power Co. (A lens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). In this vein, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors overcome the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition to intervene. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986).

Similarly, the action of a Licensing Board in provisionally ordering a hearing and preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling.

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Consumers Power Company (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978).

While the regulations do not explicitly provide for Commission review of decisions on intervention, the Commission has entertained appeals in this regard and review by the Commission apparently may be sought. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939 (1978).

With regard to briefing on appeals, 10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

2.9.7.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973).

A Licensing Board's determination as to the "personal interest" of a petitioner will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Prairie Island, supra.

Similarly, a Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

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

2.9.8 Reinstatement of Intervenor After Withdrawal

A voluntary withdrawal of intervention is "without prejudice" in that it does not constitute a legal bar to the later reinstatement of the intervention upon the intervenor's showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973). The factors to be considered in the good cause determination are generally the same as those considered under 10 CFR § 2.714(a) with primary emphasis on the delay in the proceeding, prejudice to other parties and adequate protection of the intervenor's interests. Grand Gulf, supra.

2.9.9 Rights of Intervenors at Hearing

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor in an operating license proceeding is free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Concomitantly, once the record has closed, a generic safety issue may be litigated directly only if standards for late-filed contentions and reopening the record are met. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The rules cannot legitimately be read as requiring that, once an intervenor is represented by counsel, that counsel be the party's sole representative in the proceeding. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 994 (1983).

When a party is permitted to enter a case late, it is expected to take the case as it finds it. It follows that when a party that has participated in a case all along simply changes representatives in midstream, knowledge of the matters already heard and received into evidence is imputed to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 261 (1985).

An intervenor's status as a party in a proceeding does not of itself make it a spokesman for others. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986), aff'd, ALAB-854, 24 NRC 783 (1986), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979).

Under principles enunciated in Prairie Island, an intervenor may ordinarily conduct additional cross-examination and submit

proposed factual and legal findings on contentions sponsored by others. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975). However, that does not elevate the intervenor's status to that of co-sponsor of the contentions. The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which it seeks to have litigated." 10 CFR § 2.714(b). It follows from this that one intervenor may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 n.102 (1985).

Contentions left without a sponsor due to the withdrawal of one intervenor may be adopted by another intervenor upon satisfaction of the five-factor balancing test ordinarily used to determine whether to grant a non-timely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985). See 10 CFR §§ 2.714(a)(1), (b). For a detailed discussion of the five-factor test, See Sections 2.9.3.3.3 and 2.9.5.5.

A contention which has been joined by two joint intervenors may not be withdrawn without the consent of both joint intervenors. Either of the joint intervenors may litigate the contention upon the other intervenor's withdrawal of sponsorship for the contention. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986).

An intervenor in an operating license proceeding may not proceed on the basis of allegations that the Staff has somehow failed in its performance; at least when the evidence shows that the alleged inadequate Staff review did not result in inadequacies in the analyses and performance of the applicant. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 565 n.29 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

2.9.9.1 Burden of Proof

A licensee generally bears the ultimate burden of proof. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing, 10 CFR § 2.732. But intervenors must give some basis for further inquiry. Three Mile Island, supra, 16 NRC at 1271, citing, Pennsylvania Power and Light Co. and Alleghany Electric

Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980). See Section 3.7.

An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). For a more detailed discussion, see Section 3.7.2.

2.9.9.2 Presentation of Evidence

2.9.9.2.1 Affirmative Presentation by Intervenor/Participants

An intervenor may not adduce affirmative evidence on an issue not raised by him unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17, reconsidered, ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). This rule does not apply to an interested State participating under 10 CFR § 2.715(c). Such a State may produce evidence on issues not raised by it. Project Management Corp. (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392-93 (1976).

2.9.9.2.2 Consolidation of Intervenor Presentations

A Licensing Board, in permitting intervention, may consolidate intervenors for the purpose of restricting duplicative or repetitive evidence and argument. 10 CFR § 2.714(f) (formerly, 10 CFR § 2.714(e)). In addition, parties with substantially similar interests and contentions may be ordered to consolidate their presentation of evidence, cross-examination and participation in general pursuant to 10 CFR § 2.715a. An order consolidating the participation of one party with the others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308-309 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 272-73 (1983), citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1601 (1985).

The NRC Rules of Practice permit the consolidation of intervenors, but only where those parties have substantially the same interest that may be affected by the proceeding and where consolidation would not prejudice the rights of any party. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 993 (1983).

2.9.9.3

Only parties to a Commission licensing proceeding may be consolidated. Petitioners who are not admitted as parties may not be consolidated for the purposes of participation as a single party. 10 CFR § 2.715a; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. It is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

The Commission has issued a policy statement relating to consolidation of intervenors and the conduct of licensing proceedings. Pursuant to that Commission guidance, consolidation should not be ordered when it will prejudice the rights of any intervenor; however, in all appropriate cases, single, lead intervenors should be designated to present evidence, conduct cross-examination, submit briefs, and propose findings of fact, conclusions of law, and argument. Except where other intervenors' interests will be prejudiced or upon a showing that the record will be incomplete, those activities should not be performed by such other intervenors. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

2.9.9.3 Cross-Examination by Intervenors

An intervenor may engage in cross-examination of witnesses dealing with issues not raised by him if the intervenor has a discernible interest in resolution of those issues. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867-68 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986). Licensing Boards must carefully restrict and monitor such cross-examination, however, to avoid repetition. Prairie Island, supra, 1 NRC 1.

In general, the intervenor's cross-examination may not be used to expand the number or boundaries of contested issues. Prairie Island, supra, 8 AEC 857. For a further discussion, see Section 3.13.1.

2.9.9.4 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings with respect to all issues whether or not raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986).

A Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 15 NRC 452, 457 (1981).

The right to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

2.9.9.5 Attendance at/Participation in Prehearing Conferences/Hearings

An intervenor seeking to be excused from a prehearing conference should file a request to this effect before the conference date. Such a request should present the justification for not attending. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978). For a discussion of a party's duty to attend hearings, see Section 3.6.

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-2, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1811, 1817 (1992).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the NRC Staff at the Special Prehearing Conference. Application of that sanction would also result in dismissal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

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A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

Dismissal of a party is the ultimate sanction applicable to an intervenor. On the other hand, where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and its contentions dismissed. Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-1596 (1982), citing, Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156 (1976).

2.9.9.6 Pleadings and Documents of Intervenors

An intervenor may not disregard an adjudicatory board's direction to file a memorandum without first seeking leave of the board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187 (1978).

2.9.10 Cost of Intervention

2.9.10.1 Financial Assistance to Intervenors

The question of funding of intervenors' participation was addressed by the Commission in Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976). Therein, the Commission stated that it would not provide funding for participants in licensing, enforcement or antitrust proceedings and that it also would not provide such funding for participants in rulemaking proceedings as a general proposition, although it would attempt to provide funds for qualified GESMO participants.

Part of the basis for the Commission's determination was an opinion issued by the Comptroller General. Noting that the Commission lacks express statutory authority to provide funds, the opinion stated that the Commission might nevertheless

provide funds to a participant if the Commission determines that: (1) it cannot make the necessary licensing or rulemaking determinations unless financial assistance is extended to the participant who requires it; and (2) the funded participation is "essential" to the Commission's disposition of the issues. The Commission found that it could not make these determinations with respect to participants in licensing, enforcement, antitrust and general rulemaking proceedings. On the other hand, due to the singular importance of the GESMO proceedings, the Commission would seek to provide financial assistance to GESMO participants who applied by a specified deadline and who qualified for such assistance.

Subsequent to CLI-76-23, the Comptroller General issued an opinion on funding of intervenors in FDA proceedings. That ruling was a major shift from the opinion issued by the Comptroller General in the NRC case in that the test set out therein was not whether intervention was "essential" but whether it could "reasonably be expected to contribute substantially to a full and fair determination" of the pending matter.

In 1976, the Comptroller General issued two decisions in which he held that "funding of intervenors in the absence of specific Congressional authorization was permissible where participation by the intervenor is required by statute or intervention is necessary to assure adequate representation of opposing points of view and the intervenor is indigent or otherwise unable to bear the financial cost of participation." However, this position was overruled by the Second Circuit Court of Appeals, which held that an agency could not fund participants in its proceedings without a specific grant of authority from the Congress. Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). On this basis, in part, funding for intervenors was denied in Exxon Nuclear Company, Inc. (Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-31, 6 NRC 849 (1977).

The Commission is in favor of funding intervenors but Congress has precluded such funding for fiscal year 1980. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 703 and CLI-80-20, 11 NRC 705 (1980). Authorization acts for subsequent fiscal years have explicitly prohibited NRC from utilizing appropriated monies to fund intervenors. See Rochester Gas and Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1239 (1983).

A claim for funding by intervenor for past participation is precluded because the Commission has determined not to initiate a program to provide funding for intervenors.

Puerto Rico Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767-768 (1980).

Some financial assistance was made available to intervenors for procedural matters, such as free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in prior Commission rules. 10 CFR §§ 2.708(d), 2.712(f) and 2.750(c). (45 Fed. Reg. 49535, July 25, 1980). Those rules have since been amended so that procedural financial assistance is not now available.

The Commission is not empowered to expend its appropriated funds for the purpose of funding consultants to intervenors. See P.L. 97-88, Title V Section 502 [95 Stat. 1148 (1981)] and P.L. 97-276 Section 101(g) [95 Stat. 1135 (1982)]. Nor does it appear that the Commission has authority to require the utility-applicants to do so or to assess fees for that purpose where the service to be performed is for intervenors' benefit and is not one needed by the Commission to discharge its own licensing responsibilities. See Mississippi Power and Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). See also National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1978); Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1212 (1985), citing, Pub. L. No. 98-360, 98 Stat. 403 (1984). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 14-15 (1981).

2.9.10.2 Intervenor's Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-608 (1977).

2.9.11 Appeals by Intervenor:

An intervenor may seek appellate redress on all issues whether or not those issues were raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974).

2.9.12 Intervention in Remanded Proceedings

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

2.10 Nonparty Participation - Limited Appearance and Interested States

2.10.1 Limited Appearances in NRC Adjudicatory Proceedings

Although limited appearers are not parties to any proceeding, statements by limited appearers can serve to alert the Licensing Board and the parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

2.10.1.1 Requirements for Limited Appearance

The requirements for becoming a limited appearer are set out in 10 CFR § 2.715. Based upon that section, the requirements for limited appearances are generally within the discretion of the presiding officer in the proceeding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

2.10.1.2 Scope/Limitations of Limited Appearances

Under 10 CFR § 2.715(a), the role of a limited appearer is restricted to making oral or written statements of his position on the issues within such limits and on such conditions as the Board may fix.

Pursuant to 10 CFR § 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. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI 83-25, 18 NRC 327, 333 (1983).

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A limited appearance statement is not evidence and need only be taken into account by the Licensing Board to the extent that it may alert the Board or parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co., ALAB-108, *supra*, (dictum).

The purpose of limited appearance statements is to alert the Licensing Board and parties to areas in which evidence may need to be adduced. Such statements do not constitute evidence, and accordingly, the Board is not obligated to discuss them in its decision. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), *citing*, 10 CFR § 2.715(a); Iowa Electric Light and Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

A person who makes a limited appearance before a Licensing Board may not appeal from that Board's decision. Metropolitan Edison Company (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

2.10.2 Participation by Nonparty Interested States

Under 10 CFR § 2.715(c), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford representatives of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues. Even though a State has submitted contentions and intervened under 10 CFR § 2.714, it may participate as an "interested State" under 10 CFR § 2.715(c) on issues in the proceeding not raised by its own contentions. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1079 (1982), *citing*, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). However, once a party is admitted as an interested State under Section 2.715(c), it may not reserve the right to intervene later under Section 2.714 with full party status. A petition to intervene under the provisions of the latter section must conform to the requirements for late filed petitions. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 723 (1982).

A Licensing Board may require the representative of an interested State to indicate in advance of the hearing the subject matter on which it wishes to participate, but such

a showing is not a prerequisite of admission under 10 CFR § 2.715(c). Indian Point, supra, 15 NRC at 723.

Section 2.715(c) states that the Commission shall "afford representatives of an interested State... and or agencies thereof, a reasonable opportunity to participate." Given this language, a Licensing Board is not limited to recognizing only one representative of a State. Thus the Licensing Board may admit the Attorney General of an interested State even though a State law designates another person as the State's representative. Indian Point, supra, 15 NRC at 719. Although some language in the Indian Point decision seemed to indicate that State law does not control the designation of a State representative, the decision actually rested upon the fact that the State Attorney General did not agree that the State law designated someone other than the Attorney General to represent the State. In the absence of a contrary judicial decision, the Commission will defer to the Attorney General's interpretation of the State law designating the State's representative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148, 149 and n.13 (1987).

A State participating as an interested State may appeal an adjudicatory board's decision so that an interested State participating under 10 CFR § 2.715(c) constitutes the sole exception to the normal rule that a nonparty to a proceeding may not appeal from the decision in that proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Section 274(1) of the Atomic Energy Act confers a right to participate in licensing proceedings on the State of location for the subject facility. However, 10 CFR § 2.715(c) of the Commission's Rules of Practice extends an opportunity to participate not merely to the State in which a facility will be located, but also to those other States that demonstrate an interest cognizable under Section 2.715(c). Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977). See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

Although a State seeking to participate as an "interested State" under Section 2.715(c) need not state contentions, once in the proceeding it must comply with all the procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1615 (1982), citing, River Bend, supra, 6 NRC at 768. Nevertheless, the Commission has emphasized that

the participation of an interested sovereign State, as a full party or otherwise, is always desirable in the NRC licensing process. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977). A State's participation may be so important that the State's desire to be a party to Commission review may be one factor to consider in determining whether the State should be permitted to participate in the Commission review, even though the State has not fully complied with the requirements for such participation. Id.

A State has no right to participate in administrative appeals when it has not participated in the underlying hearing. The Commission will deny a State's extremely untimely petition to intervene as a non-party interested State which is filed on the eve of the Commission's licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986), aff'd sub nom. Ohio v. NRC, 827 F.2d 258 (6th Cir. 1987).

10 CFR § 2.715(c) has been amended to include counties and municipalities and agencies thereof as governmental entities in addition to States which may participate in NRC adjudicatory proceedings as "interested" government bodies.

A governmental body must demonstrate a genuine interest in participating in the proceeding. A Licensing Board denied a municipality permission to participate as an interested State in a reopened hearing where the municipality failed to: file proposed findings of fact; comply with a Board Order to indicate with reasonable specificity the subject matters on which it desired to participate; appear at an earlier evidentiary hearing; and specify its objections to the Staff reports which were the focus of the reopened hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136 (1986).

Section 2.715(c) was also amended to more clearly delineate the participation rights of "interested" government bodies. As amended, this section provides that "interested" government bodies may introduce evidence, interrogate witnesses, advise the Commission without taking a position on any issue, file proposed findings, appeal the Licensing Board's decision, and seek review by the Commission.

The mere filing by a State of a petition to participate in an operating license application pursuant to 10 CFR § 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. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear

Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 426 (1984), citing, Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

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

A late decision by the Governor of a State to participate as representative of an interested State can be granted, but the Governor must take the proceeding as he finds it. He cannot complain of rulings made or procedural arrangements settled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983), citing, 10 CFR § 2.715(c); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

An interested State that has elected to litigate issues as a full party under 10 CFR § 2.714 is accorded the rights of an "interested State" under 10 CFR § 2.715(c) as to all other issues. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LEP-83-9, 17 NRC 403, 407 (1983), citing, Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976).

10 CFR § 2.715(c) authorizes an interested State to introduce evidence with respect to those issues on which it has not taken a position. However, at the earliest possible date in advance of the hearing, an interested State must state with reasonable specificity those subject areas, other than its own contentions, in which it intends to participate. Seabrook, supra, 17 NRC at 407.

The presiding officer may require an interested governmental entity to indicate with reasonable specificity, in advance of the hearing, the subject matters on which it desires to participate. However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances, any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1140 (1983). See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

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An interested State, once admitted to a proceeding, must observe the procedural requirements applicable to other participants. Every party, however, may seek modification for good cause of time limits previously set by a Board. Moreover, good cause, by its very nature, must be an ad hoc determination based on the facts and circumstances applicable to the particular determination. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983).

Although an interested State must observe applicable procedural requirements, including time limits, the facts and circumstances which would constitute good cause for extending the time available to a State may not be coextensive with those warranting that action for another party. States need not, although they may, take a position with respect to an issue in order to participate in the resolution of that issue. Reflecting political changes which uniquely bear upon bodies such as States, a State's position on an issue (and the degree of its participation with respect to that issue) might understandably change during the course of a Board's consideration of the issue. The Commission itself has recognized such factors, and it has permitted States to participate even where contrary to a procedural requirement which might bar another party's participation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977). See 10 CFR § 2.715(c).

A county does not lose its right to participate as an interested governmental agency pursuant to 10 CFR § 2.715(c) because it has elected to participate as a full intervenor on specified contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

A State's status as an interested State does not confer upon it any special power to adopt contentions which have been abandoned by their sponsor. A State must observe the procedural requirements applicable to other participants. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALR-934, 32 NRC 1 (1990).

Any governmental participant seeking to advance a late contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions as well as the criteria for reopening the record. Shoreham, supra, 17 NRC at 1140.

2.11 Discovery

2.11.1 Time for Discovery

Discovery begins on admitted contentions after the first prehearing conference. 10 CFR 2.740(a)(1). Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945 (1982).

Under 10 CFR § 2.740(b)(1), there can be no formal discovery prior to the special prehearing conference provided for in Section 2.751a. In any event, a potential intervenor has no right to seek discovery prior to filing his petition to intervene. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, reconsid. den. ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). See also BPI v. AEC, 502 F.2d 424, 426-29 (D.C. Cir. 1974). Once an intervenor has been admitted, formal discovery is limited to matters in controversy which have been admitted. 10 CFR § 2.740(b)(1). Discovery on the subject matter of a contention in a licensing proceeding can be obtained only after the contention has been admitted to the proceeding. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (the scope of a contention is determined by the literal terms of the contention, coupled with its stated bases), reconsid. denied on other grounds, LBP-88-25A, 28 NRC 435 (1988).

A Licensing Board denied an applicant's motion for leave to commence limited discovery against persons who had filed petitions to intervene (at that point, nonparties). The Board entertained substantial doubt as to its authority to order the requested discovery, but denied the motion specifically because it found no necessity to follow that course of action. The Board discussed at length the law relating to the prohibition found in 10 CFR § 2.740(b)(1) against discovery beginning prior to the prehearing conference provided for in 10 CFR § 2.751a. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 577-584 (1978).

Prior to the grant of a formal hearing on a proposed operating license amendment, a Licensing Board directed questions to the applicants and the NRC Staff to clarify the record regarding a possible safety issue which had not been addressed directly by the previous filings of the parties. The Board believed its questions were a permitted inquiry, 10 CFR § 2.756, to determine whether possible areas of concern could be resolved informally without a formal hearing. Such questions did not constitute impermissible discovery prior to the grant of a

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hearing. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-6, 33 NRC 169, 171-72 (1991).

Applicants are entitled to prompt discovery concerning the bases of contentions, since a good deal of information is already available from the FSAR and other documents early in the course of the proceeding. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 369 (1981).

Under 10 CFR § 2.740(b)(1), discovery is ordinarily to be completed before the prehearing conference held pursuant to 10 CFR § 2.752, absent good cause shown. The fact that a party did not engage in prehearing discovery to obtain an expert witness' "backup" calculations does not preclude a request at trial for such information, but the Licensing Board may take into account the delay in deciding to grant such a last minute request. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

The fact that late intervention has been permitted should not disrupt established discovery schedules since a tardy petitioner with no good excuse must take the proceeding as he finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

Under 10 CFR § 2.740(b)(1), discovery is available after a contention is admitted and may be terminated a reasonable time thereafter. Litigants are not entitled to further discovery as a matter of right with respect to information relevant to a contention which first surfaces long after discovery on that contention has been terminated. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1431-32 (1984), aff'd, ALAB-813, 22 NRC 59 (1985). However, an Appeal Board has recently held that a Licensing Board abused its discretion by denying intervenors the opportunity to conduct discovery of new information submitted by the applicant and admitted by the Board on a reopened record. The Appeal Board found that, although there might have been a need to conduct an expeditious hearing, it was improper to deny the intervenors the opportunity to conduct any discovery concerning the newly admitted information where it was not shown that the requested discovery would delay the hearing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. Nor does it entitle the party to an

extension of time for discovery absent a showing of good cause, as judged by the standards of 10 CFR § 2.711. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

A party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

Though the period for discovery may have long since terminated, at least one Appeal Board decision seems to indicate that a party may obtain discovery in order to support a motion to reopen a hearing provided that the party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). But see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) and Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986) where the Commission has made it very clear that a movant seeking to reopen the record is not entitled to discovery to support its motion.

The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981). The Commission stated that in virtually all cases individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983), citing Statement of Policy, supra, 13 NRC at 456. Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. Perry, supra, 18 NRC at 1401.

An intervenor who has agreed to an expedited discovery schedule during a prehearing conference is considered to have waived its objections to the schedule once the hearing has started. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

2.11.2 Discovery Rules

In general, the discovery rules as between all parties except the Staff follow the form of the Federal Rules of

Civil Procedure. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

If there is no NRC rule that parallels a Federal Rule of Civil Procedure, the Board is not restricted from applying the Federal rule. While the Commission may have chosen to adopt only some of the Federal rules of practice to apply to all cases, it need not be inferred that the Commission intended to preclude a Licensing Board from following the guidance of the Federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. Seabrook, supra, 17 NRC at 497.

Rule 26(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of non-witness experts. Seabrook, supra, 17 NRC at 497; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) (discovery of a non-witness expert permitted only upon a showing of exceptional circumstances). The filing of an affidavit as part of a non-record filing with a Licensing Board does not make an individual an expert witness. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 947 (1987).

In modern administrative and legal practice, including NRC practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981); Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1984).

A party may seek discovery of another party without the necessity of Licensing Board intervention. Where, however, discovery of a nonparty is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.720. Pacific Gas and Electric Company

(Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Only those State agencies which are parties in NRC proceedings are required to respond to requests under 10 CFR § 2.741 for the production of documents. In order to obtain documents from non-party State agencies, a party must file a request for a subpoena pursuant to 10 CFR § 2.720. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21-22 (1985), citing, Stanislaus, supra, 9 NRC at 683.

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

Each co-owner of a nuclear facility has an independent responsibility, to the extent that it is able, to provide a Licensing Board with a full and accurate record and with complete responses to discovery requests. The majority owner must keep the minority owners sufficiently well informed so that they can fulfill their responsibilities to the Board. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-27, 26 NRC 228, 230 (1987).

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

A plan to seek evidence primarily through discovery is a permissible approach for an intervenor to take. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1943 (1982).

Lack of knowledge is always an adequate response to discovery. A truthful "don't know" response is not sanctionable as a default in making discovery. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945, 1945 n.3 (1982).

At least one Licensing Board has held that intervenors may develop and support their contentions by getting a first

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round of discovery against other parties before the intervenors are required to provide responses to discovery against them. Catawba, supra, 16 NRC at 1945. But see 2.9.5.11, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

Discovery of the foundation upon which a contention is based is not only clearly within the realm of proper discovery, but also is necessary for an applicant's preparation for hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

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. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), affirmed, ALAB-764, 19 NRC 633 (1984).

2.11.2.1 Construction of Discovery Rules

For discovery between parties other than the Staff, the discovery rules are to be construed very liberally. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1742 (1981).

Where a provision of the NRC discovery rules is similar or analogous to one of the Federal rules, judicial interpretations of that Federal rule can serve as guidance for interpreting the particular NRC rule. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978).

2.11.2.2 Scope of Discovery

The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). A party seeking discovery after the discovery period is over, however, must meet a higher standard of relevance. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), LBP-76-8, 3 NRC 199, 201 (1976). While the "general relevancy" test is fairly liberal, it

does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus, parties may obtain discovery only of information which is relevant to the controverted subject matter of the proceeding, as identified in the prehearing order, or which is likely to lead to the discovery of admissible evidence. This rule applies as much to Part 70 licenses for special nuclear material as to Part 50 licenses for construction of utilization facilities. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). Moreover, while the scope of discovery is rather broad, requests phrased in terms of "all documents..." are not favored. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

An intervenor may obtain information about other reactors in the course of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982).

An intervenor's motion which sought to preserve deficient components which the applicant was removing from its plant was denied because the motion did not comply with the requirements for (1) a stay, or (2) a motion for discovery, since it did not express an intention to obtain information about the components. The questions raised in the intervenor's motion, including the possible need for destructive evaluation of the components, were directed to the adequacy and credibility of the applicant's evidence concerning the components. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 438 n.6 (1985).

In general, the discovery tools are the same as or similar to those provided for by the Federal Rules of Civil Procedure. The Commission's regulations permit depositions and requests for production of documents between intervenors and applicants without leave of the Commission and without any showing of good cause (10 CFR §§ 2.740a, 2.741). The regulations (10 CFR § 2.740b) specifically provide for interrogatories similar to those addressed by Rule 33 of the Federal Rules, although such interrogatories are not available for use against nonparties. The scope of discovery under the Commission's Rules of Practice is similar to discovery under the Federal Rules of Civil Procedure. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

Since written answers to interrogatories under oath as provided by 10 CFR § 2.740(b) are binding upon a party and may be used in the same manner as depositions, the authority of the person signing the answers to, in fact, provide such answers may be ascertained through discovery. Statements of counsel in briefs or arguments are not

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sufficient to establish this authority. Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1045 (1978).

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

To determine subject matter relevance for discovery purposes, it is first necessary to examine the issue involved. In an antitrust proceeding, a discovery request will not be denied where the interrogatories are relevant only to proposed antitrust license conditions and not to whether a situation inconsistent with the antitrust laws exists. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

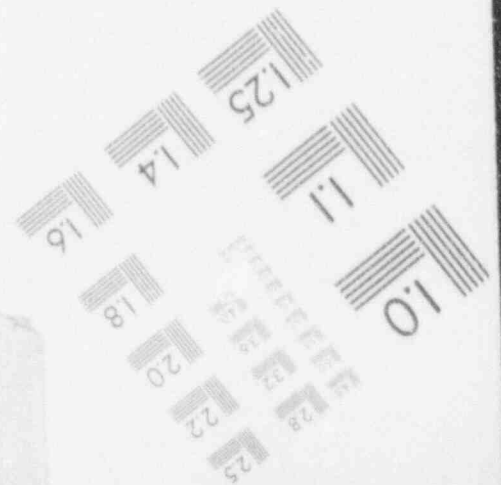
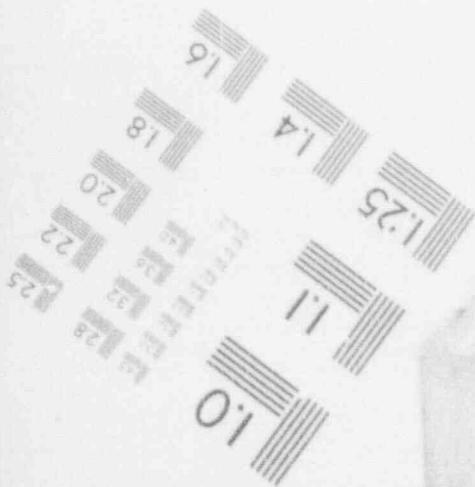
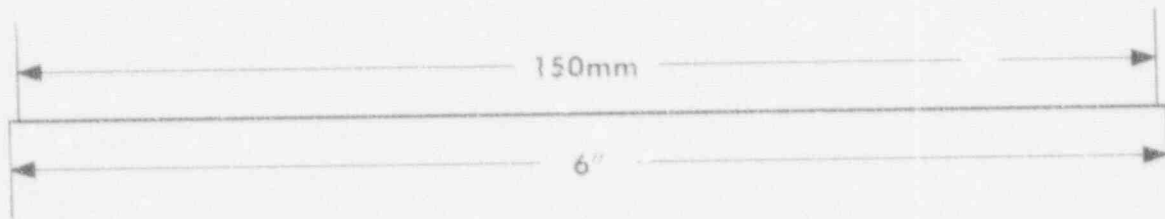
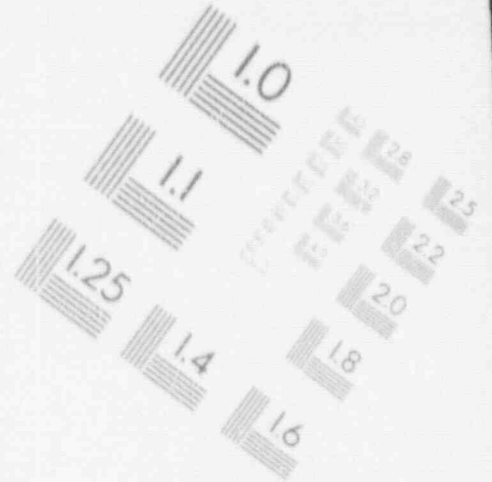
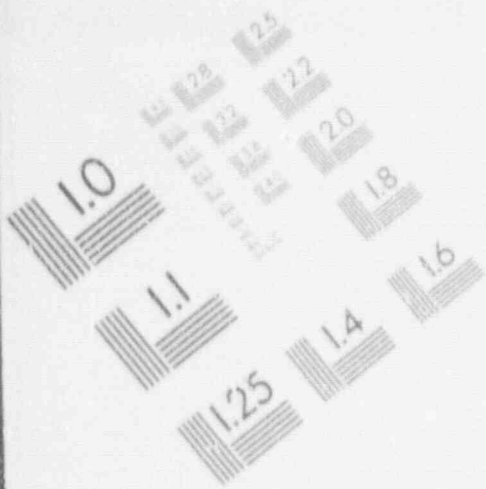
At least one Licensing Board has held that, in the proper circumstances, a party's right to take the deposition of another party's expert witness may be made contingent upon the payment of expert witness fees by the party seeking to take the deposition. Public Service Co. of Oklahoma (Black Fox, Units 1 & 2), LBP-77-18, 5 NRC 671, 673 (1977).

Based on 10 CFR § 2.720(d) and § 2.740a(h), fees for subpoenas and the fee for deponents, respectively, are to be paid by the party at whose instance the subpoena was issued, and the deposition was held. Pursuant to 10 CFR § 2.740a(d), objections on questions of evidence at a deposition are simply to be noted in short form, without argument. The relief of a stay of a hearing to permit deposition of witnesses is inappropriate in the absence of any allegation of prejudice. Each party to an NRC proceeding is not required to convene its own deposition if it seeks to question a witness as to any matter beyond the scope of those issues raised on direct by the party noticing the deposition. No party has a proprietary interest in a deposition; therefore, no party has a proprietary interest in a subpoena issued to a deponent. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1544-1546 (1982).

The Licensing Board, as provided by 10 CFR § 2.740(c) and 10 CFR § 2.740(d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). Thus, a Licensing

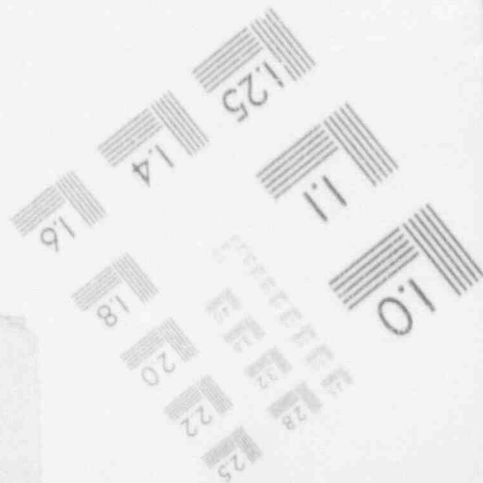
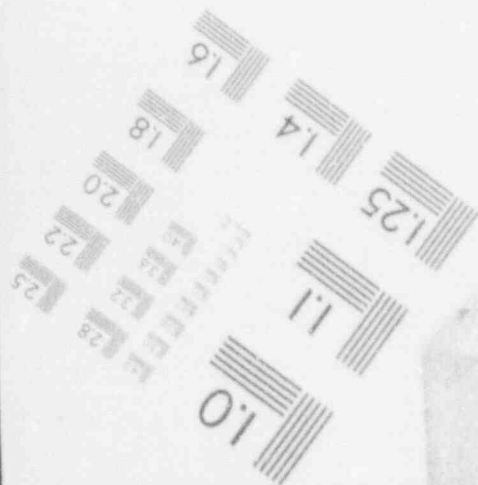
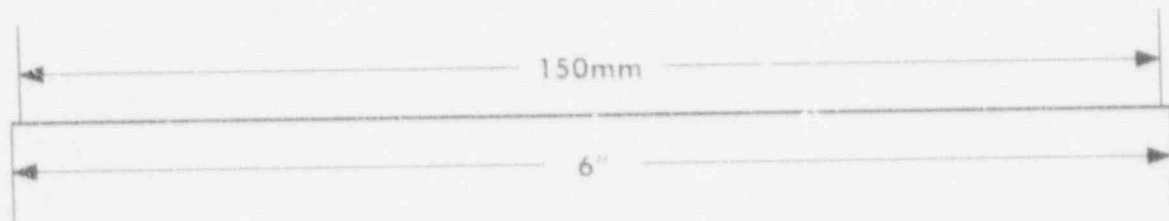
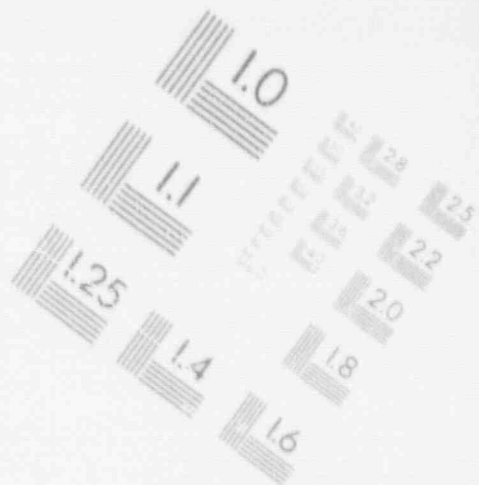
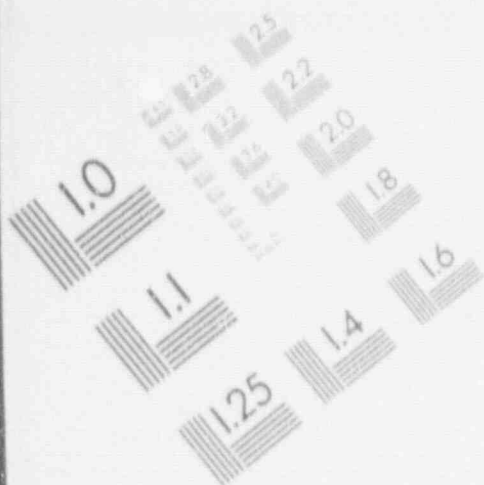
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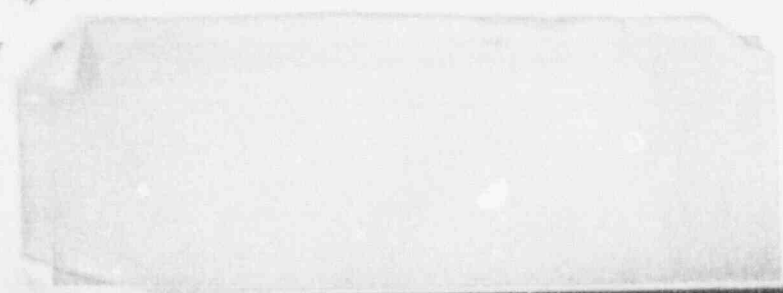
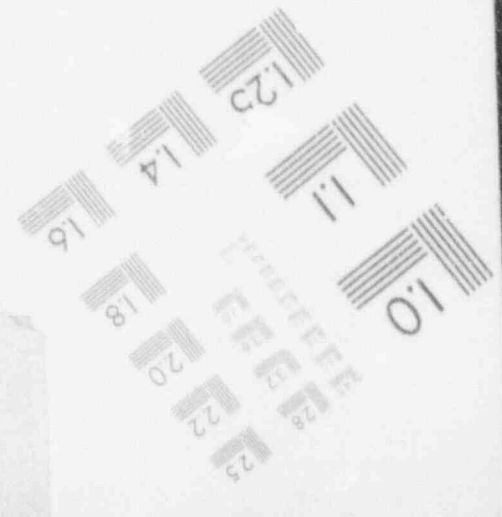
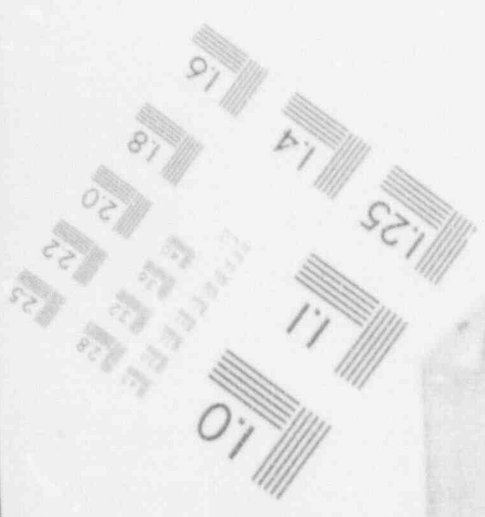
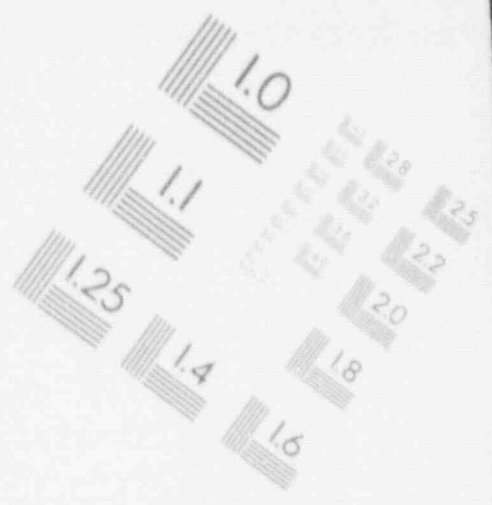
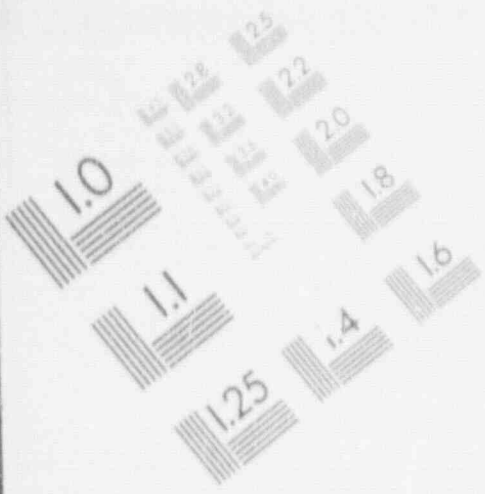
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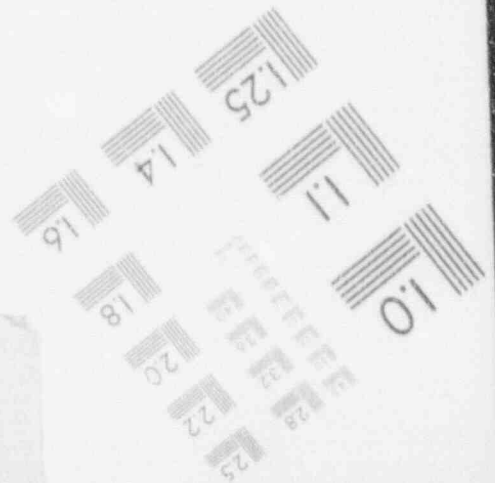
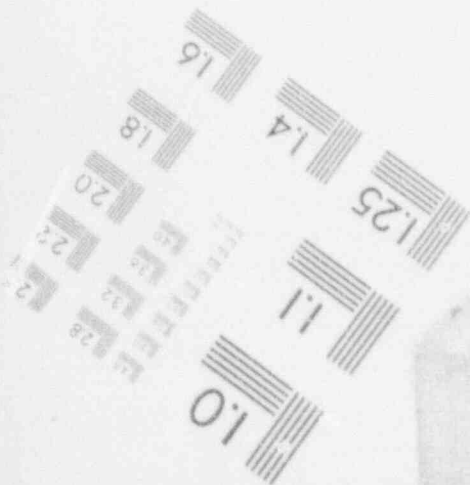
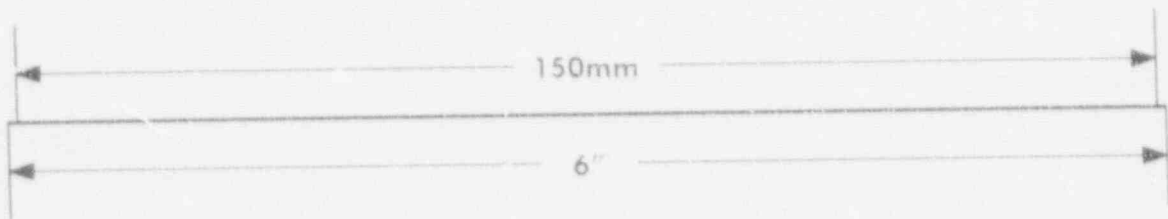
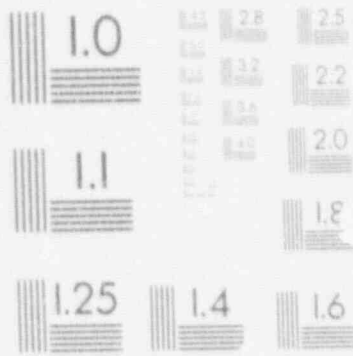
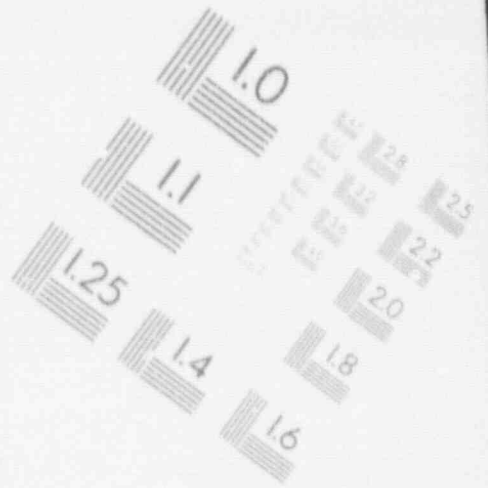
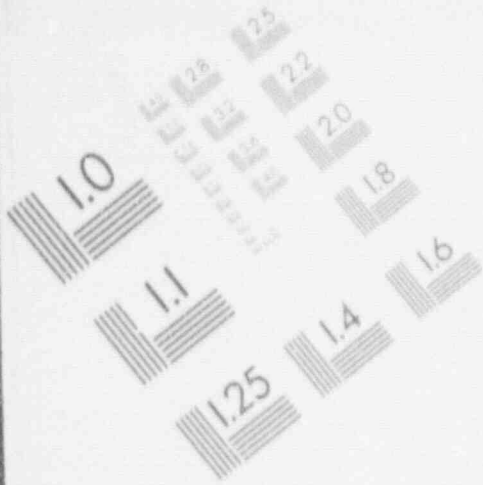
1

IMAGE EVALUATION TEST TARGET (MT-3)



1

IMAGE EVALUATION TEST TARGET (MT-3)



Board may issue a protective order which limits the representatives of a party in a proceeding who may conduct discovery of particular documents. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 75 (1987).

A party is only required to reveal information in its possession or control. A party need not conduct extensive independent research, although it may be required to perform some investigation to determine what information it actually possesses. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). This holding has been codified in the Rules of Practice at 10 CFR § 2.740(b)(3) which also prohibits the use of interrogatories which request a party to explain the reasons why the party did not use alternative data, assumptions, and analyses in developing its position on a matter in the proceeding. 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party is not required to search the record for information in order to respond to interrogatories where the issues that are the subject of the interrogatories are already defined in the record and the requesting party is as able to search the record as the party from whom discovery is requested. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 948 (1987).

2.11.2.3 Requests for Discovery During Hearing

Requests for background documents from a witness, to supply answers to cross-examination questions which the witness is unable to answer, cannot be denied solely because the material had not been previously requested through discovery. However, it can be denied where the request will cause significant delay in the hearing and the information sought has been substantially supplied through other testimony. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

2.11.2.4 Privileged Matter

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. To obtain a protective order (10 CFR § 2.740(c)), it must be demonstrated that:

- (1) the information in question is of a type customarily held in confidence by its originator;
- (2) there is a rational basis for having customarily held it in confidence;
- (3) it has, in fact, been kept in confidence; and

(4) it is not found in public sources.

Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). See also Section 6.23.3.

The claimant of a privilege must bear the burden of proving that it is entitled to such protection, including pleading it adequately in its response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982), citing In re Fischel, 557 F.2d 209 (9th Cir. 1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). See Shoreham, supra, 16 NRC at 1153. Intervenors' mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet that burden. Seabrook, supra, 17 NRC at 495.

It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to the asserting party setting forth its assertions of privilege and specifying those matters which it claims to be privileged. Shoreham, supra, 16 NRC at 1153.

Pursuant to 10 CFR § 2.740(b)(1), parties may generally obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. By choosing to model Section 2.740(b) after Federal Rule 26(b), without incorporating specific limitations, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Shoreham, supra, 16 NRC at 1157.

A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege to apply to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Claims of privilege must be specifically asserted with respect to particular documents. Privileges are not

absolute and may or may not apply to a particular document, depending upon a variety of circumstances. Shoreham, supra, 16 NRC at 1153, citing, United States v. El Paso Co., 682 F.2d 530, reh'g denied, 688 F.2d 840 (1982), cert. denied, 104 S. Ct. 1927 (1984), United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

In determining whether a party's inadvertent disclosure of a privileged document constitutes a waiver of the privilege, a Board will consider the adequacy of the precautions taken initially to prevent disclosure, whether the party was compelled to produce the document under a Board-imposed expedited discovery schedule, the number of documents which the party had to review, and whether the party, upon learning of the inadvertent disclosure, promptly objected to the production of the document. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 19-20 (1985).

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. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), aff'd, ALAB-764, 19 NRC 633, 641 (1984).

Although a report prepared by a party's non-witness experts qualifies for the work product privilege, a Licensing Board may order discovery of those portions of the report which are relevant to 10 CFR 50, Appendix B determinations concerning the causes of deficiencies in the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-87-20, 25 NRC 953, 957 (1987).

Statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Shoreham, supra, 16 NRC at 1158, citing, Fischel, 557 F.2d at 212.

The attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Shoreham, sup., 16 NRC at 1158, citing, Upjohn Co. v. United States, 449 U.S. 393, 395 (1981).

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The attorney-client privilege may not be asserted where there is a conflict of interests between various clients represented by the same attorney. There is no attorney-client relationship unless the attorney is able to exercise independent professional judgment on behalf of the interests of a client. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-1459 (1984), citing, Rule 1.7 of the ABA Model Rules of Professional Conduct.

A qualified work product immunity extends over material gathered or prepared by an attorney for use in litigation, either current or reasonably anticipated at a future time. Although the privilege is not easily overridden, a party may gain discovery of such material upon a showing of a substantial need for the material in the preparation of its case and an inability to obtain the material by any other means without undue hardships. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473-1474 (1984), citing, Hickman v. Taylor, 329 U.S. 495 (1947), and 10 CFR § 2.740(b)(2).

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 (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1098 (1983), citing, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to determination of whether such a document is privileged. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, O'Brien v. Board of Education of City School District of New York, 86 F.R.D. 54E, 549 (S.D.N.Y. 1980).

The attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Shoreham, supra, 16 NRC at 1158, citing, SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). Even if some commonly known factual matters were included in the discussion, or non-legal

advice was exchanged, where the primary purpose of a meeting was the receipt of legal advice, the entire contents thereof are protected by privilege. Midland, supra, 18 NRC at 1103, citing, Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

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. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 285 (1983), reconsideration denied, LBP-83-64, 18 NRC 760 (1983).

Communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was necessary to obtain informed legal advice [and] which might not have been made absent the privilege. Shoreham, supra, 16 NRC at 1159, citing, Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980).

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. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094 (1983).

The attorney-client privilege was not waived by the 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. Midland, supra, 18 NRC at 1100.

Where the date of a meeting, its attendees, its purpose, and its broad general subject matter are revealed, the attorney-client privilege was not waived as to the substance of the meeting. Midland, supra, 18 NRC at 1102.

Under appropriate circumstances, the attorney-client privilege may extend to certain communications from employees to corporate counsel. However, not every employee who provides a privileged communication is thereby a "client" represented by corporate counsel, or a "party" to any pending legal dispute, for purposes of ABA Disciplinary Rule 7-104. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-31, 18 NRC 1303, 1305 (1983), citing, Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn, supra, did not overturn the well-established principle that counsel should be at liberty to

approach witnesses for an opposing party. Catawba, supra, 18 NRC at 1305, citing, Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

Drafts of canned testimony not yet filed by a party are not subject to discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-28, 1 NRC 513, 514 (1975).

Security plans are not "classified," and are discoverable in accordance with the provisions of 10 CFR § 2.790(d). However, they are sensitive documents and are not to be made available to the public at large. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977). In order to discover such plans, (1) the moving party must demonstrate that the plan or a portion of it is relevant to the party's contentions; (2) the release of the plant security plan must usually be subject to a protective order; and (3) no witness may review the plan until he is first qualified as an expert with sufficient competence to evaluate it. Id. Only those portions of a security plan which are both relevant and necessary for the litigation of a party's contentions are subject to discovery. Id. at 1405.

An interrogatory seeking the identity and professional qualifications of persons relied upon by intervenors to review, analyze and study contentions and issues in a proceeding and to provide the bases for contentions is proper discovery. Such information is not privileged and is not a part of an attorney's work product even though the intervenor's attorney solicited the views and analyses of the persons involved and has the sole knowledge of their identity. General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 464-468 (1978).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR §§ 2.744(d), 2.790(a)(7); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 91 (1983); and is embodied in FOIA, 5 USC 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense

of an accused, or (2) essential to a fair determination of a cause (Rovario, supra) it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving future similar reports. South Texas, supra.

There may be a limited privilege for the identity of individuals who have expressly asked or been promised anonymity in coming forward with information concerning safety-related problems at a nuclear plant. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 537 (1982).

In determining whether or not to issue a protective order to protect the confidentiality or to limit the disclosure of the identities of prospective witnesses, a Board will weigh the benefit of encouraging the testimony of such witnesses against the detriment of inhibiting public access to that information and the cumbersome procedures necessitated by a protective order. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-40, 22 NRC 759, 763 (1985).

Privilege to withhold the names of confidential informants is not absolute; it must yield where the informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. Comanche Peak, supra, 16 NRC at 537.

Even where an informer's qualified privilege exists, it will fail in light of the Board's need for the particular information in informed decisionmaking. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 538 (1982).

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

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

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120. The Commission, in adopting the standards of Exemption 5, and "necessary to a proper decision" as its

document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123. The Government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

The executive or deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). A government decision-maker will not be compelled to testify about the mental processes and methods by which a decision was made, unless there is a clear showing of misconduct or wrongdoing. Franklin Savings Association v. Ryan, 922 F.2d 209, 211-212 (4th Cir. 1991), citing, United States v. Morgan, 313 U.S. 409 (1941).

The executive privilege may be invoked in NRC proceedings. Shoreham, supra, 19 NRC at 1333, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971).

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982), citing, Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 360 (1979).

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Shoreham, supra, 16 NRC at 1164, citing, EPA v. Mink, 410 U.S. 73, 87-88 (1973); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983). The executive privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1342 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

The executive privilege protects both intra-agency and inter-agency documents and may even extend to outside consultants to an agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1346 (1984), citing, Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. Shoreham, supra, 16 NRC at 1164, citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung, supra, 40 F.R.D. at 327.

In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the Government interest in secrecy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164-1165 (1982), citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

The burden is upon the claimant of the executive privilege to demonstrate a proper entitlement to exemption from disclosure, including a demonstration of precise and certain reasons for preserving the confidentiality of governmental communications. Shoreham, supra, 16 NRC at 1144, 1165, citing, Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

It is appropriate to look to cases decided under Exemption 5 of the FOIA for guidance in resolving claims of executive privilege in NRC proceedings related to discovery, so long as it is done using a common-sense approach which recognizes any differing equities presented in such FOIA cases. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1163-1164 (1982).

A claim of executive privilege is not waived by participation as a litigant in the proceeding. Shoreham, supra, 16 NRC at 1164.

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The privilege against disclosure of intragovernment documents containing advisory opinions, recommendations and deliberations is a part of the broader executive privilege recognized by the courts. Shoreham, supra, 16 NRC at 1164, citing United States v. Nixon, 418 U.S. 683, 705-711 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1226-1227 (1983).

The executive privilege is not limited to policymaking, but may attach to the deliberative process that precedes most decisions of government agencies. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982).

The purpose behind the privilege is to encourage frank discussions within the Government regarding the formulation of policy and the making of decisions. Shoreham, supra, 16 NRC at 1164, citing United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973).

2.17.2.5 Protective Orders

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

An affidavit in support of a corporation's request for a protective order is insufficient where it does not establish the basis for the affiant's personal knowledge (if any) respecting the basis for the protective order -- that is, the policies and practices of the corporation with regard to preserving the confidentiality of information said to be proprietary in nature. The Board might well disregard the affidavit entirely on the ground that it was not shown to have been executed by a qualified individual. While it may not be necessary to have the chief executive officer of the company serve as affiant, there is ample warrant to require that facts pertaining to management policies and practices be presented by an official who is in a position to attest to those policies and practices (and the reasons for them) from personal knowledge. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28 (1979). In North Anna, the Appeal Board granted a protective order request but explicitly declined to find that the corporation requesting the order had met its burden of showing that the information in question was proprietary and entitled to protection from public disclosure under the standards set forth in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3

NRC 408 (1976). No party had objected to the order, and the Appeal Board granted the order in the interest of obtaining the requested information without untoward further delay. However, its action should not be taken as precedent for future cases in which relief might be sought from an adjudicatory board based upon affidavits containing deficiencies as described above. North Anna, supra, 10 NRC at 28.

Pursuant to 10 CFR § 2.740(f)(2), the Board is empowered to make a protective order as it would make upon a motion pursuant to Section 2.740(c), in ruling upon a motion to compel made in accordance with Section 2.740(f). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

In at least one instance, a Licensing Board deemed it unnecessary to act on a motion for a protective order where a timely motion to compel is not filed. In such a case, the motion for protective order will be deemed granted and the matter closed upon the expiration of the time for filing a motion to compel. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1952 (1982).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through the threat of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-86 (1983).

A movant seeking a grant of confidentiality with regard to its identity must demonstrate the harm which it could suffer if its identity is disclosed. Joseph J. Macktal, CLI-89-12, 30 NRC 19, 24 (1989), reconsideration denied, CLI-89-13, 30 NRC 27 (1989).

Licensing and Appeal Boards assume that protective orders will be obeyed unless a concrete showing to the contrary is made. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 643 n.14 (1984); see Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 287-88 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 769 (1983), citing, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983). One who violates such orders risks "serious sanction". Midland, supra, 18 NRC at 769. A Board may impose sanctions to remedy the harm resulting from a party's violation of a protective

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order, and to prevent future violations of the order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537, 541 (1988).

2.11.2.6 Work Product

To be privileged from discovery by the work product doctrine, as codified in 10 CFR § 2.740(b)(2), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. Ordinary work product, which does not include the mental impressions, conclusions, legal theories or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of materials in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1162 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 179 (1986) (documents required by NRC regulations are discoverable even though attorneys may have assisted in preparing the documents in anticipation of litigation). An intervenor's mere assertion that the material is withholding constitutes attorney work product is insufficient to meet the burden of proving it is entitled to protection from discovery. Seabrook, *supra*, 17 NRC at 495.

In the absence of unusual circumstances, a corporate party cannot immunize itself from otherwise proper discovery merely by using lawyers to make file searches for information required to answer an interrogatory. Houston Lighting & Power Company (South Texas Project, Units 1 & 2), LBP-79-5, 9 NRC 193, 195 (1979).

Drafts of testimony are not covered by the attorney work product privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1793-1794 (1981).

2.11.2.7 Updating Discovery Responses

The requirements for updating discovery responses are set forth in 10 CFR § 2.740(e). Generally, a response that was accurate and complete when made need not be updated to include later acquired information with certain exceptions set forth in Section 2.740(e). Of course, an adjudicatory board may

impose the duty to supplement responses beyond that required by the regulations. 10 CFR § 2.740(e)(3).

2.11.2.8 Interrogatories

Interrogatories must have at least general relevancy, for discovery purposes, to the matter in controversy. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

Interrogatories will not be rejected solely on the number of questions. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAP-613, 12 NRC 317, 330-335 (1980). However, Licensing Boards may limit the number of interrogatories in accordance with the Commission's rules. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981).

Numbers alone do not determine the propriety of interrogatories. While a Board is authorized to impose a limit on interrogatories, the rules do not do so of their own force. In the absence of specific objections there is no occasion to review the propriety of interrogatories individually. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1941 (1982).

An intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Interrogatories designed to discover what, if any, evidence underlies an intervenor's own contentions are not out of order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Interrogatories served to determine the "regulatory basis" or "legal theory" for a contention are appropriate and important. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. Instead, a party must specify precisely which documents cited contain the desired information. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-67, 16 NRC 734, 736 (1982), citing Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1421, n.39 (1982); 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981); Martin v. Easton Publishing Co., 85 F.R.J. 312, 315 (E.D. Pa. 1980).

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To the extent the interrogatory seeks to uncover and examine the foundation upon which an answer to a specific interrogatory is based, it is proper, particularly where it relates to the interrogee's own contention. Interrogatories which inquire into the basis of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-63-17, 17 NRC 490, 493-94 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

2.11.3 Discovery Against the Staff

Discovery against the Staff is on a different footing than discovery in general. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). Discovery against the NRC Staff is not governed by the general rules but, instead, is governed by special provisions of the regulations. See, e.g., 10 CFR §§ 2.740(f)(3), 2.740a(j) and 2.741(e). Special provisions for discovery against the Staff are contained in 10 CFR § 2.720(h)(2)(i) (depositions); § 2.720(h)(2)(ii) (interrogatories); §§ 2.744, 2.790 (production of records and documents).

Depositions of named NRC Staff members may be required only upon a showing of exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981); 10 CFR § 2.720(h)(2). Factors considered in such a showing include whether: disclosure of the information is necessary to a proper decision in the proceeding; the information is not reasonably obtainable from another source; there is a need to expedite the proceeding. Id. at 223, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974).

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

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

The NRC Staff is not required to compile a list of criticisms of a proposal nor to formulate a position on them in response to an interrogatory. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), LBP-82-113, 16 NRC 1907, 1908 (1982).

FEMA (Federal Emergency Management Agency) is acting as a consultant to the NRC in emergency planning matters; therefore, its employees are entitled to limitations on discovery afforded NRC consultants by 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 701 (1983).

Provisions of the Memorandum of Understanding between FEMA and NRC qualify FEMA as an NRC consultant for purposes of 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 704 (1983).

2.11.4 Responses to Discovery Requests

It is an adequate response to any discovery request to state that the information or document requested is available in public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). This holding has been codified at 10 CFR § 2.740(b)(1). 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party's response to an interrogatory is adequate if it is true and complete, regardless of whether the discovering party is satisfied with the response. However, where a party's response is inconsistent with the party's previous statements and assertions made to the Staff, a Board will grant a motion to compel discovery. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 397-99 (1988), reconsid. denied, LBP-88-25A, 28 NRC 435 (1988).

An applicant is entitled to prompt answers to interrogatories inquiring into the factual bases for contentions and evidentiary support for them, since intervenors are not permitted to make skeletal contentions and keep the bases for them secret. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901, 903 (1981), citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81-82 (1986). An intervenor's failure to timely answer an applicant's interrogatories is not excused by the fact that the delay in answering the interrogatories might not delay the remainder of the proceeding. West Chicago, supra, 23 NRC at 82.

Answers to interrogatories should be complete in themselves. The interrogating party should not need to sift through documents or other materials to obtain a complete answer. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421 n.39 (1982), citing, 4A Moore's Federal Practice 33-25(1) at 33-129-130 (2d ed. 1981).

10 CFR § 2.740(b)(1) provides in part that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding ... including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Answers to interrogatories or requests for documents which do not comply with this provision are inadequate. Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737-1738 (1981).

Pursuant to 10 CFR § 2.741(d), a party upon whom a request for the production of documents is served is required to serve, within 30 days, a written response stating either that the requested inspection will be permitted or stating its reasons for objecting to the request. A response must state, with respect to each item or category, either that inspection will be permitted or that the request is objectionable for specific reasons. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

A Board may require a party, who has been served with a discovery request which it believes is overly broad, to explain why the request is too broad and, if feasible, to interpret the request in a reasonable fashion and supply documents (or answer interrogatories) within the realm of reason. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-41, 22 NRC 765, 768 (1985).

A request for documents should not be deemed objectionable solely because there might be some burden attendant to their production. Shoreham, supra, 16 NRC at 1155. Pursuant to 10 CFR § 2.740(f)(1), failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to 10 CFR § 2.740(c). A party is not required to seek a protective order when it has, in fact responded by objecting. An evasive or incomplete answer or response shall be treated as a failure to answer or respond. Shoreham, supra, 16 NRC at 1152.

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687-688 (1981).

The involvement of a party's attorneys in litigation or other professional business does not excuse noncompliance with, nor extend deadlines for compliance with, discovery requests or other rules of practice, and is an inadequate response to a motion to compel discovery. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 373 (1981).

2.11.5 Compelling Discovery

Discovery can be compelled where the person against whom discovery is sought resists (See 10 CFR § 2.740(f)). Subpoenas may also issue pursuant to 10 CFR § 2.720.

In the first instance, no one appears to be immune from an order compelling discovery. The ACRS, for example, has been ordered to provide materials which it declined to provide voluntarily. Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), CLI-74-16, 7 AEC 313 (1974). Nevertheless, where discovery is resisted by a nonparty (discovery against nonparties impliedly permitted under language of 10 CFR §§ 2.720(f), 2.740(c)), a greater showing of relevance and materiality appears to be necessary, and a party seeking discovery must show that:

- (1) information sought is otherwise unavailable; and
- (2) he has minimized the burden to be placed on the nonparty.

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-118, 6 AEC 263 (1973). Moreover, Licensing Boards have, on occasion, shown reluctance to enforce the discovery rules to the letter against intervenors. See, e.g., Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-74-74, 8 AEC 669 (1974).

Section 2.740 of the NRC's Rules of Practice, under which subpoenas are issued, is not founded upon the Commission's general rulemaking powers; rather, it rests upon the specific authority to issue subpoenas *duces tecum* contained in Section 161(c) of the Atomic Energy Act. Therefore, the rule of ENC v. Anglo-Canadian Shipping Company, 335 F.2d 255 (9th Cir. 1964) that agency discovery rules cannot be founded on general

rulemaking powers does not come into play. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 694 (1979). See also OIA Investigation, CLI-89-11, 30 NRC 11, 14-15 (1989), aff'd sub nom. U.S. v. Comley, 890 F.2d 539 (1st Cir. 1989).

The federal courts generally will enforce an administrative subpoena if: (1) the agency can articulate a proper purpose for issuing the subpoena; (2) the information sought by the subpoena is reasonably relevant to the purpose of the investigation; and (3) the subpoena is not too indefinite. The Commission can establish a proper purpose for issuing a subpoena by showing that the matter under investigation implicates public health and safety concerns in matters involving nuclear materials. U.S. v. Comley, 890 F.2d 539, 541-42 (1st Cir. 1989). The courts may deny enforcement of the subpoena if it is shown by firm evidence that: the subpoena was issued for an improper purpose, such as bad faith or harassment; or enforcement of the subpoena would infringe upon the right to freedom of association by compelling a private organization to reveal the identities of its existing members, subjecting them to harassment, and discouraging the recruitment of new members. U.S. v. Comley, 890 F.2d 539, 542-44 (1st Cir. 1989).

The information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. Stanislaus, supra, 9 NRC at 695.

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

The referral of matters to the Department of Justice for criminal proceedings, which are separate and distinct from matters covered by subpoenas issued by Director of Office of Inspection and Enforcement, does not bar Commission from pursuing its general health and safety and civil enforcement responsibilities through issuance of subpoena. Section 161(c) of Atomic Energy Act, 42 U.S.C. § 2201(c). Metropolitan Edison Company (Three Mile Island, Unit 1), CLI-80-22, 11 NRC 724, 725 (1980).

10 CFR § 2.720(a) contemplates ex parte applications for the issuance of subpoenas. Although the Chairman of the Licensing Board "may require a showing of general relevance of the testimony or evidence sought," he is not obligated to do so. The matter of relevance can be entirely deferred until such time as a motion to quash or modify the subpoena raises the question of relevance. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698 n.22 (1979).

A Licensing Board is required to issue a subpoena if the discovering party has made a showing of general relevance concerning the testimony or evidence sought. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

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

Generally, document production costs will not be awarded unless they are found to be not reasonably incident to the conduct of a respondent's business. Stanislaus, supra, 9 NRC at 702.

Under 10 CFR § 2.740 and § 2.740b, the presiding officer of a proceeding will rule upon motions to compel discovery which set forth the questions contained in the interrogatories, the responses of the party upon whom they were served, and arguments in support of the motion to compel discovery. An evasive or incomplete answer or response to an interrogatory shall be treated as a failure to answer or respond. Houston Lighting & Power Company (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-195 (1979).

Specific objections must be made to the alleged inadequacy of discrete responses. South Texas, supra, 9 NRC at 195.

A discovering party is entitled to direct answers or objections to each and every interrogatory posed. Objections should be plain enough and specific enough so that it can be understood in what way the interrogatories are claimed to be objectionable. General objections are insufficient. The burden of persuasion is on the objecting party to show that the interrogatory should not be answered, that the information called for is privileged, not relevant, or in some way not the proper subject of an interrogatory. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982).

A motion to compel is required under the rules to set forth detailed bases for Board action, including arguments in support of the motion. 10 CFR § 2.740(f). This means that relief will only be granted against a party resisting further discovery when the movant gives particularized and persuasive reasons for it. Generalized claims that answers are evasive or that objections are unsubstantial will not suffice. The

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movant must address each interrogatory, including consideration of the objection to it, point by point. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1950 (1982).

2.11.5.1 Compelling Discovery From ACRS and ACRS Consultants

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

2.11.5.2 Sanctions for Failure to Comply with Discovery Orders

10 CFR § 2.707 authorizes the presiding officer to impose various sanctions on a party for its failure to, among other things, comply with a discovery order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 NRC 421, 433 (1983). Those sanctions include a finding of facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order. Pursuant to 10 CFR § 2.707, the failure of a party to comply with a Board's discovery order constitutes a default for which a Board may make such orders in regard to the failure as are just. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1122 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80 (1986).

A Licensing Board may dismiss the contentions of an intervenor who has failed to respond to an applicant's discovery requests, particularly where the intervenor has failed to file a response to the applicant's motion for summary disposition. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986). An intervenor's alleged poor preparation of a contention and a related motion for summary disposition, as distinguished from the intervenor's failure to respond at all to discovery requests, does not warrant the dismissal of the intervenor's contention. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 679 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Pursuant to 10 CFR § 2.707, an intervenor can be dismissed from the proceeding for its failure to comply with discovery orders. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems

(Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric & Gas Co. (Atlantic Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702 (1975).

Intervenors were dismissed from a proceeding when the Board determined that: the intervenors had engaged in a willful, bad faith strategy to obstruct discovery; the intervenors' actions and omissions prejudiced the applicant and the integrity of the adjudicatory process; and the imposition of lesser sanctions earlier in the proceeding had failed to correct the intervenors' actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 375-77 (1988), rev'd in part and vacated in part, ALAB-902, 28 NRC 473 (1988), review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). Where multiple Licensing Boards are presiding over different portions of an operating license proceeding, an individual Licensing Board's authority to order the dismissal of a party applies only to the hearing over which it has jurisdiction, and does not extend to those portions of the proceeding pending before the other Licensing Boards. A party who seeks the dismissal of another party from the entire proceeding must request the sanction of dismissal from each of the Boards before which different parts of the proceeding are pending. Shoreham, supra, 28 NRC at 428-30, review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). On directed certification from the Appeal Board of the intervenors' appeal of their dismissal as parties by the OL-3 Licensing Board (which issued LBP-88-24, supra), the Commission determined that the intervenors' conduct before the Licensing Board warranted their dismissal as parties from all proceedings pending before the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-2, 29 NRC 211, 231-32 (1989).

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

Counsel's allegations of certain problems as excuses for intervenor's failure to provide discovery did not justify reconsideration of the Board's imposition of sanctions for such failure, where such allegations were expressly dealt with in the Board's order compelling discovery. Nor can an intervenor challenge the sanctions on the grounds that other NRC cases involved lesser sanctions, where the intervenor has willfully and deliberately refused to supply the evidentiary bases for its admitted contentions. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-82-5, 15 NRC

209, 213-214 (1982). See, however, ALAB-678, 15 NRC 1400 (1982), reversing the Byron Licensing Board's dismissal of intervenor for failure to comply with discovery orders on the ground that such a sanction was too severe in the circumstances.

The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. In selecting a sanction, Licensing Boards are to consider the relative importance of the unmet obligation; its potential harm to other parties or the orderly conduct of the proceeding; whether its occurrence is an isolated incident or a part of a pattern of behavior; the importance of the safety or environmental concerns raised by the party and all of the circumstances. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1947 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 590 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 392 (1983); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 848-49 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80-81 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 365-68 (1988); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 223 (1989).

The refusal of any party to make its witnesses available to participate in the prehearing examinations is an abandonment of its right to present the subject witness and testimony. An intervenor's intentional waiver of both the right to cross-examine and the right to present witnesses amounts to an effective abandonment of their contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935, 1936 (1982).

Although failure to comply with a Board order to respond to interrogatories may result in adverse findings of fact, the Board need not decide what adverse findings to adopt until action is necessary. When another procedure has been adopted requiring intervenors to shoulder the burden of going forward on a motion for summary disposition, it may be appropriate to await intervenor's filing on summary disposition, before deciding whether or not to impose sanctions for failure to respond to interrogatories pursuant to a Board order. Sanctions only will be appropriate if failure to respond prejudices applicant in the preparation of its case.

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982).

Where an intervenor has failed to comply with discovery requests and orders, the licensing Board may alter the usual order of presentation of evidence and require an intervenor that would normally follow a licensee, to proceed with its case first. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977), cited with approval in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); 10 CFR § 2.731; 10 CFR Part 2, Appendix A, § V(d)(4); 5 U.S.C. § 556.

2.11.6 Appeals of Discovery Rulings

A Licensing Board order granting discovery against a third party is a final order and may be appealed; an order denying such discovery is interlocutory, and an appeal is not permitted. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973).

A discovery order entered against a nonparty is a final order and thus is appealable. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 636 n.1 (1984).

Where a nonparty desires to appeal a discovery order against him, the proper procedure is for such person to enter a special appearance before the Licensing Board and then appeal to the Appeal Board. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85 (1976).

A party who seeks judicial review of an administrative subpoena must refuse to comply with the subpoena, be held in contempt by a trial court, and then appeal the finding of contempt to an appeals court. Once a party has complied with a subpoena to testify, the appeal from enforcement of the subpoena is moot. The appeals court will not consider a party's motion to seal the testimony against future use. Speculation about possible future uses of the testimony does not present a ripe issue for adjudication. Office of Thrift Supervision v. Dobbs, 931 F.2d 956, 957-959 (D.C. Cir. 1991).

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To establish reversible error from the curtailment of discovery procedures, a party must demonstrate that such curtailment made it impossible to obtain crucial evidence. Implicit in such a showing is proof that more diligent discovery was impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). The Appeal Board has refused to review a discovery ruling referred to it by a Licensing Board when the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling and where the ruling was not novel. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Id.

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

2.11.7 Discovery in High-Level Waste Licensing Proceedings

2.11.7.1 Pre-License Application Licensing Board

Pursuant to 10 CFR § 2.1010, a Pre-License Application Licensing Board is authorized to resolve questions concerning: access to the Licensing Support System (LSS); the entry of documentary material into the LSS; discovery requests; and the development and operation of the LSS.

2.11.7.2 Licensing Support System

The Licensing Support System (LSS) is an electronic information management system, established pursuant to Subpart J of 10 CFR Part 2, which will contain the documentary material generated by the participants in the high-level waste licensing proceeding as well as NRC orders and decisions related to the proceeding.

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Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). See also Consolidated Edison Co. of N.Y.; Power Authority of the State of N.Y. (Indian Point, Unit No. 2; Indian Point, Unit No. 3), LBP-82-23, 15 NRC 647, 649 (1982); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 680 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991). Nevertheless, it has the power in the first instance to rule on the scope of its jurisdiction when it is challenged. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 905 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991). Once a board determines it has jurisdiction, it is entitled to proceed directly to the merits. Zimmer, supra, 18 NRC at 646, citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980).

The effect of a Policy Statement of the Commission that deprives a Board of jurisdiction, is to prohibit that Board from inquiring into the procedural regularity of the policy statement. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 NRC 751 (1982).

After the issuance of a Licensing Board's initial decision on a particular issue, exclusive jurisdiction over the issue lies with the Appeal Board. Section 2.717(a) of the Rules of Practice is reconcilable with 2.718(j) in that the identity of the presiding officer with exclusive jurisdiction over a particular issue changes as the proceeding moves up the appellate ladder. The parties should not be able to bestow jurisdiction on a presiding officer by selecting the tribunal for the relief sought by a motion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86, 16 NRC 1190, 1191, 1193 (1982).

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

A Licensing Board's jurisdiction is defined by the Commission's notice of hearing. Commonwealth Edison Company (Zion

Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailey Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 504, 506 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20-21 (1991).

A Licensing Board generally can neither enlarge nor contract the jurisdiction conferred by the Commission. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974); Three Mile Island, *supra*, 26 NRC at 476; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-19, 30 NRC 55, 58, 59-60 (1989).

Where the Commission's notice of hearing is general and only refers to the application for an operating license, a Licensing Board has jurisdiction to consider all matters contained in the application, regardless of whether the matters were specifically listed in the notice of hearing. Catawba, *supra*, 22 NRC at 791-92 (application for an operating license contained proposal for spent fuel storage).

A reconstituted Licensing Board is legally competent to rule on all matters within its jurisdiction, including a party's objections to any orders issued by the original Licensing Board prior to the reconstitution of the Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-86-38A, 24 NRC 819, 821 (1986).

A Licensing Board does not have the jurisdiction to refer NRC examination cheaters for criminal prosecution, nor does it have authority over formulation of generic Staff procedures for administering NRC examinations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 302, 372 (1982).

The NRC's regulations do not contain provisions conferring jurisdiction on Licensing Boards to impose fines *sua sponte*. The powers granted to a Licensing Board by 10 CFR § 2.718 to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order do not include the power to impose a civil penalty. 10 CFR

§ 2.205(a) confers the authority to institute a civil penalty proceeding only upon the NRC's Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director, Office of Inspection and Enforcement. A Licensing Board becomes involved in a civil penalty proceeding only if the person charged with a violation requests a hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982); see 10 CFR § 2.205(f).

In a previously uncontested operating license proceeding, a Licensing Board has the jurisdiction to entertain a late-filed petition to intervene and to decide the issues raised by it until the Commission exercises its authority to license full power operation. The Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of record. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1380-1381 (1982).

The five notices and orders by which authority may be delegated to a Licensing Board include an order to initiate enforcement action (10 CFR § 2.202); an order calling for a hearing on imposition of civil penalties (10 CFR § 2.205(e)); a notice of hearing on an application for which a hearing must be provided (10 CFR § 2.104); a notice of opportunity for a hearing on an application not covered by 10 CFR § 2.104 (10 CFR § 2.105); and notice of opportunity for a hearing on antitrust matters (10 CFR § 2.102(d)(3)).

Where certain issues sought to be raised by an intervenor are not fairly within the scope of the issues for the proceeding as set forth in the Commission's notice of hearing, such additional issues are beyond the jurisdiction of the Licensing Board to decide. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 370-371 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

A Licensing Board which has been authorized to consider only the question of whether fundamental flaws were revealed by an exercise of an applicant's emergency plan does not also have the authority to retain jurisdiction to determine whether the flaws have been corrected. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988).

A Licensing Board which has been granted jurisdiction to preside over an operating license proceeding does not have jurisdiction to consider issues which may be raised by potential applications for operating license amendments. Commonwealth Edison Co. (Braidwood Nuclear Power Station,

Units 1 and 2), LBP-87-19, 25 NRC 950, 951 (1987), reconsideration denied, LBP-87-22, 26 NRC 41 (1987), both vacated as moot, ALAB-874, 26 NRC 156 (1987).

A Licensing Board's power in a license amendment proceeding is limited by the scope of the proceeding. Thus, in considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 CFR Part 2, Subpart E (dealing with enforcement) instead. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978).

In a license amendment proceeding, a Licensing Board has only limited jurisdiction. The Board 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. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983), citing, Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988).

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 CFR Part 2, Subpart G includes the authority to permit an applicant for a license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, 10 CFR § 2.714, and the right to file late contentions under certain conditions, 10 CFR § 2.714(a). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-1307 (1984).

A hearing is not mandatory on an operating license, but where a Board is convened it may look at all serious matters it deems merit further exploration. Pacific Gas & Electric Co. (Doblo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 229-31 (1980). Where a Licensing Board has jurisdiction to consider an issue, a party to a proceeding before that Board must first seek relief from the Board; if the Licensing Board is clearly without jurisdiction, there is no need to

present the matter to it for decision. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-5, 9 NRC 607 (1979).

A Licensing Board for an operating license proceeding is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the Board sua sponte. 10 CFR § 2.760a; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1102-03 (1982), citing, Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2, & 3), ALAB-319, 3 NRC 188, 190 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1933 (1982), citing, 10 CFR § 2.760a; Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 579 (1988). Specifically, the Board's jurisdiction is limited to a determination of findings of fact and conclusions of law on matters put into controversy by the parties to the proceeding or found by the Board to involve a serious safety, environmental or common defense and security question. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1969-70 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 & n.1 (1985), vacating, LBP-86-3, 23 NRC 69 (1986).

There is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976). The Commission's regulations limit operating license proceedings to "matters in controversy among the parties" or matters raised on a Licensing Board's own initiative sua sponte. 10 CFR §§ 2.104(c), 2.760a. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985).

The Licensing Board may assert jurisdiction over Part 70 material licensing issues raised in conjunction with an ongoing Part 50 licensing proceeding where the Part 70 materials license is integral to the project undergoing licensing consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 862-65 (1984), aff'd, ALAB-765, 19 NRC 645, 650-51 (1984), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976).

A Licensing Board must carry out the instructions of the Appeal Board as long as those instructions are not countermanded by the Commission. Licensing Boards have no authority to pass judgment on the soundness of the rulings and instructions of a reviewing appellate tribunal. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 251-52 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988).

When the Appeal Board remands an issue to the Licensing Board, the pendency of an appeal to the Commission from that order does not stay the effect of the order. Consumers Power Co. (Big Rock Point Plant), LBP-83-62, 18 NRC 708, 709 (1983).

If a Licensing Board believes that circumstances warrant reopening the record for receipt of additional evidence, it has discretion to take that course of action. Where the Board was faced with an insufficient record for summary disposition, and knew of a document which had not been introduced into evidence which would support summary disposition, it was not improper to request submission of the document in support of a motion for summary disposition. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977).

A Licensing Board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of an appeal or the expiration of the period during which the Commission or an Appeal Board can exercise its right to review the record. See 10 CFR §§ 2.717(a), 2.760(a), 2.718(j); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-83-12, 17 NRC 466, 467 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 685 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Three Mile Island, supra, 16 NRC at 1324. Until an appeal to an initial decision has been filed, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983). Where no appeal to an initial decision has been filed within the time allowed and the Appeal Board has neither completed its sua sponte review nor extended the time for doing so, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Limerick, supra, 17 NRC at 757.

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the Board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

Where a Licensing Board has retained jurisdiction following issuance of initial decision to conduct further proceedings, it has jurisdiction to consider the admissibility of new contentions which are not related to any matter previously litigated. Zimmer, supra, 17 NRC at 467.

Pursuant to § 2.714(a), a Licensing Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting specificity requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Jurisdiction to rule on the admission of contentions, which were filed prior to final agency action and which have never been litigated, rests with the Licensing Board. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983).

A Board can authorize or refuse to authorize the issuance of an operating license. It does not, however, have general jurisdiction over the already authorized on-going construction of the plant for which an operating license application is pending, and it cannot suspend such a previously issued permit. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1086 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1102-03 (1982).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

If an intervenor cannot present his case, the proper method to institute a proceeding by which the NRC would conduct its own investigation is to request action under 10 CFR § 2.206. It

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is not the Board's function to assist intervenors in preparing their cases and searching for their expert witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982). A Licensing Board is not an intervenor's advocate and has no independent obligation to compel the appearance of an intervenor's witness. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-845, 24 NRC 200, 215 (1986).

Licensing Boards have the authority to call witnesses of their own, but the exercise of this discretion must be reasonable and like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Unless a Licensing Board takes action on a motion seeking reconsideration or clarification of a decision disposing of all matters before it, the Board does not retain jurisdiction normally lost, and the motion is effectively denied. Nuclear Fuel Services Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-83-15, 17 NRC 476, 477 (1983).

3.1.2.1.1 Authority in Construction Permit Proceedings Distinguished from Authority in Operating License Proceedings

A Licensing Board's powers are not coextensive with that of the Commission, but are based solely on delegations expressed or necessarily implied in regulation or in other Commission direction. A Licensing Board is not delegated authority to and cannot order a hearing in the public interest under 10 CFR § 2.104(a). The notice constituting a construction permit Licensing Board does not provide a basis for it to order a hearing on whether an operating license should be granted. A construction permit Licensing Board's jurisdiction will usually terminate before an operating license application is filed. Thus, it probably never could be delegated authority to determine whether a hearing on the operating license application is needed in the public interest. Similarly, the general authority of a Licensing Board to condition permits or licenses provides no basis for it to initiate other adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

A Licensing Board is limited in the types of actions it may take in a construction permit proceeding. Although it may impose conditions on the granting of a construction permit, it may not require the applicant to submit a different application. In a review of alternate sites, for example, a Licensing Board is not authorized to suggest or select preferable alternate sites or to require the applicant to reapply for a construction permit at a specified new site. The Board may only accept or reject the site proposed in the application or accept it with certain conditions. Given the limited number of appropriate responses to a construction permit application, a Licensing Board should deny a construction permit on the grounds of availability of preferable alternate sites only when the alternate site is obviously superior to the proposed site. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

In operating license proceedings, as distinguished from those involving construction permits, the role of NRC adjudicatory boards is quite limited insofar as uncontested matters are concerned. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 366, 370-71 (1978).

In Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582, 589-91 (1977), the Appeal Board determined that a second Licensing Board, constituted after an initial decision in a construction permit proceeding had been issued and the jurisdiction of the original Licensing Board had terminated, lacks authority to grant a petition for untimely intervention unless specifically delegated this authority by the Commission's regulations or one of the five notices or orders discussed in Section 3.1.2.1., *supra*. The Appeal Board reasoned that Commission regulations providing for the automatic termination of the jurisdiction of the original Licensing Board revealed a policy for reasonable, timely termination of litigation. This policy would be frustrated if the second Licensing Board could, merely by its creation, reactivate and "inherit" the expired authority of the original Board. Since a Licensing Board has no independent authority to initiate adjudicatory proceedings (*Id.* at 592), and since the requisite authority was neither "inherited" nor specifically granted the second Board, that Board lacked authority to grant an untimely petition for intervention. Thus, the mere designation of a Licensing Board to entertain a petition does not in itself confer the requisite authority to grant the petition. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-389, 5 NRC 727 (1977). As a corollary, a Licensing Board cannot order a hearing in the absence of a pending construction permit or operating license proceeding, or some other proceeding which might arise upon the issuance of one of the

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five notices or orders listed above. South Texas, supra, 5 NRC at 592; Florida Power & Light Co. (St. Lucie Plant, Units 1 & 2) (Turkey Point, Units 3 & 4), LBP-77-23, 5 NRC 789 (1977). A Licensing Board is vested with the power to dismiss an application with prejudice. See 10 CFR §§ 2.107(a), 2.721(d). Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

A Licensing Board for an operating license proceeding does not have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend the previously issued construction permit. An intervenor wishing to halt such construction must file a petition under 10 CFR § 2.206 with the appropriate Commission official. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1103 (1982). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 870-871 (1984).

A Licensing Board is not authorized to order an applicant for an operating license to pursue options and alternatives to its application, such as the abandonment of an entire unit of a plant. The Board must consider the application as it has been presented. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 (1984).

An operating license proceeding is not intended to provide a forum for the reconsideration of matters originally within the scope of the construction permit proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 (1985).

In an operating license proceeding, the Commission's regulations limit an adjudicatory board's finding to the issues put into contest by the parties. See 10 CFR § 2.760a. A board is not required to make, and, under the regulations cannot properly make, the ultimate finding comparable to that required in a construction permit proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CL-83-32, 18 NRC 1309 (1983).

3.1.2.2 Scope of Authority to Rule on Petitions and Motions

Merely by having been constituted, a Licensing Board has authority to entertain petitions (10 CFR § 2.714(a)). To grant a petition, however, the Licensing Board must have been given the requisite authority specifically, either under Commission regulations or through one of the five notices or orders issued in relation to the proceeding in question.

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

A Licensing Board has jurisdiction to review an order of the Director of Nuclear Reactor Regulation which relates to a matter which could be admitted as a late-filed contention in a pending proceeding. The order does not have to be related to a currently admitted contention in the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 150-52 (1988), citing, 10 CFR § 2.717(b).

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

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

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken, rests with the Appeal Board rather than the Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982).

In NRC proceedings in which a hearing is not mandatory but depends on the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon intervention petitions. If a petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978); Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981). Thus, an "intervention" hearing board established solely for the purpose of passing on petitions to intervene does not have the additional authority to proceed beyond that assignment and to entertain filings going to the merits of matters in controversy between the petitioners and the applicant. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). An "intervention" board cannot, for example, rule on motions for summary disposition. Stanislaus, 5 NRC at 1177-1178.

A Licensing Board may entertain a request for declaratory relief. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station), ALAB-321, 3 NRC 293, 298 (1976), aff'd.

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CLI-77-1, 5 NRC 1 (1977). This power stems from the fact that the Commission itself may grant declaratory relief under the APA, 5 U.S.C. § 554(e), and delegate that power to presiding officers, 5 U.S.C. § 556(c)(9). Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station), CLI-77-1, 5 NRC 1 (1977). In this vein, Licensing Boards have the authority to issue declaratory orders to terminate a controversy or remove uncertainty. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). A Licensing Board has utilized the following test to determine whether a genuine controversy exists sufficient to support the issuance of a declaratory order: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314-16 (1989), citing, SEC v. Sloan, 436 U.S. 103, 109 (1978), quoting, Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

A Licensing Board established for an operating license proceeding has authority to consider materials license questions where matters regarding a materials license bear on issues in the operating license application. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

If a Licensing Board determines that a participation agreement prohibiting the flow of electricity in interstate commerce is inconsistent with the antitrust laws, the Board may impose license conditions despite a Federal court injunction prohibiting participant from violating the agreement. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 577 (1979).

The power to grant an exemption from the regulations has not been delegated to Licensing Boards and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

3.1.2.3 Authority of Licensing Board to Raise Sua Sponte Issues

A Licensing Board has the power to raise sua sponte any significant environmental or safety issue in operating license hearings, although this power should be used sparingly in OL cases. 10 CFR § 2.760a; Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Plant, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board's independent responsibilities under NEPA may require it to raise environmental issues not

raised by a party. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

The Board has the prerogative, under the regulations, to consider raising serious issues sua sponte and the responsibility of reviewing materials filed before it to determine whether the parties have brought such an issue before. This is particularly necessary when an issue is excluded from the proceeding because it has not been properly raised rather than because it has been rejected on its merits. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

Pursuant to 10 CFR § 2.760a and the Commission's Memorandum dated June 30, 1981, a Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that would prompt reasonable minds to inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 697 (1981).

The regulations limiting the Board's authority to raise sua sponte issues restrict its right to consider safety, environmental or defense matters not raised by parties but do not restrict its responsibility to oversee the fairness and efficiency of proceedings and to raise important procedural questions on its own motion. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-24A, 15 NRC 661, 664 (1982).

Because Boards may raise important safety and environmental issues sua sponte, they should review even untimely contentions to determine that they do not raise important issues that should be considered sua sponte. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-32 (1982).

A Licensing Board's inherent power to shape the course of a proceeding should not be confused with its limited authority under 10 CFR § 2.760a to shape the issues of the proceeding. The latter is not a substitute for or a means to accomplish the former. Sua sponte authority is not a case management tool. Accordingly, the apparent need to expedite a procedure or monitor the Staff's progress in identifying and/or evaluating potential safety or environmental issues are not factors that authorize a Board to exercise its sua sponte authority. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113 (1981).

The incompleteness of Staff review of an issue is not in itself sufficient to satisfy the standard for sua sponte review.

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516, 519 (1985), citing, Comanche Peak, supra, 14 NRC at 1114. However, a Board may take into account the pendency and likely efficacy of NRC Staff non-adjudicatory review in determining whether or not to invoke its sua sponte review authority. South Texas, supra, 21 NRC at 519-523, citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982), reconsideration denied, CLI-83-4, 17 NRC 75 (1983), and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-75, 18 NRC 1254 (1983).

A Board decision to review a proposal concerning the withholding of a portion of the record from the public is an appropriate exercise of Board authority and is not subject to the sua sponte limitation on Board authority. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982) and LBP-82-12, 15 NRC 354 (1982). Because exercise of this authority does not give rise to a sua sponte issue, notification of the Commission is not required.

The Board's authority to consider substantive issues is limited by the sua sponte rule, but the same limitation does not apply to its consideration of procedural matters, such as confidentiality issues arising under 10 CFR § 2.790. While it would not always be appropriate for the Board to take up proprietary matters on its own, where the Board finds the Staff's review unsatisfactory, sua sponte review of those matters may be necessary. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 288 (1982).

A Board may raise a procedural question, such as whether a portion of its record should be treated as proprietary or released to the public, regardless of whether the full scope of the question has been raised by a party. Point Beach, supra.

Information that will help the Board decide whether to raise a sua sponte issue should be made available to the Board. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-9, 15 NRC 339, 340 (1982).

Board inquiries related to admitted contentions do not create sua sponte matters requiring notification of the Commission. That the Board gives advance notification to a party that related questions may be asked does not convert those questions into sua sponte issues requiring notification of the Commission. Nor is notification required when a Board has already completed action on a procedural matter and no further obligation has been imposed on a party. The sua sponte rule is intended to preclude major, substantive inquiries not related to subject matter already before the Board, not minor, procedural matters. Wisconsin Electric Power Co. (Point

LBP-90-22, 31 NRC 592, 593 (1990), citing, 10 CFR § 2.1231(b). See Curators of the University of Missouri, LBP-90-33, 32 NRC 245, 250 (1990) (only NRC reports or correspondence with the licensee must be included in the hearing record). The presiding officer further directed the Staff to serve all such relevant documents on the parties, since there was no local public document room and the burden on the Staff to provide a copy of publicly available documents to the intervenors' attorney was minuscule. Curators of the University of Missouri, LBP-90-27, 32 NRC 40, 42-43 (1990).

The Commission has issued a Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), which provides guidance to Licensing Boards on the timely completion of proceedings while ensuring a full and fair record. Specific areas addressed include: scheduling of proceedings; consolidation of intervenors; negotiations by parties; discovery; settlement conferences; timely rulings; summary disposition; devices to expedite party presentations, such as pre-filed testimony outlines; round-table expert witness testimony; filing of proposed findings of fact and conclusions of law; and scheduling to allow prompt issuance of an initial decision in cases where construction has been completed.

The Commission also outlined examples of sanctions a Licensing Board may impose on a participant in a proceeding who fails to meet its obligations. A Board can warn the offending party that its conduct will not be tolerated in the future, refuse to consider a filing by that party, deny the right to cross-examine or present evidence, dismiss one or more of its contentions, impose sanctions on its counsel, or in severe cases dismiss the party from the proceeding. In selecting a sanction, a Board should consider the relative importance of the unmet obligation, potential for harm to other parties or the orderly course of the proceedings, whether the occurrence is part of a pattern of behavior, the importance of any safety or environmental concerns raised by the party, and all of the circumstances (13 NRC 452 at 454). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

Consistency with the Commission's Statement of Policy on Conduct of Licensing Proceedings requires that in general delay be avoided, and specifically that a Board obtain Commission guidance when it becomes apparent that such guidance will be necessary. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 604 (1983).

Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to

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contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48, 53 (1982).

The Commission has inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before Licensing Boards. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 34 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991).

3.1.3 Quorum Requirements for Licensing Board Hearing

In Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974), the Appeal Board attempted to establish elaborate rules to be followed before a Licensing Board may sit with a quorum only, despite the fact that 10 CFR § 2.721(d) requires only a chairman and one technical member to be present. The Appeal Board's ruling in ALAB-222 was reviewed by the Commission in CLI-74-35, 8 AEC 374 (1974). There, the Commission held that hearings by quorum are permitted according to the terms of 10 CFR § 2.721(d) and that inflexible guidelines for invoking the quorum rule are inappropriate. At the same time, the Commission indicated that quorum hearings should be avoided wherever practicable and that absence of a Licensing Board member must be explained on the record (8 AEC 374 at 376).

3.1.4 Disqualification of a Licensing Board Member

3.1.4.1 Motion to Disqualify Adjudicatory Board Member

The rules governing motions for disqualification or recusal are generally the same for the administrative judiciary as for the judicial branch itself, and the Commission has followed that practice. Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 NRC 385, 386 (1984), citing, Houston Lighting and Power Co.

(South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982).

The general requirements for motions to disqualify are discussed in Duquesne Light Co. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974). Based on that discussion and on cases dealing with related matters:

- (1) all disqualification motions must be timely filed. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973). In particular, any question of bias of a Licensing Board member must be raised at the earliest possible time or it is waived. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 384-386 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 (1984). The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for disqualification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1081-1082 (1984); Seabrook (ALAB-757), supra, 18 NRC at 1361.
- (2) a disqualification motion must be accompanied by an affidavit establishing the basis for the charge, even if founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center), ALAB-225, 8 AEC 379 (1974); Shoreham, supra, 20 NRC at 23, n.1; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 n.3 (1985).
- (3) a disqualification motion, as with all other motions, must be served on all parties or their attorneys. 10 CFR §§ 2.701(b), 2.730(a).

Disqualification of a Licensing Board member, either on his own motion or on motion of a party, is addressed in 10 CFR § 2.704. Strict compliance with Section 2.704(c) is required. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981). A motion to disqualify a member of a Licensing Board is determined by the individual Board member rather than by the full Licensing Board. Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13,

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21 n.26 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1184, 1186 n.1 (1983), citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-6, 11 NRC 411 (1980). In those cases where a party's motion for disqualification of a Board member is denied and the Board member does not recuse himself, Section 2.704(c) explicitly requires that the Licensing Board refer the matter to the Appeal Board or the Commission. Allens Creek, supra, 13 NRC at 86; Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983).

The Appeal Board has stressed that a party moving for disqualification of a Licensing Board member has a manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement of 10 CFR § 2.704(c). Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978). See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982).

Nevertheless, as to the affidavit requirement, the Appeal Board has held that the movant's failure to file a supporting affidavit is not crucial where the motion to disqualify is founded on a fact to which the Licensing Board itself had called attention and is particularly narrow thereby obviating the need to reduce the likelihood of an irresponsible attack on the Board member in question through use of an affidavit. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978).

An intervenor's status as a party to a proceeding does not of itself give it standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). However, a party requesting disqualification may attempt to establish by reference to a Board member's overall conduct that a pervasive climate of prejudice exists in which the party cannot obtain a fair hearing. A party may also attempt to demonstrate a pattern of bias by a Board member toward a class of participants of which it is a member. Seabrook, supra, 18 NRC at 1187-1188. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1199 n.12 (1983).

A challenged member of an Appeal Board must first be given an opportunity to disqualify himself, before the Commission will

act. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-9, 11 NRC 436 (1980).

3.1.4.2 Grounds for Disqualification of Adjudicatory Board Member

The aforementioned rules (3.1.4.1) with respect to motions to disqualify apply, of course, where the motion is based on the assertion that a Board member is biased. Although a Board member or the entire Board will be disqualified if bias is shown, the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a particular party is not evidence of bias against that party. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721, 726 n.60 (1985). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), *aff'd*, ALAB-907, 28 NRC 620 (1988). Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

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

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

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

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

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An administrative trier of fact is subject to disqualification if:

- (1) he has a direct, personal, substantial pecuniary interest in a result;
- (2) he has a personal bias against a participant;
- (3) he has served in a prosecutive or investigative role with regard to the same facts as are in issue;
- (4) he has prejudged factual - as distinguished from legal or policy - issues; or
- (5) he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

The fact that a member of an adjudicatory tribunal may have a crystalized point of view on questions of law or policy is not a basis for his or her disqualification. Shoreham, supra, 20 NRC at 34, citing, Midland, supra, 6 AEC at 66; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988).

In its decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982), the Commission made clear that Licensing Board members are governed by the same disqualification standards that apply to Federal judges. Hope Creek, supra, 19 NRC at 20. The current statutory foundation for the disqualification standards is found in 28 U.S.C., Sections 144 and 455. Section 144 requires a Federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. Hope Creek, supra, 19 NRC at 20. Section 455(a) imposes an objective standard which is whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. Hope Creek, supra, 19 NRC at 21-22.

Under 28 U.S.C. § 455(b)(2), a judge must disqualify himself in circumstances where, inter alia, he served in private

practice as a lawyer in the "matter in controversy." In accord with 28 U.S.C. § 455(e), disqualification in such circumstances may not be waived. Hope Creek, supra, 19 NRC at 21.

In applying the disqualification standards under 28 U.S.C. § 455(b)(2), the Appeal Board concluded that, in the instance of an adjudicator versed in a scientific discipline rather than in the law, disqualification is required if he previously provided technical services to one of the parties in connection with the "matter in controversy." Hope Creek, supra, 19 NRC at 23. To determine whether the construction permit proceeding and the operating license proceeding for the same facility should be deemed the same "matter" for 28 U.S.C. § 455(b)(2) purposes, the Appeal Board adopted the "wholly unrelated" test, and found the two to be sufficiently related that the Licensing Board judge should have recused himself. Hope Creek, supra, 19 NRC at 24-25.

An administrative trier of fact is subject to disqualification for the appearance of bias or prejudgment of the factual issues as well as for actual bias or prejudgment. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568 (1985).

Disqualifying bias or prejudice of a trial judge must generally stem from an extra-judicial source even under the objective standard for recusal which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Preliminary assessments, made on the record, during the course of an adjudicatory proceeding, based solely upon application of the decision-maker's judgment to material properly before him in the proceeding, do not compel disqualification as a matter of law. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1364-1365 (1982), citing, United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973); In Re International Business Machines Corporation, 619 F.2d 923, 929 (2d Cir. 1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1197 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721 (1985).

The fact that a Board member's actions are erroneous, superfluous, or inappropriate does not, without more, demonstrate

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an extrajudicial bias. Matters are extrajudicial when they do not relate to a board member's official duties in a case. Rulings, conduct, or remarks of a Board member in response to matters which arise in administrative proceedings are not extrajudicial. Seabrook (ALAB-749), *supra*, 18 NRC at 1200. See also Seabrook (ALAB-748), *supra*, 18 NRC at 1188; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 640-41 (1988), *aff'd*, ALAB-907, 28 NRC 620, 624 (1988).

A judge will not be disqualified on the basis of: occasional use of strong language toward a party or in expressing views on matters arising from the proceeding; or actions which may be controversial or may provoke strong reactions by parties in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Limerick, *supra*, 22 NRC at 721; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), *aff'd*, ALAB-907, 28 NRC 620, 624 (1988).

A letter from a Board judge expressing his opinions to a judge presiding over a related criminal case did not reflect extrajudicial bias since the contents of the letter were based solely on the record developed during the NRC proceeding. The factor to consider is the source of the information, not the forum in which it is communicated. Three Mile Island, *supra*, 21 NRC at 569-570. Such a letter does not violate Canon 3A(6) of the Code of Judicial Conduct which prohibits a judge from commenting publicly about a pending or impending proceeding in any court. Canon 3A(6) applies to general public comment, not the transmittal of specific information by a judge to another court. Three Mile Island, *supra*, 21 NRC at 571. Such a letter also does not violate Canon 2B of the Code of Judicial Conduct which prohibits a judge from lending the prestige of his office to advance the private interests of others and from voluntarily testifying as a character witness. Canon 2B seeks to prevent a judge's testimony from having an undue influence in a trial. Three Mile Island, *supra*, 21 NRC at 570.

Membership in a national professional organization does not perforce disqualify a person from adjudicating a matter to which a local chapter of the organization is a party. Sheffield, *supra*, 8 NRC at 302.

3.1.4.3 Improperly Influencing an Adjudicatory Board Decision

Where a Licensing Board has been subjected to an attempt to improperly influence the content or timing of its decision, the Board is duty-bound to call attention to that fact promptly on its own initiative. On the other hand, a Licensing Board which has not been subjected to attempts at improper influence need not investigate allegations that such

attempts were contemplated or promised. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 102 (1977).

3.1.5 Resignation of a Licensing Board Member

The Administrative Procedure Act requirement that the official who presides at the reception of evidence must make the recommendation or initial decision (5 U.S.C. § 554(d)) includes an exception for the circumstance in which that official becomes "unavailable to the agency." When a Licensing Board member resigns from the Commission, he becomes "unavailable" (10 CFR § 2.704(d)). Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 101 (1977). Resignation of a Board member during a proceeding is not, of itself, grounds for declaring a mistrial and starting the proceedings anew. Id. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977) was affirmed generally and on the point cited herein in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

"Unavailability" of a Licensing Board member is dealt with generally in 10 CFR § 2.704(d).

3.2 Export Licensing Hearings

3.2.1 Scope of Export Licensing Hearings

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission, in making its export licensing determinations, will consider non-proliferation and safeguards concerns, and not foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-61 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

3.3 Hearing Scheduling Matters

3.3.1 Scheduling of Hearings

An ASLB may not schedule a hearing for a time when it is known that a technical member will be unavailable for more than one half of one day unless there is no reasonable alternative to such scheduling. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 238 (1974).

Otherwise, an ASLB has general authority to regulate the course of a licensing proceeding and may schedule hearings on specific issues pending related developments on other issues.

Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977). In deciding whether early hearings should be held on specific issues, the Board should consider:

- (1) the likelihood that early findings would retain their validity;
- (2) the advantage to the public interest and to the litigants in having early, though possibly, inconclusive, resolution of certain issues;
- (3) the extent to which early hearings on certain issues might occasion prejudice to one or more litigants, particularly in the event that such issues were later reopened because of supervening developments.

Peconic Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975); accord Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975).

As a general rule, scheduling is a matter of Licensing Board discretion which will not be interfered with absent a "truly exceptional situation". Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 CFR § 2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet to be filed operating license application.

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

Generally speaking, Licensing Boards determine scheduling matters on the basis of representations of counsel about projected completion dates, availability of necessary information, and adequate opportunities for a fair and thorough hearing. The Board would take a harder look at an applicant's projected completion date if it could only be met by a greatly accelerated schedule, with minimal opportunities for discovery and the exercise of other procedural rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 286-87 (1983).

An Appeal Board will overturn a Licensing Board's denial of a request for a schedule change only on finding that the Board abused its discretion by setting a schedule that deprives a party of its right to procedural due process. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982), quoting, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

3.3.1.1 Public Interest Requirements re Hearing Schedule

In matters of scheduling, the paramount consideration is the public interest. The public interest is usually served by as rapid a decision as is possible consistent with everyone's opportunity to be heard. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

To fulfill its obligation under the Administrative Procedure Act to decide cases within a reasonable time, the Commission established expedited procedures for the conduct of the 1988 Shoreham emergency planning exercise proceeding in order to minimize the delays resulting from the Commission's usual procedures, while still preserving the rights of the parties. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-70 (1988), citing, Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

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

3.3.1.2 Convenience of Litigants re Hearing Schedule

Although the convenience of litigants is entitled to recognition, it cannot be dispositive on questions of scheduling. Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-225, 2 NRC 671, 684-685 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

Nevertheless, ASLB action in keeping to its schedule despite intervenors' assertions that they were unable to prepare for cross-examination or to attend the hearing because of a need to prepare briefs in a related matter in the U.S. Court of Appeals has been held to be an error requiring reopening of the hearing. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.3.1.3 Adjourned Hearings

(RESERVED)

3.3.2 Postponement of Hearings

3.3.2.1 Factors Considered in Hearing Postponement

Where there is no immediate need for the license sought, the ASLB decision as to whether to go forward with hearings or postpone them should be guided by the three factors listed in the Douglas Point case; namely:

- (1) the likelihood that findings would retain their validity;
- (2) the advantage to the public and to litigants in having early, though possibly inconclusive, resolution;
- (3) the possible prejudice arising from an early hearing.

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

The fact that a party has failed to retain counsel in a timely manner is not grounds for seeking a delay in the

commencement of hearings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 816 (1975).

A Licensing Board has considered the following factors in evaluating an NRC Staff motion to stay the commencement of a show cause proceeding involving the Staff's issuance of an immediately effective license suspension order: 1) the length of the requested stay; 2) the reasons for requesting the stay; 3) whether the licensee has persistently asserted its rights to a prompt hearing and to other procedural means to resolve the matter; and 4) the resulting prejudice to the licensee's interests if the stay is granted. Finlay Testing Laboratories, Inc., LBP-8P-1A, 27 NRC 19, 23-26 (1988), citing, Barker v. Wingo, 40/ U.S. 514 (1972).

3.3.2.2 Effect of Plant Deferral on Hearing Postponement

The deferral of a plant which has been noticed for hearing does not necessarily mean that hearings should be postponed. At the same time, an ASLB does have authority to adjust discovery and hearing schedules in response to such deferral. Wisconsin Electric Power Co. (Koshkonong Nuclear Power Plant, Units 1 & 2), CLI-75-2, 1 NRC 39 (1975). Note also that the adjudicatory early site review procedures set forth in 10 CFR Part 2 provide a means by which separate, early hearings may be held on site suitability matters despite the fact that the proposed plant and related construction permit proceedings have been deferred.

3.3.2.3 Sudden Absence of ASLB Member at Hearing

When there is a sudden absence of a technical member, consideration of hearing postponement must be made, and if time permits, the parties' views must be solicited before a postponement decision is rendered. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974).

Note that in Commonwealth Edison Co. (Zion Station, Units 1 & 2), CLI-74-35, 8 AEC 374 (1974), the Commission reviewed ALAB-222. While the Commission was not in total agreement with the Appeal Board's setting of inflexible guidelines for invoking the quorum rule, it agreed in principle with the Appeal Board's view that all three ASLB members must participate to the maximum extent possible in evidentiary hearings. As such, it appears that the above guidance from ALAB-222 remains in effect.

3.3.2.4 Time Extensions for Case Preparation Before Hearing

In view of the disparity between the Staff and applicant on the one hand and intervenors on the other with regard to the time available for review and case preparation, the Appeal

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Panel has been solicitous of intervenors' desires for additional time for case preparation. See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986, 99'-93 (1974). At the same time, a party's failure to have as yet retained counsel does not provide grounds for seeking a delay in proceedings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Moreover, a party must make a timely request for additional time to prepare its case; otherwise, it may waive its right to complain. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978). More recently, too, both the Commission and the Appeal Board have made it clear that the fact that a party may possess fewer resources than others to devote to a proceeding does not relieve that party of its hearing obligations. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982).

The Appeal Board granted Staff's request for an extension of a deadline for filing written testimony but called the matter to the attention of the Commission, which has supervisory authority over the Staff. In granting the extension, made as a result of the Staff's inability to meet the earlier deadline due to assignment of Staff to Three Mile Island related matters, the Board rejected the intervenor's suggestion that it hold a hearing to determine the reasons for, and reasonableness of, the extension request. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12 (1979).

Where time extensions have been granted, the original time period is not material to a determination as to whether due process has been observed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980).

3.3.3 Scheduling Disagreements Among Parties

Parties must lodge promptly any objections they may have to the scheduling of the prehearing phase of a proceeding. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2 & 3), ALAB-377, 5 NRC 430 (1977).

3.3.4 Appeals of Hearing Date Rulings

As a general rule, scheduling is a matter of ASLB discretion. As such, Appeal Boards are disinclined to interfere with scheduling decisions absent a "truly exceptional situation"

which warrants ASLAB interlocutory consideration. Public Service Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975). Since the responsibility for conduct of the hearing rests with the presiding officer pursuant to 5 U.S.C. § 556(c) and 10 CFR § 2.718, the Appeal Board is reluctant to examine a Licensing Board's scheduling decision except where there is a claim that such decision constituted an abuse of discretion and amounted to a denial of procedural due process. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188 (1978); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 379 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 74 & n.68, 83 (1985).

With regard to claims of insufficient time to prepare for a hearing, even if a party is correct in its assertion that the Staff received an initial time advantage in preparing testimony as a result of scheduling, it must make a reasonable effort to have the procedural error corrected (by requesting additional time to respond) and not wait to use the error as grounds for appeal if the party disagrees with the decision on the merits. A party is entitled to a fair hearing, not a perfect one. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978).

Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

3.3.5 Location of Hearing

(RESERVED)

3.3.5.1 Public Interest Requirements re Hearing Location

(RESERVED)

3.3.5.2 Convenience of Litigants Affecting Hearing Location

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the

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hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co., (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-531 (1979).

3.3.6 Consolidation of Hearings and of Parties

Consolidation of hearings is covered generally by 10 CFR § 2.716. Consolidation of parties is covered generally by 10 CFR § 2.715a.

A Board, on its own initiative, may consolidate parties who share substantially the same interest and who raise substantially the same questions, except when such action would prejudice one of the intervenors. Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986), citing, 10 CFR § 2.715a and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

Consolidation is primarily discretionary with the Boards involved. Taking into account the familiarity of the Licensing Boards with the issues most likely to bear on a consolidation motion, the Commission will interpose its judgment in consolidation cases only in the most unusual circumstances. Portland General Electric Co., (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-26, 4 NRC 608 (1976).

Under 10 CFR § 2.716, consolidation is permitted if found to be conducive to the proper dispatch of the Board's business and to the ends of justice. Dairyland Power Cooperative (La Crosse Boiling Water Reactor, Operating License and Show Cause), LBP-81-31, 14 NRC 375, 377 (1981).

The Commission may in its own discretion order the consolidation of two or more export licensing proceedings, and may utilize 10 CFR § 2.716 as guidance for deciding whether or not to take such action. Edlow International Co., (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328-1329 (1977). Note, however, that persons who are not parties to either of two adjudicatory proceedings have no standing to have those proceedings consolidated under Section 2.716. Id. at 1328. Where proceedings on two separate applications are consolidated, the Commission may explicitly reserve the right to act upon the applications at different times. Edlow International Co., (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-78-4, 7 NRC 311, 312 (1978). See also

Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 894 (1987).

3.3.7 In Camera Hearings

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

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

Where a party to a hearing objects to the disclosure of information and makes out a prima facie case that the material is proprietary in nature, it is proper for an adjudicatory board to issue a protective order and conduct an in camera session. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Because the party that seeks disclosure of allegedly proprietary information has the right to conduct cross-examination in camera, no prejudice results from an adjudicatory board's use of this procedure. Three Mile Island, supra, 21 NRC at 1215.

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered; if an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1025 (1981).

3.4 Issues for Hearing

The judgment of a Licensing Board with regard to what is or is not in controversy in a proceeding being conducted by it is entitled to great respect. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); Public Service Company of Indiana (Marble Hill

Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also Northern Indiana Public Service Company (Bailey Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1269, 1286 (1983).

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 CFR Part 2, Subpart G includes the authority to permit an applicant for a license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, 10 CFR § 2.714, and the right to file late contentions under certain conditions, 10 CFR § 2.714(a). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-1307 (1984).

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

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. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 366 (1983), citing, 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 F.2d 1 (1978), aff'd sub nom., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 836 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982).

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

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

2), CLI-80-31, 12 NRC 264, 276 (1980). See also Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-105, 16 NRC 1629, 1641 (1982), citing, Black Fox, *supra*, 12 NRC at 264.

Upon certification the Commission held that in view of the fact that the TMI accident resulted in generation of hydrogen gas in excess of hydrogen generation design basis assumptions of 10 CFR § 50.44, hydrogen gas control could be properly litigated under Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR § 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guidelines values. Metropolitan Edison Company (Three Mile Island, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980). See also Illinois Power Co. (Clinton Power Station, Unit 1), LBP-82-103, 16 NRC 1603, 1609 (1982), citing, Three Mile Island, *supra*, 11 NRC at 675.

A genuine scientific disagreement on a central decisional issue is the type of matter that should ordinarily be raised for adversarial exploration and eventual resolution in the adjudicatory context. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 105 (1983). See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 (1976), *aff'd sub nom. Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 912-13 (1982), *review declined*, CLI-83-2, 17 NRC 69 (1983).

The Commission may entirely eliminate certain issues from operating license consideration on the ground that they are suited for examination only at the earlier construction permit stage. Short of that, the Commission has considerable discretion to provide by rule that only issues that were or could have been raised by a party to the construction permit proceeding will not be entertained at the operating license stage except upon such a showing as "changed circumstances" or "newly discovered evidence." Commission practice, however, has been to determine the litigability of issues at the operating license stage with reference to conventional *res judicata* and collateral estoppel principles. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 696-97 (1982).

It is not a profitable use of adjudicatory time to litigate the Probabilistic Risk Assessment (PRA) methodology used on the chance that different methodology would identify a new problem or substantially modify existing safety concerns. If it is known that a problem exists which would be illustrated by a change in PRA methodology, that problem can be litigated directly; there is no need to

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modify the PRA to consider it. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 73 (1983).

3.4.1 Intervenor's Contentions - Admissibility at Hearing

Contentions are like Federal court complaints; before any decision that a contention should not be entertained, the proponent of the contention must be given some chance to be heard in response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979).

10 CFR § 2.714 sets forth the criteria by which ASLBs are to judge the admissibility of contentions. Pursuant to that regulation, a contention is acceptable as an issue in controversy if some basis is provided for the contention and the basis is set forth with particularity. In passing on the admissibility of a contention, a Licensing Board is not to consider the merits of the contention itself. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 216 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Illinois Power Co. (Clinton Power Station, Units 1 and 2), LBP-81-15, 13 NRC 708, 711 (1981).

Although amendments to the Commission's Rules of Practice with regard to intervention have affected the time as to which contentions must be filed, the amended rules retain the requirement that the basis for contentions be set forth with reasonable specificity. 10 CFR § 2.714(b); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 802 n.73 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). A Licensing Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the requirement of reasonable specificity set forth in 10 CFR § 2.714. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

General fears or criticisms of past practices of the nuclear industry or the applicant are not appropriate bases for contentions unless there is reason to suspect the specific procedures or safety-related tests used in a proposed demonstration program which requires a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1026 (1981).

Where the laws of physics deprive a proposed contention of any credible or arguable basis, the contention will not be admitted. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 870 (1984),

aff'd, ALAB-765, 19 NRC 645, 654 n.13 (1984); compare Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Whether or not a basis for contentions has been established must be decided by considering the contentions in the context of the entire record of the case up to the time the contentions are filed. Thus, when an application for a license amendment is itself incomplete, the standard for the admission of contentions is lowered, because it is easier for petitioners to have reasons for believing that the application has not demonstrated the safety of the proposed procedures for which an amendment is sought. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853 (1981).

A contention concerning the health effects of radon emissions will be admitted only if the documented opinion of one or more qualified authorities is provided to the Licensing Board that the incremental (health effects of) fuel cycle-related radon emissions will be greater than those determined in the Appeal Board proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1454 (1982), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC 632, 635 (1981).

Where the only NEPA matters in controversy are legal contentions that there has been a failure to comply with NEPA and 10 CFR Part 51, the Board may rule on the contentions without further evidentiary hearings, making use of the existing evidentiary record and additional material of which it can take official notice. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 NRC 1724, 1728 (1981).

When considering admission of new intervenor contentions based on new regulatory requirements, the Licensing Board must find a "nexus" between the new requirements and the particular facility involved in the proceeding, and that the contentions raise significant issues. The new contentions need not be solely related to contentions previously admitted, but may address themselves to the new requirements imposed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233-34 (1981).

As a general rule, Licensing Boards should not accept in individual license proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission. As a corollary, certain issues included in an adjudicatory proceeding may be rendered inappropriate for resolution in that proceeding because the Commission has taken generic action during the pendency of the adjudication. There

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may nonetheless be situations in which matters subject to generic consideration may also be evaluated on a case-by-case basis where such evaluation is contemplated by, or at least consistent with, the approach adopted in the rulemaking proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NR. 814, 889-90 (1983), aff'd, CLI-84-11, 20 NRC 1 (1984).

3.4.2 Issues Not Raised by Parties

A Licensing Board may, on its own motion, explore issues which the parties themselves have not placed in controversy. 10 CFR § 2.760a; Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1975). This power, however, is not a license to conduct fishing expeditions and, in operating license proceedings, should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious safety or environmental issue remains. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-74-28, 8 AEC 7 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985). The Commission's Indian Point ruling has been incorporated into the regulations in modified form at 10 CFR § 2.760a.

When a Licensing Board in an operating license proceeding considers issues which might be deemed to be raised sua sponte by the Board, it should transmit copies of the order raising such issues to the Commission and General Counsel in accordance with the Secretary's memo of June 30, 1981. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-923 (1981).

The Licensing Board may be alerted to such serious issues not raised by the parties through the statements of those making limited appearances. See Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

Pursuant to authority granted under 10 CFR § 2.760a, the presiding officer in an operating license proceeding may examine matters not put into controversy by the parties only where he or she determines that a serious safety, environmental or common defense and security matter exists. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-859, 26 NRC 13, 25 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

The Commission has directed that when a Licensing Board or an Appeal Board raises an issue sua sponte in an operating license proceeding, it must issue a separate order making the requisite findings, briefly state its reasons for raising the issue, and forward a copy of the order to the OGC and the Commission. Comanche Peak, CLI-81-24, supra; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987). A Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that reasonable minds could inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 697 (1981).

In an operating license proceeding where a hearing is convened as a result of intervention, the Licensing Board will resolve all issues raised by the parties and any issue which it raises sua sponte. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). The decision as to all other matters which need to be considered prior to issuance of the operating license is the responsibility of the NRC Staff alone. Indian Point, supra, 3 NRC at 190; Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 58 (1984). Once the Licensing Board has resolved all contested issues and any sua sponte issues, the NRC Staff then has the authority to decide if any other matters need to be considered prior to the issuance of an operating license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-23, 14 NRC 159 (1981). The mere acceptance of a contention does not justify a Board's assuming that a serious safety, environmental, or common defense and security matter exists or otherwise relieve it of the obligation under 10 CFR § 2.760a to affirmatively determine that such a situation exists. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981).

In a construction permit proceeding, the Licensing Board has a duty to assure that the NRC Staff's review was adequate, even as to matters which are uncontested. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 774 (1977).

3.4.3 Issues Not Addressed by a Party

The fact that the Staff may be estopped from asserting a position does not affect a Board's independent responsibility

to consider the issue involved. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975).

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

The parties must be given an opportunity, at oral hearing or by written pleadings, to produce relevant evidence concerning abuses of Commission regulations and adjudicatory process, but if a party fails to formally tender such evidence, the Licensing Board should not engage in its own independent and selective search of the record. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978 (1981).

3.4.4 Separate Hearings on Special Issues

Pursuant to a Licensing Board's general power to regulate the course of a hearing under 10 CFR § 2.718, such Boards have the authority to consider, either on their own or at a party's request, a particular issue separately from and prior to other issues that must be decided in a proceeding. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 544 (1975). See also 10 CFR Part 2, Appendix A, para. I(c)(1). Indeed, multiple contentions can be grouped and litigated in separate segments of the evidentiary hearing so as to enable the Licensing Board to issue separate partial initial decisions, each of which decides a major segment of the case. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-93-30, 17 NRC 1132, 1136 (1983).

In a special proceeding, where the Commission has specified the issues for hearing, a Licensing Board is obliged to resolve all such issues even in the absence of active participation by intervenors. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

A request for a low-power license does not give rise to an entire proceeding separate and apart from a pending full-power operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing, Pacific Gas and Electric Co.

(Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981).

The Appeal Board's holding in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), that any early findings made by a Licensing Board, in circumstances where the applicant had disclosed an intent to postpone construction for several years, would be open to reconsideration "only if supervening developments or newly available evidence so warrant", does not support a later Licensing Board's action in imposing a similar limitation on the right to raise issues which were not encompassed by the early findings. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 385-387 (1979), reconsid. denied, ALAB-539, 9 NRC 422 (1979).

3.4.5 Construction Permit Extension Proceedings

An applicant who fails to file a timely request for an extension of its construction permit and allows the permit to expire does not automatically forfeit the permit. The Commission has held that a construction permit does not lapse until the Commission has taken affirmative action to complete the forfeiture. The Commission will consider and may grant an untimely application for an extension of the construction permit, without requiring the initiation of a new construction permit proceeding. However, the applicant must still establish good cause for an extension of its permit. In addition, the applicant is not entitled to continue its construction activities after the expiration date of its permit and prior to any extension of its permit. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-85-4, 23 NRC 113, 120 & nn. 4-5 (1986).

Intervenors in a construction permit extension proceeding may only litigate those issues that (1) arise from the reasons assigned to the requested extension, and (2) cannot abide the operating license proceeding. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-80-31, 12 NRC 699, 701 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1301 (1982).

Contentions having no discernible relationship to the construction permit extension are inadmissible in a permit extension proceeding; a show-cause proceeding under 10 CFR § 2.206 is the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-81-6, 13 NRC 253, 254 (1981), citing, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980); Shoreham, supra, 15 NRC at 1302; Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 979 (1984).

The focus of any construction permit extension proceeding is to be whether "good cause" exists for the requested extension. Determination of the scope of an extension proceeding should be based on "common sense" and the "totality of the circumstances," more specifically whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and, prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1227, 1229-30 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 553 (1980). See Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984).

The NRC's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension; the same limitation to apply to any interested person seeking to challenge the request for an extension. The most "common sense" approach to the interpretation of Section 185 of the Atomic Energy Act and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. WPPSS, supra, 16 NRC at 1228-1229; Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 550-51 (1983); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-846, 19 NRC 975, 978 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121 (1986).

A permit holder may establish good cause for delays by showing a need to correct deficiencies which resulted from a previous corporate policy to speed construction by intentionally violating NRC requirements. The permit holder must also show that the previous policy has since been discarded and repudiated. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 403 (1986).

3.5.1 Use of Summary Disposition

The Commission and Appeal Board have encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists.

Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-425 (1973).

A Licensing Board will deny intervenors' motion for summary disposition where the intervenors have not raised any litigable issues because of their failure to submit admissible contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 741 (1989).

3.5.1.1 Construction Permit Hearings

While, as a general rule, summary disposition can be granted in nearly any proceeding as to nearly any matter for which there is no genuine issue of material fact, there is an exception under NRC Practice. In construction permit hearings, summary disposition may not be used to determine the ultimate issue as to whether the CP will be granted. 10 CFR § 2.749(d). See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

3.5.1.2 Amendments to Existing Licenses

Summary disposition may be used in license amendment proceedings where a hearing is held with respect to the amendment. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). See, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 556-567 (1979); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985).

3.5.2 Motions for Summary Disposition

Under the Rules of Practice, 10 CFR Part 2, a motion for summary disposition should be granted if the Licensing Board determines, with respect to the question at issue, that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. 10 CFR § 2.749(d).

§ 3.5.2

10 CFR § 2.749 permits a Board to deny summarily motions for summary disposition which occur shortly before a hearing where the motion would require the diversion of the parties' or the Board's resources from preparation for the hearing. The Regents of the University of California (UCLA Research Reactor), LBP-82-93, 16 NRC 1391, 1393 (1982).

The Board may not dictate to any party the manner in which it presents its case. The Board may not substitute its judgment for the parties' on the merits of their case in order to summarily dismiss their motions, but it must deal with the motions on the merits before reaching a conclusion. UCLA Research Reactor, *supra*, 16 NRC at 1394, 1395.

Under the NRC Rules of Practice, there is required to be annexed to a motion for summary disposition a "separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982), *citing*, 10 CFR § 2.749(a). Where such facts are properly presented and are not controverted, they are deemed to be admitted. La Crosse, *supra*, 16 NRC at 520; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), *reconsid. denied*, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 305 (1985).

If there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should have been permitted or required to proceed further, the motion must be denied. General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982). As the Board rules on such a motion, all statements of material facts required to be served by the moving party must be deemed to be admitted, unless controverted by the statement required to be served by the opposing party. 10 CFR § 2.749. Motions for summary disposition under Section 2.749 are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient. The asserted facts must be material and of a substantial nature, not fanciful or merely suspicious. Where neither an answer opposing the motion nor a statement of material fact has been filed by an intervenor, and where Staff and applicants have filed affidavits to show that no genuine issue exists, the motion

Generating Plant, Units 3 and 4), LBP-86-27, 24 NRC 255, 261 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC 495, 498, 506 (1988); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 475 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-9, 28 NRC 271, 272-73 (1989); All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-44, 32 NRC 433, 447 (1990).

All material facts set forth in the motion and not adequately controverted by the response are deemed to be admitted. 10 CFR § 2.749(a). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 61 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991). A party opposing the motion may not rely on a simple denial of material facts stated by the movant but must set forth specific facts showing that there is a genuine issue. 10 CFR § 2.749(b); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632-33 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC 495, 498, 504-06 (1988); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542 & n.5 (1990). Where a party opposing the motion is unable to file affidavits in opposition in the time available, he may file an affidavit showing good reasons for his inability to make a timely response in which case the Board may refuse summary disposition or grant a continuance to permit proper affidavits to be prepared. 10 CFR § 2.749(c).

As to affidavits in support of a motion for a summary disposition, a document submitted with a verified letter in which the attestation states that the person is "duly authorized to execute and file this information on behalf of the applicants" is not sufficient to make the document admissible into evidence pursuant to § 2.749(b). An affidavit must be submitted by a person to show he is competent to testify to all matters discussed in the document.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 755 (1977).

Although 10 CFR § 2.749(b) does not expressly require that the affidavit be based on a witness' personal knowledge of the material facts, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418-419 (1986).

Movant's papers which are insufficient to show an absence of an issue of fact, cannot premise a grant of summary judgment. Similarly, a response opposing a motion for summary judgment must have a statement of material facts. Mere allegations and denials will not suffice, but there must be a showing of genuine issues of fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); 10 CFR § 2.749(b); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 229, 231 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-88-23, 28 NRC 178, 182 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 662-65 (1988). In that connection, it would frequently not be sufficient for an opponent to rely on quotations from or citations to published work of researchers who have apparently reached conclusions at variance with the movant's affiants. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 436 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

Answers to interrogatories can be used to counter evidentiary material proffered in support of a motion for summary disposition, but only if they are made on the basis of personal knowledge, over facts that would be admissible as evidence, and are made by a respondent competent to testify to those facts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1175 (1983).

An opponent's allegation of missing information without a showing of its materiality is insufficient to defeat a motion for summary disposition. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 687-88 (1989), vacated and reversed, ALAB-944, 33 NRC 81, 140-48 (1991).

3.5.3 Summary Disposition Rules

By and large, the rules and standards established by the courts for granting or denying a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will be applied by Licensing Boards in their consideration of motions for summary disposition under 10 CFR § 2.749. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974).

Based on judicial interpretations of Rule 56, the burden of proof with respect to summary disposition is upon the movant who must demonstrate the absence of any genuine issue of material fact. J. Moore, Federal Practice, Vol. 6, Ch. 56, para. 56.15(3) (2nd ed. 1966); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Adickes v. Kress and Co., 398 U.S. 144, 157 (1970); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 460, 461-62 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 665 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LRP-90-4, 31 NRC 54, 67, 69 (1990). Thus, if a movant fails to make the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention. La Crosse, supra, 16 NRC at 519. See Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 435 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

Nonetheless, where a proponent of a contention fails to respond to a motion for summary disposition, it does so at its own risk; for, if a contention is to remain litigable, there must at least be presented to the Board a sufficient factual basis "to require reasonable minds to inquire further." La Crosse, supra, 16 NRC at 519-20, citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980); Louisiana Power and Light Co. (Waterford Steam

Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983). To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact. Poller v. Columbia Broadcasting Co., Inc., 368 U.S. 464 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1954); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981). The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974) and cases cited therein at pp. 878-879. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963); Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986). The opposing party need not show that he would prevail on the issues but only that there are genuine issues to be tried. American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1967); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418 (1986). The fact that the party opposing summary disposition failed to submit evidence controverting the disposition does not mean that the motion must be granted. The proponent of the motion must still meet his burden of proof to establish the absence of a genuine issue of material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986).

The Commission may take official notice of a matter which is beyond reasonable controversy and which is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991), citing, Government of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976).

10 CFR § 2.743(i) requires that the parties be informed of the precise facts as to which official notice will be taken and be given the opportunity to controvert those facts. Moreover, it is clear that official notice applies to facts, not opinions or conclusions. Consequently, it is improper to take official notice of opinions and conclusions. Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), LBP-74-26, 7 AEC 758, 760 (1974). While official notice is appropriate as to background facts or facts relating only indirectly to the issues, it is inappropriate as to facts directly and specifically at issue in a proceeding. K. Davis, Administrative Law Treatise, § 15.08.

Official notice of information in another proceeding is permissible where the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 n.3 (1982), citing, United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-530 (1945); 10 CFR 2.743(i).

The use of officially noticeable material is unobjectionable in proper circumstances. 10 CFR § 2.743(i). Interested parties, however, must have an effective chance to respond to crucial facts. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 350 (1983), citing, Carson Products Co. v. Califano, 594 F.2d 453, 459 (5th Cir. 1979).

A Licensing Board will decline to take official notice of a matter which is initially presented in a party's proposed findings of fact and conclusions of law since this would deny opposing parties the opportunity under 10 CFR § 2.734(c) to confront the facts noticed. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 565-66 (1988).

Absent good cause, a Licensing Board will not take official notice of documents which are introduced for the first time as attachments to a party's proposed findings of fact. In order to be properly admitted as evidence, such documents should be offered as exhibits before the close of the record so that the other parties have an opportunity to raise objections to the documents. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 687-88 (1987).

The Commission's reference to various documents in the background section of an order and notice of hearing does not indicate that the

Commission has taken official notice of such documents. A party who wishes to rely upon such documents as evidence in the hearing should offer the documents as exhibits before the close of the record. Three Mile Island Inquiry, *supra*, 25 NRC at 688-89.

A Licensing Board will not take official notice of State law. Thus, if a party wishes to base proposed findings on a State's regulations, such regulations must be offered and accepted as an exhibit. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 525, 549 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), and aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990).

3.11 Evidence

10 CFR § 2.743 generally delineates the types and forms of evidence which will be accepted and, in some cases must be submitted in NRC licensing proceedings.

Generally, testimony is to be pre-filed in writing before the hearing. Pre-filed testimony must be served on the other parties at least 15 days in advance of the hearing at which it will be presented, though the presiding officer may permit introduction of testimony not so served either with the consent of all parties present or after they have had a reasonable chance to examine it. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92 (1977). Note, however, that where the proffering party gives an exhibit to the other parties the night before the hearing and then alters it over objection at the hearing the following day, it is error to admit such evidence since the objecting parties had no reasonable opportunity to examine it. *Id.*

Technical analyses offered in evidence must be sponsored by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 (1983), citing, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant Units 1 and 2), ALAB-443, 6 NRC 741, 754-56 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 n.22 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 350-51 (1988). A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

3.11.1 Rules of Evidence

While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983). See generally Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

3.11.1.1 Admissibility of Evidence

Evidence is admissible if it is relevant, material, reliable and not repetitious. 10 CFR § 2.743(c). Under this standard, the application for a permit or license is admissible upon authentication. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974).

This same standard applies to proceedings conducted under the informal adjudication procedures of 10 CFR Part 2, Subpart L. The presiding officer in such proceedings may strike, on motion or on the presiding officer's own initiative, any portion of a written presentation or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable. Rockwell International Corp. (Rocketdyne Division), LBP-90-10, 31 NRC 293, 298 (1990), citing, 10 CFR § 2.1233(e).

A determination on materiality will precede the admission of an exhibit into evidence, but this is not an ironclad requirement in administrative proceedings in which no jury is involved. The determinations of materiality could be safely left to a later date without prejudicing the interests of any new party. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

The requirement of authentication or identification as a condition precedent to the admissibility of evidence in NRC licensing proceedings is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 (1983), citing, Fed. R. Evid. 901(a).

The Final Safety Analysis Report (FSAR) is conditionally admissible as substantive evidence, but once portions of the FSAR are put into controversy, applicants must present one or more competent witnesses to defend them. San Onofre, supra, 17 NRC at 366.

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A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-659 (1971).

In order for expert testimony to be admissible, it need only (1) assist the trier of fact, and (2) be rendered by a properly qualified witness. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983). See Fed. R. Evid. 702; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985).

The opinions of an expert witness which are based on scientific principles, acquired through training or experience, and data derived from analyses or by perception are admissible as evidence. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 & n.52 (1985). See Fed. R. Evid. 702; McGuire, *supra*, 15 NRC at 475.

The fact that a witness is employed by a party, or paid by a party, goes only to the persuasiveness or weight that should be accorded the expert's testimony, not to its admissibility. Waterford, *supra*, 17 NRC at 1091; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-39, 22 NRC 755, 756 (1985).

3.11.1.1.1 Admissibility of Hearsay Evidence

Hearsay evidence is generally admissible in administrative proceedings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411-12 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 501 n.67 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

There is still a requirement, however, that the hearsay evidence be reliable. For example, a statement by an unknown expert to a nonexpert witness which such witness proffers as substantive evidence is unreliable and, therefore, inadmissible. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92 (1977). In addition to being reliable, hearsay evidence must be relevant, material and not unduly repetitious, to be

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admissible under 10 CFR § 2.743(c). Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).

Although the testimony of an expert witness which is based on work or analyses performed by other people is essentially hearsay, such expert testimony is admissible in administrative proceedings if its reliability can be determined through questioning of the expert witness. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 718 (1985).

In considering a motion for summary disposition, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418-19 (1986).

3.11.1.2 Hypothetical Questions

Hypothetical questions may be propounded to a witness. Such questions are proper and become a part of the record, however, only to the extent that they include facts which are supported by the evidence or which the evidence tends to prove. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 828-29 (1976).

3.11.1.3 Reliance on Scientific Treatises, Newspapers, Periodicals

An expert may rely on scientific treatises and articles despite the fact that they are, by their very nature, hearsay. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976). The Appeal Board in Clinton left open the question as to whether an expert could similarly rely on newspapers and other periodicals.

An expert witness may testify about analyses performed by other experts. If an expert witness were required to derive all his background data from experiments which he personally conducted, such expert would rarely be qualified to give any opinion on any subject whatsoever. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 718 (1985), citing Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972).

An intervenor in a materials licensing proceeding who relies upon newspaper articles to support its written presentation, 10 CFR § 2.1233(d), must include a clearly cross-referenced set of copies of the articles containing numbered pages and

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dates of publication. Rockwell International Corp. (Rocket-dyne Division), LBP-90-11, 31 NRC 320, 323 (1990).

3.11.1.4 Off-the-Record Comments

Obviously, nothing can be treated as evidence which has not been introduced and admitted as such. In this vein, off-the-record ex parte communications carry no weight in adjudicatory proceedings and cannot be treated as evidence. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 191 (1978).

3.11.1.5 Presumptions and Inferences

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. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 100 (1983).

In any NRC licensing proceeding, a FEMA (Federal Emergency Management Agency) finding will constitute a rebuttable presumption on questions of adequacy and implementation capability of emergency planning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 702 (1983), citing, 10 CFR § 50.47(a)(2).

When a party has relevant evidence within his control which he fails to produce, it may be inferred that such evidence is unfavorable to him. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

3.11.1.6 Government Documents

NRC adjudicatory boards may follow Rule 90^c of the Federal Rules of Evidence, waiving the need for extrinsic evidence of authenticity as a precondition to admitting official government documents to allow into evidence government documents. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 49 (1979).

3.11.2 Status of ACRS Letters

Section 182(b) of the Atomic Energy Act of 1954 and 10 CFR § 2.743(g) of the Commission's Rules of Practice require that the Advisory Committee on Reactor Safeguards (ACRS) letter be proffered and received into evidence. However, because the ACRS is not subject to cross-examination, the ACRS letter cannot be admitted for the truth of its contents, nor may it provide the basis for any findings where the proceeding in which it is offered is a contested one. Arkansas Power &

Light Co. (Arkansas Nuclear-1, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

The contents of an ACRS report are not admissible in evidence for the truth of any matter stated therein as to controverted issues, but only for the limited purpose of establishing compliance with statutory requirements. A Licensing Board may rely upon the conclusion of the ACRS on issues that are not controverted by any party. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 and n.36 (1983). See also Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 340 (1973).

A Licensing Board may rely upon conclusions of the ACRS on issues that are not controverted by any party. 10 CFR Part 2, Appendix A, § V(f)(1),(2). However, the contents of an Advisory Committee on Reactor Safeguards (ACRS) report cannot, of itself, serve as an underpinning for findings on health and safety aspects of licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 518 (1983), citing, Arkansas Power and Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

3.11.3 Presentation of Evidence by Intervenors

An intervenor may not adduce affirmative evidence on an issue that he has not raised himself unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17 (1974). Nevertheless, an intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), affirming, ALAB-244, 8 AEC 857, 867-888 (1974).

An intervenor which has failed to present allegedly relevant information during direct examination of a witness in a Licensing Board proceeding may not assert that the information nevertheless should be considered on appeal since it could have been elicited during cross-examination. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 387 n.49 (1990).

3.11.4 Evidentiary Objections

Objections to particular evidence or the manner of presentation thereof must be made in a timely fashion. Failure to object to evidence bars the subsequent taking of exceptions to its admission. Florida Power & Light Co. (St. Lucie Nuclear

Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 554 n.56 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), and aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990). To preserve a claim of error on an evidentiary ruling, a party must interpose its objection and the basis therefore clearly and affirmatively. If a party appears to acquiesce in an adverse ruling and does not insist clearly on the right to introduce evidence, the Appeal Board will not find that the evidence was improperly excluded. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 362 n.90 (1978).

3.12 Witnesses at Hearing

Because of the complex nature of the subject matter in NRC hearings, witness panels are often utilized. It is recognized in such a procedure that no one member of the panel will possess the variety of skills and experience necessary to permit him to endorse and explain the entire testimony. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 569 (1977).

The testimony and opinion of a witness who claims no personal knowledge of, or expertise in, a particular aspect of the subject matter of his testimony will not be accorded the weight given testimony on that question from an expert witness reporting results of careful and deliberate measurements. Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 & 2), LBP-78-15, 7 NRC 642, 647 n.8 (1978).

While a licensing Board has held that prepared testimony should be the work and words of the witness, not his counsel, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1799 (1981), the Appeal Board has made it clear that what is important is not who originated the words that comprise the prepared testimony but rather whether the witness can truthfully attest that the testimony is complete and accurate to the best of his or her knowledge. Midland, ALAB-691, 16 NRC 897, 918 (1982).

Where technical issues are being discussed, Licensing Boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand simultaneously so they may respond immediately on an opposing witness' answer to a question. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). The admission of surrebuttal testimony is a matter within the discretion of a Licensing Board, particularly when the party sponsoring the testimony reasonably should have anticipated the attack upon its evidence. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397 n.101 (1990), citing, Cellular Mobile Systems v. FCC, 782 F.2d 182, 201-02 (D.C. Cir. 1985).

Where the credibility of evidence turns on the demeanor of a witness, an appellate board will give the judgment of the trial board, which saw and heard the testimony, particularly great deference. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1218 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). However, demeanor is of little weight where other testimony, documentary evidence, and common sense suggest a contrary result. Three Mile Island, supra, 19 NRC at 1218.

3.12.1 Compelling Appearance of Witness

10 CFR § 2.720 provides that, pursuant to proper application by a party, a Licensing Board may compel the attendance and testimony of a witness by the issuance of a subpoena. A Licensing Board has no independent obligation to compel the appearance of a witness. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

The Rules of Practice preclude a Licensing Board from declining to issue a subpoena on any basis other than that the testimony sought lacks "general relevance." In ruling on a request for a subpoena, the Board is specifically prohibited from attempting "to determine the admissibility of evidence." 10 CFR § 2.720(a); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 93 (1977).

3.12.1.1 NRC Staff as Witnesses

The provisions of 10 CFR § 2.720(a)-(g) for compelling attendance and testimony do not apply to NRC Commissioners or Staff. 10 CFR § 2.720(h). Nevertheless, once a Staff witness has appeared, he may be recalled and compelled to testify further, despite the provisions of 10 CFR § 2.720(h), if it is established that there is a need for the additional testimony on the subject matter. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974).

3.12.1.2 ACRS Members as Witnesses

Members of the ACRS are not subject to examination in an adjudicatory proceeding with regard to the contents of an ACRS Report. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 766 n.10 (1977).

The Appeal Board, at intervenors' request, directed that certain consultants to the ACRS appear as witnesses in the proceeding before the Board. Such an appearance was proper under the circumstances of the case, since the ACRS consultants had testified via subpoena at the licensing board level at intervenors' request. Pacific Gas and Electric Company

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(Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-604, 12 NRC 149, 150-51 (1980).

3.12.2 Sequestration of Witnesses

In Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565 (1977), the Appeal Board considered a Staff request for discretionary review of a Licensing Board ruling which excluded prospective Staff witnesses from the hearing room while other witnesses testified. The Appeal Board noted that while sequestration orders must be granted as a matter of right in Federal district court cases, NRC adjudicatory proceedings are clearly different in that direct testimony is generally pre-filed in writing. As such, all potential witnesses know in advance the basic positions to be taken by other witnesses. In this situation, the value of sequestration is reduced. Moreover, the highly technical and complex nature of NRC proceedings often demands that counsel have the aid of expert assistance during cross-examination of other parties' witnesses.

In view of these considerations, the Appeal Board held that sequestration is only proper where there is some countervailing purpose which it could serve. The Board found no such purpose in this case, but in fact, found that sequestration here threatened to impede full development of the record. As such, the Licensing Board's order was overturned. The Appeal Board also noted that there may be grounds to distinguish between Staff witnesses and other witnesses with respect to sequestration, with the Staff being less subject to sequestration than other witnesses, depending on the circumstances.

3.12.3 Board Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-08 (1977).

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

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in

that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Thus, while Licensing Boards have the authority to call witnesses of their own, the exercise of this discretion must be reasonable and, like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Applying the criteria of Summer, supra, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health effects contention. Carolina Power & Light Co. and North Carolina East and West Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

3.12.4 Expert Witnesses

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his expertise. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of the expert should be established by showing either academic training or relevant experience or some combination of the two. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978). As to academic training, such training that bears no particular relationship to the matters for which an individual is proposed as an expert witness is insufficient, standing alone, to qualify the individual as an expert witness on such matters. Diablo Canyon, LBP-78-36, 8 NRC at 571. In addition, the fact that a proposed expert witness was accepted as an expert on the subject matter by another Licensing Board in a separate proceeding

does not necessarily mean that a subsequent Board will accept the witness as an expert. Diablo Canyon, LBP-78-36, 8 NRC at 572.

A witness is qualified as an expert by knowledge, skill, experience, training, or education. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing, Fed. R. Evid. 702. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

The value of testimony by a witness at NRC proceedings is not undermined merely by the fact that the witness is a hired consultant of a licensee. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1211 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability--for whatever reason--to provide the foundation for them to the decision maker and litigants. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 171-72 (1989), stay denied on other grounds, ALAB-914, 29 NRC 357 (1989), affirmed on other grounds, ALAB-926, 31 NRC 1 (1990). An assertion of "engineering judgment", without any explanation or reasons for the judgment, is insufficient to support the conclusions of an expert engineering witness. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1420 (1983), modified on reconsid. sub nom., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 518, 532 (1984).

A Board should give no weight to the testimony of an asserted expert witness who can supply no scientific basis for his statements (other than his belief) and disparages his own testimony. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 735 (1985).

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

been presented earlier. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1143 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984).

3.14.3 Material Not Contained in Hearing Record

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 n.33 (1986). Neither the Licensing Board nor the Appeal Board may base a decision on factual material which has not been introduced into evidence. However, if extra-record material raises an issue of possible importance to matters such as public health, the Appeal Board may examine it. If this examination creates a serious doubt about the decision reached by the Licensing Board, the Appeal Board may order that the record be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-352 (1978). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-937, 32 NRC 135, 150-152 (1990).

Whether or not proffered affidavits would leave the Licensing Board's result unchanged, simple equity precludes the Appeal Board from reopening the record in aid of intervenors' apparent desire to attack the decision below on fresh grounds. Where the presentation of new matter to supplement the record is untimely, its possible significance to the outcome of the proceeding is of no moment, at least where the issue to which it relates is devoid of grave public health and safety or environmental implications. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34, 38-39 (1981), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); and Hartsville, *supra*.

3.15 Interlocutory Review via Directed Certification

As a general rule, interlocutory appeals during a pending proceeding are not permitted. 10 CFR § 2.730(f). However, a party may seek

interlocutory review by filing a petition for certification as to any question deserving early dispositive resolution. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 482-83 (1975). The issues that may be certified are not limited to those that have not yet been considered and ruled upon by the presiding Licensing Board. *Id.* In fact, the Appeal Board will be disinclined to direct certification unless and until the Licensing Board has been given a reasonable opportunity to decide the issue itself. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727 (1975). An exception to this rule will be made in compelling circumstances where, for example, there is an emergency situation requiring an immediate, final determination of the issue. *Id.* The practice of simultaneously seeking interlocutory appellate review of grievances by way of directed certification and Licensing Board reconsideration of the same rulings is disfavored. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

The only procedural vehicle by which a party may seek review of interlocutory matters is a request for directed certification. The exercise of an Appeal Board's discretionary authority to grant directed certification is reserved for 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. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 n.1 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991).

To obtain certification for an interlocutory review, the party seeking it must show that, without such certification, the public interest will suffer or unusual delay or expense will be encountered. 10 CFR § 2.730(f); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478 (1975); Seabrook Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LDP-89-6, 29 NRC 127, 135 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds & remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

This showing is not made merely by a demonstration that a Licensing Board promulgated an interlocutory, non-appealable pronouncement at variance with previous rulings of other boards, unless some special circumstance makes immediate elimination of the decisional conflict imperative. *Id.*

Developments occurring subsequent to the filing of a motion for directed certification to the Appeal Board may strip the question raised in the motion for certification of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

Appeal Boards undertake discretionary interlocutory review of a Licensing Board ruling only where such ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-572, 10 NRC 693, 694 (1979); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 23 (1983), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 473 (1985).

The Appeal Boards' certification authority was not intended to be applied to a mixed question of law and fact in which the factual element was predominant. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

The Commission's Rules of Practice, 10 CFR § 2.714a, prohibit a person from taking an interlocutory appeal from an order entered on his intervention petition unless that order has the effect of denying the petition in its entirety. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-621, 12 NRC 578, 579 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991).

3.16 Licensing Board Findings

The findings of a Licensing Board must be supported by reliable, probative and substantial evidence in the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184 (1975). It is well settled that the possibility that inconsistent or even contrary views could be drawn if the views of an opposing party's experts were accepted does not prevent the Licensing Board's findings from being supported by substantial evidence. Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 866 (1975).

A Licensing Board is free to decide a case on a theory different from that on which it was tried but when it does so, it has a concomitant obligation to bring this fact to the attention of the parties before it and to afford them a fair opportunity to present argument, and where appropriate, evidence. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 55-56 (1978); Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975). Note that as to a Licensing Board's findings, the Appeal Board has authority to make factual findings on the basis of record evidence which are different from those reached by a Licensing Board and can issue supplementary findings of its own. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). The Appeal

Board decision can be based on grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and/or evidence. *Id.* In any event, neither the Licensing Board nor the Appeal Board may base a decision on factual material which has not been introduced into evidence. Otherwise, other parties would be deprived of the opportunity to impeach the evidence through cross-examination or to refute it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

An Appeal Board will vacate a Licensing Board decision which is pending on appeal when, subsequent to the issuance of the decision, circumstances have changed so as to significantly alter the evidentiary basis of the decision. Where a party seeks to change its position or materially alter its earlier presentation to the Licensing Board, the hearing record no longer represents the actual situation in the case. Other parties should be given an appropriate opportunity to comment upon or to rebut any new information which is material to the resolution of issues. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 91, 115-17 (1991).

The Board's initial decision should contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3, & 4), ALAB-256, 1 NRC 10, 14 n.8 (1975). Despite the fact that a number of older cases have held that a Licensing Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), *aff'd sub nom.*, Union of Concerned Scientists v. AEC, 449 F.2d 1069 (D.C. Cir 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), the Appeal Board has indicated that a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). While the Seabrook Appeal Board found that the deficiencies in the initial decision were not so serious as to require reversal, especially in view of the fact that the Appeal Board itself can make findings of fact where necessary, the Appeal Board made it clear that a Licensing Board's blatant failure to follow the Appeal Board's direction in this regard is ground for reversal of the Licensing Board's decision.

Notwithstanding its authority to do so, the Appeal Board will normally be reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Seabrook, *supra*, 6 NRC at 42. See Long Island Lighting Co. (Shoreham

Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 530-31 (1988). Note, however, that in at least one case the Appeal Board did search the record where (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy and (2) it did not take an extended period of time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 368 (1978).

The Appeal Board's admonition that Licensing Boards must clearly set forth the basis for their decisions applies to a Board's determination with respect to alternatives under NEPA. Thus, although a Licensing Board may utilize its expertise in selecting between alternatives, some explanation is necessary. Otherwise, the requirement of the Administrative Procedure Act that conclusions be founded upon substantial evidence and based on reasoned findings "become[s] lost in the haze of so-called expertise." Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

When evidence is presented to the Licensing Board in response to an Appeal Board instruction that a matter is to be investigated, the Licensing Board is obligated to make findings and issue a ruling on the matter. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 368 (1978).

In Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 492 (1978), the Appeal Board reiterated that the bases for decisions must be set forth in detail, noting that, in carrying out its NEPA responsibilities, an agency "must go beyond mere assertions and indicate its basis for them so that the end product is" an informed and adequately explained judgment.

Licensing Boards have an obligation "to articulate in reasonable detail the basis for [their] determination." A substantial failure of the Licensing Board in this regard can result in the matter being remanded for reconsideration and a full explication of the reasons underlying whatever result that Board might reach upon such reconsideration. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410-412 (1978).

The fact that a Licensing Board poses questions requiring that evidence be produced at the hearing in response to those questions does not create an inviolate duty on the part of the Board to make findings specifically addressing the subject matter of the questions. Portland General Electric Company (Trojan Nuclear Plant), LBP-78-32, 8 NRC 413, 416 (1978).

A Licensing Board decision which rests significant findings on expert opinion not susceptible of being tested on examination of the witness is a fit candidate for reversal. Virginia Electric and Power Company

(North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979).

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

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

In order to avoid unnecessary and costly delays in starting the operation of a plant, a Board may conduct and complete operating license hearings prior to the completion of construction of the plant. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622, 1627 (1985) review denied, CLI-85-14, 22 NRC 177, 178 (1985). Thus, a Board must make some predictive findings and, "in effect, approve applicant's present plans for future regulatory compliance." Diablo Canyon, *supra*, 21 NRC at 1627, citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 79 (1981).

There is no requirement mandated by the Atomic Energy Act nor the Commission's regulations that a Licensing Board may not resolve a contested issue if any form of confirmatory analysis is ongoing as of the close of the record on that issue, where a Licensing Board is able to make the basic findings prerequisite to the issuance of an operating license based on the existing record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 519 (1983), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622, 1628 (1985), review denied, CLI-85-14, 22 NRC 177, 178 (1985).

Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 923 (1981).

3.16.1 Independent Calculations by Licensing Board

A Board is free to draw conclusions by applying known engineering principles to and making mathematical calculations from facts in the record whether or not any witness purported to attempt this exercise. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437, rev. on other gnds., CLI-74-40, 8 AEC 809 (1974). However, the Board must adequately explain the basis for its conclusions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

3.17 Res Judicata and Collateral Estoppel

Although the judicially developed doctrine of res judicata is not fully applicable in administrative proceedings, the considerations of fairness to parties and conservation of resources embodied in this doctrine are relevant. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 27 (1978), citing, Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

Thus, as a general rule, it appears that res judicata principles may be applied, where appropriate, in NRC adjudicatory proceedings. Consistent with those principles, res judicata does not apply when the foundation for a proposed action arises after the prior ruling advanced as the basis for res judicata or when the party seeking to employ the doctrine had the benefit, when he obtained the prior ruling, of a more favorable standard as to burden of proof than is now available to him. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

The common law rules regarding res judicata do not apply, in a strict sense, to administrative agencies. Res judicata need not be applied by an administrative agency where there are overriding public policy interests which favor relitigation. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing, International Harvester Co. v. Occupational Safety and Health Review Commission, 628 F.2d 982, 986 (7th Cir. 1980).

When an agency decision involves substantial policy issues, an agency's need for flexibility outweighs the need for repose provided by the principle of res judicata. Clinch River, supra, 16 NRC at 420, citing, Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969); FTC v. Texaco, 555 F.2d 867, 861 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), rehearing denied, 434 U.S. 883 (1977).

A change in external circumstances is not required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to which an old policy applied. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23,

16 NRC 412, 420 (1982), citing, Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969).

An Agency must be free to consider changes that occur in the way it perceives the facts, even though the objective circumstances remain unchanged. Clinch River, supra, 16 NRC at 420, citing, Maxwell, supra; FTC v. Texaco, 555 F.2d 867, 874 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), rehearing denied, 434 U.S. 883 (1977).

Principles of collateral estoppel, like those of res judicata, may be applied in administrative adjudicatory proceedings. U.S. v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982); Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 25 n.40 (1984), citing, Farley, supra; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). Collateral estoppel precludes relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. Davis-Besse, supra; Farley, supra.

The application of collateral estoppel does not hinge on the correctness of the decision or interlocutory ruling of the first tribunal. Moore's Federal Practice, para. 0.405[1] and [4.1] at 629, 634-37 (2d ed. 1974); Davis-Besse, supra. It is enough that the tribunal had jurisdiction to render the decision, that the prior judgment was rendered on the merits, that the cause of action was the same, and that the party against whom the doctrine is asserted was a party to the earlier litigation or in privity with such a party. Davis-Besse, supra. Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties. Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-640, 13 NRC 487, 543 (1981). In virtually every case in which the doctrine of collateral estoppel was asserted to prevent litigation of a contention, it was held that privity must exist between the intervenor advancing the contention and the intervenor which litigated it in the prior proceeding. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NPC 399, 404 (1985) and cases cited. But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-200 (1981). Conversely, that parties to the former action were not joined to the second action does not prevent application of the principle. Dreyfus v. First National Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir. 1970), cert. denied, 400 U.S. 832 (1970); Hummel v. Equitable Assurance Society, 151 F.2d 994, 996 (7th Cir. 1945); Davis-Besse, supra, 5 NRC 557. Where circumstances have changed (as

to context or law, burden of proof or material facts) from when the issues were formerly litigated or where public interest calls for relitigation of issues, neither collateral estoppel nor res judicata applies. Farley, supra, 7 AEC 203; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 286 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 56-57 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990). Furthermore, under neither principle does a judicial decision become binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. 2 Davis, Administrative Law Treatise, § 18.12 at pp. 627-28. Cf. US v. Radio Corp. of America, 358 U.S. 334, 347-52 (1959). Where application of collateral estoppel would not affect the Commission's ability to control its internal proceedings, however, a prior court decision may be binding on the NRC. Davis-Besse, supra.

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-575 (1979).

There is no basis under the Atomic Energy Act or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages; principles of res judicata and collateral estoppel then come into play. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 464 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1044 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1081 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). A contention already litigated between the same parties at the construction permit stage may not be relitigated in an operating license proceeding. Duke Power Co.

(Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 78-82 (1982); Shearon Harris, supra, 23 NRC at 536.

A party which has litigated a particular issue during an NRC proceeding is not collaterally estopped from litigating in a subsequent proceeding an issue which, although similar, is different in degree from the earlier litigated issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 849 (1987), aff'd, ALAB-869, 26 NRC 13, 22 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

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

When certain issues have been adequately explored and resolved in an early phase of a proceeding, an intervenor may not relitigate similar issues in a subsequent phase of the proceeding unless there are different circumstances which may have a material bearing on the resolution of the issues in the subsequent proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 402-403 (1990).

Collateral estoppel requires presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 (1983), citing, Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986). In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Shearon Harris, supra, 23 NRC at 536.

The doctrine of collateral estoppel traditionally applies only when the parties in the case were also parties (or their privies) in the previous case. A limited extension of that doctrine permits

"offensive" collateral estoppel, i.e., the claim by a person not a party to previous litigation that an issue had already been fully litigated against the defendant and that the defendant should be held to the previous decision because he has already had his day in court. Parklane Hosiery Co., Inc. v. Leo M. Shore, 439 U.S. 322 (1979). At least one Licensing Board has held that, in operating license proceedings, estoppel may also be applied defensively, to preclude an intervenor who was not a party from raising issues litigated in the construction permit proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-201 (1981). This would not appear to be wholly consistent with the Appeal Board's ruling in Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Station, Units 1 and 2), ALAB-640, 13 NRC 487, 543 (1981).

The Licensing Board which conducted the San Onofre operating license hearing relied upon similar reasoning. The Board held that, although "identity of the parties" and "full prior adjudication of the issues" are textbook elements of the doctrines of res judicata and collateral estoppel, they are not prerequisites to foreclosure of issues at the operating stage which were or could have been litigated at the construction permit stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 82 (1982). When an issue was known at the construction permit stage and was the subject of intensive scrutiny, anyone who could have (even if no one had) litigated the issue at that time can not later seek to do so at the operating license hearing without a showing of changed circumstances or newly discovered evidence. San Onofre, supra, 15 NRC at 78-82. The Appeal Board subsequently found that the Licensing Board had erred. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 353-354 (1983). The doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as having their day in court. There is no public policy reason why the Agency's administrative proceedings warrant a looser standard. San Onofre (ALAB-673), supra, 15 NRC at 696. The Appeal Board also disagreed with the Licensing Board's statement that organizations or persons who share a general point of view will adequately represent one another in NRC proceedings. San Onofre (ALAB-673), supra, 15 NRC at 695-696.

The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another is whether legal accountability between the two groups or virtual representation of one group by the other is shown. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 n.3 (1983), citing, Southern California

Edison Co. (San Onofre Nuclear Generating Station, Units 1 and 2), ALAB-673, 15 NRC 688, 695-96 (1982) (dictum).

An operating license Board will not apply collateral estoppel to an issue which was considered during an uncontested construction permit hearing. When there are no adverse parties in the construction permit hearing, there can be neither privity of parties nor "actual litigation" of the issue sufficient to support reliance on collateral estoppel. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 622-624 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1980), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 506 (1989) (collateral estoppel does not apply to an issue which was reviewed by the NRC Staff, but which was not previously the subject of a contested proceeding).

An intervenor in an operating license proceeding, who was not a party in the construction permit proceeding, is not collaterally estopped from raising and relitigating issues which were fully investigated in the construction permit proceeding. However, the intervenor has the burden of providing even greater specificity than normally required for its contentions. The intervenor must specify how circumstances have changed since the construction permit proceeding or how the Licensing Board erred in the construction permit proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 539-40 (1986). Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 n.5 (1983).

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

The Commission will give effect to factual findings of Federal courts and sister agencies when those findings are part of a final judgment, even when the party seeking estoppel effect was not a party to the initial litigation. Although the application of collateral estoppel would be denied if a party could have easily joined in the prior litigation, the Commission will apply collateral estoppel even though it is alleged that a party could have joined in, if the prior litigation was a complex antitrust case. Furthermore, FERC determinations about the applicability of antitrust laws are sufficiently similar to Commission determinations to be entitled to collateral estoppel effect. Even a shift in the burden of persuasion does not exclude the application of collateral estoppel when it is apparent

that the FERC opinion did not arrive at its antitrust conclusions because of the burden of persuasion. On the other hand, the decision of a Federal district court on a summary judgment motion is not a final judgment entitled to collateral estoppel effect, particularly when the court did not fully explain the grounds for its opinion and when its decision was issued after the hearing board had already begun studying the record and had formed factual conclusions which were not adequately addressed in the district court's opinion. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167, 1173-80, 1189-90 (1981).

Summary disposition may be denied on the basis of res judicata and collateral estoppel. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14 (1980), affirming, LBP-79-27, 10 NRC 563 (1979).

3.18 Termination of Proceedings

3.18.1 Procedures for Termination

10 CFR § 2.203 authorizes a Board to terminate a proceeding, at any time after the issuance of a notice of hearing, on the basis of a settlement agreement, according due weight to the position of the Staff. Robert L. Dickherber and Commonwealth Edison Co. (Quad Cities Nuclear Power Station), LBP-90-28, 32 NRC 85, 86-87 (1990); St. Mary Medical Center-Hobart and St. Mary Medical Center-Gary, LBP-90-46, 32 NRC 463, 465 (1990).

Termination of adjudicatory proceedings on a construction permit application should be accomplished by a motion filed by applicant's counsel with those tribunals having present jurisdiction over the proceeding. A letter by a lay official to the Commission when the Licensing Board has jurisdiction over the matter is not enough. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 668-9 (1980).

An operating license proceeding may not be terminated solely on the basis of a Stipulation whereby all the parties have agreed to terminate the proceeding. The parties must formally file a motion to terminate with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-14, 29 NRC 487, 488-89 (1989).

3.18.2 Post-Termination Authority of Commission

10 CFR § 2.107(a) expressly empowers Licensing Boards to impose conditions upon the withdrawal of a permit or license application after the issuance of a notice of hearing. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 659 n.2 (1980).

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issue, but he is free to challenge the reasoning used to reach the result in defending that result if another party appeals. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975). The prevailing party is free to urge any ground in defending the result, including grounds rejected by the Licensing Board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 133, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

- (2) A third party entering a special appearance to defend against discovery may appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87-88 (1976).
- (3) As to orders denying a petition to intervene, only the petitioner who has been excluded from the proceeding by the order may appeal. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). In such an appeal, other parties may file briefs in support of or opposition to the appeal. Id.
- (4) A party to a Licensing Board proceeding has no standing to press before an Appeal Board the grievances of other parties to the proceeding not represented by him. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30 (1979); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 135 & n.3 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 203 n.3 (1986).

Third parties may file amicus briefs with respect to any appeal, even though such third parties could not prosecute the appeal themselves. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 7 (1976). The Appeal Board in ALAB-304 implied that leave to file an amicus brief may be necessary. The procedure for filing an amicus brief, including the requirement to seek to file such brief, is now contained in 10 CFR § 2.715.

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

The Commission has long construed its Rules of Practice to allow the Staff to appeal from initial decisions. 10 CFR § 2.762 explicitly treats the Staff as a party for purposes of filing appeals. In the Matter of Radiation Technology, Inc., ALAB-567, 10 NRC 533, 547-548 (1979). Although a party generally may appeal only on a showing of discernible injury, the Staff may appeal on questions of precedential importance. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

5.3 How to Appeal

The general rules as to the manner of taking an appeal are set out in 10 CFR § 2.762. Formerly under that regulation, an appeal was taken by the filing of exceptions within ten days after service of the initial decision. Recent changes to 10 CFR § 2.762 require only the filing of a notice of appeal within the same time period. A supporting brief must be filed within 30 days after the notice of appeal has been filed, although the Staff has 40 days to file such a brief. Other parties may file supporting or opposing briefs in response within 30 days (40 days for the Staff) after the initial supporting brief of the appellant. See Sections 5.4 (Time for Filing Appeals), 5.9 (Perfecting Appeals), 5.10 (Briefs on Appeal) and 5.13 (Appeals from Orders, Rulings, Initial Decisions, Partial Initial Decisions) for further discussion of these matters.

5.4 Time for Filing Appeals

As a general rule, only "final" actions are appealable. The test for "finality" for appeal purposes is essentially a practical one. For the most part, a Licensing Board's action is final when it either disposes of a major segment of a case or terminates a party's right to participate. Rulings that do neither are interlocutory. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1256 (1982); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 NRC 1365, 1394-1395 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-994, 27 NRC 632, 636-37 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-933, 31 NRC 491, 496-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-943, 33 NRC 11, 12-13 (1991).

Where a major segment of a case has been remanded to a Licensing Board, there is no final Licensing Board action for appellate purposes until the Licensing Board makes a final determination of all the remanded matters associated with that major segment. Seabrook, supra, 33 NRC at 13.

Administrative orders generally are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988).

A Licensing Board's partial initial decision in an operating license proceeding, which resolves a number of safety contentions, but does not authorize the issuance of an operating license or resolve all pending safety issues, is nevertheless appealable since it disposes of a major segment of the case. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 298 n.21 (1985), citing, Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

The requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 CFR § 2.714a, and appeals from initial decisions pursuant to 10 CFR § 2.762. Waterford, supra, 16 NRC at 895 n.2.

Appeals from interlocutory orders issued by Licensing Boards must await the initial decision rendered by the Board at the end of the case. 10 CFR §§ 2.760 and 2.762; Cincinnati Gas and Electric Co. (William H. Zimmer Station), ALAB-633, 13 NRC 94 (1981), citing, Boston Edison Co. (Pilgrim Station, Unit 2), ALAB-269, 1 NRC 411 (1975).

In general, an immediately effective Licensing Board initial decision is a "final order," even though subject to appeal within the agency, unless its effectiveness has been administratively stayed pending the outcome of further Commission review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976). In other areas, an order granting discovery against a third party is "final" and appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). Similarly, a Licensing Board order on the issue of whether offsite activity can be engaged in prior to issuance of an LWA or a CP is appealable. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976). When a Licensing Board grants a Part 70 license to transport and store fuel assemblies during the course of an OL hearing, the decision is not interlocutory and is immediately appealable. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976). Partial initial decisions which do not yet authorize construction activities nevertheless may be significant and, therefore, appealable as of

right. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975). Similarly, a Licensing Board's decision authorizing issuance of an LWA and rejecting the applicant's claim that it is entitled to issuance of a construction permit is final for the purposes of appellate review. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978). A Licensing Board's denial of a 10 CFR § 2.758 waiver petition is immediately appealable. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 125-126 (1989).

A protracted withholding of action on request for relief may be treated as tantamount to a denial of the request and final action. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977). At least in those instances where the delay involves a Licensing Board's failure to act on a petition to intervene, such a "denial" of the petition is appealable. Greenwood, supra.

As previously noted, an appeal is taken by the filing of a notice of appeal within ten days after service of the initial decision. Licensing Boards may not vary or extend the appeal periods provided for in the regulations. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (1976); Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975). While a motion for a time extension may be filed with the Appeal Board and will sometimes be granted in complex cases, mere agreement among the parties is not sufficient to show good cause for an extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

The rules for taking an appeal also apply to appeals from partial initial decisions. Once a partial initial decision is rendered, an appeal must be filed immediately in accordance with the regulations or the appeal is waived. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975).

Although the time limits established by the Rules of Practice with regard to appeals from Licensing Board decisions and orders are not jurisdictional, Appeal Board policy is to construe them strictly. Hence untimely appeals are not accepted absent a demonstration of extraordinary and unanticipated circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982), citing, Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); 10 CFR Part 2, App. A, IX(d)(4). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635 (1988).

The timeliness of a party's brief on appeal from a Licensing Board's denial of the party's motion to reopen the record is determined by the standards of 10 CFR § 2.762, which applies to appeals from final orders, and not 10 CFR § 2.714a(b), which is specifically applicable to appeals from board orders "wholly denying a petition for leave to intervene and/or request for a hearing". Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-628, 23 NRC 13, 18 n.6 (1986).

The time limits imposed in 10 CFR § 2.762(a) for filing appeal briefs refer to the date upon which the appeal was filed and not to when it was originally due for filing prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is accepted appellate practice for the appeal period specified in 10 CFR § 2.762(a) to be tolled while the trial tribunal has before it an authorized and timely-filed petition for reconsideration of the decision or order in question. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983 (1981).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). A Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Greenwood, *supra*, 7 NRC at 571.

The Appeal Board does not generally characterize its own decisions as final or not final for the purpose of review. Its opinion would only be advisory, and the Appeal Board does not render advisory opinions in the absence of the most compelling considerations. The Office of the General Counsel may interpret 10 CFR §§ 2.770 and 2.771 (final decisions) pursuant to its mandate under 10 CFR § 1.32(f), and any party may request an interpretation of these regulations on finality if it so desires. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 463 (1978).

Finality of a decision is usually determined by examining whether it disposes of at least a major segment of the case or terminates a party's right to participate. The general policy is to strictly enforce time limits for appeals following a final decision. However, where the lateness of filing was not due to a lack of diligence, but, rather, to a misapprehension about the finality of a Board decision, the Appeal Board will allow the appeal as a matter of discretion. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-160 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635-637 (1988).

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

5.5 Matters Considered on Appeal

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-465 (1980).

Unless the Commission has directed otherwise, an Appeal Board, in considering an appeal on the merits, is not to give any weight to statements made in the course of the Commission's immediate effectiveness review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-937, 32 NRC 135, 148 n.42 (1990), citing, 10 CFR § 2.764(g).

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

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

As a general rule, a party may seek appellate redress only on those parts of a decision or ruling which he can show will result in some discernible injury to himself. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). An intervenor may appeal only those issues which it placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.762(d)(1), 54 Fed. Reg. 33168, 33182 (August 11, 1989). There is some indication that a matter of recurring importance may be appealed in a particular case even though it may no longer be determinative in the case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), the Appeal Board will refuse to hear the appeal. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978).

In normal circumstances, an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees but which has no operative effect. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 980 (1978).

5.5.1 Issues Raised for the First Time on Appeal

Although the Appeal Board "might make an exception in the case of a serious substantive issue as to which a genuine problem has been demonstrated, (it) ordinarily will not entertain an issue raised for the first time on appeal." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978) (issues not raised in either proposed findings or exceptions to the initial decision). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), citing, Hartsville, supra; Public Service Electric and Gas Co. (Salem Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358, 361 n.120 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397 n.101 (1990). Thus, as a general rule, an appeal may be taken only as to matters or issues raised at the hearing. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 (1978); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1021 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 343 (1973). The Appeal Board will not entertain a contention for the first time on appeal, absent a serious substantive issue, where a party has not pursued the contention before the Licensing Board through proposed findings of fact. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). The Appeal Board's disinclination to entertain an issue raised for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been, but were not, timely put before

the Licensing Board. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

An intervenor who seeks to raise a new issue on appeal must satisfy the criteria for reopening the record as well as the requirements concerning the admissibility of late-filed contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 248 n.29 (1986).

Although the absence of an appeal does not deprive the Appeal Board of the right to review an issue contested before a Licensing Board, the Appeal Board must be judicious in taking up new matters not previously put in controversy. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978).

An appeal may only be based on matters and arguments raised below. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 496 n.28 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 281 (1987). Even though a party may have timely objected to a Licensing Board's ruling on an issue, an Appeal Board will not consider new arguments offered by the party against the ruling when those arguments were not raised before the Licensing Board. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). Cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 131 n.2 (1985). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 812 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 229-30 (9th Cir. 1988). A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 47-48 (1984). A party is not permitted to raise on appellate review Licensing Board practices to which it did not object at the hearing stage. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985).

The jurisdiction of an Appeal Board to consider new matters arising during the course of its review of a Licensing Board

decision does not hinge upon the nature of the proceeding. Rather, irrespective of whether a construction permit or an operating license is involved, the pivotal factor is the posture of the case and the degree of finality which has attached to the agency action which is in question. Where finality has attached to some but not all issues, Appeal Board jurisdiction to entertain new matters is dependent upon the existence of a reasonable nexus between those matters and the issues remaining before the Board. Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-930, 31 NRC 343, 346-47 (1990).

5.5.2 Effect on Appeal of Failure to File Proposed Findings

The Appeal Board is not required to review exceptions where no proposed findings and rulings were filed by the appellant on the issue with respect to which the appeal is taken. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975). However, while a party's failure to file proposed findings on an issue may be "taken into account" by the Appeal Board if the party later appeals that issue, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 333 (1973), absent a Licensing Board order requiring the submission of proposed findings of fact and conclusions of law, an intervenor that does not make such a filing nevertheless is free to pursue on appeal all issues it litigated below. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 19, 20 (1983).

5.5.3 Matters Considered on Appeal of Ruling Allowing Late Intervention

One exception to the rule prohibiting interlocutory appeals is that a party opposing intervention may appeal an order admitting the intervenor. 10 CFR § 2.714a. See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 n.7 (1976). However, since Licensing Boards have broad discretion in allowing late intervention, an Appeal Board's review of an order allowing late intervention is limited to determining whether that discretion has been abused. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 107 (1976); Marble Hill, *supra*. The Appeal Board will look to the papers filed in the case and the uncontroverted facts set forth therein to determine if the Licensing Board abused its discretion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8 (1977).

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5.5.4 Consolidation of Appeals on Generic Issues

The Appeal Board consolidated and scheduled for hearing radon cases where intervenors are actively participating, and held the remaining cases in abeyance. Where the issues are largely generic, consolidation will result in a more manageable number of litigants, and relevant considerations will likely be raised in the first group of consolidated cases. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 433 (1979), reconsid., denied, ALAB-546, 9 NRC 636 (1979).

5.6 Appeal Board Action

5.6.1 Role of Appeal Board

The Appeal Board's role is generally that of an appellate tribunal. For example, it will not police a licensee's compliance with license conditions, a matter suitable for the Commission's enforcement branch. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-356, 4 NRC 525 (1976).

Under 10 CFR § 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 a Board will exercise that authority. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 171 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).

The Appeal Board reviews all initial decisions and the record, regardless of whether appeals have been taken. See, e.g., South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-114, 6 AEC 253 (1973); Cincinnati Gas & Electric Co. (William H. Zimmer Station), ALAB-79, 5 AEC 342 (1972). Where appeals are filed, the Appeal Board is not limited in its review to those issues raised in the appeals. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 361 (1973). Although it has the power to do so, the Appeal Board will not ordinarily conduct a de novo review of the record and make its own independent findings of fact since the Licensing Board is the basic fact-finder under Commission procedures. Wisconsin Electric Power Co. (Point Beach Nuclear Plant No. 2), ALAB-78, 5 AEC 319 (1972). Nevertheless, the Appeal Board, as part of its customary sua sponte review of an initial decision in the absence of an appeal, may examine independently and with care the totality of the evidence if the matter at hand is of an unusual character. Southern California Edison Co. and San Diego Gas & Electric Co. (San Onofre Nuclear Generating

Station, Units 2 & 3), ALAB-432, 6 NRC 465 (1977). In this vein, in an operating license proceeding, the Appeal Board will search the record under its sua sponte authority to ensure that there are no significant safety issues requiring corrective action. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984). In addition, an Appeal Board has authority to make factual findings, on the basis of record evidence, which are different from those reached by a Licensing Board and can issue supplementary findings of its own. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). The Appeal Board is free to disagree with the lower board's regulatory interpretation even if no party presses an appeal on the issue. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 135 n.10 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978). The Appeal Board decision can be based upon grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and, where appropriate, evidence. Id. However, notwithstanding its authority to do so, the Appeal Board will normally be reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Seabrook, supra, 6 NRC at 42.

An Appeal Board is not obligated to rule on every discrete point adjudicated below, so long as the Board is able to render a decision on other grounds that effectively dispose of the appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 460 n.25 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 15 (1981).

The Appeal Board is not subject to the jurisdictional limitations placed upon Federal courts by the "case or controversy" provision in Article III of the Constitution. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979). Therefore, there is no insuperable barrier to the Appeal Board's rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to a Licensing Board's

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decision. However, this course will not be embarked upon in the absence of the most compelling cause. Comanche Peak, 17 NRC 93; Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 54 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988).

The Appeal Board, and the NRC in general, lacks the power to decide whether a civil penalty assessed against an applicant should be borne by the applicant's stockholders rather than its ratepayers. This is a matter to be determined by State regulatory agencies. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 198 (1978).

Once a partial initial decision (PID) has been appealed, supervening factual developments relating to major safety issues considered in the PID should be raised before the Appeal Board, not the Licensing Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-383, 5 NRC 609 (1977).

The Appeal Board normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c), Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

An Appeal Board lacks the authority to appoint specific Licensing Board members to preside over a particular proceeding. Such authority resides in the Commission or the Chairman of the Licensing Board Panel pursuant to 10 CFR §§ 2.704 and 2.721. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 307 (1988).

Although the absence of an appeal does not deprive the Appeal Board of the right to review an issue contested before a Licensing Board, the Appeal Board must be judicious in taking up new matters not previously put in controversy. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978).

An Appeal Board has the authority to take evidence -- particularly in regard to limited matters as to which the record is incomplete. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 (1978). However, since the Licensing Board is the initial fact-finder in NRC proceedings, an Appeal Board will exercise its authority to take evidence only in exceptional circumstances. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 351 (1988).

It is well-settled that the Appeal Board is empowered to decline the acceptance of a Licensing Board referral. 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); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-495, 5 NRC 1190, 1191 (1977).

When the time within which the Commission might have elected to review an Appeal Board decision expires, any residual jurisdiction retained by the Appeal Board expires. 10 CFR § 2.717(a); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978).

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.8 (1984), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985).

Where finality has attached to some, but not all, issues, an Appeal Board has jurisdiction to consider new matters when there is a reasonable nexus between those matters and the issues remaining before the Board. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306-07 (1988). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1714 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-930, 31 NRC 343, 346-47 (1990). It is unimportant whether the issues pending before the Appeal Board arose from a motion to reopen the record or from an appeal of a Licensing Board decision. The focus is on whether and what issues remain

before the Appeal Board. Waterford, *supra*, 20 NRC at 1589 n.4, citing, North Anna, *supra*, 9 NRC at 708.

An Appeal Board has the inherent right to determine in the first instance the scope of its jurisdiction. Thus, an Appeal Board has jurisdiction to consider a petition which challenges its decisionmaking process, even though jurisdiction over the substantive decisions themselves has passed to the Commission on appeal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 58-59 and n.2 (1986), vacated, CLI-86-18, 24 NRC 501 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 305 (1988).

Appeal Board review will be routinely undertaken of any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979), cited in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-652, 14 NRC 627, 628 (1981); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 341 (1983), citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-826, 22 NRC 893, 894 (1985).

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

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

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

Appeal Board opinions that, in the circumstances of the particular case, are essentially advisory in nature will be reserved (if given at all) for issues of demonstrable recurring importance. Long Island Lighting Co. (Shoreham

Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284-85 (1988).

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken to an initial decision rests with the Appeal Board rather than the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 n.3 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1713 n.5 (1985).

Until exceptions are filed, there is literally no appeal to invoke Appeal Board jurisdiction. Limerick, *supra*, 17 NRC at 758. See generally 10 CFR § 2.762(a); 10 CFR § 2.785. Thus, although an NRC Appeal Board has broader powers than most appellate bodies, neither the Board's *sua sponte* review authority nor its power, in exceptional circumstances, to take evidence and make its own factual determinations enhances its knowledge of a proceeding before the proceeding reaches its docket or operates to give it jurisdiction over an initial decision immediately upon the initial decision's issuance. Limerick, *supra*, 17 NRC at 758.

Once an appeal has been filed from a Licensing Board's decision resolving a particular issue, jurisdiction over that issue passes from the Licensing Board to the Appeal Board. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987).

5.6.2 Parties' Opportunity to be Heard on Appeal

On considering an issue on appeal, the Appeal Board should not act on the issue on the basis of the receipt of Staff views only without affording equal opportunity to other parties to express their views. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163 (1976); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 204 n.3 (1974).

Requests for emergency relief which require adjudicatory boards to act without giving the parties who will be adversely affected a chance to be heard ought to be reserved for palpably meritorious cases and filed only for the most serious reasons. The Appeal Board will grant emergency relief without affording the adverse parties at least some opportunity to be heard in opposition only in the most extraordinary circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 780 n.27 (1977).

5.6.3 Standards for Reversing Licensing Board on Findings of Fact

The Commission's regulations explicitly provide that the Commission or the Appeal Board has the authority to modify or set aside findings made by the Licensing Board. 10 CFR §§ 2.740(b), 2.785; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 29 (1978).

In acting for the Commission, the Appeal Board need not accept every finding a Licensing Board makes and the Appeal Board will not apply the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure, which governs appellate review of district court findings. But the Appeal Board is not free to disregard the fact that Licensing Boards are the Commission's primary factfinding tribunals. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975). In this regard, Appeal Boards are reluctant to make essentially basic environmental findings which did not receive Staff consideration in the FES or adequate attention at the Licensing Board hearing. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51, 55 (1975).

Although an Appeal Board is not bound by the factual findings of the Licensing Board, until the Appeal Board can review the record itself or the appellant demonstrates the inadequacy of the Licensing Board's findings, those findings deserve the Appeal Board's respect. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621 (1977).

The normal deference that an appellate body owes to the trier of the facts when reviewing a decision on the merits is thus even more compelling at the preliminary state of review. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 133 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977).

In general, an Appeal Board has the right to reject or modify findings of a Licensing Board if, after giving the Licensing Board's decision the probative force it intrinsically commands, the Appeal Board is convinced that the record compels a different result. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975); accord, Northern Indiana Public Service Co., ALAB-303 *supra*; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon

Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181-82 (1989); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397-98 (1990). The same standard applies even if the Appeal Board is conducting a review *sua sponte*. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981). In fact, where the record will fairly sustain a result deemed "preferable" by the agency to the one selected by the Licensing Board, the agency may substitute its judgment for that of the lower Board. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976). Nevertheless, a finding by a Licensing Board will not be overturned simply because the Appeal Board might have reached a different result had it been the primary fact-finder. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Moreover, the "substantial evidence" rule does not apply to the NRC's internal review process and hence does not control an Appeal Board's evaluation of Licensing Board decisions. Catawba, *supra*, 4 NRC at 402-405.

Notwithstanding its authority to do so, the Appeal Board will normally be reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977). Thus, a Licensing Board's failure to clearly set forth the basis for its decision is ground for reversal. The Appeal Board is not constrained to reverse the Licensing Board, however. The Appeal Board may make factual findings based on its own review of the record and decide the case accordingly. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

Licensing Board determinations on the timeliness of filing of motions are unlikely to be reversed on appeal as long as they are based on a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 159-160 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A Licensing Board's determination that an intervenor has properly raised and presented an issue for adjudication is entitled to substantial deference and will be overturned only when it lacks a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

On specific matters, a Licensing Board's determination as to a petitioner's "personal interest" will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 193 (1973). Where a Licensing Board has permitted a petitioner to amend his petition to cure defects prior to issuance of a final order, allowance of an opportunity to amend will not be disturbed by the Appeal Board absent a showing of gross abuse of discretion. Prairie Island, *supra*.

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 & 5), ALAB-485, 7 NRC 986, 980 (1978).

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980). An Appeal Board will affirm a Licensing Board finding which was based on testimony later withdrawn from the record, if there is sufficient evidence elsewhere in the record to support the finding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 84 (1985).

Where a Licensing Board imposes an incorrect remedy, an Appeal Board will search for a proper one. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234-235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

5.6.4 Grounds for Immediate Suspension of Construction Permit by Appeal Board

The Appeal Board, ancillary to its appellate jurisdiction, has authority to suspend a decision authorizing issuance of a

construction permit. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). Immediate revocation or suspension of a construction permit, upon review of the issuance thereof, is appropriate if the Appeal Board finds deficiencies that:

- (a) pose a hazard during construction;
- (b) need to be corrected before further construction takes place;
- (c) are incorrigible; or
- (d) might result in significant environmental harm if construction is permitted to continue.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 401 (1975).

Whether a public utility commission's consent is required before construction contracts can be entered into and carried out is a question of State law. If the State authorities want to suspend construction pending the results of the public utility commission's review, it is their prerogative. But the Appeal Board will not suspend construction on the "strength of nothing more than potentiality of action adverse to the facility being taken by another agency" (citation omitted). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977).

5.6.5 Immediate Effectiveness of Appeal Board Decision

Decisions of Appeal Boards which are immediately effective are presumptively valid. Unless and until such a decision is stayed or overturned by the appropriate authority, it is entitled to full recognition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-423, 6 NRC 115, 117 (1977).

Decisions and orders of an Appeal Board are immediately effective. Absent an Appeal Board's or the Commission's issuance of a stay, a Licensing Board is both entitled and duty-bound to carry out Appeal Board directives with suitable dispatch. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-597, 11 NRC 870, 873-874 (1980).

5.6.6 Effect of Appeal Board Affirmance as Precedent

If an Appeal Board affirms a Licensing Board decision as to which no exceptions have been filed without extended discussion, the Licensing Board's decision does not necessarily have the same precedential value as Appeal Board decisions.

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Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 208 n.4 (1974). Where no exceptions have been filed and the Appeal Board states that there is "no error requiring corrective action," the Appeal Board's affirmance of the Licensing Board's decision cannot be read as necessarily signifying approval of everything said by the Licensing Board. The inference cannot be drawn that the Appeal Board agrees with all the reasoning by which the Licensing Board justified its decision or with the Licensing Board's discussion of matters which do not have a direct bearing on the outcome. Id.; Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2-3 (1985).

An Appeal Board will not give stare decisis effect to Licensing Board conclusions on legal issues not brought to it by way of an appeal. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983), citing, Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978); General Electric Co. (Vallecitos Nuclear Center - General Electric Test Reactor, Operating License No. TR-1), ALAB-720, 17 NRC 397, 402 n.7 (1983); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-826, 22 NRC 893, 894 n.6 (1985). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988).

5.6.6.1 Precedential Effect of Unpublished Opinions of Appeal Boards

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

5.6.7 Disqualification of Appeal Board Member

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

5.7 Stays Pending Appeal

Under 10 CFR § 2.764(f)(2), upon receipt of a Licensing Board's decision authorizing the issuance of a full power operating license, the Commission will determine, sua sponte, whether to stay the

effectiveness of the decision. Criteria to be considered by the Commission include, but are not limited to: the gravity of the substantive issue; the likelihood that it has been resolved incorrectly below; and the degree to which correct resolution of the issue would be prejudiced by operation pending review. Until the Commission speaks, the Licensing Board's decision is considered to be automatically stayed. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-13, 22 NRC 1, 2 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 n.2 (1985).

The Commission's immediate effectiveness review is usually based upon a full Licensing Board decision on all contested issues. However, the Commission conducted an immediate effectiveness review and authorized the issuance of a full power license for Limerick Unit 2, even though, pursuant to a federal court remand, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider environmental issues. The Commission noted that: (1) all contested safety issues had been fully heard and resolved; and (2) the National Environmental Policy Act (NEPA) does not always require resolution of all contested environmental issues and completion of the entire NEPA review process prior to the issuance of a license. Philadelphia Electric Co. (Limerick Generating Station, Unit 2), CLI-89-17, 30 NRC 105, 110 (1989), citing, 40 CFR § 1506.1.

An intervenor's speculative comments are insufficient grounds for a stay of a Licensing Board's authorization of a full power operating license. The intervenor must challenge the Licensing Board's substantive conclusions concerning contested issues in the proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 (1987), aff'd, Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

The Commission's denial of a stay, pursuant to its immediate effectiveness review, does not preclude a party from petitioning under 10 CFR § 2.786 for appellate review of any Appeal Board decisions affirming the Licensing Board's conclusions. Shearon Harris, supra, 25 NRC at 4 n.3, citing, 10 CFR § 2.764(9).

Before a full power license can be issued for a plant, the Commission must complete its immediate effectiveness review of the pertinent Licensing Board decision pursuant to 10 CFR § 2.764(f)(2). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 n.26 (1982).

A stay of the effectiveness of a Licensing Board decision pending appeal of that decision to the Appeal Board may be sought by the party appealing the decision. Such a stay is normally sought by written motion, although, in extraordinary circumstances, a stay ex parte may be granted. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7

AEC 420 (1974). The movant may submit affidavits in support of his motion; opposing parties may file opposing affidavits, and it is appropriate for the appellate tribunal to accept and consider such affidavits in ruling on the motion for a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-356, 4 NRC 525 (1976). The party seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977).

General assertions, in conclusionary terms, of alleged harmful effects are insufficient to demonstrate entitlement to a stay. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1979).

In the past it has been held that, as a general rule, motions for stay of a Licensing Board action should be directed to the Licensing Board in the first instance. Under those earlier rulings, the Appeal Board made it clear that, while filing a motion for a stay with the Licensing Board is not a jurisdictional prerequisite to seeking a stay from the Appeal Board, Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976), the failure, without good cause, to first seek a stay from the Licensing Board is a factor which the Appeal Board may properly take into account in deciding whether it should itself grant the requested stay. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977); Public Service Co. of New Hampshire, ALAB-338 *supra*. See also Toledo Edison Co. (Davis-Besse Nuclear Power Plant), ALAB-25, 4 AEC 633, 634 (1971). More recently, however, amendments to 10 CFR § 2.788 on stays pending review have made it clear that a request for stay may be filed with either the Licensing Board or the Appeal Board. 10 CFR § 2.788(f).

An Appeal Board has the power to stay the effectiveness of conditions imposed in a construction permit without staying the effectiveness of the permit itself. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

An Appeal Board may also entertain and grant a motion for a stay pending remand of a Licensing Board decision. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

In addition to stays pending appeals to the Appeal Board, the Appeal Board itself will entertain requests for stays pending judicial review of its own decision. The Virginia Petroleum Jobbers criteria (these criteria have been incorporated into the regulations -- see Section 5.7.1 *infra*) for granting stays are applicable in such a situation. Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974).

A party aggrieved by an Appeal Board decision denying a stay should apply to the Commission for a stay under 10 CFR § 2.788(a), (h), rather than petition for review under 10 CFR § 2.786(b). Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), CLI-78-3, 7 NRC 307, 308 n.2 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 30 n.44 (1978). Under 10 CFR § 2.788(a), a party may move for a stay of an Appeal Board decision pending Commission review if such motion is filed within the period of time after service of the decision for which a stay is sought as set forth in Section 2.788(a). Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, No. 2), ALAB-414, 5 NRC 1425, 1427 (1977). The date of service for purposes of computing the time for filing a stay motion under Section 2.788 is the date on which the Docketing and Service Branch of the Office of the Secretary of the Commission serves the order or decision. *Id.* at 5 NRC 1427-1428.

Despite its subordinate status, an Appeal Board is empowered by 10 CFR § 2.764(g) to grant a 10 CFR § 2.788 stay without regard to what the Commission has done or might do in its *sua sponte* review. This power is granted at least in part because the factors that the Commission is to consider in making its 10 CFR § 2.764 determination do not coincide with the criteria set out for the Appeal Board in the Virginia Petroleum Jobbers case. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27, 30 n.6 (1981). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 194-195 (1985).

If, absent a stay pending appeal, the *status quo* will be irreparably altered, grant of a stay may be justified to preserve the Commission's ability to consider, if appropriate, the merits of a case. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334 (1983).

5.7.1 Requirements for a Stay Pending Appeal

The Rules of Practice do not provide for an automatic stay of an order upon the filing of a notice of appeal. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 97 (1983).

The Appeal Board has long held that a stay of an initial decision will be granted only upon a showing similar to that required for a preliminary injunction in the Federal courts. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). The test to be applied for such a showing is that laid down in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Southern California Edison Co. (San Onofre Nuclear Generating

Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-192, 7 AEC 420, 421 (1974). See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1184-85 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 96-97 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1618 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.5 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 290 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Safety Light Corp. (Ploomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 & n.59 (1990); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 267 (1990); Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103-104 (1990); Curators of the University of Missouri, LBP-90-35, 32 NRC 259, 265-66 (1990). Under this test, four factors are examined:

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- (1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
- (2) has the movant shown that, without the requested relief, it will be irreparably injured;
- (3) would the issuance of a stay substantially harm other parties interested in the proceeding;
- (4) where does the public interest lie?

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982). Since that section merely codifies long-standing agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

The Virginia Petroleum Jobbers rule applies not only to stays of initial decisions of Licensing Boards, but also to stays of Licensing Board proceedings in general, Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975), and stays pending judicial review, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). In addition, the concept of a stay pending consideration by the Appeal Board of a petition for directed certification has been recognized. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976). The rule applies to stays of limited work authorizations, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630 (1977), as well as to requests for emergency stays pending final disposition of a stay motion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). The rule also applies to stays of implementation and enforcement of radiation protection standards. Environmental Radiation Protection Standards for Nuclear Power Operations, (40 CFR § 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 460, 463 (1981). It also applies to postponements of the effectiveness of a license amendment issued by the NRC Staff. In the case of a request for postponement of an amendment, the Commission has stated that a bare claim of an absolute right to a prior hearing on the issuance of a license amendment does not constitute a substantial showing of irreparable injury as required by 10 CFR § 2.788(e). Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service

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Center), CLI-81-29, 14 NRC 940 (1981). The rule has been applied to a stay of enforcement orders. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

The Commission has recently issued revised regulations concerning stays of the effectiveness of license amendments. 10 CFR § 50.58(b)(6), as amended in 51 Fed. Reg. 7744, 7765 (March 6, 1986). The NRC Staff's issuance of an immediately effective license amendment based on a "no significant hazards consideration" finding is a final determination which is not subject to either a direct appeal or an indirect appeal to the Commission through the request for a stay. However, in special circumstances, the Commission may, on its own initiative, exercise its inherent discretionary supervisory authority over the Staff's actions in order to review the Staff's "no significant hazards consideration" determination. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NPC, 799 F.2d 1268 (9th Cir. 1986).

Note that 10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending proceedings on remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1, 2 & 3), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balance of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-89-15, 30 NRC 96, 100 (1989). Similarly, in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977), the Appeal Board ruled that the criteria for a stay pending remand differ from those required for a stay pending appeal. Thus, it appears that the criteria set forth in 10 CFR § 2.788 may not apply to requests for stays pending remand. In this same vein, where a litigant who has prevailed on a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

Where the four factors set forth in 10 CFR § 2.788(e) are applicable, no single one of the factors is, of itself, necessarily dispositive. Rather, the strength or weakness of the movant's showing on a particular factor will determine how strong his showing on the other factors must be in order to justify the relief he seeks. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-RI-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-520, 22 NRC 743, 746 n.8 (1985). In any event, there should be more than a mere showing of the possibility of legal error by a Licensing Board to warrant a stay. Philadelphia Electric Co., ALAB-221 *supra*; Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-158, 6 AEC 999 (1973). The establishment of grounds for appeal is not itself sufficient to justify a stay. Rather, there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

The factor which has proved most crucial in Appeal Board deliberations with regard to stays pending appeal is the question of irreparable injury to the movants if the stay is not granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 195 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 & n.7 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-

507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978). See also Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). It is the established rule that a party is not ordinarily granted a stay of an administration order without an appropriate showing of irreparable injury. Id., quoting Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989).

The irreparable injury requirement is not satisfied by some cost merely feared as liable to occur at some indefinite time in the future. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977). Nor are actual injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, sufficient to justify a stay if not irreparable. Davis-Besse, supra. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 450, 465 (1981), citing, Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) and Hornblower and Weeks-Hemphill Noves, Inc. v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

An intervenor's claim that an applicant's commitment of resources to the operation of a facility pending an appeal will create a Commission bias in favor of continuing a license does not constitute irreparable injury. The Commission has clearly stated that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258-59 (1990), citing, Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1985). However, the Commission also noted that the commitment of resources and other economic

factors are properly considered in the NEPA decisionmaking process. Seabrook, supra, 31 NRC at 258 n.62. Thus, a party challenging the alternative site selection process may be able to show irreparable injury if a stay is not granted to halt the development of a proposed site during the pendency of its appeal. Any resources which might be expended in the development of the proposed site would have to be considered in any future cost-benefit analysis and, if substantial, could skew the cost-benefit analysis in favor of the proposed site over any alternative sites. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 268-269 (1990).

A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to obtain the grant of a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990).

The "level or degree of possibility of success" on the merits necessary to justify a stay will vary according to the tribunal's assessment of the other factors that must be considered in determining if a stay is warranted. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). Where there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an overwhelming showing of likelihood of success on the merits is required to obtain a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co., ALAB-415, 5 NRC 1435, 1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 362-63 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990).

To make a strong showing of likelihood of success on the merits, the movant must do more than list the possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269-70 (1990). A party's expression of confidence or expectation of success on the merits of its appeal before the Commission or the Boards is too speculative and is also insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units

1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers (now set forth in 10 CFR § 2.788) is on the movant. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 273 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981).

In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978), the Appeal Board stressed the importance of the irreparable injury requirement, stating that a party is not ordinarily granted a stay absent an appropriate showing of irreparable injury.

Where a decision as to which a stay is sought does not allow the issuance of any licensing authorization and does not affect the status quo ante, the movant will not be injured by the decision and there is, quite simply, nothing for the Appeal Board to stay. Jamesport, supra.

The fact that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury. It must also be established that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 271 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259-260 (1990).

The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 410 (1989). Similarly, irreversible changes produced by

the irradiation of the reactor during low-power testing do not constitute irreparable injury. Seabrook, CLI-89-8, supra, 29 NRC at 411.

Mere exposure to the risk of full power operation of a facility does not constitute irreparable injury when the risk is so low as to be remote and speculative. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

The importance of a showing of irreparable injury absent a stay was stressed by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978), where the Appeal Board indicated that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure.

If the movant for a stay fails to meet its burden on the first two 10 CFR § 2.788(e) factors, it is not necessary to give lengthy consideration to balancing the other two factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Catawba, supra, 20 NRC at 1635. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.c. (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 363 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990).

Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC proceedings, a Board may consider such interests in determining whether, under the third stay criterion, the granting of a stay would harm other parties. Thus, a Board may consider the potential economic harm to an applicant caused by a stay of the applicant's operating license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

In a decontamination enforcement proceeding where a licensee seeks a stay of an immediately effective order, the fourth factor - where the public interest lies - is the most important consideration. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 148 (1990), aff'd as modified. ALAB-931, 31 NRC 350, 369 (1990).

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

5.7.2 Stays Pending Remand After Judicial Review

Where a litigant who has prevailed upon a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

5.8 Specific Appealable Matters

5.8.1 Rulings on Intervention

NRC regulations contain a special provision (10 CFR § 2.714a) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene. Under 10 CFR § 2.714a(b), a petitioner may appeal such an order but only if the effect thereof is to deny the petition in its entirety -- i.e., to refuse petitioner entry into the case. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-583, 16 NRC 160 (1982), citing, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 19, 18 n.6 (1986). Only the petitioner denied leave to intervene can take an appeal of such an order. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 n.7 (1983), citing, 10 CFR § 2.714a(b). Petitioner may not appeal an order admitting him as an intervenor but denying certain of his contentions. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 507 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-259, 1 NRC 411 (1975). Appellate review of a ruling rejecting some but not all of a petitioner's contentions is available only at the end of the case. Northern States Power Co. (Tyrono Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252

(1978). Similarly, where a proceeding is divided into two segments for convenience purposes and a petitioner is barred from participation in one segment but not the other, that is not such a denial of participation as will allow an interlocutory appeal under 10 CFR § 2.714a. River Bend, *supra*, 3 NRC 607.

A State participating as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation, but it may not seek review of an order which permits the State to participate but excludes an issue which it seeks to raise. River Bend, *supra*.

Only the petitioner may appeal from an order denying it leave to intervene. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). Other parties may file briefs in support of or opposition to the appeal. *Id.* The Applicant, the NRC Staff or any other party may appeal an order granting a petition to intervene or request for a hearing in whole or in part, but only on the grounds that the petition or request should have been denied in whole. 10 CFR § 2.714(c); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 30 (1988).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978). Similarly, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

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10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

While the regulations do not explicitly provide for Commission review of decisions on intervention, the Commission has entertained appeals in this regard and review by the Commission apparently may be sought. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939 (1978).

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

5.8.2 Scheduling Orders

Since scheduling is a matter of Licensing Board discretion, the Appeal Boards generally will not interfere with scheduling decisions absent a "truly exceptional situation." Virginia Electric & Power Co. (North Anna Power Station, Unit 1 & 2), ALAB-584, 11 NRC 451, 467 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 568 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975); Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-344, 4 NRC 207, 209 (1976) (Appeal Board is reluctant to overturn or otherwise interfere with scheduling orders of Licensing Boards absent due process problems); and Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981) (Appeal Board is loath to interfere with a Licensing Board's denial of a request to delay a proceeding where the Commission has ordered an expedited hearing; in such a case there must be a "compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" to invoke discretionary review); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987) (petitioner failed to substantiate its claim that a Licensing Board decision to conduct simultaneous hearings deprived it of the right to a fair hearing); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 68 (1987) (Appeal Board declined to exercise directed certification authority where intervenors' concerns about infringement of procedural due process were premature);

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 277 (1987) (intervenor failed to show specific harm resulting from the Licensing Board's severely abbreviated hearing schedule); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-4, 29 NRC 243, 244 (1989).

In determining the fairness of a Licensing Board's scheduling decisions, an Appeal Board will consider the totality of the relevant circumstances disclosed by the record. Seabrook, supra, 25 NRC at 421; Seabrook, ALAB-889, supra, 27 NRC at 269.

Where a party alleges that a Licensing Board's expedited hearing schedule violated its right to procedural due process by unreasonably limiting its opportunity to conduct discovery, an Appeal Board will examine: the amount of time allotted for discovery; the number, scope, and complexity of the issues to be tried; whether there exists any practical reason or necessity for the expedited schedule; and whether the party has demonstrated actual prejudice resulting from the expedited hearing schedule. Seabrook, supra, 25 NRC at 421, 425-427.

Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 438 (1979).

5.8.3 Discovery Rulings

5.8.3.1 Rulings on Discovery Against Nonparties

An order granting discovery against a nonparty is final and appealable by that nonparty as of right. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). An order denying such discovery is wholly interlocutory and an immediate appeal by the party seeking discovery is excluded by 10 CFR § 2.730(f). Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973); Long Island Lighting

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Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 380-81 (1984).

5.8.3.2 Rulings Curtailing Discovery

In appropriate instances, an order curtailing discovery is appealable. To establish reversible error from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery is impossible. Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). Absent such circumstances, however, an order denying discovery, and discovery orders in general are not immediately appealable since they are interlocutory. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472 (1981); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.4 Refusal to Compel Joinder of Parties

A Licensing Board's refusal to compel joinder of certain persons as parties to a proceeding is interlocutory in nature and, pursuant to 10 CFR § 2.730(f), is not immediately appealable. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.4.1 Order Consolidating Parties

Just as an order denying consolidation is interlocutory, an order consolidating the participation of one party with others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Company (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

5.8.5 Order Denying Summary Disposition

As is the case under Rule 56 of the Federal Rules of Civil Procedure, an order denying a motion for summary disposition under 10 CFR § 2.749 is not immediately appealable. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-221, 1 AEC 93 (1974). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 CFR § 2.714a exception to the prohibition on interlocutory appeals, and may not be appealed. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977). (See also 3.5).

5.8.6 Procedural Irregularities

Absent extraordinary circumstances, an Appeal Board will not consider alleged procedural irregularities unless an appeal has been taken by a party whose rights may have been substantially affected by such irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974).

5.8.7 Matters of Recurring Importance

There is some indication that a matter of recurring procedural importance may be appealed in a particular case even though it may no longer be determinative in that case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), the Appeal Board will refuse to hear the appeal. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978).

5.8.8 Advisory Decisions on Trial Rulings

Advisory decisions on trial rulings which resulted in no discernible injury ordinarily will not be considered on appeal. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).

5.8.9 Order on Pre-LWA Activities

A Licensing Board order on the issue of whether offsite activity can be undertaken prior to the issuance of an LWA or a construction permit is immediately appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976).

5.8.10 Partial Initial Decisions

Partial initial decisions which do not yet authorize construction activities still may be significant and, therefore, immediately appealable as of right. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 871 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

Although 10 CFR § 2.762(a), the sole provision in the Rules of Practice allowing appeals to the Appeal Board, refers only to "initial decisions," a "partial initial decision" with regard to activities prior to the issuance of an LWA is an "initial decision" within the meaning of 10 CFR § 2.762(a), at least where the partial initial decision amounts to a final decision

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on the merits of the applicant's request for permission to do work prior to issuance of an LWA. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-331, 3 NRC 771 (1976).

For the purposes of appeal, partial initial decisions which decide a major segment of a case or terminate a party's right to participate, are final Licensing Board actions on the issues decided. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983). See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

5.8.11 Other Licensing Actions

When a Licensing Board, during the course of an operating license hearing, grants a Part 70 license to transport and store fuel assemblies, the decision is not interlocutory and is immediately appealable as of right. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976).

When a Licensing Board's ruling removes any possible adjudicatory impediments to the issuance of a Part 70 license, the ruling is immediately appealable. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 45 n.1 (1984), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 787 (1986) (a Licensing Board's dismissal by summary disposition of an intervenor's contention dealing with fuel loading and precriticality testing may be challenged in connection with the intervenor's challenge of the order authorizing issuance of the license).

5.8.12 Rulings on Civil Penalties

In a civil penalty case, an order by the Administrative Law Judge affirming the Director of Inspection and Enforcement's order imposing civil penalties on a licensee, but at the same time granting a request for a hearing to present facts to support mitigation of the amount of the penalty, is not appealable under 10 CFR § 2.762 because it is premature. An appeal at this point is foreclosed by 10 CFR § 2.730(f). Section 2.730(f) is a rule of general applicability governing civil penalty proceedings to the same extent as it does licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

5.8.13 Evidentiary Rulings

While all evidentiary rulings are ultimately subject to appeal at the end of the proceeding, not all such rulings are worthy of appeal. Some procedural and evidentiary errors almost invariably occur in lengthy hearings where the presiding officer must rule quickly. Only serious errors affecting substantial rights and which might have influenced improperly the outcome of the hearing merit the hearing merit exception and briefing on appeal. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

Evidentiary exclusions must affect a substantial right, and the substance of the evidence must be made known by way of an offer of proof or be otherwise apparent, before the exclusions can be considered errors. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697-98 n.14 (1982).

For a discussion of the procedure necessary to preserve evidentiary rulings for appeal, see Section 3.11.4.

5.8.14 Director's Decision on Enforcement Petition

The Appeal Board normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c). Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

5.8.15 Findings of Fact

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978).

5.9 Perfecting Appeals

Normally, Appeal Boards will not review or pass upon specific rulings (e.g., rulings with respect to contentions) in the absence of a properly perfected appeal by the injured party. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974). An appeal is perfected by the filing of a notice of appeal with respect to the order or ruling as to which an appeal is sought.

While the Commission does not require the same precision in the filings of laymen that is demanded of lawyers, any party wishing to challenge some particular Licensing Board action must at least identify the order in question, indicate that he is appealing from

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it, and give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978).

5.9.1 General Requirements for Appeals from Initial Decision

The general requirements for an appeal from an initial decision are set out in 10 CFR § 2.762. Section § 2.762(a) provides that such appeal is to be filed within ten days after service of the initial decision. A brief in support of the appeal is to be filed within 30 days (40 days in the case of the Staff). 10 CFR § 2.762(a).

5.10 Briefs on Appeal

5.10.1 Necessity of Brief

In any appeal, the filing of a brief in support of the appeal is mandatory. The appellant's failure to file such a brief will result in dismissal of the entire appeal, and this rule applies even if the appellant is acting *pro se*. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 485 n.2 (1986). Under prior practice where an appeal was taken by the filing of exceptions, all exceptions were to be briefed and exceptions not briefed normally were disregarded by the Appeal Board in its consideration of the appeal. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 315 (1978); Florida Power & Light Co. (St. Lucie Nuclear Plant, Unit 2), ALAB-435, 6 NRC 541 (1977); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 621 n.1 (1976); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 832 n.3 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 382-383 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1083 n.2 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 824 n.4 (1984).

Intervenors have a responsibility to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions. Salem, supra, 14 NRC at 50, citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553

(1978). Even parties who participate in NRC licensing proceedings pro se have an obligation to familiarize themselves with proper briefing format and with the Commission's Rules of Practice. Salem, supra, 14 NRC at 50, n.7.

5.10.2 Time for Submittal of Brief

10 CFR § 2.762 provides that briefs supporting an appeal must be filed within 30 days (40 days for the Staff) after filing the notice of appeal.

The time limits imposed in 10 CFR § 2.762(a) for filing briefs refer to the date upon which the appeal was actually filed and not to when the appeal was originally due to be filed prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is not necessary for a party to bring to the Appeal Board's attention the fact that its adversary has not met prescribed time limits. Nor as a general rule will any useful purpose be served by filing a motion seeking to have an appeal dismissed because the appellant's brief was a few days late; the mailing of a brief on a Sunday or Monday which was due for filing the prior Friday does not constitute substantial noncompliance within the meaning of 10 CFR § 2.762(e) [now § 2.762(f)], which would warrant dismissal, absent unique circumstances. Wolf Creek, supra.

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

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably submitted, irrespective of the extent of the lateness. Wolf Creek, ALAB-424, supra. Apparently, however, the written explanation for the tardiness may be waived by the Appeal Board if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Id. at 126.

5.10.2.1 Time Extensions for Brief

Motions to extend the time for briefing are not favored. In any event, such motions should be filed in such a manner as to reach the Appeal Board at least one day before the period

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sought to be extended expires. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (1973); Boston Edison Co. (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308 (1972). An extension of briefing time which results in the rescheduling of an already calendared oral argument will not be granted absent extraordinary circumstances. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-144, 6 AEC 628 (1973).

5.10.2.2 Supplementary Briefs

A supplementary brief will not be accepted unless requested by the Appeal Board or accompanied by a motion for leave to file which sets forth reasons for the out-of-time filing.

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-115, 6 AEC 257 (1973).

Material tendered by a party without leave of the Appeal Board, after oral argument has been held and an appeal has been submitted for decision, constitutes improper supplemental argument. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981).

5.10.3 Contents of Brief

The general requirements for the form of the brief in support of an appeal are set forth in 10 CFR § 2.762. Any brief which in form or content is not in substantial compliance with these requirements may be stricken either on motion of a party or on the Commission's own motion. 10 CFR § 2.762(g). For example, an appendix to a reply brief containing a lengthy legal argument will be stricken when the appendix is simply an attempt to exceed the page limitations set by the Appeal Board. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

Although the Commission's Rules of Practice do not specifically require that a brief include a statement of the facts of the case, those facts relevant to the appeal should be set forth. An Appeal Board has indicated that it would dismiss an appeal if the failure to include a statement of facts were not corrected. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640 (1977). The statement of facts set forth in the brief on appeal should include an exposition of that portion of the procedural history of the

case related to the issue or issues presented by the appeal. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769, 771 n.2 (1977).

The brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issue raised on appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). A brief which does not contain such information is tantamount to an abandonment of the issue. Id.; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-795, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 805 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1619 (1984). At a minimum, briefs must identify the particular error addressed and the precise portions of the record relied upon in support of the assertion of error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983), citing, 10 CFR § 2.762(a); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) and 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); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986). This is particularly true where the Licensing Board rendered its rulings from the bench and did not issue a detailed written opinion.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 702-03 n.27 (1985).

10 CFR § 2.762 requires that a brief clearly identify the errors of fact or law that are the subject of the appeal and specify the precise portion of the record relied on in support of the assertion of error. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 464 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). Claims of error that are without substance or are inadequately briefed will not be considered on appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 481 (1982), citing, Salem, supra, 14 NRC at 49-50. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 (1987). Issues which are inadequately briefed are deemed to be waived. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990). Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). See 10 CFR § 2.762(d).

An appeal may be dismissed when inadequate briefs make its arguments impossible to resolve. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1970). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 13 NRC 343, 348 n.7 (1983), citing, 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); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 71 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 n.74 (1986). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987).

Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10 (1990). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). Nonetheless, NRC litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Susquehanna, supra, 16 NRC at 956, citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). All parties appearing in NRC proceedings, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of the facts. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 n.6 (1986).

A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, and (2) relate to matters raised in the party's proposed findings of fact and conclusions of law. An Appeal Board will not ordinarily entertain arguments raised for the first time on appeal, absent a serious, substantive issue. Pennsylvania

Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

All factual assertions in the brief must be supported by references to specific portions of the record. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 211 (1986). All references to the record should appear in the appellate brief itself; it is inappropriate to incorporate into the brief by reference a document purporting to furnish the requisite citations. Kansas Gas & Electric Company (Wolf Creek Generating Plant, Unit 1), ALAB-424, 6 NRC 122, 127 (1977). Incorporation by reference in the brief of exceptions without any supporting record references or other authority violates both the letter and spirit of 10 CFR § 2.762. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). A letter incorporating by reference a brief and proposed findings and conclusions filed with the Licensing Board does not satisfy the requirements for a brief on exceptions. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769 (1977).

Documents appended to an appellate brief will be stricken where they constitute an unauthorized attempt to supplement the record. However, if the documents were newly discovered evidence and tended to show that significant testimony in the record was false, the Appeal Board might be sympathetic to a motion to reopen the hearing. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3); (Perry Nuclear Power Plant, Units 1 & 2), ALAB-430, 6 NRC 451 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1985), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).

Personal attacks on opposing counsel are not to be made in appellate briefs, Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-838 (1974), and briefs which carry out personal attacks in an abrasive manner upon Licensing Board members will be stricken.

Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

10 CFR § 2.762 has been amended to set a 70-page limit on appellate briefs. 10 CFR § 2.762(e). Established page limitations may not be exceeded without leave and may not be circumvented by use of "appendices" to the brief. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977), although Section 2.762(e) does permit a request for enlargement of the page limitation on a showing of good cause filed at least seven days before the date on which the brief is due. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 n.3 (1986).

Briefs longer than 10 pages must contain a table of contents with page references and a table of authorities with page references to citations of authority. 10 CFR § 2.762(d). The appellant's brief must contain a statement of the case with applicable procedural history. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-388, 5 NRC 640 (1977).

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

5.10.3.1 Opposing Briefs

Briefs in opposition to the appeal should concentrate on the appellant's brief, not on the exceptions which had been filed. See Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 52 n.39 (1976).

Reply briefs are due within 30 days of filing and service of the appellant's brief, or, in the case of the Staff, within 40 days. 10 CFR § 2.762(c). If service of appellant's brief is made by mail, add 5 days to these time periods. 10 CFR § 2.710.

5.10.4 Amicus Curiae Briefs

10 CFR § 2.715 has been amended to allow a nonparty to file a brief amicus curiae with regard to matters before the Appeal Board or the Commission. The nonparty must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion with the Appeal Board or Commission. 10 CFR § 2.715(d).

The opportunity of a nonparty to participate as amicus curiae has been extended to Licensing Board proceedings. A U.S.

Senator lacked authorization under his State's laws to represent his State in NRC proceedings. However, in the belief that the Senator could contribute to the resolution of issues before the Licensing Board, the Appeal Board authorized the Senator to file amicus curiae briefs or to present oral arguments on any legal or factual issue raised by the parties to the proceeding or the evidentiary record. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987).

5.11 Oral Argument

If not requested by a party, oral arguments are scheduled by an Appeal Board when one or more members of the Board have questions of the parties. See 10 CFR § 2.763; Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982). All parties are expected to be present or represented at oral argument unless specifically excused by the Board. Such attendance is one of the reasons for the presence of all parties when they participate in Commission adjudicatory proceedings. Point Beach, 15 NRC at 279.

5.11.1 Failure to Appear for Oral Argument

If for sufficient reason a party cannot attend an oral argument, it should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported. A bare declaration of inadequate financial resources is clearly deficient. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

Failure to advise the Appeal Board of an intent not to appear at oral argument already calendared is discourteous and unprofessional and may result in dismissal of the appeal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-337, 4 NRC 7 (1976).

5.11.2 Grounds for Postponement of Oral Argument

Postponement of an already calendared oral argument for conflict reasons will be granted only upon a motion setting out:

- (1) the date the conflict developed;
- (2) the efforts made to resolve it;
- (3) the availability of alternate counsel;
- (4) public and private interest considerations;
- (5) the positions of the other parties;

(6) the proposed alternate date.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-165, 6 AEC 1145 (1973).

A party's inadequate resources to attend oral argument, properly substantiated, may justify dispensing with oral argument. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

5.11.3 Oral Argument by Nonparties

Under 10 CFR § 2.715(d), a person who is not a party to a proceeding may be permitted to present oral argument to the Appeal Board or the Commission. A motion to participate in the oral argument must be filed and non-party participation is at the discretion of the Appeal Board or the Commission.

5.12 Actions Similar to Appeals

5.12.1 Motions to Reconsider

Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Similarly, Appeal Boards will entertain a petition for reconsideration. When such a petition is filed, no other party need respond absent a request by the Appeal Board to do so. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-166, 6 AEC 1148, 1150 n.7 (1973). The practice followed by the Appeal Board, that it is unnecessary for a party to respond to a motion for reconsideration unless specifically requested to do so by the Board, is also applicable to requests for clarification of a prior decision. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-544, 9 NRC 630, 631 (1979).

The Appeal Board has indicated that a motion to file to reconsider a prior decision will be denied where the Appeal Board is left with the conviction that what confronts it is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead, is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

Motions to reconsider an order must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to a case. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25-26 (1983).

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Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and new arguments are not relevant in such a motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

The Commission's refusal to hear a discretionary appeal does not cut off the Appeal Board's right to reconsider a question in an appeal which is still pending before the Appeal Board. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision, and the Federal court stays its review pending the agency's disposition of the motion to reconsider; the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

An Appeal Board may not reconsider a matter after it has lost jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

5.12.2 Interlocutory Reviews

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question whether the petition should have been wholly denied (10 CFR § 2.714a), there is no right to appeal any interlocutory ruling by a Licensing Board to an Appeal Board. 10 CFR § 2.730(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 280 (1987). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are not immediately appealable, though such rulings may be reviewed later by deferring appeals on them until the end of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). In the same vein see Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 618 (1988) (a Licensing Board denied a motion to add new bases to

a previously admitted contention). Similarly, interlocutory appeals from Licensing Board rulings made during the course of a proceeding, such as the denial of a motion to dismiss the proceeding, are forbidden. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977).

The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983). See 10 CFR § 2.730(f).

The prohibition against interlocutory appeals set forth in 10 CFR § 2.730(f) is a rule of general applicability. It applies to an interlocutory ruling of the Administrative Law Judge with respect to civil penalties just as it applies to rulings in licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

It applies as well to an intervenor's "appeal" of a Licensing Board order rescinding any earlier orders or issuances granting procedural assistance to intervenors, following the suspension of the operation of 10 CFR § 2.750(c) upon which the assistance program was based. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13 (1981).

It is not the Appeal Board's role to monitor the numerous interlocutory rulings made by Licensing Boards. Thus, interlocutory appeals of such rulings rarely will be entertained. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

Although interlocutory appeals are generally not permitted as a matter of right under the Rules of Practice, 10 CFR § 2.730(f), the Appeal Board may, as a matter of discretion, elect to entertain matters normally subject to appellate review at the end of a case when (and if) an appeal is taken from the Licensing Board's final decision, 10 CFR § 2.718(i) and § 2.785(b)(1). Discretionary review is granted only sparingly and only when a Licensing Board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980); United States Department of Energy, Project Management Corp.

Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474, 475 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 171 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 278-79 (1990). Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975).

Even though the criteria for discretionary interlocutory review have not been satisfied, an Appeal Board may still accept a Licensing Board's referral of an interlocutory ruling where the ruling involves a question of law, has generic implications, and has not been addressed previously on appeal. Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 279 (1990).

An Appeal Board conducted discretionary interlocutory review of a presiding officer's rulings issued during the early stages of a materials licensing proceeding where the Appeal Board determined that the presiding officer's rulings, which interpreted and implemented the informal hearing procedures in 10 CFR Part 2, Subpart L, had fundamentally altered the very shape of the proceeding. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

Although generally precluding interlocutory appeals, 10 CFR § 2.730(f), 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 10 CFR § 2.718(i). Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 475 (1985).

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 standard that the discretionary review of interlocutory Licensing Board rulings authorized by 10 CFR §§ 2.730(f) and 2.718(i) should be undertaken only in the most compelling circumstances. 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. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984). The language regarding directed certification in § V(f)(4) of Appendix A to the Rules of Practice, like the Commission's Policy Statement, does not relax the standards for directed certification. Id. at 1583-84. The fact that an evidentiary ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. Id. at 1583.

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. Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982).

The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a Licensing Board scheduling order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987).

In the absence of a potential for truly exceptional delay or expense, the risk that a Licensing Board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985).

A Licensing Board's decision to admit a contention which will require the Staff to perform further statutory required review does not result in unusual delay or expense which justifies referral of the Board's decision for interlocutory review. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257-258 n.19 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

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A Licensing Board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate. Rulings which do neither are interlocutory. Interlocutory determinations may not be brought before the Appeal Board as a matter of right until the Board below has rendered a reviewable decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1071-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984).

5.12.2.1 Directed Certification of Questions for Interlocutory Review

The Commission's rules do not allow the Appeal Board to entertain interlocutory appeals, 10 CFR § 2.730(f). In extraordinary circumstances, however, the Appeal Board can review interlocutory rulings by a petition for directed certification pursuant to 10 CFR § 2.718(i). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437 (1979); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 10 NRC 565, 567 (1982), citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20 and n.7 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 67-68 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987).

An Appeal Board's decision on a request for directed certification is usually based on its evaluation of the party's petition. However, in unusual circumstances, the Board may also schedule oral argument. Shoreham, supra, 25 NRC at 136-37 and n.28.

Although the Rules of Practice do not specify any time limit for the filing of a petition for directed certification, a party should file the petition promptly after the interlocutory ruling has been issued. The promptness of a filing is determined by the circumstances of each particular case. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 76 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-884, 27 NRC 56, 57-58 (1988).

Despite the general prohibition against interlocutory review, the regulations provide that a party may ask a Licensing Board to certify a question to the Appeal Board without ruling on it. 10 CFR § 2.718(i). The regulations also allow a party to request that a Licensing Board refer a ruling on a motion to the Appeal Board under 10 CFR § 2.730(f). The Appeal Board

has construed Section 2.718 as giving any party the right to seek interlocutory review by filing a petition for "directed certification" to the Appeal Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 482-483 (1973).

A party seeking certification under Section 2.718(i) must, at a minimum, establish that a referral under 10 CFR § 2.730(f) would have been proper -- i.e., that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1652-53 (1982). However, the added delay and expense occasioned by the admission of a contention -- even if erroneous -- does not alone distinguish the case so as to warrant interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982). The fact that applicants will be unable to recoup the time and financial expense needed to litigate late-filed contentions is a factor that is present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory Appeal Board review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982).

Discretionary interlocutory review will be granted by the Appeal Board only when 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. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Perry, supra, 15 NRC at 1110; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 568 (1982), citing, Marble Hill, supra, 5 NRC at 1192; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 NRC 565, 568 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station,

Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 49-50 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 261 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 437 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 360-62 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991). A ruling that does no more than admit a contention has a low potential for meeting that standard. Perry, supra, 16 NRC at 1756, citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 (1985), rev'd, CLI-86-8, 23 NRC 241 (1986). See also dissent of Commissioner Asselstine in Braidwood, supra, 23 NRC at 253-55. A Licensing Board has certified for interlocutory review its rulings on the admissibility of contentions in an emergency plan exercise proceeding because of the unusual nature of the time requirements in such proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 8-9 (1989).

Whether review should be undertaken on "certification" or by referral before the end of the case turns on whether failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988).

The fact that an interlocutory Licensing Board ruling may be wrong does not per se justify directed certification. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 1, 14 n.4 (1983).

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(WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 (1984).

A prior hearing is not required under Section 189a of the Atomic Energy Act, as amended, for Commission approval of a license amendment in situations where the NRC Staff makes a "no significant hazards consideration" finding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-623 (1981); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 123 (1986). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

The legislative history of Section 12 of Pub. L. 97-415 (1982), the "Sholly Amendment", modifying Section 189(a) of the Atomic Energy Act of 1954, supports the determination that Congress intended that hearings on license amendments be held, if properly requested, even after irreversible actions have been taken upon a finding of no significant hazards consideration. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414-15 (1984). Thus a timely filed contention will not be considered moot, even if the contested action has been completed. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-19, 19 NRC 1076, 1084 (1984).

The Staff may issue an amendment to a materials license without providing prior notice of an opportunity for a hearing. Curaors of the University of Missouri, LBP-90-18, 31 NRC 559, 574 (1990).

A Board may terminate a hearing on an application for an amendment to an operating license when the only intervenor withdraws from the hearing, and there are no longer any matters in controversy. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-39, 20 NRC 1031, 1032 (1984).

A hearing on an application for a facility license amendment may be dismissed when the parties have all agreed to a stipulation for the withdrawal of all the intervenors' admitted contentions and the Board has not raised any sua sponte issues. Pacific Gas and Electric Co. (Humboldt Bay Power Plant, Unit 3), LBP-88-4, 27 NRC 236, 238-39 (1988).

A hearing can be requested on the application for a license amendment to reflect a change in ownership of a facility. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 80 (1977).

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A license amendment may become immediately effective under 10 CFR § 2.204 (now § 2.202) without a prior hearing if the public health, safety or interest requires. Furthermore, there is no inherent contradiction between a finding that there is "no significant hazard" in a given case and a finding in the same case that latent conditions may potentially cause harm in the future thus justifying immediate effectiveness of an amendment permitting corrections. Nuclear Fuel Services Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940, 942 (1981).

For there to be any statutory right to a hearing on the granting of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982).

6.1.4.1 Notice of Hearing on License/Permit Amendments

(RESERVED)

6.1.4.2 Intervention on License/Permit Amendments

The requirements for intervention in license amendment proceedings are the same as the requirements for intervention in initial permit or license proceedings (see generally Section 2.9). The right to intervene is not limited to those persons who oppose the proposed amendment itself, but extends to those who raise related claims involving matters arising directly from the proposed amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974).

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

6.1.4.3 Summary Disposition Procedures on License/Permit Amendments

Summary disposition procedures may be used in proceedings held upon requests for hearings on proposed amendments. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974).

6.10 Inspection and Enforcement

The Commission has both the duty and the authority to make such investigations and inspections as it deems necessary to protect the public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 374 (1978).

Because the atomic energy industry is a pervasively regulated industry, lawful inspections of licensee's activities are within the warrantless search exception for a "closely regulated industry" delineated by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 377 (1978). In addition, a licensee's submission to all applicable NRC regulations constitutes advance consent to lawful inspections, and therefore, no warrant is required for such inspections. Callaway, supra, 8 NRC at 377.

Proposed investigation of the discharge by a licensee's contractor of a worker who reported alleged construction problems to the Commission was within the Commission's statutory and regulatory authority to assure public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 376 (1978). The Commission should not defer such an inquiry into the discharge of a worker under a proper exercise of its authority to investigate safety related matters merely because such investigation may touch on matters that are the subject of a grievance proceeding between the licensee and the worker. Callaway, supra, 8 NRC at 378.

Refusal by a licensee and contractor to permit a lawful Staff investigation deemed necessary to assure public health and safety is serious enough to warrant the drastic remedy of permit suspension pending submission to investigation, since the refusal interferes with the Commission's duty to assure public health and safety. Callaway, supra, 8 NRC at 378.

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

A search warrant is not needed for inspections of licensed activities. Id. at 538-540.

The Executive Director of Operations is authorized by the Commission to issue subpoenas pursuant to Section 151c of the Atomic Energy Act where necessary or appropriate for the conduct of inspections or investigations. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6, 9 (1987).

The NRC Staff's Office of Inspection and Enforcement does inspect construction activities and reports. Where weaknesses or errors which substantially affect safety are detected, the Staff requires the applicant to take appropriate action. Deliberate or careless

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failure of applicants to adhere to the program is the basis for the imposition of penalties. Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1614 (1982).

6.10.1 Enforcement Actions

"[A] licensee may not avoid responsibility for violations because its employees or agents failed to comply with the Commission's rules, regulations or license conditions." Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 651 (1978).

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

The ability of the Director of Inspection and Enforcement to proceed against a licensee by issuing an order imposing civil penalties is not a denial of due process because the licensee was not able to cross-examine the Director to determine he had not been improperly influenced by Staff. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-538 (1979).

A licensee is normally afforded the opportunity to challenge an enforcement action in a public hearing prior to the time an enforcement action takes effect. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1123 (1985). However, the Commission is empowered to make a shutdown order immediately effective where such action is required by the public health, safety, or public interest. Three Mile Island, *supra*, 21 NRC at 1123-24 n.2. See 10 CFR § 2.202(a)(5), implementing 5 U.S.C. § 558(c).

The Commission is obligated under the law to lift the effectiveness of an immediately effective shutdown order once the concerns which brought about the order have been adequately resolved. Three Mile Island, *supra*, 21 NRC at 1124. See, e.g., Pan American Airways v. C.A.B., 684 F.2d 31 (D.C. Cir. 1982); Northwest Airlines v. C.A.B., 539 F.2d 846 (D.C. Cir. 1976); Air Line Pilots Ass'n. v. International v. C.A.B., 458 F.2d 846 (D.C. Cir. 1972),

6.10.1.2 Enforcement Proceedings (Formerly Show Cause Proceedings)

(See 6.24)

6.11 Masters in NRC Proceedings

For a discussion of the role of a "master" in NRC proceedings, see Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975) and Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-290, 2 NRC 401 (1975). In ALAB-300, the Appeal Board ruled that parties to an NRC proceeding may voluntarily agree among themselves to have a master of their own choosing make certain discovery rulings by which they will abide. In effect, the master's rulings were like stipulations among the parties. The question as to whether the Licensing and Appeal Boards retained jurisdiction to review the master's discovery rulings was not raised in this case. Consequently, the Appeal Board did not reach a decision as to that issue. Davis-Besse, supra, 2 NRC at 768.

More recently, 10 CFR Part 2 has been amended to provide for the use of special assistants to Licensing Boards. Specifically, special assistants may be appointed to take evidence and prepare a record. With the consent of all parties, the special assistant may take evidence, and prepare a report that becomes a part of the record, subject to appeal to the Licensing Board. 10 CFR § 2.722.

It is within the discretion of the Special Master to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 894 (1981).

A Special Master's conclusions are considered as informed advice to the Licensing Board; however, the Board must independently arrive at its own factual conclusions. Where judgment is material to a particular conclusion, the Board must rely on its own collegial consensus. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 209 (1982). Pursuant to 10 CFR § 2.722(a)(3), the regulations under which a Special Master may be appointed in NRC proceedings specify that Special Masters' reports are advisory only. The Board alone is authorized by statute, regulation and the notice of hearing to render the initial decision in proceedings. The decision must be rendered upon the Board's own understanding of the reliable, probative and substantial evidence of the record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 288 (1982).

Where the Special Master's conclusions are materially affected by a witness' demeanor, the Licensing Board must give especially careful consideration to whether or not other more objective witness credibility standards are consistent with the Special Master's conclusions. However, the Licensing Board may afford weight to the Special Master's reported direct observations of a witness' demeanor. Three Mile Island, supra, 16 NRC at 289.

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6.12 Material False Statements in Applications

(See 1.5.2)

6.13 Materials Licenses

The production, processing and sale of uranium and uranium ore are controlled by the Atomic Energy Act of 1954, as amended. Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787, 791 (10th Cir. 1960). Natural uranium and ores bearing it in sufficient concentration constitute "source material" and, when enriched for fabrication into nuclear fuel, become "special nuclear material" within the meaning of the Act. (42 U.S.C. §§ 2014(z) and (aa), 2071, 2091.) Both are expressly subject to Commission regulation (42 U.S.C. §§ 2073, 2093). 10 CFR Parts 40 and 70 specifically provide for the domestic licensing of source and special nuclear material respectively.

In this regard, the NRC has granted a general license to acquire title to nuclear fuel without first obtaining a specific license. Thus, persons may obtain title and own uranium fuel and are free to contract to receive title to such fuel without an NRC license or specific NRC regulatory control. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 554-55 (1978). It is only when a person seeks to reduce its contractual ownership to actual possession that regulatory requirements on possession and use must be met and a specific materials license must be obtained. Sterling, *supra*, 8 NRC at 555.

In the case of materials licenses, the Commission has the legal latitude under Section 189a of the Atomic Energy Act to use informal procedures (instead of the formal trial-type hearing specified in Section 554 of the A.P.A.) to fully apprise it of the concerns of a party challenging the licensing action and to provide an adequate record for determining their validity. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 253 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983); Rockwell International (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651 (1984). The informal hearing procedure applicable to materials licensing proceedings are specified in 10 CFR Part 2, Subpart L (§ 2.1201 - § 2.1263), 54 Fed. Reg. 8269 (February 28, 1989). However, the consistent agency practice is for Licensing Boards, already presiding at operating license hearings, to act on requests to raise Part 70 issues involving the same facility. Limerick, *supra*, 19 NRC at 651-52; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

While informal procedures may be followed, persons seeking to challenge the materials licensing action still may be required to establish standing under existing agency precedents regarding 10

CFR § 2.714(d). Energy Systems, supra, 17 NRC at 1003. In the absence of a valid petition to intervene under 10 CFR § 2.714, there is no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983). A petition to intervene in a materials licensing proceeding must: (1) establish the petitioner's standing or interest in the proceeding; (2) provide a brief statement of how the petitioner's interest plausibly may be affected by the outcome of the proceeding; and (3) a concise statement of the petitioner's areas of concern sufficient to establish that the issues sought to be raised are germane to the proceeding. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d). See Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-25, 30 NRC 187, 189 (1989). A petitioner's statement of concerns must provide the presiding officer with the minimal information needed to ensure that the issues sought to be litigated are germane to the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 47 (1990); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 568 (1990); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166-67 (1991). A petitioner may raise only substantive concerns about the licensing activity and not procedural concerns about the adequacy of the hearing process. Pathfinder, supra, 31 NRC at 50, 51.

For an informal hearing on the Staff's denial of an application for a materials license amendment, the presiding officer requested the applicant to prepare a statement, using as guidance the formal procedural requirements for contentions specified in 10 CFR § 2.714(a), of each particular claim of error and, with reasonable specificity, the basis for each claim. Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-86-35, 24 NRC 557, 558 (1986). Subsequent to the informal hearing, the Commission directed the presiding officer to consider the applicant's tardy responses to questions posed by the presiding officer during the informal hearing in order to determine if the information submitted by the applicant satisfied the formal substantive criteria specified in 10 CFR § 2.734 for reopening the record. Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-88-3, 27 NRC 220, 222-23 (1988).

Notwithstanding the absence of a hearing on an application for a materials license, the Commission's regulations require the Staff to make a number of findings concerning the applicant and its ability to protect the public health and safety before the issuance of the license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984). See 10 CFR §§ 70.23, 70.31. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981) (analogous to the regulatory scheme for the issuance of operating licenses under 10 CFR § 50.57), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

A materials licensee may not unilaterally terminate its license where continuing health and safety concerns remain. A license to receive, process, and transport radioactive waste to authorized land burial sites imposes a continuing obligation on the licensee to monitor and maintain the burial sites. The requirement of State ownership of land burial sites is intended to provide for the ultimate, long term maintenance of the sites, not to shift the licensee's continuing responsibility for the waste material to the States. U.S. Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 110-11 (1987), vacated, ALAB-866, 25 NRC 897 (1987).

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

Final orders on motions pertaining to Part 70 materials licenses issued during an operating license hearing are appealable upon issuance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LEP-84-16, 19 NRC 857, 876 (1984), aff'd, ALAB-765, 19 NRC 645, 648 n.1 (1984).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license to receive new fuel at a new facility. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

There is no reason to believe that the granting of a Special Nuclear Material (SNM) license should be deferred until after the applicant shows its compliance with local laws. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

An amendment to a Part 70 application gives rise to the same rights and duties as the original application. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

6.14 Motions in NRC Proceedings

Provisions with regard to motions in general in NRC proceedings are set forth in 10 CFR § 2.730. Motion practice before the Commission involves only a motion and an answer; movants who do not seek leave to file a reply are expressly denied the right to do so. 10 CFR § 2.730(c). Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71 (1981).

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

Consideration by the NRC in its environmental review is not required for the parts of the water supply system which will be used only by a local government agency, however, cumulative impacts from the jointly utilized parts of the system will be considered. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1473, 1475 (1982).

Insofar as environmental matters are concerned, under the National Environmental Policy Act (NEPA) there is no legal basis for refusing an operating license merely because some environmental uncertainties may exist. Where environmental effects are remote and speculative, agencies are not precluded from proceeding with a project even though all uncertainties are not removed. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part, sub nom., Western Oil and Gas Association v. Alaska, 439 U.S. 922 (1982); NRDC v. Morton, 458 F.2d 827, 835, 837-838 (D.C. Cir. 1972).

Environmental uncertainties raised by intervenors in NRC proceedings do not result in a per se denial of the license, but rather are subject to a rule of reason. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982).

6.15.1 Environmental Impact Statements (EIS)

The activities for which environmental statements need be prepared and the procedures for preparation are covered generally in 10 CFR Part 51. For a discussion of the scope of an NRC/NEPA review when the project addressed by that review is also covered by a broader overall programmatic EIS prepared by another Federal agency, see USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the Atomic Energy Act, NEPA, nor the Commission's regulations require that there be a hearing on an environmental impact statement. Public hearings are held on an EIS only if the Commission finds such hearings are required in the public interest. 10 CFR § 2.104. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 625 (1981), citing, Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978).

Under the plain terms of NEPA, the environmental assessment of a particular proposed Federal action coming within the

statutory reach may be confined to that action together with, inter alia, its unavoidable consequences. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978).

The environmental review mandated by NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects which are shown to have some likelihood of occurring. This conclusion draws direct support from the judicial interpretation of the statutory command imposing the obligation to make reasonable forecasts of the future. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978).

An agency can fulfill its NEPA responsibilities in the preparation of an EIS if it:

- 1) reasonably defines the purpose of the proposed Federal action. The agency should consider Congressional intent and views as expressed by statute as well as the needs and goals of the applicants seeking agency approval;
- 2) eliminates those alternatives that would not achieve the purpose as defined by the agency; and
- 3) discusses in reasonable detail the reasonable alternatives which would achieve the purpose of the proposed action.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-198 (D.C. Cir. 1991).

Underlying scientific data and inferences drawn from NEPA through the exercise of expert scientific evaluation may be adopted by the NRC from the NEPA review done by another Federal agency. The NRC must exercise independent judgment with respect to conclusions about environmental impacts based on interpretation of such basic facts. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982), citing, Federal Trade Commission v. Texaco, 555 F.2d 862, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 868 n.65 (1984). However, to the extent possible, the NRC will adopt the environmental impact statement prepared by the Department of Energy to evaluate the environmental impact resulting to the development and operation of a geologic repository for high-level radioactive waste. 10 CFR § 51.109, 54 Fed. reg. 27864, 27870-71 (July 3, 1989).

NEPA requires that a Federal agency make a "good faith" effort to predict reasonably foreseeable environmental impacts and that the agency apply a "rule of reason" after taking a "hard look" at potential environmental impacts. But an agency need

not have complete information on all issues before proceeding. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate EIS focusing on questions such as the costs and benefits of low power testing. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 783 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.15.1.1 Need to Prepare an EIS

Federal agencies are required to prepare an environmental impact statement for every major Federal action significantly affecting the quality of the human environment. NEPA § 102(2)(C); 42 U.S.C § 4332(2)(C). An agency's decision not to exercise its statutory authority does not constitute a major Federal action. Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 334 (D.C. Cir. 1991), citing, Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1245-46 (D.C. Cir. 1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991).

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

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

In the case of licensing nuclear power plants, adverse impacts include the impacts of the nuclear fuel cycle. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1076 (1982), citing, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539 (1978).

The fact of whether benefits of a proposed action outweigh its costs is distinct from the primary question of whether an environmental impact statement is needed because the action is a major Federal action significantly affecting the environment. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

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

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

For an analysis of when an environmental assessment rather than an EIS is appropriate, see Commonwealth Edison Company (Zion Station, Units 1 & 2), LBP-80-7, 11 NRC 245, 249-50 (1980).

The NRC Staff is not required to prepare a complete environmental impact statement if, after performing an initial environmental assessment, it determines that the proposed action will have no significant environmental impact. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450, 1452 n.5 (1984).

An operating license amendment to recapture the construction period and allow for operation for 40 full years is not an action which requires the preparation of an environmental impact statement or an environmental report. A construction period recapture amendment only requires the Staff to prepare an environmental assessment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

A supplemental Environmental Impact Statement (EIS) or an Environmental Impact Appraisal (EIA) does not have to be prepared prior to the granting of authorization for issuance of a low-power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

The issuance of a possession-only license need not be preceded by the submission of any particular environmental information or accompanied by any NEPA review related to decommissioning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1, 6-7 (1991).

When the environmental effects of full-term, full-power operation have already been evaluated in an EIS, a licensing action for limited operation under a 10 CFR § 50.57(c) license that would result in lesser impacts need not be accompanied by an additional impact statement or an impact appraisal. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226 (1981), and ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). The Commission authorized the issuance of a low power operating license for Limerick Unit 2, even though, pursuant to a federal court order, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider certain severe accident mitigation design alternatives. Since the existing EIS was valid except for the failure to consider the design alternatives, and low power operation presents a much lower risk of a severe accident than does full power operation, the Commission found that the existing EIS was sufficient to support the issuance of a low power license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-89-10, 30 NRC 1, 5-6 (1989), reconsid. denied and stay denied, CLI-89-15, 30 NRC 96, 101-102 (1989).

It is well-established NEPA law that separate environmental statements are not required for intermediate, implementing steps such as the issuance of a low-power license where an EIS has been prepared for the entire proposed action and there have been no significant changed circumstances. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984), on certification from, ALAB-769, 19 NRC 995 (1984). See Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1377 (1980).

The principle stated in the Shoreham and Diablo Canyon cases, supra, is applicable even where an applicant may begin low-power operation and it is uncertain whether the applicant will ever receive a full-power license. In Shoreham, the fact that recent court decisions in effect supported the refusal by the State and local governments to participate in the development of emergency plans was determined not to be a significant change of circumstances which would require the preparation of a supplemental environmental impact statement to assess the costs and benefits of low-power operation. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 418-19 (1989).

The NRC Staff is not required to prepare an environmental impact statement to evaluate the "resumed operation" of a facility or other alternatives to a licensee's decision not to

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operate its facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-208 (1990), reconsid. denied, CLI-91-2, 33 NRC 61 (1991).

Environmental review of the storage of spent fuel in reactor facility storage pools for at least 30 years beyond the expiration of reactor operating licenses is not required based upon the Commission's generic determination that such storage will not result in significant environmental impacts. Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing, 10 CFR § 51.23.

An environmental impact statement need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the environmental impact appraisal prepared for the project had an adequate basis for concluding that the expansion of a spent fuel pool would not cause any significant environmental impact. Consumers Power Co. (Big Rock Point Plant), LBP-82-78, 16 NRC 1107 (1982).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major Federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low-level waste. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-163 (1980).

It must at least be determined that there is significant new information before the need for a supplemental environmental statement can arise. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49 (1983), citing, Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981).

A supplemental environmental statement need not necessarily be prepared and circulated even if there is new information. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing, California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 CFR § 1502.9(c).

6.15.1.2 Scope of EIS

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken. Duke Power Company (Oconee/McGuire), LBP-80-28, 12 NRC 459, 473 (1980).

An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive environmental impact statement on the plan so

long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Peshlak v. Duncan, 476 F. Supp. 1247, 1260 (D.D.C. 1979); and Conservation Law Foundation v. GSA, 427 F. Supp. 1369, 1374 (D.R.I. 1977).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), the U.S. Supreme Court embraced the doctrine that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." The same has been held with respect to remote and speculative environmental impacts of the proposed project itself. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981); Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, 16 NRC 1733, 1744 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), quoting NRDC v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696-97 & n.12 (1985). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-685 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981).

When major Federal actions are involved, if related activities taken abroad have a significant effect within the U.S., those

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effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALP-562, 10 NRC 437, 446 (1979).

6.15.2 Role of EIS

A NEPA analysis of the Government's proposed licensing of private activities is necessarily more narrow than a NEPA analysis of proposed activities which the Government will conduct itself. The former analysis should consider issues which could preclude issuance of the license or which could be affected by license conditions. Kleppe v. Sierra Club, 427 U.S. 390 (1976). It should focus on the proposal submitted by the private party rather than on broader concepts. It must consider other alternatives, however, even if the agency itself is not empowered to order that those alternatives be undertaken. Were there no distinction in NEPA standards between those for approval of private actions and those for Federal actions, NEPA would, in effect, become directly applicable to private parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

The impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an environmental impact statement be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of the known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-660 (1979).

6.15.3 Circumstances Requiring Redrafting of Final Environmental Statement (FES)

In certain instances, an FES may be so defective as to require redrafting, recirculation for comment and reissuance

in final form. Possible defects which could render an FES inadequate are numerous and are set out in a long series of NEPA cases in the Federal Courts. See, e.g., Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972) (FES inadequate when it suffers from a serious lack of detail and relies on conclusions and assumptions without reference to supporting objective data); Essex City Preservation Ass'n. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976) (new FES required when there is significant new information or a significant change in circumstances upon which original FES was based); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (existence of unexamined but viable alternative could render FES inadequate). A new FES may be necessary when the current situation departs markedly from the positions espoused or information reflected in the FES. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 256 (1985).

Even though an FES may be inadequate in certain respects, ultimate NEPA judgments with respect to any facility are to be made on the basis of the entire record before the adjudicatory tribunal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Previous regulations explicitly recognized that evidence presented at a hearing may cause a Licensing Board to arrive at conclusions different from those in an FES, in which event the FES is simply deemed amended *pro tanto*. Barnwell, *supra*, 2 NRC at 671; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1571 n.20 (1982). Since findings and conclusions of the licensing tribunal are deemed to amend the FES where different therefrom, amendment and recirculation of the FES is not always necessary, particularly where the hearing will provide the public ventilation that recirculation of an amended FES would otherwise provide. Limerick, *supra*, 1 NRC at 163. Defects in an FES can be cured by the receipt of additional evidence subsequent to issuance of the FES. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983). See Ecology Action v. AEC, 492 F.2d 998, 1000-02 (2nd Cir. 1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 195-97 (1975).

Such modification of the FES by Staff testimony or the Licensing Board's decision does not normally require recirculation of the FES. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975), unless the modifications are truly substantial. Barnwell, *supra*, 2 NRC at 671; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20

NRC 446, 553 (1984); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 252, 256 (1985).

Two Courts of Appeals have approved the Commission's rule that the FES is deemed modified by subsequent adjudicatory tribunal decisions. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2nd Cir. 1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 n.43 (1978). See also New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 (1st Cir. 1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985), citing, 10 CFR § 51.102 (1985).

If the changes contained in an errata document for an FES do not reveal an obvious need for a modification of plant design or a change in the outcome of the cost-benefit analysis, the document need not be circulated or issued as a supplemental FES. Nor is it necessary to issue a supplemental FES when timely comments on the DES have not been adequately considered. The Licensing Board may merely effect the required amendment of the FES through its initial decision. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 634 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983).

The NRC Staff is not required to respond to comments identified in an intervenor's dismissed contention concerning the adequacy of the final environmental statement (FES), where the Staff has prepared and circulated for public comment a supplemental final environmental statement (SFES) which addresses and evaluates the matters raised by the comments on the FES. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 698 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Similarly, there is no need for a supplemental impact statement and its circulation for public comment where the changes in the proposed action which would be evaluated in such a supplement mitigate the environmental impacts, although circulation of a supplement may well be appropriate or necessary where the change has significant aggravating environmental impacts. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 28-29 (1978).

NEPA does not require the staff of a Federal agency conducting a NEPA review to consider the record, as developed in collateral State proceedings, concerning the environmental effects of the proposed Federal action. Failure to review the State records prior to issuing an FES, therefore, is not grounds for

requiring preparation and circulation of a supplemental FES. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

A proposed shift in ownership of a plant with no modification to the physical structure of the facility does not by itself cast doubt on the benefit to be derived from the plant such as to require redrafting and recirculating the EIS. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 184 (1978).

The Staff's environmental evaluation is not deficient merely because it contains only a limited discussion of facility decommissioning alternatives. There is little value in considering at the operating license stage what method of decommissioning will be most desirable many years in the future in light of the knowledge which will have been accumulated by that time. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974).

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

6.15.3.1 Effect of Failure to Comment on Draft Environmental Statement (DES)

Where an intervenor received and took advantage of an opportunity to review and comment on a DES and where his comments did not involve the Staff's alternate site analysis and did not bring sufficient attention to that analysis to stimulate the Commission's consideration of it, the intervenor will not be permitted to raise and litigate, at a late stage in the hearings, the issue as to whether the Staff's alternate site analysis was adequate, although he may attack the conclusions reached in the FES. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-366, 5 NRC 39, 66-67 (1977), aff'd as modified, CLI-77-8, 5 NRC 503 (1977).

Since the public is afforded early opportunity to participate in the NEPA review process, imposition of a greater burden for justification for changes initiated by untimely comments is appropriate. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977).

Comments on a DES which fail to meet the standards of CEQ Guidelines (40 CFR § 1500.9(e)) on responsibilities of commenting entities to assist the Staff need not be reviewed by the Staff. Thus, where comments which suggest that the Staff consider collateral State proceedings on the environmental effects of a proposed reactor do not

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specify the parts of the collateral proceedings which should be considered and the parts of the DES which should be revised, the Staff need not review the collateral proceedings. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

6.15.3.2 Stays Pending Remand for Inadequate EIS

Where judicial review disclosed inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) a traditional balancing of the equities, and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-785 (1977).

6.15.4 Alternatives

NEPA requires an agency to consider alternatives to its own proposed action which may significantly affect the quality of the human environment. An agency should not consider alternatives to the applicant's stated goals. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991).

Perhaps the most important environmentally related task the Staff has under NEPA is to determine whether an application should be turned down because there is some other site at which the plant ought to be located. No other environmental question is both so significant in terms of the ultimate outcome and so dependent upon facts particular to the application under scrutiny. Consequently, the Appeal Board expects the Staff to take unusual care in performing its analysis and in disclosing the results of its work to the public. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 543, 544 (1977).

A hard look for a superior alternative is a condition precedent to a licensing determination that an applicant's proposal is acceptable under NEPA. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 513 (1978). When NEPA requires an EIS, the Commission is obliged to take a harder look at alternatives than if the proposed action were inconsequential. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1005-1006 (1981), citing, Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). In fact the NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts, nor (2)

involve the commitment of available resources respecting which there are unresolved conflicts. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265-266 (1979).

NEPA was not intended merely to give the appearance of weighing alternatives that are in fact foreclosed. Pending completion of sufficient comparison between an applicant's proposed site and others, in situations where substantial work has already taken place, the Commission can preserve the opportunity for a real choice among alternatives only by suspending outstanding construction permits. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 958-959 (1976).

Despite the importance of alternate site considerations, where all parties have proceeded since the inception of the proceeding on the basis that there was no need to examine alternate sites beyond those referred to in the FES, a party cannot insist at the "eleventh hour" that still other sites be considered in the absence of a compelling showing that the newly suggested sites possess attributes which establish them to have greater potential as alternatives than the sites already selected as alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-495, 8 NRC 304, 306 (1978).

A party seeking consideration at an advanced stage of a proceeding of a site other than the alternate sites already explored in the proceeding must at least provide information regarding the salient characteristics of the newly suggested sites and the reasons why these characteristics show that the new sites might prove better than those already under investigation. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-499, 8 NRC 319, 321 (1978).

The fact that a possible alternative is beyond the Commission's power to implement does not absolve the Commission of any duty to consider it, but that duty is subject to a "rule of reason". Factors to be considered include distance from site to load center, institutional and legal obstacles and the like. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 486 (1978).

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

(North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-458 (1980); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985).

Pursuant to NEPA § 102(2)(E), the Staff must analyze possible alternatives, even if it believes that such alternatives need not be considered because the proposed action does not significantly affect the environment. A Board is to make the determination, on the basis of all the evidence presented during the hearing, whether other alternatives must be considered. "Some factual basis (usually in the form of the Staff's environmental analysis) is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources' - the statutory standard of Section 102(2)(E)." Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 449-50 (1988), reconsidered, LBP-89-6, 29 NRC 127, 134-35 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

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

The application of the Commission's "obviously superior" standard for alternative sites (see 6.15.4.1 infra) does not affect the Staff's obligation to take the hard look. The NRC's "obviously superior" standard is a reasonable exercise of discretion to insist on a high degree of assurance that the extreme action of denying an application is appropriate in view of inherent uncertainties in benefit-cost analysis. Sterling, supra, 11 NRC at 735.

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

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of

the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-85 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 317 (1981). The consideration of alternatives in such a case does not include alternatives to the continued operation of the plant, even though the amendment might be necessary to continued reactor operation. Turkey Point, supra.

Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982). In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CFR §§ 51.95, 51.106.

6.15.4.1 Obviously Superior Standard for Site Selection

The standard for approving a site is acceptability, not optimality. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977). Due to the more extensive environmental studies made of the proposed site in comparison to alternate sites, more of the environmental costs of the selected site are usually discovered. Upon more extensive analysis of alternate sites, additional cost will probably be discovered. Moreover, a Licensing Board can do no more than accept or reject the application for the proposed site; it cannot ensure that the applicant will apply for a construction permit at the alternate site. For these reasons, a Licensing Board should not reject a proposed site unless an alternate site is "obviously superior" to the proposed site. Id. at 526. Standards of acceptability, instead of optimality, apply to approval of plant designs as well. Id. In view of all of this, an applicant's selection of a site may be rejected on the grounds that a preferable alternative exists only if the alternative is "obviously superior". Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541 (1977). For a further discussion of the "obviously superior" standard with regard to alternatives, see Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 67, 78 (1977).

The Commission's obviously superior standard for alternate sites has been upheld by the Court of Appeals for the First Circuit. The Court held that, given the necessary imprecision of the cost-benefit analysis and the fact that the proposed site will have been subjected to closer scrutiny than any alternative, NEPA does not require that the single best site for environmental purposes be chosen. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 1978).

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A Licensing Board determination that none of the potential alternative sites surpasses a proposed site in terms of providing new generation for areas most in need of new capacity cannot of itself serve to justify a generic rejection of all those alternative sites on institutional, legal, or economic grounds. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 491 (1978).

To establish that no suggested alternative sites are "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site and individual alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978)

It is not enough for rejection of all alternative sites to show that a proposed site is a rational selection from the standpoint solely of system reliability and stability. For the comparison to rest on this limited factor, it would also have to be shown that the alternative sites suffer so badly on this factor that no need existed to compare the sites from other standpoints. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 497 (1978).

For application of the "obviously superior" standard, see Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393-399 (1978), particularly at 8 NRC 397 where the Appeal Board equates "obviously" to "clearly and substantially."

6.15.4.2 Standards for Conducting Cost-Benefit Analysis Related to Alternatives

If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units No. 3 and 4), ALAB-660, 14 NRC 987, 1004 (1981), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978).

Neither the NRC Staff nor a Licensing Board is limited to reviewing only those alternate sites unilaterally selected by the applicant. To do so would permit decisions to be based upon "stare" alternatives elected to be identified by an applicant and would often result in consideration of something less than the full range of reasonable alternatives that NEPA contemplates. The adequacy of the alternate site analysis performed by the Staff remains a proper subject of inquiry by

the Licensing Board, notwithstanding the fact that none of the alternatives selected by the applicant proves to be "obviously superior" to the proposed site. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), LBP-77-60, 6 NRC 647, 659 (1977). Nevertheless, the NEPA evaluation of alternatives is subject to a "rule of reason" and application of that rule "may well justify exclusion or but limited treatment" of a suggested alternative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 100 (1977), citing, CLI-77-8, 5 NRC 503, 540 (1977).

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977), the Commission set forth standards for determining whether, in connection with conducting a second cost-benefit analysis to consider alternate sites, the Licensing Board should account for nontransferable investments made at the previously approved site. Where the earlier environmental analysis of the proposed site had been soundly made, the projected costs of construction at the alternate site should take into account nontransferable investments in the proposed site. Where the earlier analysis lacked integrity, prior expenditures in the proposed site should be disregarded. Seabrook, supra, 5 NRC at 533-536.

Population is one -- but only one -- factor to be considered in evaluating alternative sites. All other things being equal, it is better to place a plant farther from population concentrations. The population factor alone, however, usually cannot justify dismissing alternative sites which meet the Commission's regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 510 (1978).

In alternative site considerations, the presence of an existing reactor at a particular site where the proposed reactor might be built is significant, but not dispositive. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394-395 (1978).

In assessing the environmental harm associated with land clearance necessary to build a nuclear facility, one must look at what is being removed -- not just how many acres are involved. Sterling, supra, 8 NRC at 395.

In considering the economic costs of building a facility at an alternative site, the costs of replacement power which might be required by reason of the substitution at a late date of an alternate site for the proposed site may be considered. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394 (1978).

However, where no alternative site is "obviously superior" from an environmental standpoint, there is no need to consider this "delay cost" factor. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 533-536 (1977); Sterling, supra, 8 NRC at 398. Indeed, unless an alternative site is shown to be environmentally superior, comparisons of economic costs are irrelevant. Sterling, supra, 8 NRC at 395, n.25.

6.15.5 Need for Facility

Pursuant to NEPA, the NRC must make a finding as to the need for the facility or need for power in determining whether construction of the facility should be authorized. "Need-for-power" is a shorthand expression for the "benefit" side of the cost-benefit balance NEPA mandates. A nuclear plant's principal "benefit" is the electric power it generates. Hence, absent some "need-for-power," justification for building a facility is problematical. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 90 (1977). For a further discussion of "need for facility," see Section 3.7.3.2.

NEPA does not foreclose reliance, in resolution of "need-of-power" issues, on the judgment of local regulatory bodies that are charged with the responsibility to analyze future electrical demand growth, at least where the forecasts are not facially defective, are explained on a detailed record, and a principal participant in the local proceeding has been made available for examination in the NRC proceeding. Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 241 (1978).

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

The standard for judging the "need-for-power" is whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that demand. Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 237 (1978).

For purposes of NEPA, need-for-power and alternative energy source issues are not to be considered in operating license proceedings for nuclear power plants. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527-528 (1982); Carolina Power and Light Co., and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544-546 (1986).

In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CFR §§ 51.95, 51.106.

6.15.6 Cost-Benefit Analysis Under NEPA

The NEPA cost-benefit analysis considers the costs and benefits to society as a whole. Rather than isolate the costs or benefits to a particular group, overall benefits are weighed against overall costs. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 391 (1978).

A cost-benefit analysis should include the consideration and balancing of qualitative as well as quantitative impacts. Those factors which cannot reasonably be quantified should be considered in qualitative terms. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1329-1330 (1984), citing, Statement of Considerations for 10 CFR Part 51, 49 Fed. Reg. 9363 (March 12, 1984).

In weighing the costs and benefits of a facility, adjudicatory boards must consider the time and resources that have already been invested if the facility has been partially completed. Money and time already spent are irrelevant only where the NEPA comparison is between completing the proposed facility on the one hand and abandoning that facility on the other. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-392, 5 NRC 759 (1977). In comparing the costs of completion of a facility at the proposed site to the costs of building the facility at an alternate site, the Commission may consider the fact that costs have already been incurred at the proposed site. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1st Cir. 1978).

Unless a proposed nuclear unit has environmental disadvantages when compared to alternatives, differences in financial cost are of little concern. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 2 NRC 102, 161 (1978); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1993 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978). Only after an environmentally superior alternative has been identified do economic considerations become relevant. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1981).

A reasonably foreseeable, non-speculative, substantial reduction in benefits should trigger the need, under NEPA, to reevaluate the cost-benefit balance of a proposed action before further irreversible environmental costs are incurred.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 630-31 (1983).

The NRC considers need-for-power and alternative energy sources (e.g., a coal plant) as part of its NEPA cost-benefit analysis at the construction permit stage for a nuclear power reactor. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 972 (1983). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), 1 NRC 347, 352-72 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 522 (1977). In the operating license environmental analysis, however, need-for-power and alternative energy sources are not considered and contentions which directly implicate need-for-power projections and comparisons to coal are barred by the regulations; correlatively, such comparative cost savings may not be counted as a benefit in the Staff's NEPA cost-benefit analysis. Shearon Harris, *supra*, 17 NRC at 974.

Even if the cost-benefit balance for a plant is favorable, measures may be ordered to minimize particular impacts. Such measures may be ordered without awaiting the ultimate outcome of the cost-benefit balance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 419 (1983).

While the balancing of costs and benefits of a project is usually done in the context of an environmental impact statement prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain Federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

Sunk costs are as a matter of law not appropriately considered in an operating license cost-benefit balance. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 586-87 (1982), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-95, 16 NRC 1401, 1404-1405 (1982).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate focusing on questions such as the costs

and benefits of low power testing. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.15.6.1 Consideration of Specific Costs Under NEPA

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

The environmental and economic costs of decommissioning necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 5 NRC 231, 313 (1979).

Alternative methods of decommissioning do not have to be discussed. All that need be shown is that the estimated costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Susquehanna, supra, 9 NRC at 314.

6.15.6.1.1 Cost of Withdrawing Farmland from Production

(SEE 3.7.3.5.1)

6.15.6.1.2 Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility

Increased employment and tax revenue cannot be included on the benefit side in striking the ultimate NEPA cost-benefit balance for a particular plant. But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 509 n.58 (1978).

6.15.7 Consideration of Class 9 Accidents in an Environmental Impact Statement

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.46 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of the ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However,

the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

In proceedings instituted prior to June, 1980, serious (Class 9) accidents need be considered only upon a showing of "special circumstances." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529 (1982); 45 Fed. Reg. 40101 (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40101) cannot be equated with a health and safety requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1664 (1982). The fact that a nuclear power plant is located near an earthquake fault and in an area of known seismic activity does not constitute a special circumstance. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 826-828 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795-796 (1983).

Absent new and significant safety information, Licensing Boards may not act on proposals concerning Class 9 accidents in operating reactors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-85-21, 23 NRC 849, 870 (1986), citing, 50 Fed. Reg. 32,144, 32,144-45 (August 8, 1985). Licensing Boards may not admit contentions which seek safety measures to mitigate or control the consequences of Class 9 accidents in operating reactors. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 846-47 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 30-31 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP 89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29,

45-47 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-85-3, 29 NRC 51, 54 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). However, pursuant to their NEPA responsibilities, Licensing Boards may consider the risks of such accidents. Vermont Yankee, *supra*, 25 NRC at 854-55, aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 31 n.28 (1987), reconsid. denied, ALAB-976, 26 NRC 277, 285 (1987). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 132-35 (1989), citing, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988) and the NRC Severe Accident Policy Statement, 50 Fed. Reg. 32138 (Aug. 8, 1985), rev'd, ALAB-919, 30 NRC 29 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In Diablo Canyon and Vermont Yankee, *supra*, the licensees applied for license amendments which would permit the expansion of each facility's spent fuel pool storage capacity. The intervenors submitted contentions, based on hypothetical accident scenarios, and requested the preparation of environmental impact statements. The Appeal Board rejected the contentions after determining that the hypothetical accident scenarios were based on remote and speculative events, and thus were Class 9 or beyond design-basis accidents which could not provide a proper basis for admission of the contentions. The Appeal Board has made it clear that: (1) NEPA does not require the preparation of an environmental impact statement on the basis of an assertion of a hypothetical accident that is a Class 9 or beyond design-basis accident, citing, San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 479 U.S. 923 (1986); and (2) the NEPA Policy Statement, 45 Fed. Reg. 40101 (June 13, 1980), which describes the circumstances under which the Commission will consider, as a matter of discretion, the environmental impacts of beyond design-basis accidents, does not apply to license amendment proceedings. See Vermont Yankee, *supra*, 26 NRC at 283-85; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458-460 (1987), affirming, LBP-87-24, 26 NRC 159 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 47-51 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC

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129 (1990). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 458-59 (1988), aff'd on other grounds, ALAB-893, 27 NRC 527 (1988).

6.15.8 Power of NRC Under NEPA

The Licensing Board is not obliged under NEPA to consider all issues which are currently the subject of litigation in other forums and which may some day have an impact on the amount of effluent available. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-45, 15 NRC 1527, 1528, 1530 (1982).

The Commission is not required by NEPA to hold formal hearings on site preparation activities because NEPA did not alter the scope of the Commission's jurisdiction under the Atomic Energy Act. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982), citing, Gage v. United States Atomic Energy Commission, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972); 39 Fed. Reg. 14506, 14507 (April 24, 1979).

The National Environmental Policy Act (NEPA) requires that the Commission prepare an environmental impact statement only for major actions significantly affecting the environment. Clinch River, supra, 16 NRC at 424.

A Federal agency may consider separately under NEPA the different segments of a proposed Federal action under certain circumstances. Where approval of the segment under consideration will not result in any irreversible or irretrievable commitments to remaining segments of the proposed action, the agency may address the activities of that segment separately. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

An agency will consider the following factors to determine if it should confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought: (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan; and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 810 (1985), citing, Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir. 1976) (en banc). Applying these criteria, the Board determined that

it was not required to assess the environmental impacts of possible future construction and operation of transmission lines pursuant to an overall grid system long-range plan when considering a presently proposed part of the transmission system (operation of the Braidwood nuclear facility). Braidwood, supra, 22 NRC at 810-12.

The NRC Staff may, if it desires, perform a more complete review than the minimum legally required. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 972 (1982).

Compliance with the National Historic Preservation Act does not preclude the need to comply with NEPA with regard to impacts on historic and cultural aspects of the environment. Therefore, noise impacts on proposed historic districts must be evaluated and, if necessary, mitigation measures undertaken. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 435 (1983).

6.15.8.1 Powers in General

Commensurate with the Commission's obligation to comply with NEPA in licensing nuclear facilities is an implicit power to impose permit and license conditions indicated by the NEPA analysis.

The Commission may prescribe such regulations, orders and conditions as it deems necessary under any activity authorized pursuant to the Atomic Energy Act of 1954, as amended, and NEPA requires the Commission to exercise comparable regulatory authority in the environmental area. Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 352 (1972).

Where necessary to assure that NEPA is complied with and its policies protected, Licensing Boards can and must ignore stipulations among the parties to that effect. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 3), CLI-75-14, 2 NRC 835 (1975). Beyond this, Licensing Boards have independent responsibilities to enforce NEPA and may raise environmental issues *sua sponte*. Tennessee Valley Authority (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

In Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-399, 5 NRC 1156 (1977), the Appeal Board dealt with the question as to the degree to which NEPA allows the NRC to preempt State and local regulation with respect to nuclear facilities. Therein, the Appeal Board held that the Federal doctrine of preemption invalidates local zoning decisions that substantially obstruct or delay the effectuation of an NRC license condition imposed by the Commission pursuant to NEPA. Id. at 1169-1170.

The Appeal Board stated:

...NEPA gave this Commission both the power and the duty to interpret and administer with the Atomic Energy Act and its own regulations in accordance with the policies of NEPA. Among the policies of NEPA are to 'fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,' to 'attain the widest range of beneficial uses of the environment without degradation...', and to 'enhance the quality of renewable resources....' ...State or local regulation is preempted where it 'produces a result inconsistent with the objective of the Federal statute,' where it 'frustrates the full effectiveness of Federal law,' or where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ... (footnotes omitted). 5 NRC 1169.

However, the Appeal Board also indicated that, where a question is presented as to whether State or local regulations relating to alteration of a nuclear power plant are preempted under NEPA, the NRC should refrain from ruling on that question until regulatory action has been taken by the State or local agency involved. *Id.* at 1170. To the same effect in this regard is Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 35 (1978), where the Appeal Board reiterated that Federal tribunals should refrain from ruling on questions of Federal preemption of State law where a State statute has not yet been definitively interpreted by the State courts or where an actual conflict between Federal and State authority has not ripened.

A State or political subdivision thereof may not substantially obstruct or delay conditions imposed upon a plant's operating license by the NRC pursuant to its NEPA responsibilities, as such actions would be preempted by Federal law. However, a State may refuse to authorize construction of a nuclear power plant on environmental or other grounds and may prevent or halt operation of an already built plant for some valid reason under State law. Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 34-35 (1978).

When another agency has yet to resolve a major issue pertaining to a particular nuclear facility, NRC may allow construction to continue at that facility only if NRC's NEPA analysis encompasses all likely outcomes of the other agency's review. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 957 (1978).

A Licensing Board may rule on the adequacy of the FES once it is introduced into evidence and may modify it if necessary.

A Licensing Board's authority to issue directions to the NRC Staff regarding the performance of its independent responsibilities to prepare a draft environmental statement is limited. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980).

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

6.15.8.2 Transmission Line Routing

Consistent with its interpretation of the Commission's NEPA authority (see Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 330 (1972)), the Appeal Board has held that the NRC has the authority under NEPA to impose conditions (i.e., require particular routes) on transmission lines, at least to the extent that the lines are directly attributable to the proposed nuclear facility. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974). In addition, the Commission has legal authority to review the offsite environmental impacts of transmission lines and to order changes in transmission routes selected by an applicant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 83 (1977).

6.15.8.3 Pre-LWA Activities/Offsite Activities

NEPA and the Commission's implementing regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). A "site," in the context of the Commission's NEPA responsibilities, includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Id. 10 CFR § 50.10(c), which broadly prohibits any substantial action which would affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. Id. In those situations where the Commission does approve offsite activities (e.g., through an LWA or a CP), conditions may be imposed to minimize adverse impacts. Id.

6.15.8.4 Relationship to EPA with Regard to Cooling Systems

The NRC may accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental

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impacts from a cooling system in striking an overall cost-benefit balance for the facility. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23, 24 (1978). For a discussion of the statutory framework governing the relationship between NRC and EPA in this area, see Seabrook, supra, 7 NRC at 23-26. Briefly, that relationship in the present setting may be described thusly: EPA determines what cooling system a nuclear power facility may use and NRC factors the impacts resulting from use of that system into the NEPA cost-benefit analysis. Id., 7 NRC at 26.

The NRC's acceptance and use, without independent inquiry, of EPA's determination as to the aquatic impacts of the Seabrook Station (see Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23, 24 (1978)) was upheld in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978).

The Commission may rely on final decisions of the Environmental Protection Agency prior to completion of judicial review of such decisions. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-17, 8 NRC 179, 180 (1978).

Although an adverse environmental impact on water quality resulting from a cooling system discharge is an important input in the NEPA cost-benefit balance, a Licensing Board cannot require alteration of a facility's cooling system if that system has been approved by EPA. Carolina Power & Light Co. (H. B. Robinson, Unit 2), LBP-78-22, 7 NRC 1052, 1063-64 (1978).

NRC need not relitigate issue of environmental impacts caused by a particular cooling system when it is bound to accept that cooling system authorized by EPA. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 970 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 24 (1978).

6.15.8.5 NRC Power Under NEPA With Regard to the FWPCA

The spread of the Federal responsibility for water quality standards and pollution control among various licensing agencies, which resulted from the reading given NEPA by the Calvert Cliffs court, has been curtailed. That responsibility has shifted to EPA as its exclusive province. Section 511(c)(2) of the FWPCA does not change a licensing agency's obligation to weigh degradation of water quality in its NEPA cost-benefit balance, but the substantive regulation of water pollution is in EPA's hands. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 712-13 (1978).

Section 511(c)(2) of the FWPCA requires that the Commission and the Appeal Board accept EPA's determinations on effluent limitations. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 275, 282 (1979).

Section 511(c)(2) of the Clean Water Act does not preclude NRC from considering noise impacts of the cooling water system on the surrounding environment. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 419 (1983).

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

6.15.9 Spent Fuel Pool Proceedings

A Licensing Board is not required to consider in a spent fuel pool expansion case the environmental effects of all other spent fuel pool capacity expansions. Because pending or past licensing actions affecting the capacity of other spent fuel pools could neither enlarge the magnitude nor alter the nature of the environmental effects directly attributable to the expansion in question, there is no occasion to take into account any such pending or past actions in determining the expansion application at bar. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 267-68 (1979).

The attempt, in a licensing proceeding for an individual pool capacity expansion, to challenge the absence of an acceptable generic long-term resolution of the waste management question was precluded in Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41 (1978), remanded sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979), restating the Commission's policy that for the purposes of licensing actions, the availability of offsite spent fuel repositories in the relatively near term should be presumed. Trojan, supra. See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 853-54 (1987) (Licensing Board rejected a contention which sought to examine the possibilities or effects of long-term or openended storage), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

The Licensing Board need not consider alternatives to pool capacity expansion in a proposed expansion proceeding, where the environmental effects of the proposed action are negligible. The NEPA mandate that alternatives to the proposed

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licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Trojan, supra, 9 NRC at 265-266; Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 459 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

In a license amendment proceeding to expand a spent fuel pool, the environmental review for such amendment need not consider the effects of continued plant operation where the environmental status quo will remain unchanged. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 326 (1981), citing, Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980).

6.16 NRC Staff

6.16.1 Staff Role in Licensing Proceedings

The NRC Staff generally has the final word in all safety matters, not placed into controversy by parties, at the operating license stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 n.31 (1981).

The NRC Staff has a continuing responsibility to assure that all regulatory requirements are met by an applicant and continue to be met throughout the operating life of a nuclear power plant. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143, 143 n.23 (1982).

The NRC Staff has the primary responsibility for reviewing all safety and environmental issues prior to the award of any operating license. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1369 (1982).

An operating license may not be issued until the NRC makes the findings specified in 10 CFR § 50.57. It is the Staff's duty to ensure the existence of an adequate basis for each of that section's determinations. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1420 n.36 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-896 (1981).

The fact that an application for an operating license is uncontested does not mean that an operating license automatically issues. An operating license may not issue unless and until the NRC Staff makes the findings specified in 10 CFR § 50.57, including the ultimate finding that such issuance will not be inimical to the health and safety of the public. Washington Public Power Supply System (WPPSS Nuclear Project 2), ALAB-722, 17 NRC 546, 553 n.8 (1983), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981). The same procedure applies under 10 CFR §§ 70.23, 70.31 in the case of an application for a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

In a contested operating license proceeding, a Licensing Board may authorize the Director of Nuclear Reactor Regulation to issue a license for fuel loading and precriticality testing in order to avoid delaying these activities pending a decision on the issuance of a full power license. If the Board determines that any of the admitted contentions is relevant to fuel loading and precriticality testing, the Board must resolve the contention and make the related findings pursuant to 10 CFR § 50.57(a) for the issuance of a license. The Director is still responsible for making the other § 50.57(a) findings. If there are no relevant contentions, the Board may authorize the Director to make all the § 50.57(a) findings. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-31, 24 NRC 451, 453-54 (1986), citing, 10 CFR § 50.57(c). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 553, 555-56 (1986), aff'd, ALAB-854, 24 NRC 83, 790 (1986) (a Licensing Board is required to make findings concerning the adequacy of onsite emergency preparedness, pursuant to 10 CFR § 50.47(d), only as to matters which are in controversy); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485, 490-93 (1988) (to authorize low-power operation pursuant to 10 CFR § 50.57(c), a board need only resolve those matters in controversy involving low-power, as opposed to full power, operation); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-20, 28 NRC 161, 166-67 (1988), aff'd, ALAB-904, 28 NRC 509, 511 (1988).

A Licensing Board (OL-3) presiding in the Shoreham operating license proceeding, having dismissed the government intervenors from the proceeding, found that the applicant's motion for 25% power operation was unopposed. Pursuant to 10 CFR § 50.57(c), the Board authorized the Director of Nuclear Reactor Regulation to make the required findings under 10 CFR § 50.57(a) and to issue a 25% power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-30, 28 NRC 644, 648-49 (1988). The Appeal Board found that

the Licensing Board's decision did not give due regard to the rights of the government intervenors. Although the government intervenors had been dismissed by the Shoreham OL-3 Licensing Board, they still retained full party status before the Shoreham OL-5 Licensing Board. The Appeal Board believed that 10 CFR § 50.57(c) gave the government intervenors the opportunity to be heard on the 25% power request to the extent that any of its contentions which might be admitted by the Shoreham OL-5 Board were relevant. The Appeal Board certified the case to the Commission on the basis of a novel question of procedure, 10 CFR § 2.785(d), involving the interpretation and application of 10 CFR § 50.57(c). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 633-35 (1988).

The NRC Staff may not deny an application without giving the reasons for the denial, and indicating how the application failed to comply with statutory and regulatory requirements. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 250 (1985), citing, SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1168-69 (1984), 5 U.S.C. § 555(e), 10 CFR § 2.103(b).

In general, the Staff does not occupy a favored position at hearing. It is, in fact, just another party to the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). The Staff's views are in no way binding upon the Board and they cannot be accepted without being subjected to the same scrutiny as those of other parties. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). In the same vein, the Staff must abide by the Commission's regulations just as an applicant or intervenor must do. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 435 (1974); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479, 484 (1985). On the other hand, in certain situations, as where the Staff prepares a study at the express direction of the Commission, the Staff is an arm of the Commission and the primary instrumentality through which the NRC carries out its regulatory responsibilities and its submissions are entitled to greater consideration. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451 (1976).

In a construction permit proceeding, the NRC Staff has a duty to produce the necessary evidence of the adequacy of the review of unresolved generic safety issues. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1

and 2), ALAB-728, 17 NRC 777, 806 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances an adjudicatory board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a full-term, full power operating license has issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Prior to issuing an operating license, the Director of Nuclear Reactor Regulation must find that Commission regulations, including those implementing NEPA, have been satisfied and that the activities authorized by the license can be conducted without endangering the health and safety of the public. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 n.7 (1982), citing, 10 CFR § 50.40(d); 10 CFR § 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).

Licensing Boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, Boards cannot direct the Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3),

LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 865 n.52 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985). Citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 515-17 (1980).

Although the establishment of a local public document room is an independent Staff function, the presiding officer in an informal proceeding has directed the Staff to establish such a room in order to comply with the requirements of proposed regulations which had been made applicable to the proceeding. However, the presiding officer acknowledged that he lacked the authority to specify the details of the room's operation. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-5, 27 NRC 241, 243-44 & n.1 (1988).

Although the Licensing Boards and the NRC Staff have independent responsibilities, they are "partners" in implementation of the Commission's policy that decisionmaking should be "both sound and timely," and thus they must coordinate their operations in order to achieve this goal. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 203 (1978).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor thus is free to challenge directly an unresolved generic safety issue by filing a proper contention but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989).

The general rule that the applicant carries the burden of proof in licensing proceedings does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978).

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

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980). See Public Service Co. of New Hampshire (Secbrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991).

When conducting its review of the issues, the Staff should acknowledge differences of opinion among Staff members and give full consideration to views which differ from the official Staff position. Such discussion can often contribute to a more effective treatment and resolution of the issues. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 580-582 n.6 (1985).

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

6.16.1.1 Staff Demands on Applicant or Licensee

While the Commission, through the Regulatory Staff, has a continuing duty and responsibility under the Atomic Energy Act of 1954 to assure that applicants and licensees comply with the applicable requirements, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 627 (1973), the Staff may not require an applicant to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Power Station), ALAB-191, 7 AEC 431, 445, 447 n.32 (1974). The Staff cannot require a general licensee to comply with public health and safety conditions which are more stringent than the Commission's regulatory requirements applicable to general licensees. Wranbler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-89-39, 30 NRC 746, 755 (1989).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but

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not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

6.16.1.2 Staff Witnesses

Except in extraordinary circumstances, a Licensing Board may not compel the Staff to furnish a particular named individual to testify - *i.e.*, the Staff may select its own witnesses. 10 CFR § 2.720(h)(2)(i). However, once a certain individual has appeared as a Staff witness, he may be recalled and compelled to testify further. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974). A Board may require Staff witnesses to update their previous testimony on a relevant issue in light of new analyses and information which have been developed on the same subject. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1094-1095 n.13 (1984).

The Commission's rules provide that the Executive Director for Operations generally determines which Staff witnesses shall present testimony. An adjudicatory board may nevertheless order other NRC personnel to appear upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 104-05 (1983), *citing* 10 CFR § 2.720(h)(2)(i); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 500-501 (1985) (Mere disagreement among NRC Staff members is not an exceptional circumstance); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986). *See generally*, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980).

6.16.1.3 Post Hearing Resolution of Outstanding Matters by the Staff

As a general proposition, issues should be dealt with in the hearings and not left over for later, and possibly more informal, resolution. The post hearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983), *citing*, Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); *accord*, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-37

(1975); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 (1986).

On the other hand, with respect to emergency planning, the Licensing Board may accept predictive findings and post hearing verification of the formulation and implementation of emergency plans. Byron, supra, 19 NRC at 212, 25-52, citing, Waterford, supra, 17 NRC at 1103-04; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1600, 1601 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-95 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), and aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990).

Completion of the minor details of emergency plans are a proper subject for post hearing resolution by the NRC Staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984), citing, Waterford, supra, 17 NRC 1076.

A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license to the Staff for post hearing resolution. Such referral should be used sparingly, however. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). Since delegation of open matters to the Staff is a practice frowned upon by the Commission and the Appeal Board, a Licensing Board properly decided to delay issuing a construction permit until it had reviewed a loan guarantee from REA rather than delegating that responsibility to the Staff for post hearing resolution. Marble Hill, supra.

A Licensing Board has delegated to the Staff responsibility for reviewing and approving changes to a licensee's plan for the design and operation of an on-site waste burial project. The Board believed that such a delegation was appropriate where the Board had developed a full and complete hearing record, resolved every litigated issue, and reviewed the project plan which the licensee had developed, at the Board's request, to summarize and consolidate its testimony during the

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hearing concerning the project. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 298 (1987).

The mere pendency of confirmatory Staff analyses regarding litigated issues does not automatically foreclose Board resolution of those issues. The question is whether the Board has adequate information, prior to the completion of the Staff analyses, on which to base its decision. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1171 (1984).

In order to conduct an expeditious hearing, without having to wait for the completion of confirmatory tests by a licensee and analysis of the test results by the Staff, a Licensing Board may decide to conduct a hearing on all matters ripe for adjudication and to grant an intervenor an opportunity to request an additional hearing limited to matters, within the scope of the admitted contentions, which arise subsequent to the closing of the record. The intervenor must be given timely access to all pertinent information developed by the licensee and the Staff after the close of the hearing with respect to the confirmatory tests. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560-61 (1986), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861, 865 (1973), aff'd, ALAB-226, 8 AEC 381, 400 (1974). Although the intervenor will not be required to meet the usual standards for reopening a record, the intervenor must indicate in the motion to reopen that the new test data and analyses are so significant as to change the result of the prior hearing. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-17, 23 NRC 792, 797 (1986).

The Licensing Board must determine that the analyses remaining to be performed will merely confirm earlier Staff findings regarding the adequacy of the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 436 & n.2, 440 (1985), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), which cites, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973) (the mechanism of post hearing findings is not to be used to provide a reasonable assurance that a facility can be operated without endangering the health and safety of the public); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983) (post hearing procedures may be used for confirmatory tests); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622 (1985) (once a method of evaluation had been used to confirm that one of two virtually identical units had met the standard of a reasonable assurance of safety, it was acceptable to exclude

from hearings the use of the same evaluation method to confirm the adequacy of the second unit).

Staff analyses which are more than merely confirmatory because a further evaluation is necessary to demonstrate compliance with regulatory requirements in light of negative findings of the Licensing Board regarding certain equipment and that relate to contested issues should be retained with the Board's jurisdiction until a satisfactory evaluation is produced. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 79-80 (1986).

At the same time, it is entirely appropriate for the Staff to resolve matters not at issue in an operating license or amendment proceeding. In such proceedings, once a Licensing Board has resolved any contested issues and any issues which it raises *sua sponte*, the decision as to all other matters which need be considered prior to issuance of an operating license is the responsibility of the Staff alone. Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 790-91 (1986). The Licensing Board is neither required nor expected to pass upon all items which the Staff must consider before the operating license is issued. Indian Point, supra, 3 NRC at 190.

6.16.2 Status of Staff Regulatory Guides

Regulatory guides promulgated by the Staff are not regulations, are subject to question in the course of adjudicatory hearings, and, when challenged, are to be regarded merely as the views of one party which cannot serve as evidence of their own validity but must be supported by other sources. Porter County Chapter of the Izaak Walton League of America v. AEC, 633 F.2d 1011 (7th Cir. 1976); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 439, *rev'd on other gnds.*, CLI-74-40, 8 AEC 809 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 68 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 28 n.76 (1974); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Unit 2), ALAB-188, 7 AEC 323, 333 n.42, *rev'd in part on other gnds.*, CLI-74-23, 7 AEC 947 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 174 n.27 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 260-61 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A,

27 NRC 452, 463-64 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Nevertheless, regulatory guides are entitled to considerable prima facie weight. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974), clarified as to other matters, CLI-74-43, 8 AEC 826 (1974).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161, 1169 (1984). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though nonconformance with such guides does not mean noncompliance with the regulations. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978). See also Wrangler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-89-39, 30 NRC 746, 756-57, 759 (1989).

The criteria described in NUREG-0654 regarding emergency plans, referenced in NRC regulations, were intended to serve solely as regulatory guidance, not regulatory requirements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 710 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 367-68 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 487 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 238 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988).

In absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 CFR § 50.47(b). However, such adherence is not required, because regulatory guides are not intended to serve as substitutes for regulations. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

6.16.3 Status of Staff Position and Working Papers

Staff position papers have no legal significance for any regulatory purpose and are entitled to less weight than an adopted regulatory guide. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974). Similarly, an NRC Staff working paper or draft report neither adopted nor sanctioned by the Commission itself has no legal significance for any NRC regulatory purpose. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397 (1976); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Unit 2), ALAB-209, 7 AEC 971, 973 (1974). But see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 857-60 (1987) (the Licensing Board admitted contentions that questioned the sufficiency of an applicant's responses to an NRC Staff guidance document which provided guidelines for Staff review of spent fuel pool modification applications), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 34 (1987), reconsidered, denied, ALAB-876, 26 NRC 277 (1987).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

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6.16.4 Status of Standard Review Plan

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

6.16.5 Conduct of NRC Employees

(RESERVED)

6.17 Orders of Licensing and Appeal Boards

6.17.1 Compliance with Board Orders

Compliance with orders of an NRC adjudicatory board is mandatory unless such compliance is excused for good cause. Thus, a party may not disregard a board's direction to file a memorandum without seeking leave of the board after setting forth good cause for requesting such relief. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). Similarly, a party seeking to be excused from participation in a prehearing conference ordered by the board should present its justification in a request presented before the date of the conference. Seabrook, sup-a, 8 NRC at 191.

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not simply refuse to comply with a direct Board order, even if it believes the Board decision to have been based upon an erroneous interpretation of the law. A Licensing Board is to be accorded the same respect as a court of law. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1930 and n.5 (1982). See 10 CFR § 2.713(a).

When an issue is admitted into a proceeding in an order of the Board, it becomes part of the law of that case. Parties may use the prior history of a case to interpret ambiguities in a Board order, but no party may challenge the precedential authority of a Board's decision other than in a timely motion for reconsideration. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-18, 17 NRC 501, 504 (1983).

6.18 Precedent and Adherence to Past Agency Practice

Application of the "law of the case" doctrine is a matter of discretion. When an administrative tribunal finds that its declared law is wrong and would work an injustice, it may apply a different rule of law in the interests of settling the case before it correctly. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

An Appeal Board does not give stare decisis effect to affirmation of Licensing Board conclusions on legal issues not brought to it by way of an appeal. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

A Licensing Board is required to give stare decisis effect only to an issue of law which was heard and decided in a prior proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358-59 & n.112 (1989), citing, EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986), and 1B Moore's Federal Practice para. 0.402[2], at 30.

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 & 5), ALAB-485, 7 NRC 986, 988 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

6.19 Pre-Permit Activities

NEPA and the Commission's implementing regulations proscribe environmental: significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

A "site" in this context includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Id. The Commission may authorize certain site-related work prior to issuance of a construction permit pursuant to 10 CFR § 50.10(c) and (e). 10 CFR § 50.10(c), which broadly prohibits any substantial action which would adversely affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. Wolf Creek, supra.

Commission regulations provide means for an applicant to obtain precicensing authorization to engage in certain specified construction activities. Those include obtaining an exemption from licensing requirements under 10 CFR § 50.12, pleading special circumstances under 10 CFR § 2.758, and demonstrating that proposed activities will have only de minimus or "trivial" environmental effects. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293 (1976); Washington Public Power Supply System (Nuclear Projects 3 & 5), LBF-77-15, 5 NRC 643 (1977). In those situations where the Commission does approve offsite (through an LWA or CP) or pre-permit (through an LWA) activities, conditions may be imposed to minimize adverse impacts. Kansas Gas & Electric Co., CLI-77-1, 5 NRC 1 (1977).

The limited work authorization procedure under 10 CFR § 50.10(e)(1) and (2) ("LWA-1") and the 10 CFR § 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 423 (1982).

A request for an exemption from any Commission regulation in 10 CFR Part 50, including the general prohibition on commencement of construction in 10 CFR § 50.10(c), may be granted under 10 CFR § 50.12(a). United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 418 (1982).

The Commission may apply 10 CFR § 50.12 to a first of a kind project. There is no indication in 10 CFR § 50.12 that exemptions for conduct of site preparation activities are to be confined to typical, commercial light water nuclear power reactors. Commission practice has been to consider each exemption request on a case-by-case basis under the applicable criteria in the regulations. There is no indication in the regulations or past practice that an exemption can be granted only if an LWA-1 can also be granted or only if justified to meet electrical energy needs. Clinch River, supra, CLI-82-23, 16 NRC at 419.

In determining whether to grant an exemption pursuant to 10 CFR § 50.12 to allow pre-permit activities the Commission considers the

totality of the circumstances and evaluates the exigency of the circumstances in that overall determination. Exigent circumstances have been found where: (1) further delay would deny the public currently needed benefits that would have been provided by timely completion of the facility but were delayed due to external factors, and would also result in additional otherwise avoidable costs; and (2) no alternative relief has been granted (in part) or is imminent. The Commission will weigh the exigent circumstances offered to justify an exemption against the adverse environmental impacts associated with the proposed activities. Where the environmental impacts of the proposed activities are insignificant, but the potential adverse consequences of delay may be severe and an exemption will mitigate the effects of that delay, the case is strong for granting an exemption that will preserve the option of realizing those benefits in spite of uncertainties in the need for prompt action. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 (1983), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 938 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-76-20, NRC 476 (1976); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

Use of the exemption authority under 10 CFR § 50.12 has been made available by the Commission only in the presence of exceptional circumstances. A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. These equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good-faith effort to comply with the regulation from which the exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved. These equities do not, however, apply to the requisite findings on public health and safety and common defense and security. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1376-1377 (1984). The costs of unusually heavy and protracted litigation may be considered in evaluating financial or economic hardships as an equity in assessing the propriety of an exemption. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1378-1379 (1984).

The public interest criterion for granting an exemption from 10 CFR § 50.10 under 10 CFR § 50.12(b) is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances. Clinch River, supra, 16 NRC at 425, 426, citing, Washington Public Power Supply System (WPPSS Nuclear Power Projects Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

6.19.1 Pre-LWA Activity

Unlike authorization of activities under an LWA, pre-LWA activities may be authorized prior to issuance of a partial initial decision on environmental issues. Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). Permission to commence activities preparatory to construction in advance of an LWA can be sought by three different methods. One method is to seek a determination by the Licensing Board that the proposed activities are not barred by 10 CFR § 50.10(c) because their impacts are de minimus (the so-called "trivial impact" standard) or minor and fully redressible.

This is the preferred method when the issues involved are essentially factual. The second method is to proceed in accordance with 10 CFR § 2.758(b) under which a waiver or exemption may be obtained from the Commission if the Board certifies the issue presented in accordance with 10 CFR § 2.758(d). This method should be used when an interpretation or application of a regulation to particular facts is called into question. The third method is to seek an exemption from the Commission under 10 CFR § 50.12. The Commission has stated that this method is extraordinary and emphasized that it should be used sparingly. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977).

10 CFR § 50.10(c) permits only that pre-LWA activity with so trivial an impact that it can be safely said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the application for the facility ultimately be denied. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 1 NRC 6 (1976), aff'd in part, CLI-77-1, 5 NRC 1 (1977). For purposes of authorization of pre-LWA activity under 10 CFR § 50.10(c), redressibility is a factor to be considered. Where the potential damage from the pre-LWA activity is fully redressible and the applicant is willing to commit to restoration of the site, a Licensing Board can permit the applicant to proceed accordingly. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

The governing standard with regard to pre-LWA activity is "trivial impact," not zero impact. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), ALAB-446, 6 NRC 870 (1977), reversing in part, LBP-77-61, 6 NRC 674 (1977). The fact that certain activities would entail the removal of some trees which could not be replaced within a short span of time does not necessarily mean that such activities cannot be conducted prior to issuance of an LWA. Id.

The proscriptions in the Wild and Scenic River Act against any form of assistance by a Federal agency in the construction of a water resource project which might have a direct and adverse impact on a river designated under the Act precludes the granting by a Licensing Board of pre-LWA authority for constructing a proposed sewer line to service a proposed nuclear plant where the nuclear plant itself is considered to be a "water resource project." Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), LBP-77-61, 6 NRC 674, 678 (1977), rev'd in part, ALAB-446, 6 NRC 870 (1977).

6.19.2 Limited Work Authorization

Under 10 CFR § 50.10(e), the Commission may authorize certain site-related pre-permit work which is more substantial than that permitted under 10 CFR § 50.10(c). Prior to granting such "limited work authorization" (LWA), the presiding officer in the proceeding must have made certain environmental findings and, in some instances, health and safety findings. See 10 CFR § 50.10(e)(1) through (3). Notice to all parties of the proposed action is necessary. Carolina Power & Light Co. (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229 (1974).

A limited work authorization allows preliminary construction work to be undertaken at the applicant's risk, pending completion of later hearings covering radiological health and safety issues. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 473 n.1 (1982), citing, 10 CFR § 50.10(e)(1); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 778 (1979).

The cost-benefit analysis which must be performed prior to issuance of an LWA requires a determination as to whether construction of certain site-related facilities should be permitted prior to issuance of a construction permit but subsequent to a determination resulting from a cost-benefit analysis that the plant should be built. The cost-benefit analysis relevant to issuance of an LWA has been handled generically under 10 CFR § 51.52(b). Thus, the cost-benefit balance required for an LWA need not be specifically performed for each LWA. Rather, once a Licensing Board has made all the findings on environmental and site suitability matters required by Section 51.52(b) and (c), the cost-benefit balancing implicit in those regulations has automatically been satisfied. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572, 579-80 (1977).

Applicants are not required to have every permit in hand before a Limited Work Authorization can be granted. Public

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Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 123, 129 (1978).

The Board may conduct a separate hearing and issue a partial decision on issues pursuant to NEPA, general site suitability issues specified by 10 CFR § 50.10(e), and certain other possible issues for a limited work authorization. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 161 (1983), vacated as moot, ALAB-755, 18 NRC 1337 (1983).

Although the LWA and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984), citing, 10 CFR §§ 2.718, 2.714(f),(g) (formerly, 10 CFR §§ 2.714(e),(f)).

6.19.2.1 LWA Status Pending Remand Proceedings

It has been held that, where a partial initial decision on a construction permit is remanded by an Appeal Board to the Licensing Board for further consideration, an outstanding LWA may remain in effect pending resolution of the CP issues provided that little consequential environmental damage will occur in the interim. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit #), ALAB-335, 3 NRC 830 (1976). On appeal of this decision, however, the Court of Appeals stayed the effectiveness of the LWA pending alternate site consideration by the Licensing Board on the grounds that it is anomalous to allow construction to take place at one site while the Board is holding further hearings on other sites. Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978).

6.20 Regulations

The proper test of the validity of a regulation is whether its normal and fair interpretation will deny persons their statutory rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983), citing, American Trucking Association v. United States, 627 F.2d 1313, 1318-19 (D.C. Cir. 1980).

6.20.1 Compliance with Regulations

All participants in NRC adjudicatory proceedings, whether lawyers or laymen, have an obligation to familiarize themselves with the NRC Rules of Practice. The fact that a party may be a newcomer to NRC proceedings will not excuse that party's noncompliance with the rules. Boston Edison Co.

(Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 467 n.24 (1985), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980), which quotes, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980).

Applicants and licensees must, of course, comply with the Commission's regulations, but the Staff may not compel an applicant or licensee to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 445, 447 n.32 (1974).

The power to grant exemptions from the regulations has not been delegated to Licensing Boards and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

6.20.2 Commission Policy Statements

A Commission policy statement is binding upon the Commission's adjudicatory boards. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 695 (1985), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 82-83 (1974).

6.20.3 Regulatory Guides

Staff regulatory guides are not regulations and do not have the force of regulations. When challenged by an applicant or licensee, they are to be regarded merely as the views of one party, although they are entitled to considerable prima facie weight. See Section 6.16.2 and cases cited therein. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 and n.10 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

In the absence of other evidence, adherence to regulatory guidance may be sufficient to demonstrate compliance with regulatory requirements. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-698, 16 NRC 1290,

1299 (1982) (rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983)), citing, Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-407 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983). Generally speaking, however, such guidance is treated simply as evidence of legitimate means for complying with regulatory requirements, and the Staff is required to demonstrate the validity of its guidance if it is called into question during the course of litigation. Three Mile Island, supra, 16 NRC at 1299, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station CLI-74-40, B AEC 809, 811 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985).

Nonconformance with regulatory guides or Staff positions does not mean that the General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778 (1981). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though, as stated previously, nonconformance with such guides does not mean noncompliance with the regulations. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978).

Licenses can be required to show they have taken steps to provide equivalent or better measures than called for in regulatory guides if they do not, in fact, comply with the specific requirements set forth in the guides. Consolidated

Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, '6 NRC 1629, 1631 (1982).

6.20.4 Challenges to Regulations

In Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), Comm'n's Mem. & Order, 2 CCH At. Eng. L. Rep. § 11,578.02 (1969), the Commission recognized the general principle that regulations are not subject to amendment in individual adjudicatory proceedings. Under that ruling, now supplanted by 10 CFR § 2.758, challenges to the regulations would be permitted in only three limited situations:

- (1) where the regulation was claimed to be outside the Commission's authority;
- (2) where it was claimed that the regulation was not promulgated in accordance with applicable procedural requirements;
- (3) in the case of radiological safety standards, where it was claimed that particular standards were not within the broad discretion given to the Commission by the Atomic Energy Act to establish.

The Commission directed Licensing Boards to certify the question of the validity of any challenge to it prior to rendering any initial decision. Thus, the Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

No challenge of any kind is permitted, in an adjudicatory proceeding, as to a regulation that is the subject of ongoing rulemaking. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972). In such a situation, the appropriate forum for deciding a challenge is the rulemaking proceeding itself. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-352, 4 NRC 371 (1976).

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law as an attack upon a regulation of the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 144 (1986);

American Nuclear Corporation (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 709-710 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 71 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989). Consequently, under current regulations, there can be no challenge of any kind by discovery, proof, argument, or other means except in accord with 10 CFR § 2.758. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 204 (1975); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1385, aff'd, ALAB-704, 16 NRC 1725 (1982); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1104 n.44 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136, 138 (1986).

Under Section 2.758, the regulation must be challenged by way of a petition requesting a waiver or exception to the regulation on the sole ground of "special circumstances" (i.e., because of special circumstances with respect to the subject matter of the particular proceeding, application of the regulation would not serve the purposes for which the regulation was adopted. 10 CFR § 2.758(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 145 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). Pursuant to 10 CFR § 2.1239(b), the same standard is applicable to the waiver of a regulation in a materials licensing proceeding conducted under the Subpart L informal adjudicatory procedures. Curators of the University of Missouri, LBP-90-23, 32 NRC 7, 9 (1990). Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circumstances must be such as to undercut the rationale for the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, reconsid. denied, CLI-89-3, 29 NRC 234 (1989). The petition must be accompanied by an affidavit. Other parties to the proceeding may respond to the petition. If the

petition and responses, considered together, do not make a prima facie showing that application of the regulation would not serve the purpose intended, the Licensing Board may not go any further. If a prima facie showing is made, then the issue is to be directly certified to the Commission (not to the Appeal Board - 10 CFR § 2.758(d)) for determination. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 890 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 445 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987). A waiver petition should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). In the alternative, any party who asserts that a regulation is invalid may always petition for rulemaking under 10 CFR Part 1, Subpart H (§§ 2.800-2.807).

The provisions of 10 CFR § 2.758 do not entitle a petitioner for a waiver or exception to a regulation to file replies to the responses of other parties to the petition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

An attack on a Commission regulation is prohibited unless the petitioner can make a prima facie showing of special circumstances such that applying the regulation would not serve the purpose for which it was adopted. The prima facie showing must be made by affidavit. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 270 (1983), citing, 10 CFR § 2.758. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

To make a prima facie showing under 10 CFR § 2.758 for waiving a regulation, a stronger showing than lack of reasonable assurance has to 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. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983).

Another Licensing Board has applied a "legally sufficient" standard for the prima facie showing. According to the Board, the question is whether the petition with its accompanying affidavits as weighed against the responses of the parties

presents legally sufficient evidence to justify the waiver or exception from the regulation. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 328 (1987). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988).

A request for an exception, based upon claims of costly delays resulting from compliance with a regulation, rather than claims that application of the regulation would not serve the purposes for which the regulation was adopted, is properly filed pursuant to 10 CFR § 50.12 rather than 10 CFR § 2.758. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444-45 (1985).

A request for an exception is properly filed pursuant to 10 CFR § 50.12, and not 10 CFR § 2.758, when the exception: (1) is not directly related to a contention being litigated in the proceeding; and (2) does not involve safety, environmental, or common defense and security issues serious enough for the Board to raise on its own initiative. Perry, supra, 22 NRC at 445-46.

An Appeal Board has determined that it has the authority to consider a motion for interlocutory review of a Licensing Board's scheduling order involving a Section 2.758 petition. The Board found that the only express limitation on its normal appellate jurisdiction is the requirement, pursuant to footnote 7 of Section 2.758, of directed certification to the Commission of a Licensing Board's determination that a prima facie showing has been established. The Board determined that, except in that specific situation, it could exercise its normal appellate authority, including its authority to consider interlocutory Licensing Board rulings through directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-360, 25 NRC 63, 67 (1987).

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.45 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

6.20.5 Agency's Interpretation of its Own Regulations

The wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 745 (1989); Wrangler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-89-39, 30 NRC 746, 756 (1989).

Where NRC interprets its own regulations and where those regulations have long been construed in a given way, the doctrine of stare decisis will govern absent compelling reasons for a different interpretation; the regulations may be modified, if appropriate, through rulemaking procedures. New England Power Co. (NEP Units 1 and 2), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-390, 5 NRC 733, 741-42 (1977).

6.21 Rulemaking

Rulemaking procedures are covered, in general, in 10 CFR §§ 2.800-2.807, which govern the issuance, amendment and repeal of regulations and public participation therein. It is well established that an agency's decision to use rulemaking or adjudication in dealing with a problem is a matter of discretion. Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 800 (1981), citing, NAACP v. FPC, 425 U.S. 662, 668 (1976).

The Commission has authority to determine whether a particular issue shall be decided through rulemaking, through adjudicatory consideration, or by both means. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-118, 16 NRC 2034, 2038 (1982), citing F.P.C. v. Texaco, Inc., 377 U.S. 33, 42-44 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1955). In the exercise of that authority, the Commission may preclude or limit the adjudicatory consideration of an issue during the pendency of a rulemaking. Midland, *supra*, 16 NRC at 2038.

When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudication being conducted at that time. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 584-585 (1982); LBP-82-118, 16 NRC 2034, 2037 (1982).

6.21.1 Rulemaking Distinguished from General Policy Statements

While notice and comment procedures are required for rulemaking, such procedures are not required for issuance of

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a policy statement by the Commission since policy statements are not rules. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163 (1976).

6.21.2 Generic Issues and Rulemaking

The Commission has indicated that, as a rule, generic safety questions should be resolved in rulemaking rather than adjudicatory proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-15, clarified, CLI-74-43, 8 AEC 826 (1974). In this vein, it has been held that the Commission's use of rulemaking to set ECCS standards is not a violation of due process. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

It is within the agency's authority to settle factual issues of a generic nature by means of rulemaking. Minnesota v. NRC, 602 F.2d 412, 416-17 (D.C. Cir. 1979) and Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974), cited in Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 802 (1981). An agency's previous use of a case-by-case problem resolution method does not act as a bar to a later effort to resolve generic issues by rulemaking. Pacific Coast European Conference v. United States, 350 F.2d 197, 205-06 (9th Cir.), cert. denied, 382 U.S. 958 (1965), cited in Fire Protection, supra, and the fact that standards addressing generic concerns adopted pursuant to such a rulemaking proceeding affect only a few, or one, licensee(s) does not make the use of rulemaking improper. Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978), cited in Fire Protection, supra.

Waiver of a Commission rule is not appropriate for a generic issue. The proper approach when a problem affects nuclear reactors generally is to petition the Commission to promulgate an amendment to its rules under 10 CFR § 2.802. If the issue is sufficiently urgent, petitioner may request suspension of the licensing proceeding while the rulemaking is pending. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-57, 14 NRC 1037, 1038-39 (1981).

6.22 Research Reactors

10 CFR § 50.22 constitutes the Commission's determination that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under § 103 of the Atomic Energy Act rather than § 104. Section 104 licenses are granted for research and education, while Section 103 licenses are issued for industrial or commercial purposes. The Regents of the University of California (UCLA Research Reactor), LBP-83-24, 17 NRC 666, 670 (1983).

6.23 Disclosure of Information to the Public

10 CFR § 2.790 deals generally with NRC practice and procedure in making NRC records available to the public. 10 CFR Part 9 specifically establishes procedures for implementation of the Freedom of Information (10 CFR §§ 9.3 to 9.16) and Privacy (10 CFR §§ 9.50, 9.51) Acts.

Under 10 CFR § 2.790, hearing boards are delegated the authority and obligation to determine whether proposals of confidentiality filed pursuant to Section 2.790(b)(1) should be granted pursuant to the standards set forth in subsections (b)(2) through (c) of that Section. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 NRC 1747, 1755-56 (1981). Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48 (1982).

Under Chrysler Corp. v. Brown, 441 U.S. 281, 60 L.Ed.2d 208, 99 S. Ct. 1705 (1979), neither the Privacy Act nor the Freedom of Information Act gives a private individual the right to prevent disclosure of names of individuals where the Licensing Board elects to disclose. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 891 (1981).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-33, 15 NRC 887, 891-892 (1982), the Board ruled that the names and addresses of temporary employees who have worked on a tube-sleeving project are relevant to intervenor's quest for information about quality assurance in a tube-sleeving demonstration project. Since applicants have not given any specific reason to fear that intervenors will harass these individuals, their names should be disclosed so that intervenors may seek their voluntary cooperation in providing information to them.

In the Seabrook offsite emergency planning proceeding, the Licensing Board extended a protective order to withhold from public disclosure the identity of individuals and organizations who had agreed to supply services and facilities which would be needed to implement the applicant's offsite emergency plan. The Board noted the emotionally charged atmosphere surrounding the Seabrook facility, and, in particular, the possibility that opponents of the licensing of Seabrook would invade the

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applicant's commercial interests and the suppliers' right to privacy through harassment and intimidation of witnesses in an attempt to improperly influence the licensing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 295 (1988).

6.23.1 Freedom of Information Act Disclosure

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

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

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Palisades, supra, 12 NRC at 120.

Section 2.744 of the Rules of Practice provides that a presiding officer may order production of any record exempt under Section 2.790 if its "disclosure is necessary to a proper decision and the document is not reasonably obtainable from another source." This balancing test weighs the need for a proper decision against the interest in privacy. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 892 (1981).

The presiding officer in an informal hearing lacks the authority to review the Staff's procedures or determinations involving FOIA requests for NRC documents. However, the presiding officer may compel the production of certain of the requested documents if they are determined to be necessary for the development of an adequate record in the proceeding. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-28, 26 NRC 297, 299 (1987).

Although 10 CFR § 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. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 99 (1983).

Nondisclosure of commercial or financial information pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), may be appropriate if an agency can demonstrate that public disclosure of the information would harm an identifiable agency interest in efficient program operations or in the effective execution of

its statutory responsibilities. The mere assertion that disclosure of confidential information provided to the NRC by a private organization will create friction in the relationship between the NRC and the private organization does not satisfy this standard. Critical Mass Energy Project v. NRC, 931 F.2d 939, 943-945 (D.C. Cir. 1991). Also, commercial or financial information may be withheld if disclosure of the information likely would impair the agency's ability to obtain necessary information in the future. To meet this standard, an agency may show that nondisclosure is required to maintain the qualitative value of the information. Critical Mass, supra, 931 F.2d at 945-947, citing, National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Palisades, supra, 12 NRC at 123.

The Government is no less entitled to normal privilege than is any other party in civil litigation. Palisades, supra, 12 NRC at 127.

Any documents in final form memorializing the Director's decision not to issue a notice of violation imposing civil penalties does not fall within Exemption 5. Palisades, supra, 12 NRC at 129.

A person who has submitted an FOIA request to an agency must exhaust all administrative remedies before filing a lawsuit seeking production of the documents. An agency has 10 working days to respond to the request. 5 U.S.C. § 552(a)(6)(A). If the agency has not responded within this 10-day period, then the requester has constructively exhausted the administrative remedies and may file a lawsuit. 5 U.S.C. § 552(a)(6)(C). However, if the agency responds after the 10-day period, but before the requester has filed suit, then the requester must exhaust all the administrative remedies. Oglesby v. United States Department of the Army, 920 F.2d 57, 63-65 (D.C. Cir. 1990).

An agency must conduct a good faith search for the requested records, using methods which reasonably can be expected to produce the information requested. Oglesby, supra, 920 F.2d at 68.

6.23.2 Privacy Act Disclosure

(RESERVED)

6.23.3 Disclosure of Proprietary Information

10 CFR § 2.790, which deals generally with public inspection of NRC official records, provides exemptions from public inspection in appropriate circumstances. Specifically, Section 2.790(a) establishes that the NRC need not disclose information, including correspondence to and from the NRC regarding issuance, denial, and amendment of a license or permit, where such information involves trade secrets and commercial or financial information obtained from a person as privileged or confidential.

Under 10 CFR § 2.790(b), any person may seek to have a document withheld, in whole or in part, from public disclosure on the grounds that it contains trade secrets or is otherwise proprietary. To do so, he must file an application for withholding accompanied by an affidavit identifying the parts to be withheld and containing a statement of the reasons for withholding. As a basis for withholding, the affidavit must specifically address the factors listed in Section 2.790(b)(4). If the NRC determines that the information is proprietary based on the application, it must then determine whether the right of the public to be fully appraised of the information outweighs the demonstrated concern for protection of the information.

For an affidavit to be exempt from the Board's general authority to rule on proposals concerning the withholding of information from the public, that affidavit must meet the regulatory requirement that it have "appropriate markings". When the plain language of the regulation requires "appropriate markings", an alleged tradition by which Staff has accepted the proprietary nature of affidavits when only a portion of the affidavits is proprietary is not relevant to the correct interpretation of the regulation. In addition, legal argument may not appropriately be withheld from the public merely because it is inserted in an affidavit, a portion of which may contain some proprietary information. Affidavits supporting the proprietary nature of other documents can be withheld from the public only if they have "appropriate markings". An entire affidavit may not be withheld because a portion is proprietary. The Board may review an initial Staff determination concerning the proprietary nature of a document to determine whether the review has addressed the regulatory criteria for withholding. A party may not withhold legal arguments from the public by inserting those arguments into an affidavit that contains some proprietary information. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982).

6.23.3.1 Protecting Information Where Disclosure is Sought in an Adjudicatory Proceeding

To justify the withholding of information in an adjudicatory proceeding where full disclosure of such information is sought, the person seeking to withhold the information must demonstrate that:

- (1) the information is of a type customarily held in confidence by its originator;
- (2) the information has, in fact, been held in confidence;
- (3) the information is not found in public sources;
- (4) there is a rational basis for holding the information in confidence.

Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981). This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR § 2.744(d), § 2.790(a)(7); and is embodied in FOIA, 5 U.S.C. § 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra); it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving similar future reports. South Texas, supra.

For a detailed listing of the factors to be considered by a Licensing Board in determining whether certain documents should be classed as proprietary and withheld from disclosure

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in an adjudicatory proceeding, see Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, Appendix at 518 (1973) and (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307 (1982). If a Licensing Board or an intervenor with a pertinent contention wishes to review data claimed by an applicant to be proprietary, it has a right to do so, albeit under a protective order if necessary. 10 CFR § 2.790(b)(6); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544 n.12 (1977).

Where a party to a hearing objects to the disclosure of information on the basis that it is proprietary in nature and makes out a prima facie case to that effect, it is proper for an adjudicatory board to issue a protective order and conduct further proceedings in camera. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Nuclear Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered. If an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017 (1981).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through threats of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner organization publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-486 (1983).

6.23.3.2 Security Plan Information Under 10 CFR § 2.790(d)

Plant security plans are "deemed to be commercial or financial information" pursuant to 10 CFR § 2.790(d). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982).

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

Intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements. Shoreham, *supra*, 16 NRC at 1124.

Commission regulations, 10 CFR § 2.7.2, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. Shoreham, *supra*, 16 NRC at 1124.

Release of a security plan to qualified intervenors must be under a protective order and the individuals who review the security plan itself should execute an affidavit of non-disclosure. Diablo Canyon, *supra*, 11 NRC at 778.

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside the hearing process. A person subject to a protective order, however, is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Diablo Canyon, *supra*, 11 NRC at 778.

6.24 Enforcement Proceedings (Formerly Show Cause Proceedings)

On August 15, 1991, the Commission completed final rulemaking which revised the Commission's procedures for initiating formal enforcement action. 56 Fed. Reg. 40664 (August 15, 1991). Pursuant to 10 CFR § 2.204(a), the Commission will issue a demand for information to a licensee or other person subject to the jurisdiction of the Commission in order to determine whether to initiate an enforcement action. A licensee must respond to the demand for information; a person other than a licensee may respond to the demand or explain the reasons why the demand should not have been issued. 10 CFR § 2.204(b). Since the demand for information only requires the submission of information, and does not by its own terms modify, suspend, or revoke a license, or take other enforcement action, there is no right to a hearing. If the Commission decides to initiate enforcement action, it will serve on the licensee or other person subject to the jurisdiction of the Commission, an order specifying the alleged

violations and informing the licensee or other person of the right to demand a hearing on the order. 10 CFR § 2.202(a). The Commission has deleted the term "order to show cause" from Section 2.202.

Under 10 CFR § 2.202, the NRC Staff is empowered to issue an order to show cause why enforcement action should not be taken when it believes that modification or suspension of a license, or other such enforcement action, is warranted. Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue such an order to show cause. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Any person at any time may request the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, or Director, Office of Inspection and Enforcement, as appropriate, to issue a show cause order for suspension, revocation or modification of an operating license or a construction permit. 10 CFR § 2.206, 10 CFR § 2.202 et seq.

The Director of Nuclear Reactor Regulation, upon receipt of a request to initiate an enforcement proceeding, is required to make an inquiry appropriate to the facts asserted. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including Staff analyses of generic issues, documents issued by other agencies and the comments of the licensee on the factual allegations. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432, 433 (1978).

In reaching a determination on a show cause petition, the Director need not accord presumptive validity to every assertion of fact, irrespective of the degree of substantiation. Nor is the Director required to convene an adjudicatory proceeding to determine whether an adjudicatory proceeding is warranted. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

The APA, 5 U.S.C 551 et seq., particularly Section 554, and the Commission's regulations, particularly 10 CFR § 2.719, deal specifically with on-the-record adjudication and thus the Staff's participation in a construction permit proceeding does not render it incapable of impartial regulatory action in a subsequent show cause or suspension proceeding where no adjudication has begun. Moreover, in terms of policy, any view which questions the Staff's capabilities in such a situation is contradicted by the structure of nuclear regulation established by the Atomic Energy Act and 20 years experience implementing that statute. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 431, 432 (1978).

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. NRC can develop policy that has licensees consent to, rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in a show cause

proceeding. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

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

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

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

New matters which cannot be raised before a Board because of a lack of jurisdiction may be raised in a petition under 10 CFR § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1217 n.39 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 840 (1984). Where petitioner's case has no discernible relationship to any other pending proceeding involving the same facility, the show cause proceeding set out in 10 CFR § 2.206 must be regarded as the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570 (1980).

In every case, a petitioner that for some reason cannot gain admittance to a construction permit or operating license hearing, but wishes to raise health, safety, or environmental concerns before the NRC, may file a request with the Director of Nuclear Reactor Regulation under 10 CFR § 2.206 asking the Director to institute a proceeding to address those concerns. The Staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity, or if it believes no show cause proceeding or other action is necessary, by advising the requestor in writing of reasons explaining that determination. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767, 1768 (1982). See Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1228-1229 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 606

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F.2d 1363, 1369-1370 (D.C. Cir. 1979); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 552-53 (1983).

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

The agency has broad discretion in establishing and applying rules for public participation in enforcement proceedings. Marble Hill, *supra*, 11 NRC at 440-41.

6.24.1 Petition for Enforcement Order

The mechanism for requesting a show cause order is a petition filed pursuant to 10 CFR § 2.206. See, e.g., Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Note that such a petition may not be used to seek relitigation of an issue that has already been decided or to avoid an existing forum in which the issue is being or is about to be litigated. Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 and 2) and (Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985).

Nonparties to a proceeding are also prohibited from using 10 CFR § 2.206 as a means to reopen issues which were previously adjudicated. General Public Utilities, *supra*, 21 NRC at 564. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1979), *aff'd*, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

6.24.1.1 Grounds for Enforcement Order

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

6.24.1.2 Burden of Proof for Enforcement Order

The Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any

Commission proceeding bearing on its application to do so, including a show cause proceeding. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 571 (1980).

6.24.1.3 Issues in Enforcement Proceedings

One cannot seek to intervene in an enforcement proceeding to have NRC impose a stricter penalty than the NRC seeks. Issues in show cause proceedings are only those set out in the show cause order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). One who seeks the imposition of stricter requirements should file a petition pursuant to 10 CFR § 2.206. Sequoyah Fuels Corp. (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 513-514 (1986), citing, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1982).

The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-442 (1980); Sequoyah Fuels Corp. (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 512 n.2 (1986).

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

6.24.2 Standards for Issuing an Enforcement Order

The standard to be applied in determining whether to issue a show cause order is whether substantial health or safety issues have been raised. A mere dispute over factual issues will not suffice. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

The Director of Nuclear Reactor Regulation properly has discretion to differentiate between those petitions which indicate that substantial issues have been raised warranting institution of a proceeding and those which serve merely to demonstrate that in hindsight, even the most thorough and reasonable of forecasts will prove to fall short of absolute prescience. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

6.24.3 Review of Decision on Request for Enforcement Order

10 CFR § 2.206 has been amended to provide that the Commission may, on its own motion, review the decision of the Director not to issue a show cause order to determine if the Director has abused his discretion. 10 CFR § 2.206(c)(1). No other petition or request for Commission review will be entertained. 10 CFR § 2.206(c)(2).

While there is no specific provision for Commission review of a decision to issue a show cause order, the amended regulation does acknowledge that the review power set forth in Section 2.206 does not limit the Commission's supervisory power over delegated Staff actions. 10 CFR § 2.206(c)(1). Thus, it is clear that the Commission may conduct any review of a decision with regard to requests for show cause orders that it deems necessary.

Prior to the amendment of Section 2.206, that regulation was silent as to Commission review. At that time, the Commission indicated that its review of a decision of the Director would be directed toward whether the Director abused his authority and, in particular, would include a consideration of the following:

- (1) does the statement of reasons for issuing the order permit a rational understanding of the basis for the decision;
- (2) did the Director correctly comprehend the applicable law, regulations and policy;
- (3) were all necessary factors included and irrelevant factors excluded;
- (4) were appropriate inquiries made as to the facts asserted;
- (5) is the decision basically untenable on the basis of the facts known to the Director.

Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173 (1975). See also Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 676 n.1 (1979); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 544-45 (1990).

Under the Indian Point standards, the Director's decision will not be disturbed unless it is clearly unwarranted or an abuse of discretion. Licenses Authorized to Possess or Transport Strategic Quantities of Special Nuclear Material, CLI-77-3, 5 NRC 16 (1977). Although the Indian Point review is essentially a deferral to the Staff's judgment on facts

relating to a potential enforcement action, it is not an abdication of the Commission's responsibilities since the Commission will decide any policy matters involved. Id. at 5 NRC 20, n.6.

In determining whether the Director abused his discretion, a Licensing Board will evaluate the reasonableness of the Director's decision in light of the facts available to the Director at the time he issued his decision. The Director's decision must be based upon reliable, probative, and substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 556-57 (1990), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

The question of whether the federal courts have jurisdiction to review the Director's denial of a § 2.206 petition has not been directly addressed by the Supreme Court. However, two federal appeals courts have determined that the Director's denial is unreviewable. Safe Energy Coalition v. NRC, 866 F.2d 1473, 1476, 1477-78 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223, 230, 231 (7th Cir. 1989). The courts relied upon: (1) the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), which precludes judicial review when agency action is committed to agency discretion by law, and (2) the Supreme Court's interpretation of § 701(a)(2) in Heckler v. Chaney, 470 U.S. 821 (1985), where the Court held that an agency's refusal to undertake enforcement action upon request is presumptively unreviewable by the courts. That presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Upon review of the Atomic Energy Act, NRC regulations, and NRC case law, the courts did not find any provisions which would rebut the presumption of unreviewability. Also note Ohio v. NRC, 868 F.2d 810, 818-19 (6th Cir. 1989), in which the court avoided the jurisdictional issue, and instead dismissed the petition for review on its merits.

The Appeal Board normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

Review of a show cause order is limited to whether the Director of Nuclear Reactor Regulation abused his discretion. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

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The validity of a show cause order is judged on the basis of information available to the Director at the time it was issued at the start of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). See Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542-43 n.5, 556-57 (1990).

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

6.24.4 Notice/Hearing on Enforcement Order to Licensee/Permittee

While a show cause order with immediate suspension of a license or permit may be issued without prior written notice where the public health, interest or safety is involved, the Commission cannot permanently revoke a license without prior notice and an opportunity for a hearing guaranteed by 10 CFR § 2.202. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7 (1974).

The Director may issue an immediately effective order without prior written notice under 10 CFR § 2.202(f) (now § 2.202(a) (5)) if (1) the public health, safety or interest so requires, or (2) the licensee's violations are willful. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979). In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678 (1979).

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

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

6.24.5 Burden of Proof in Enforcement Proceedings

The burden of proof in a show cause proceeding with respect to a construction permit is on the permit holder. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11 (1975). As to safety matters this is so until the award of a full-term operating license. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-81-7, 13 NRC 257, 264-65 (1981). However, the burden of going forward with evidence "sufficient to require reasonable minds to inquire further" is on the person who sought the show cause order. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 110-11 (1976).

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

6.24.6 Consolidation of Petitioners in Enforcement Proceedings

The Director may, in his discretion, consolidate the essentially indistinguishable requests of petitioners if those petitioners are unable to demonstrate prejudice as a result of the consolidation. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

6.24.7 Necessity of Hearing in Enforcement Proceedings

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

6.24.8 Intervention in Enforcement Proceedings

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

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6.25 Summary Disposition Procedures

(SEE 3.5)

6.26 Suspension, Revocation or Modification of License

A license or construction permit may be modified, suspended or revoked for:

- (1) any material false statement in an application or other statement of fact required of the applicant;
- (2) conditions revealed by the application, statement of fact, inspection or other means which would warrant the Commission to refuse to grant a license in the first instance;
- (3) failure to construct or operate a facility in accordance with the terms of the construction permit or operating license; or
- (4) violation of, or failure to observe, any terms and provisions of the Atomic Energy Act, the regulations, a permit, a license, or an order of the Commission. 10 CFR § 50.100.

The procedures for modifying, suspending or revoking a license are set forth in Subpart B to 10 CFR. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990), citing, Atomic Energy Act § 186(a), 49 U.S.C. § 2236(a).

Where information is presented which demonstrates an undue risk to public health and safety, the NRC will take prompt remedial action including shutdown of operating facilities. Such actions may be taken with immediate effect notwithstanding the Administrative Procedure Act requirements of notice and opportunity to achieve compliance. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 404, 405 (1978).

A violation of a regulation does not of itself result in a requirement that a license be suspended. Both the Atomic Energy Act and NRC regulations support the conclusion that the choice of remedy for regulatory violations is within the sound judgment of the Commission and not foreordained. See 42 U.S.C. § 2236, § 2280, § 2282; 10 CFR § 50.100. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978).

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

If a safety problem is revealed at any time during low-power operation of a facility or as a result of the merits review of a

party's appeal of the decision to authorize low-power operation, the low-power license can be suspended. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1934). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981).

There is no statutory requirement under Section 189a of the Atomic Energy Act of 1954 for the Commission to offer a hearing on an order lifting a license suspension. 42 U.S.C. § 2239(a). It is within the discretionary powers of the Commission to offer a formal hearing prior to lifting a license suspension. The Commission's decision depends upon the specific circumstances of the case and a decision to grant a hearing in a particular instance (such as the restart of Three Mile Island, Unit 1) does not establish a general agency requirement for hearings on the lifting of license suspensions. The Commission has generally denied such requests for hearings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1575 n.7 (1985). See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953 (1984), aff'd, San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), aff'd on reh'q en banc, 789 F.2d 26 (1986).

6.27 Technical Specifications

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

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an application's safety analysis report (or equivalent) be subject to a technical specification to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Trojan, supra, 9 NRC at 273; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62, 65-66 & n.8 (1986) (fire protection program need not be included in technical specification).

Technical specifications for a nuclear facility are part of the operating license for the facility and are legally binding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1257 (1984), rev'd in part on other

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grounds, CLI-85-2, 21 NRC 282 (1985), citing, Trojan, supra, 9 NRC at 272-73.

6.28 Termination of Facility Licenses

Termination of facility licenses is covered generally in 10 CFR § 50.82.

6.29 Procedures in Other Types of Hearings

6.29.1 Military or Foreign Affairs Functions

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

6.29.2 Export Licensing

Individual fuel exports are not major Federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980). (See also 3.4.6)

6.29.2.1 Jurisdiction of Commission re Export Licensing

The Commission is neither required nor precluded by the Atomic Energy Act or NEPA from considering impacts of exports on the global commons. Provided that NRC review does not include visiting sites within the recipient nation to gather information or otherwise intrude upon the sovereignty of a foreign nation, consideration of impacts upon the global commons is legally permissible. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 637-644 (1980). The Commission's legislative mandate neither compels nor precludes examination of health, safety and environmental effects occurring abroad that could affect U.S. interests. The decision whether to examine these effects is a question of policy to be decided as a matter of agency discretion. Id., 11 NRC at 654.

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

The Commission lacks legal authority under AEA, NEPA and NNPA to consider health, safety and environmental impacts upon citizens of recipient nations because of the traditional rule of domestic U.S. law that Federal statutes apply only to conduct within, or having effect within, the territory of the

U.S. unless the contrary is clearly indicated in the statute. Id., 11 NRC at 637. See also General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

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

6.29.2.2 Export License Criteria

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

The Commission may not issue a license for component exports unless it determines that the three specific criteria in § 109(b) of AEA are met and also determines that the export won't be inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

6.29.3 High-Level Waste Licensing

The procedures for the conduct of the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are specified in Subpart J of 10 CFR Part 2 (10 CFR §§ 2.1000 - 2.1023). 54 Fed. Reg. 14925 (April 14, 1989). These procedures take precedence over the rules of general applicability in 10 CFR Part 2, Subpart G, although 10 CFR § 2.1000 specifies many of the rules of general applicability which will continue to apply to high-level waste licensing proceedings.

Subpart J provides procedures for the development and operation of the Licensing Support System: an electronic information management system, which will contain the documentary material generated by the participants in the proceeding as well as the NRC orders and decisions related to the proceeding. See 2.11.7, Discovery in High-Level Waste Licensing Proceedings.

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LBP-82-81, 16 NRC 112(1982)	1.9

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LBP-90-15, 31 NRC 501(1990)	2.9.4.1.1
LBP-90-25, 32 NRC 21(1990)	2.9.4.1.1

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ALAB-675, 15 NRC 110(1982)	5.12.2.1
ALAB-706, 16 NRC 1754(1982)	2.9.5 5.12.2.1
ALAB-736, 18 NRC 165(1983)	3.15 3.5.3
ALAB-802, 21 NRC 490(1985)	2.9.2 3.1.2.7 3.11.1.1.1 5.10.3 6.15.1.2
ALAB-805, 21 NRC 596(1985)	5.12.2 5.12.2.1
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ALAB-831, 23 NRC 62(1986)	6.27
ALAB-841, 24 NRC 64(1986)	3.3.1 3.5.2.3 5.10.3 5.6.3 5.8.2 6.16.1.3
CLI-86-20, 24 NRC 518(1986)	2.10.2
CLI-86-22, 24 NRC 685(1986)	1.8 5.15.1
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LBP-81-24, 14 NRC 175(1981)	2.9.4.1.1 3.17
LBP-81-35, 14 NRC 682(1981)	2.11.4 2.9.3.3.3 2.9.5.3 2.9.9.2.2 3.7.3.2
LBP-81-42, 14 NRC 842(1981)	2.9.5.7
LBP-81-57, 14 NRC 1037(1981)	6.21.2
LBP-82-1A, 15 NRC 43(1982)	2.9.5.7 5.9.1

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LBP-82-102,	16 NRC 1597(1982)	2.11.2.2
LBP-82-11,	15 NRC 348(1982)	2.9.5.5 2.9.5.7
LBP-82-114,	16 NRC 1909(1982)	3.1.2.5 3.5
LBP-82-15,	15 NRC 555(1982)	2.9.5.5 2.9.5.7
LBP-82-53,	16 NRC 196(1982)	2.9.3.3.3 5.1B
LBP-82-67,	16 NRC 734(1982)	2.11.2.8
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LBP-82-79,	16 NRC 111(1982)	2.9.5.5 3.1.2.3
LBP-82-89,	16 NRC 1355(1982)	2.9.5.5
LBP-82-9,	15 NRC 339(1982)	3.1.2.3
LBP-82-90,	16 NRC 1359(1982)	2.9.5.5
LBP-82-98,	16 NRC 1459(1982)	2.9.5
LBP-83-18,	17 NRC 501(1983)	6.17.1
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LBP-83-46,	18 NRC 218(1983)	3.5.3
LBP-83-52,	18 NRC 256(1983)	3.1.2
LBP-83-77,	18 NRC 1365(1983)	5.4
LBP-83-79,	18 NRC 1400(1983)	2.11.1
LBP-83-80,	18 NRC 1404(1983)	2.9.3.3.3 2.9.5.5
LBP-84-28,	20 NRC 129(1984)	2.9.5.1
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 LBP-77-14, 5 NRC 494(1977) 6.15
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 ALAB-238, 8 AEC 656(1974) 2.9.3.3.3
 ALAL 269, 1 NRC 411(1975) 2.9.7
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 LBP-80-29, 12 NRC 581(1980) 5.14
 LBP-82-108, 16 NRC 1811(1982) 2.9.5
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(POINT BEACH NUCLEAR PLANT, UNIT 2).
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 ALAB-78, 5 AEC 319(1972) 3.1.1
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LBP-78-23, 8 NRC 71(1978)	2.6
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LBP-81-44, 14 NRC 850(1981)	3.1.2.4
LBP-81-45, 14 NRC 853(1981)	3.1.2.4
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LBP-81-46, 14 NRC 862(1981)	3.1.2.4
LBP-81-55, 14 NRC 1017(1981)	3.3.7
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	6.23.3.1
LBP-81-62, 14 NRC 1747(1981)	6.23
LBP-82-10, 15 NRC 341(1982)	2.11.5.2
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LBP-82-12, 15 NRC 354(1982)	3.1.1
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LBP-82-19A, 15 NRC 623(1982)	3.1.2.4
LBP-82-2, 15 NRC 48(1982)	3.1.2.7
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 LBP-82-3, 15 NRC 231(1982) 3.1.1
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 ALAB-110, 6 AEC 247(1973) 2.11.1
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CLI-73-12, 6 AEC 241(1973)

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CLI-75-1, 1 NRC 1(1975)

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(QUANICASSEEE PLANT, UNITS 1 AND 2),

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CLI-74-37, 8 AEC 627(1974)

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LBP-83-73, 18 NRC 1231(1983)

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ALAB-329, 3 NRC 607(1976) 2.9.7
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ALAB-358, 4 NRC 558(1976) 2.9.4.1.4
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ALAB-383, 5 NRC 609(1977) 5.6.1

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LBP-74-74, 8 AEC 669(1974) 2.11.5

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ALAB-588, 11 NRC 533(1980)

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ALAB-550, 14 NRC 43(1981) 4.2

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LBP-79-14, 9 NRC 557(1979) 3.5.1.2

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LBP-80-27, 12 NRC 435(1980) 6.15

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CLL-85-10, 21 NRC 1569(1985) 6.26

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ALAB-202, 7 AEC 986(1974) 3.3.2.4

ALAB-268, 1 NRC 383(1975) 3.4.3

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ALAB-432, 6 NRC 465(1977) 3.17

ALAB-673, 15 NRC 688(1982) 5.7.1

5.8.13

ALAB-717, 17 NRC 346(1983) 1.9

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3.11.1.1

3.11.1.1.1

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6.5.1

CLI-82-11, 15 NRC 1383(1982) 2.9.9.4

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LBP-77-35, 5 NRC 1290(1977) 3.1.2.2

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LBP-81-36, 14 NRC 691(1981) 3.1.2.3

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LBP-82-3, 15 NRC 61(1982) 3.17

LBP-82-46, 15 NRC 1531(1982) 3.14.2

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CLI-84-6, 19 NRC 975(1984) 2.9.4.1.1

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ALAB-271, 1 NRC 478(1975)	3.15 5.12.2.1
ALAB-293, 2 NRC 660(1975)	3.3.1 3.3.4 5.8.2
ALAB-295, 2 NRC 668(1975)	3.3.1 3.3.4 5.8.2
ALAB-338, 4 NRC 10(1976)	5.7 5.7.1
ALAB-349, 4 NRC 235(1976)	3.17 3.7.3.3 5.18 5.4
ALAB-350, 4 NRC 365(1976)	5.18
ALAB-356, 4 NRC 525(1976)	5.6.1 5.7
ALAB-366, 5 NRC 39(1977)	6.15.3.1
ALAB-390, 5 NRC 733(1977)	6.20.5
ALAB-422, 6 NRC 33(1977)	3.1.1 3.1.4.3 3.1.5 3.12.1 3.13.1 3.16 3.16.1 4.2 4.3 4.4 5.6.1 5.6.3 6.1.4 6.15 6.15.4.1 6.15.4.2 6.15.5 6.15.8.2
ALAB-423, 6 NRC 115(1977)	4.3 5.6.5
ALAB-471, 7 NRC 477(1978)	3.11.1.5 3.16 3.7.2

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	6.17.1
ALAB-495, 8 NRC 304(1978)	6.15.4
ALAB-499, 8 NRC 319(1978)	6.15.4
ALAB-513, 8 NRC 694(1978)	3.1.2.1
	5.6.1
ALAB-520, 9 NRC 48(1979)	3.11.1.1
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ALAB-548, 9 NRC 640(1979)	5.15.2
ALAB-557, 10 NRC 153(1979)	6.15.4
ALAB-623, 12 NRC 670(1980)	6.26
ALAB-731, 17 NRC 1073(1983)	5.12.2
ALAB-734, 18 NRC 11(1983)	5.12.2
ALAB-737, 18 NRC 168(1983)	1.8
	2.9.5
	2.9.5.5
	5.12.2
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ALAB-748, 18 NRC 1184(1983)	3.1.4.1
	3.1.4.2
ALAB-749, 18 NRC 1195(1983)	3.1.4.1
	3.1.4.2
ALAB-751, 18 NRC 1313(1983)	3.1.4.1
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ALAB-838, 23 NRC 585(1986)	2.9.7 5.12.2.1
ALAB-839, 24 NRC 45(1986)	2.6.1 5.12.2.1
ALAB-854, 24 NRC 783(1986)	2.9.9 5.8.11 6.14.3 6.16.1 6.16.1.3
ALAB-858, 25 NRC 17(1987)	5.12.2 5.12.2.1 5.8.2
ALAB-860, 25 NRC 63(1987)	5.12.2.1 5.8.2 6.20.4
ALAB-862, 25 NRC 144(1987)	2.10.2 3.1.2.6 5.10.4
ALAB-864, 25 NRC 417(1987)	5.12.2.1 5.8.2
ALAB-865, 25 NRC 430(1987)	2.9.5.13 5.7.1
ALAB-875, 26 NRC 251(1987)	5.15.1.1 6.16.2 6.20.4
ALAB-879, 26 NRC 410(1987)	3.14.2 4.4.4
ALAB-883, 27 NRC 43(1988)	2.9.5.5 4.4.2
ALAB-884, 27 NRC 56(1988)	5.12.2.1
ALAB-886, 27 NRC 74(1988)	4.4.1.1
ALAB-889, 27 NRC 265(1988)	5.12.2.1 5.12.2.1.1 5.8.2
ALAB-891, 27 NRC 341(1988)	3.11 5.6.1
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ALAB-895, 28 NRC 7(1988)	6.20.4 6.8
ALAB-896, 28 NRC 27(1988)	5.12.2.1 5.8.1
ALAB-899, 28 NRC 93(1988)	2.9.5.1
ALAB-904, 28 NRC 509(1988)	6.16.1
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ALAB-915, 29 NRC 427(1989)	3.17 4.4.1 6.15.7
ALAB-916, 29 NRC 434(1989)	5.12.2.1
ALAB-918, 29 NRC 473(1989)	2.9.5.13 2.9.5.4 2.9.5.5 3.1.2.1 4.4.1 4.4.2 6.16.1
ALAB-920, 30 NRC 121(1989)	5.4 6.8
ALAB-924, 30 NRC 331(1989)	1.8 5.5.1 6.18
ALAB-927, 31 NRC 137(1990)	4.4.1.1
ALAB-930, 31 NRC 343(1990)	5.5.1 5.6.1
ALAB-932, 31 NRC 371(1990)	3.11.3 3.12 3.5.2 3.5.2.3 5.5.1 5.6.3
ALAB-933, 31 NRC 491(1990)	5.4
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	4.4.1.1
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ALAB-938, 32 PRC 75(1990)	2.9.5.5
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	4.4.2
ALAB-937, 32 NRC 135(1990)	1.8
	3.1.2.5
	3.10
	3.11.4
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	5.5
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ALAB-940, 32 NRC 225(1990)	2.2
	2.9.5.1
	3.17
	4.4.2
ALAB-941, 32 NRC 337(1990)	1.8
	3.1.2.5
	3.10
	3.11.4
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ALAB-942, 32 NRC 395(1990)	2.9.5.1
	2.9.5.10
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ALAB-943, 33 NRC 11(1991)	5.4
CLI-76-17, 4 NRC 451(1976)	6.16.1
CLI-77-25, 6 NRC 535(1977)	2.10.2
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CLI-77-8, 5 NRC 503(1977)	3.1.2.1.1
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CLI-78-14, 7 NRC 952(1978)	5.19.1
	6.15.4
	6.15.8.1
CLI-78-15, 8 NRC 1(1978)	4.7
CLI-78-17, 8 NRC 179(1978)	6.15.8.4
CLI-83-23, 18 NRC 311(1983)	2.9.5.5
CLI-88-1C, 28 NRC 573(1988)	6.20.4
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CLI-88-7, 28 NRC 271(1988)	6.8
CLI-88-8, 28 NRC 419(1988)	2.9.5.5
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CLI-89-20, 30 NRC 231(1989)	6.8
CLI-89-3, 29 NRC 234(1989)	2.9.5.1
	2.9.5.4
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	6.20.4
	6.8
CLI-89-4, 29 NRC 243(1989)	5.8.2
CLI-89-7, 29 NRC 395(1989)	6.8
CLI-89-8, 29 NRC 399(1989)	5.7.1
	6.15.1.1
	6.20.4
CLI-90-10, 32 NRC 218(1990)	4.4.2
CLI-90-3, 31 NRC 219(1990)	3.1.2
	5.15
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CLI-90-6, 31 NRC 483(1990)	4.4.1.1
	4.4.2
LBP-74-36, 7 AEC 877(1974)	1.9
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ALAB-303	NORTHERN INDIANA PUBLIC SERVICE CO. (BAILLY GENERATING STATION, NUCLEAR-1), 2 NRC 858 (1975)	2.11.6 3.16 5.6.3 5.8.3.2
ALAB-304	CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT NUCLEAR STATION, UNITS 1, 2 AND 3), 3 NRC 1 (1976)	2.9.4.1.4 5.2

ALAB-304	CONSOLIDATED EDISON CO. OF N.Y.	6.18.1
ALAB-305	CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 3 NRC 8 (1976)	2.9.5.1 4.3
ALAB-307	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 17 (1976)	5.7.1
ALAB-310	DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 1), 3 NRC 33 (1976)	5.4
ALAB-311	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 85 (1976)	2.11.6 5.2 5.4
ALAB-313	PUERTO RICO WATER RESOURCES AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1), 3 NRC 94 (1976)	2.7 6.5.2
ALAB-314	TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1), 3 NRC 98 (1976)	5.12.2.1
ALAB-315	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 3 NRC 101 (1976)	6.24.5
ALAB-316	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 3 NRC 167 (1976)	2.5.1 3.1.2.1 3.4
ALAB-317	GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 3 NRC 175 (1976)	3.7.3.4 5.2

ALAB-318 LONG ISLAND LIGHTING CO.
(JAMESPORT NUCLEAR POWER STATION, UNITS 1 AND 2), 3 NRC 186 (1976) 5.12.2.1

ALAB-319 CONSOLIDATED EDISON CO. OF N.Y.
(INDIAN POINT STATION, UNITS 1, 2 AND 3), 3 NRC 128 (1976) 3.1.2.3
3.4.2
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ALAB-320 KANSAS GAS AND ELECTRIC CO.
(WOLF CREEK NUCLEAR GENERATING STATION), 3 NRC 293 (1976) 3.1.2.1
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6.19
6.19.1

ALAB-321 PUBLIC SERVICE CO. OF INDIANA
(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 3 NRC 328 (1976) 2.9.4
2.9.4.1.2

ALAB-322 TOLEDO EDISON CO.
(DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1), 3 NRC 331 (1976) 6.3

ALAB-323 VIRGINIA ELECTRIC AND POWER CO.
(NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 3 NRC 347 (1976) 1.5.2

ALAB-324 PROJECT MANAGEMENT CORP.
(CLINCH RIVER BREEDER REACTOR PLANT), 3 NRC 406 (1976) 5.12.2.1

ALAB-325 KANSAS GAS AND ELECTRIC CO.
(WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 408 (1976) 2.11.2.4
2.11.2.5
4.3
5.12.2.1
6.23.3.1

ALAB-326 ALLIED-GENERAL NUCLEAR SERVICES
(BARWELL FUEL RECEIVING AND STORAGE STATION), 3 NRC 420 (1976) 2.9.4.1.2

ALAB-329 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 3 NRC 607 (1976)	2.9.7 2.9.7.1 5.8.1
ALAB-330 PROJECT MANAGEMENT CORP. (CLINCH RIVER BREEDER REACTOR PLANT), 3 NRC 613 (1976)	5.12.2.1
ALAB-331 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 771 (1976)	5.4 5.8.10 5.6.9
ALAB-332 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION), 3 NRC 785 (1976)	6.4.1.1 6.4.2 6.4.2.1 6.4.2.2 6.4.2.3
ALAB-333 PORTLAND GENERAL ELECTRIC CO. (PEBBLE SPRINGS NUCLEAR PLANT, UNITS 1 AND 2), 3 NRC 804 (1976)	2.9.4 2.9.4.1.1
ALAB-334 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 3 NRC 809 (1976)	2.7 3.11.1.2 6.5.2
ALAB-335 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 3 NRC 830 (1976)	3.11.4 4.4 5.10.1 5.5.1 6.19.2.1
ALAB-336 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 4 NRC 3 (1976)	4.3

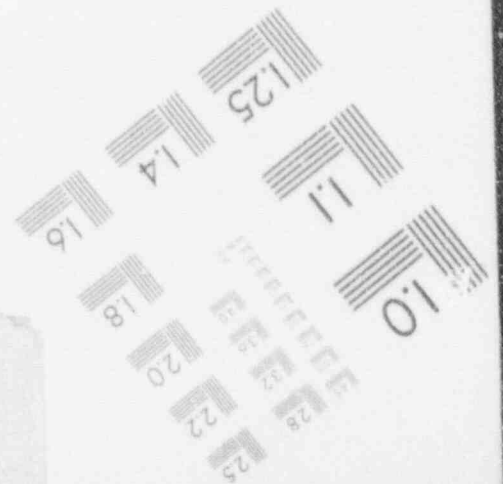
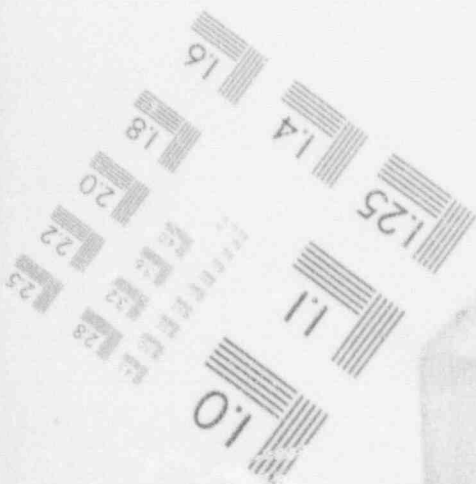
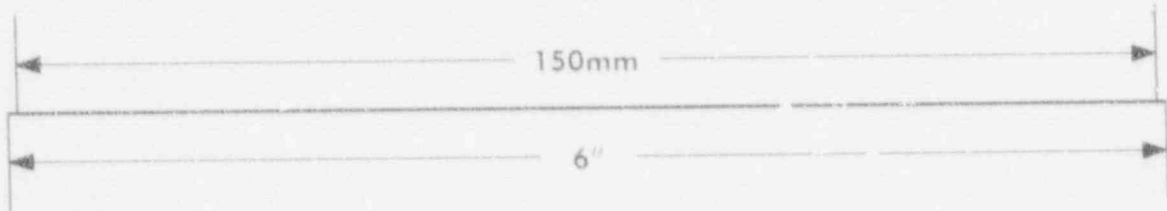
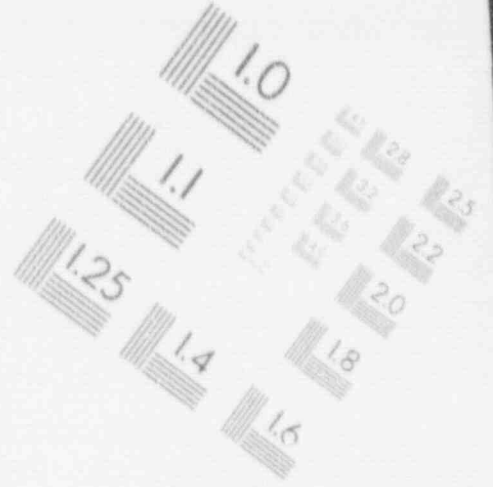
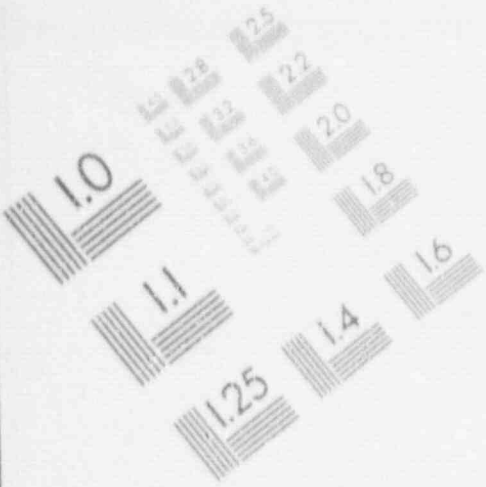
ALAB-338 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 4 NRC 10 (1976)	5.7 5.7.1
ALAB-339 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 4 NRC 20 (1976)	2.9.3.3.3 2.9.7.1 5.12.2 5.5.3 5.8.4.1
ALAB-340 ILLINOIS POWER CO. (CLINTON POWER STATION, UNITS 1 AND 2), 4 NRC 27 (1976)	2.11.1 2.11.2.2 2.11.2.3 3.11.1.3 3.13.1 5.10.3.1
ALAB-341 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1 AND 2), 4 NRC 95 (1976)	2.9.3.3.2 2.9.3.3.3
ALAB-342 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 98 (1976)	2.9.3.3.3 2.9.3.3.4 2.9.4 2.9.4.1.1 2.9.7.1 5.5.3
ALAB-343 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING STATION, UNITS 1 AND 2), 4 NRC 169 (1976)	5.15
ALAB-344 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 4 NRC 207 (1976)	5.8.2
ALAB-345 USERDA (CLINCH RIVER BREEDER REACTOR PLANT), 4 NRC 212 (1977)	5.1

ALAB-345	USERDA	5.8.1
ALAB-347	UNION ELECTRIC CO. (CALLAWAY PLANT, UNITS 1 AND 2), 4 NRC 216 (1976)	3.7.3.4
ALAB-348	UNION ELECTRIC CO. (CALLAWAY PLANT, UNITS 1 AND 2), 4 NRC 225 (1976)	3.7.3.3 5.6.4
ALAB-349	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 4 NRC 235 (1976)	3.17 3.7.3.3 5.18 5.4
ALAB-350	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 4 NRC 365 (1976)	5.18
ALAB-352	UNION ELECTRIC CO. (CALLAWAY PLANT, UNITS 1 AND 2), 4 NRC 371 (1976)	5.20.4
ALAB-353	LONG ISLAND LIGHTING CO. (JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 381 (1976)	5.12.2.1
AL 18-354	USERDA (CLYNNCH RIVER BREEDER REACTOR PLANT), 4 NRC 383 (1976)	2.10.2 2.9.3.3.3 2.9.5.1 2.9.7.1 2.9.9.2.1 5.2
ALAB-355	DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 397 (1976)	3.11.1.1.1 5.10.3 5.6.3 6.16.3

ALAB-356	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 4 NRC 525 (1976)	5.6.1 5.7
ALAB-357	CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 4 NRC 542 (1976)	6.1.5
ALAB-358	GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 4 NRC 558 (1976)	2.9.4.1.4 3.6
ALAB-359	DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 619 (1976)	4.4.1 4.4.2 5.10.1
ALAB-366	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 5 NRC 39 (1977)	6.15.3.1
ALAB-367	TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 5 NRC 92 (1977)	3.11 3.11.1.1.1 3.13.1 5.10.1 5.10.3 5.6.3
ALAB-369	CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 5 NRC 129 (1977)	5.2
ALAB-370	PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 131 (1977)	4.5 5.8.3.2 5.8.4
ALAB-371	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 409 (1977)	3.3.1

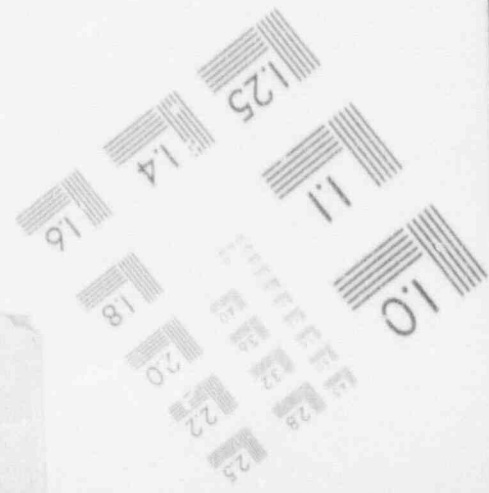
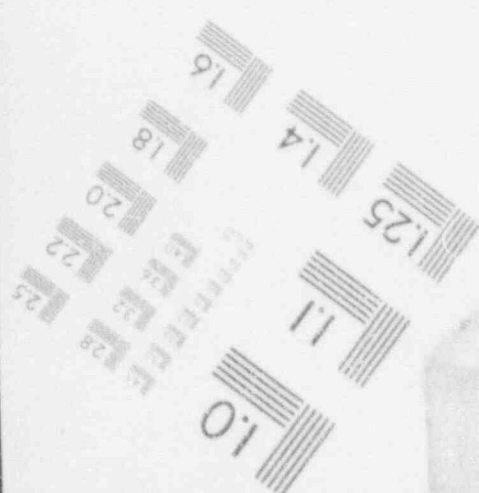
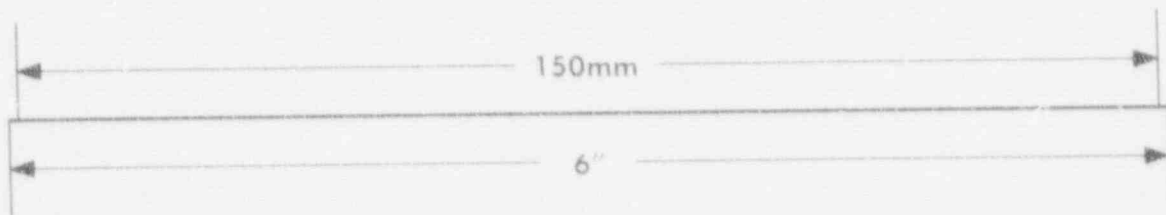
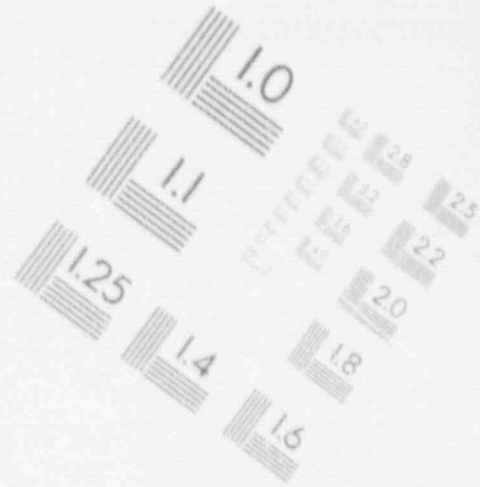
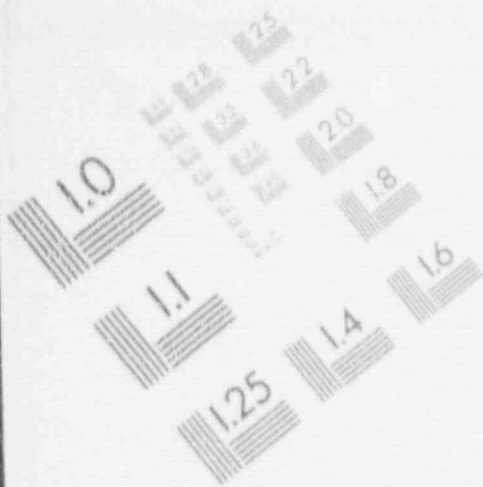
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IMAGE EVALUATION TEST TARGET (MT-3)



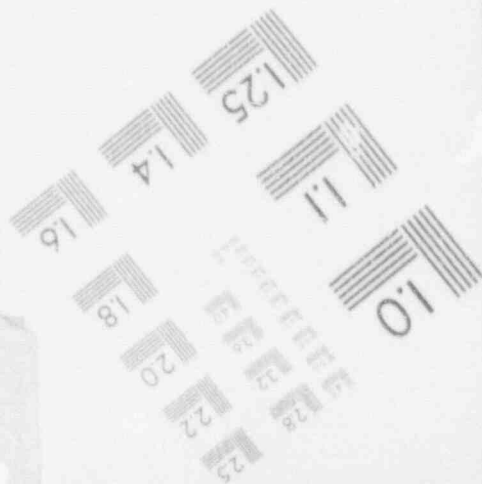
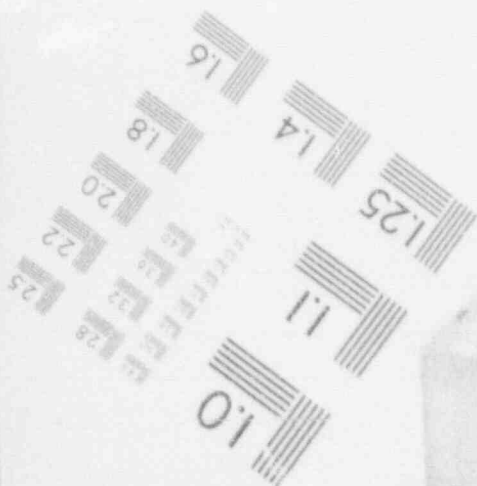
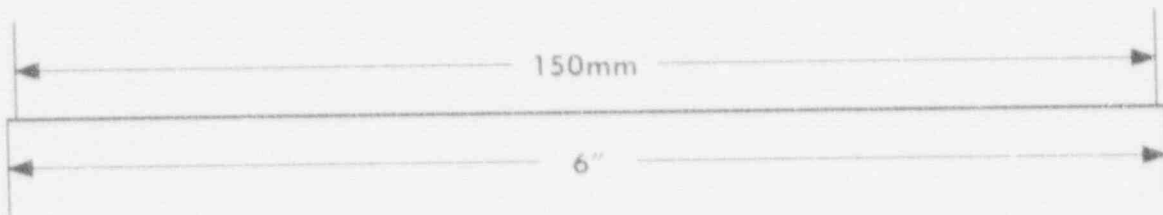
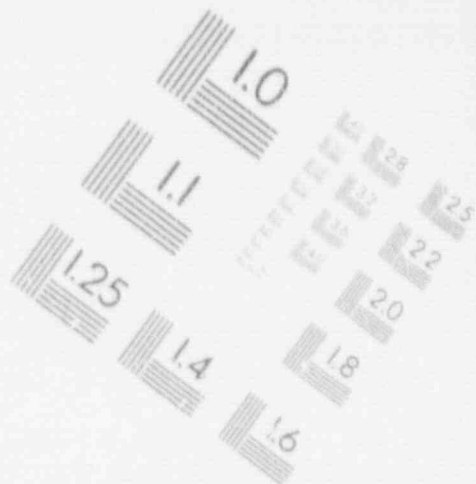
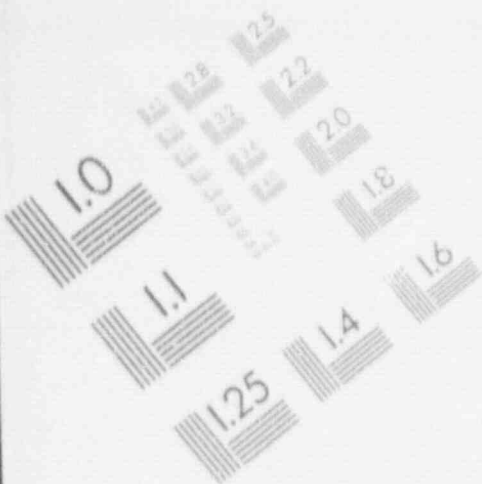
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IMAGE EVALUATION TEST TARGET (MT-3)



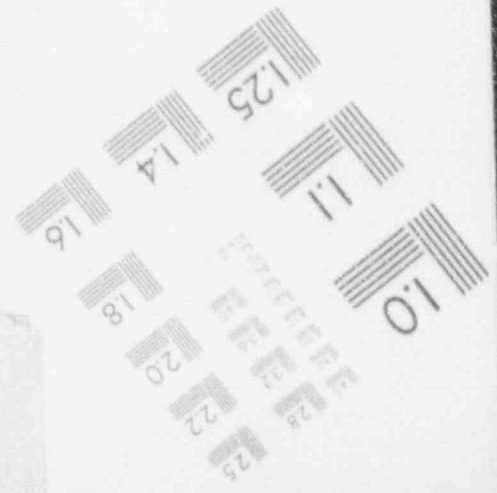
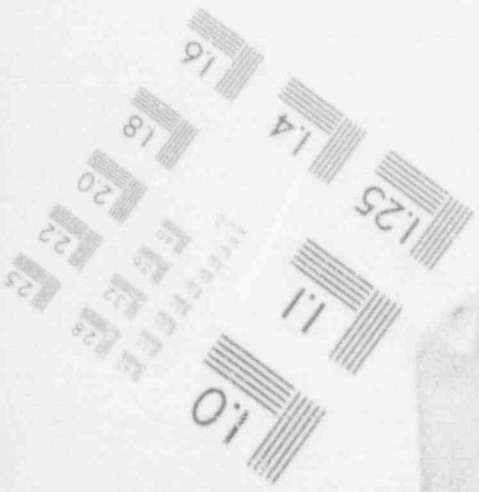
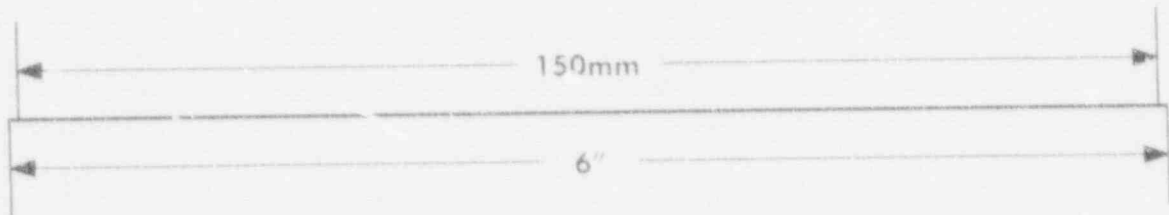
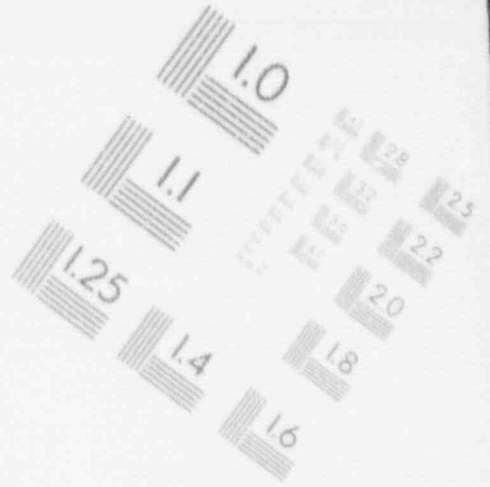
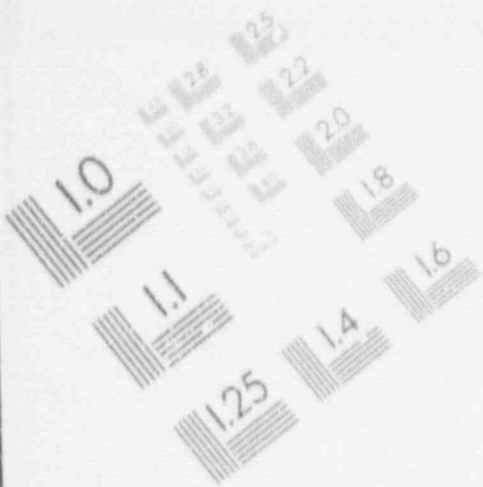
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IMAGE EVALUATION TEST TARGET (MT-3)



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IMAGE EVALUATION TEST TARGET (MT-3)



ALAB-371 PUBLIC SERVICE CO. OF INDIANA	5.12.2.1
ALAB-374 PUBLIC SERVICE CO. OF INDIANA (HARRLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 417 (1977)	4.6 5.12.2.1.2
ALAB-376 DETROIT EDISON CO. (GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 5 NRC 426 (1977)	2.9.4.1.1 2.9.7 3.1.2.4 5.4 5.8.1
ALAB-377 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 5 NRC 430 (1977)	2.6 3.3.3
ALAB-378 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 5 NRC 557 (1977)	3.17 6.4.2.2
ALAB-379 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 565 (1977)	3.12 3.12.2
ALAB-380 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 5 NRC 572 (1977)	3.1.2.3 6.15.8.1 6.19.2 6.9.1
ALAB-381 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 5 NRC 582 (1977)	3.1.2.1.1 3.1.2.5 4.4 6.15.1 6.3.1

ALAB-382 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 603 (1977) 2.9.10.2
3.12.3

ALAB-383 GULF STATES UTILITIES CO.
(RIVER BEND STATION, UNITS 1 AND 2), 5 NRC 609 (1977) 5.6.1

ALAB-384 METROPOLITAN EDISON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 5 NRC 612 (1977) 2.9.3.3.3

ALAB-385 TOLEDO EDISON CO.
(DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 5 NRC 621 (1977) 5.6.3
5.7
5.7.1
6.3

ALAB-388 PUBLIC SERVICE CO. OF OKLAHOMA
(BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 640 (1977) 5.10.3

ALAB-389 PHILADELPHIA ELECTRIC CO.
(PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 5 NRC 727 (1977) 3.1.2.1.1
5.19.1

ALAB-390 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 5 NRC 733 (1977) 6.20.5

ALAB-392 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 5 NRC 759 (1977) 6.15.6

ALAB-393 PUBLIC SERVICE CO. OF INDIANA
(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 767 (1977) 5.12.2.1

ALAB-394 PUBLIC SERVICE ELECTRIC AND GAS CO.
(HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 5 NRC 769 (1977) 5.10.3

ALAB-395 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2). 5 NRC 772 (1977)

5.15.2
5.18
5.19.3
5.6.2
5.7
5.7.1
6.15.3.2

ALAB-399 CONSOLIDATED EDISON CO. OF N.Y.
(INDIAN POINT STATION, UNIT 2). 5 NRC 1156 (1977)

6.15.8.1

ALAB-400 PACIFIC GAS AND ELECTRIC CO.
(STANISLAUS NUCLEAR PROJECT, UNIT 1). 5 NRC 1175 (1977)

2.9.3
3.1.2.2
3.5.2.1
5.8.5

ALAB-404 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR PLANT, UNIT 2). 5 NRC 1185 (1977)

5.7.1

ALAB-405 PUBLIC SERVICE CO. OF INDIANA
(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2). 5 NRC 1190 (1977)

3.15
5.12.2.1

ALAB-408 DUQUESNE LIGHT CO.
(BEAVER VALLEY POWER STATION, UNIT 1). 5 NRC 1383 (1977)

3.1.2.5
4.6
5.16.1

ALAB-409 TENNESSEE VALLEY AUTHORITY
(HARTSVILLE NUCLEAR PLANT UNITS 1A, 2A, 1B, 2B). 5 NRC 1391 (1977)

5.13.4

ALAB-410 PACIFIC GAS AND ELECTRIC CO.
(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2). 5 NRC 1398 (1977)

2.11.2.4
3.12.4
6.20.4

ALAB-413	TENNESSEE VALLEY AUTHORITY (WATTS BAR NUCLEAR PLANT, UNITS 1 AND 2), 5 NRC 1418 (1977)	2.9.4.1.1 2.9.4.1.2 2.9.4.1.4 2.9.4.2
ALAB-414	CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 5 NRC 1425 (1977)	5.15 5.7
ALAB-415	FLORIDA POWER AND LIGHT CO. 5 NRC 1435 (1977)	5.7.1
ALAB-417	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 1442 (1977)	5.4 6.14.3 6.4.1.1
ALAB-418	TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A, 2A, 1B, 2B), 6 NRC 1 (1977)	4.5 5.12.1
ALAB-419	NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 6 NRC 3 (1977)	3.15 3.4 5.12.2.1.1
ALAB-420	FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 6 NRC 8 (1977)	2.9.3.3.3 2.9.3.3.4 5.5.3 6.3
ALAB-421	VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 6 NRC 25 (1977)	5.14

ALAB-422	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 6 NRC 33 (1977)	3.1.1 3.1.4.3 3.1.5 3.12.1 3.13.1 3.16 3.16.1 4.2 4.3 4.4 5.6.1 5.6.3 6.1.4 6.15 6.15.4.1 6.15.4.2 6.15.5 6.15.8.2
ALAB-423	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 6 NRC 115 (1977)	4.3 5.6.5
ALAB-424	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 6 NRC 122 (1977)	2.9.4.1.1 5.10.2 5.10.3 5.13.4 5.4
ALAB-428	FLORIDA POWER AND LIGHT CO. (S1. LUCIE PLANT, UNIT 1; TURKEY POINT PLANT, UNITS 3 AND 4), 6 NRC 221 (1977)	6.3 6.3.1
ALAB-430	TOLEDO EDISON CO. AND CLEVELAND ELECTRIC ILLUMINATING CO. (DAVIS-BESSE STATION, UNITS 1, 2, 3; PERRY PLANT, UNITS 1 AND 2), 6 NRC 457 (1977)	4.4 5.10.3
ALAB-431	DUKE POWER CO. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 460 (1977)	2.9.3.3.3

ALAB-432 SOUTHERN CALIFORNIA EDISON CO. AND SAN DIEGO GAS AND ELECTRIC CO.
(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 6 NRC 465 (1977)

5.6.1

ALAB-433 DUKE POWER CO.
(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 469 (1977)

5.12.2
5.2

ALAB-434 POWER AUTHORITY OF THE STATE OF NEW YORK
(GREENE COUNTY NUCLEAR PLANT), 6 NRC 471 (1977)

2.9.7

ALAB-435 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR PLANT, UNIT 2), 6 NRC 541 (1977)

5.10.1
6.15.4
6.15.4.1
6.23.3.1

ALAB-437 PUBLIC SERVICE CO. OF INDIANA
(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 6 NRC 630 (1977)

5.7.1

ALAB-438 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 6 NRC 638 (1977)

2.11.6
5.12.2.1

ALAB-439 POWER AUTHORITY OF THE STATE OF NEW YORK
(GREENE COUNTY NUCLEAR PLANT), 6 NRC 640 (1977)

5.12.2.1

ALAB-440 DUKE POWER CO.
(CHEROKEE NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 642 (1977)

2.9.2
2.9.3.3.3

ALAB-441 PITTSBURGH-DES MOINES STEEL CO.
6 NRC 725 (1977)

5.12.2
5.8.12

ALAB-443 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 6 NRC 741 (1977)

3.1.2.1

ALAB-443

CLEVELAND ELECTRIC ILLUMINATING CO.

3 1.2.6
 3 14.2
 3 5.2.3
 3 5.3
 5 6.4

ALAB-444

GULF STATES UTILITIES CO.
 (RIVER BEND STATION, UNITS 1 AND 2), 6 NRC 760 (1977)

2 10.2
 2 9.3.3.3
 2 9.5.7
 3 1.2.5
 3 12.1.2
 3 4.2
 3 7.3.4
 6 16.2
 6 20.3
 6 9.2.1

ALAB-445

TENNESSEE VALLEY AUTHORITY
 (YELLOW CREEK NUCLEAR PLANT, UNITS 1 AND 2), 6 NRC 865 (1977)

1 7.1
 2 5.3

ALAB-446

PUGET SOUND POWER AND LIGHT CO.
 (SAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 6 NRC 870 (1977)

6 19.1

ALAB-447

EXXON NUCLEAR CO.
 (NUCLEAR FUEL RECOVERY AND RECYCLING CENTER), 6 NRC 873 (1977)

2 10.2

ALAB-451

PORTLAND GENERAL ELECTRIC CO.
 (TROIJAN NUCLEAR PLANT), 6 NRC 889 (1977)

3 1.2.5
 6 1.6
 6 16.1

ALAB-453

CONSOLIDATED EDISON CO. OF N.Y.
 (INDIAN POINT STATION, UNIT 2), 7 NRC 31 (1978)

6 15.8.1

ALAB-454

METROPOLITAN EDISON CO.
 (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 7 NRC 39 (1978)

2 10.1.2
 2 10.2

ALAB-454	METROPOLITAN EDISON CO.	5.2
ALAB-455	NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 7 NRC 41 (1978)	3.16 5.6.1 6.1 6.1.3.1 6.15.1 6.15.9 6.20.2
ALAB-456	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 7 NRC 63 (1978)	2.9.5.6 6.20.4
ALAB-457	DUKE POWER CO. (CHEROKEE NUCLEAR STATION, UNITS 1, 2 AND 3), 7 NRC 70 (1978)	6.14.1
ALAB-458	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 7 NRC 155 (1978)	4.3 5.15.3 5.7.1 5.7.2 6.15.4.2
ALAB-459	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 7 NRC 179 (1978)	1.1 3.11.1.4 3.3.2.4 3.3.4 5.13 5.6.1 6.15.3
ALAB-460	PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 7 NRC 204 (1978)	4.3
ALAB-461	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 7 NRC 313 (1978)	3.1.2.5

ALAB-461	PUBLIC SERVICE CO. OF INDIANA	3.1.2.7 3.13.1 5.10.1 5.4 5.5 5.8.7 6.16.1.3
ALAB-462	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 7 NRC 320 (1978)	3.14.3 3.7.3.2 3.7.3.4 3.7.3.5.1 4.4.1 4.4.2
ALAB-463	TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 7 NRC 341 (1978)	3.1.2.7 3.11.4 3.13.1 3.14.3 3.16 3.7.2 4.3 4.4 5.5.1 6.7.1 6.7.2
ALAB-464	NORTHERN STATES POWER CO. (TYRONE ENERGY PARK, UNIT 1), 7 NRC 372 (1978)	3.1.2.6 4.4.1.1
ALAB-465	DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 457 (1978)	5.6.1 5.8.14 6.24.3
ALAB-467	TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 7 NRC 459 (1978)	4.5 5.1 5.4 5.5

ALAB-467	TENNESSEE VALLEY AUTHORITY	5.6.1 5.8.15
ALAB-468	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 7 NRC 464 (1978)	3.3.4 5.8.2
ALAB-469	DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 470 (1978)	5.9 6.14
ALAB-470	DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 473 (1978)	2.9.4.1.1 2.9.4.1.2 2.9.4.1.4 2.9.4.2 3.1.2.5 6.15.1
ALAB-471	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 7 NRC 477 (1978)	3.11.1.5 3.15 3.7.2 3.7.3.6 6.15.4 6.15.4.1 6.15.4.2 6.15.6.1.2
ALAB-472	DETROIT EDISON CO. (GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 7 NRC 570 (1978)	2.9.7 5.4 5.8.1
ALAB-473	NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 7 NRC 737 (1978)	2.9.4.1.1 2.9.4.1.4 2.9.4.2 2.9.5.3 2.9.7 5.8.1

ALAB-474	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 7 NRC 746 (1978)	2.9.2
ALAB-476	DETROIT EDISON CO. (GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 7 NRC 759 (1978)	2.9.3.3.3
ALAB-477	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 7 NRC 766 (1978)	4.5
ALAB-479	BOSTON EDISON CO. (PILGRIM NUCLEAR STATION, UNIT 2), 7 NRC 774 (1978)	3.7 6.16.1
ALAB-481	LONG ISLAND LIGHTING CO. (JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), 7 NRC 807 (1978)	5.7.1
ALAB-482	DUKE POWER CO. (CHEROKEE NUCLEAR STATION, UNITS 1, 2 AND 3), 7 NRC 979 (1978)	5.1 5.5 6.18
ALAB-485	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS 3 AND 5), 7 NRC 986 (1978)	5.6.3 6.18
ALAB-486	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 8 NRC 9 (1978)	4.4.2 5.5.1
ALAB-488	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 8 NRC 187 (1978)	2.6 2.9.9.5 2.9.9.6 3.6 6.17.1

ALAB-489	OFFSHORE POWER SYSTEMS (FLOATING NUCLEAR POWER PLANTS), 8 NRC 194 (1978)	1.8 3.1.2.5 3.3.1 6.15.7 6.16.1 6.16.1.1 6.18 6.20.4
ALAB-490	CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 8 NRC 234 (1978)	3.7.3.2 6.15.5
ALAB-491	VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 8 NRC 245 (1978)	5.5.1 5.6.1 6.9.2.2
ALAB-492	NORTHERN STATES POWER CO. (TYRONE ENERGY PARK, UNIT 1), 8 NRC 251 (1978)	2.9.5.13 5.8.1
ALAB-493	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 8 NRC 253 (1978)	2.7 3.1.2.6 3.6 4.5 5.12.1 5.15.1 5.18 5.19.4 5.7.1 6.18 6.5.1 6.5.2
ALAB-494	NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 8 NRC 299 (1978)	3.1.4.1 3.1.4.2

ALAB-495 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), B NRC 304 (1978)

6.15.4

ALAB-496 PORTLAND GENERAL ELECTRIC CO.
(TROJAN NUCLEAR PLANT), B NRC 308 (1978)

2.9.9.2.2
5.8.4.1

ALAB-497 DAIRYLAND POWER COOPERATIVE
(LA CROSSE BOILING WATER REACTOR), B NRC 312 (1978)

3.1.4.1

ALAB-499 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), B NRC 319 (1978)

6.15.4

ALAB-500 OFFSHORE POWER SYSTEMS
(FLOATING NUCLEAR POWER PLANTS), B NRC 323 (1978)

5.14

ALAB-501 WASHINGTON PUBLIC POWER SUPPLY SYSTEM
(WPPSS NUCLEAR PROJECTS 3 AND 5), B NRC 391 (1978)

5.15
5.6.1

ALAB-502 ROCHESTER GAS AND ELECTRIC CORP.
(STERLING POWER PROJECT, UNIT 1), B NRC 383 (1978)

3.7.3.2
5.1
6.15.4.1
6.15.4.2

ALAB-504 PACIFIC GAS AND ELECTRIC CO.
(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), B NRC 406 (1978)

3.16
5.12.2
5.12.2.1

ALAB-505 PUBLIC SERVICE CO. OF OKLAHOMA
(BLACK FOX STATION, UNITS 1 AND 2), B NRC 527 (1978)

5.7.1
6.4.1

ALAB-506	TENNESSEE VALLEY AUTHORITY (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2), 8 NRC 533 (1978)	6.15
ALAB-507	ROCHESTER GAS AND ELECTRIC CORP. (STERLING POWER PROJECT, UNIT 1), 8 NRC 551 (1978)	6.13
ALAB-513	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 8 NRC 694 (1978)	3.1.2.1 5.6.1
ALAB-514	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 8 NRC 697 (1978)	5.12.2.1
ALAB-515	TENNESSEE VALLEY AUTHORITY (YELLOW CREEK NUCLEAR PLANT, UNITS 1 AND 2), 8 NRC 702 (1978)	6.15.8.5
ALAB-516	DELMARVA POWER AND LIGHT CO. (SUMMIT POWER STATION, UNITS 1 AND 2), 9 NRC 5 (1979)	1.3 6.2
ALAB-518	PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 9 NRC 14 (1979)	4.3 6.15.1.2 6.16.4
ALAB-519	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 9 NRC 42 (1979)	2.11.5.1
ALAB-520	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 9 NRC 48 (1979)	3.11.1.1 3.11.1.6
ALAB-522	VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 9 NRC 54 (1979)	2.9.4.1.1 2.9.7.1

ALAB-523 PUGET SOUND POWER AND LIGHT CO.
(SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 9 NRC 58 (1979)

2.9.3.3.3
2.9.3.3.4

ALAB-524 PORTLAND GENERAL ELECTRIC CO.
(TROJAN NUCLEAR PLANT), 9 NRC 65 (1979)

5.7.1

ALAB-525 METROPOLITAN EDISON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 9 NRC 111 (1979)

3.14.1

ALAB-526 CAROLINA POWER AND LIGHT CO.
(SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 9 NRC 122 (1979)

2.9.12
2.9.3.3.2
5.19.1

ALAB-528 DUKE POWER CO.
(DODD NUCLEAR STATION AND MCQUIRE NUCLEAR STATION), 9 NRC 146 (1979)

2.9.3.3.3
2.9.4.1.2
2.9.4.2
2.9.6

ALAB-530 PUBLIC SERVICE CO. OF INDIANA
(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 9 NRC 261 (1979)

4.4

ALAB-531 PORTLAND GENERAL ELECTRIC CO.
(TROJAN NUCLEAR PLANT), 9 NRC 263 (1979)

6.15
6.15.4
6.15.9
6.27

ALAB-532 PHILADELPHIA ELECTRIC CO.
(PEACH BOTTOM ATOMIC POWER STATION, UNIT 3), 9 NRC 279 (1979)

4.1
6.15.8.5

ALAB-534 PORTLAND GENERAL ELECTRIC CO.
(TROJAN NUCLEAR PLANT), 9 NRC 287 (1979)

2.5.1
3.4

ALAB-534 PORTLAND GENERAL ELECTRIC CO.

6.1.3.1
6.1.4.4

ALAB-535 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 9 NRC 377 (1979)

2.9.7
3.4.4

ALAB-537 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 9 NRC 422 (1979)

3.4.4

ALAB-540 PHILADELPHIA ELECTRIC CO.
(PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 9 NRC 428 (1979)

5.5.4

ALAB-541 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 9 NRC 436 (1979)

5.12.2.1
5.8.2

ALAB-542 IN RE ATLANTIC RESEARCH CORP.
9 NRC 611 (1979)

6.10.1.1

ALAB-544 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 9 NRC 630 (1979)

5.12.1

ALAB-546 PHILADELPHIA ELECTRIC CO.
(PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 9 NRC 636 (1979)

5.5.4

ALAB-547 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 9 NRC 638 (1979)

5.4

ALAB-548 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 9 NRC 640 (1979)

5.15.2

ALAB-549 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC 644 (1979)	2.9.3.3.3 2.9.4.1.2 2.9.5.1
ALAB-550 PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 9 NRC 683 (1979)	2.11.2 2.11.5 2.11.6
ALAB-551 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 9 NRC 704 (1979)	4.6 5.19.1 5.5.1 5.6.1 6.5.4.1
ALAB-552 PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT UNITS 1 AND 2), 10 NRC 1 (1979)	2.9.3.3.3
ALAB-553 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 10 NRC 12 (1979)	3.3.2.4
ALAB-554 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 10 NRC 15 (1979)	3.5
ALAB-555 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 10 NRC 23 (1979)	3.12.4 3.16
ALAB-556 PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 NRC 30 (1979)	3.1.4.1 3.1.4.2 5.2
ALAB-557 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 10 NRC 153 (1979)	6.15.4

ALAB-559	PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 NRC 162 (1979)	2.9.3.3.3
ALAB-560	TOLEDO Edison CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 10 NRC 265 (1979)	6.3
ALAB-562	PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 10 NRC 437 (1979)	6.15.1.2 6.15.8.1
ALAB-565	HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 10 NRC 521 (1979)	2.9.5 2.9.5.3 3.4.1 6.14
ALAB-566	PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 10 NRC 527 (1979)	3.3.5.2 3.7.1 6.9.1
ALAB-567	IN THE MATTER OF RADIATION TECHNOLOGY, INC. 10 NRC 533 (1979)	5.2 6.10 6.10.1
ALAB-568	VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 10 NRC 554 (1979)	5.10.2
ALAB-569	CAROLINA POWER AND LIGHT CO. (H. B. ROBINSON, UNIT 2), 10 NRC 557 (1979)	6.15.6.1 6.15.8.5
ALAB-571	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 2), 10 NRC 687 (1979)	4.6 5.6.1 5.8.1

ALAB-572 PUGET SOUND POWER AND LIGHT CO.
(SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 NRC 693 (1979)

3.15

ALAB-573 PUBLIC SERVICE CO. OF OKLAHOMA
(BLACK FOX STATION, UNITS 1 AND 2), 10 NRC 775 (1979)

3.5
5.1
5.10.3
6.15.3

ALAB-574 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 7 (1980)

1.7.1
2.5.2
2.5.3
2.9.3.1
2.9.3.3.1
2.9.5
3.1.2.4

ALAB-575 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 11 NRC 14 (1980)

3.17

ALAB-577 CAROLINA POWER AND LIGHT CO.
(SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 11 NRC 18 (1980)

3.1.2.1.1
3.16
3.3.1
3.3.1.1
3.4
3.7.3.7
4.3
5.19.1
5.2
5.5
5.6.1
6.16.1

ALAB-578 VIRGINIA ELECTRIC AND POWER CO.
(NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 11 NRC 189 (1980)

4.6
5.15

ALAB-579 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR PLANT, UNIT 2), 11 NRC 223 (1980)

4.4.1.1

ALAB-579	FLORIDA POWER AND LIGHT CO.	5.12.1 6.24
ALAB-580	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 227 (1980)	3.1.2.1 3.14.7 3.3.7 4.6 5.6.3
ALAB-581	CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 11 NRC 233 (1980)	1.8 3.1.2.1.1 3.3.1 3.7.3.7 5.6.3
ALAB-582	HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 239 (1980)	2.9.3.3.3 2.9.4.1.4 5.10.3 5.5.1
ALAB-583	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 447 (1980)	2.10.2 5.2
ALAB-584	VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 11 NRC 451 (1980)	3.1.1 3.3.2.4 3.5.2.3 3.5.4 3.5.5 5.5 5.8.2 6.15.4
ALAB-585	HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNITS 1 AND 2), 11 NRC 469 (1980)	5.5

ALAB-585 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 472 (1980)

2.9.7
5.8.1

ALAB-588 PUBLIC SERVICE ELECTRIC AND GAS CO.
(SALEM NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 533 (1980)

5.12.2.1

ALAB-590 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 542 (1980)

2.9.3.1
3.5

ALAB-591 DUKE POWER CO.
(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 11 NRC 741 (1980)

3.1.2.1

ALAB-592 PACIFIC GAS AND ELECTRIC CO.
(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 744 (1980)

5.6.6.1
6.4.1.1

ALAB-593 PENNSYLVANIA POWER AND LIGHT CO AND ALLEGHENY ELECTRIC COOPERATIVE INC.
(SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 11 NRC 761 (1980)

5.12.2

ALAB-594 IN RE ATLANTIC RESEARCH CORP.
11 NRC 841 (1980)

6.10.1.1

ALAB-595 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 11 NRC 860 (1980)

2.9.3.3.3
2.9.7

ALAB-596 ROCHESTER GAS AND ELECTRIC CORP.
(STERLING POWER PROJECT, UNIT 1), 11 NRC 867 (1980)

1.9

ALAB-597 DUKE POWER CO.
(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 11 NRC 870 (1980)

5.6.5
5.6.10

ALAB-598	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)	11 NRC 876 (1980)	4.4.2
ALAB-600	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)	12 NRC 3 (1980)	2.10.2 2.11.2.5
ALAB-601	COMMONWEALTH EDISON CO. (CARROL COUNTY SITE)	12 NRC 18 (1980)	6.6.1
ALAB-604	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)	12 NRC 149 (1980)	3.12.1.2
ALAB-605	PUERTO RICO ELECTRIC POWER AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1)	12 NRC 153 (1980)	1.10
ALAB-606	NUCLEAR ENGINEERING CO. (SHEPHERD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE)	12 NRC 156 (1980)	5.4 6.15 1.1
ALAB-607	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)	12 NRC 155 (1980)	3.12.3
ALAB-611	NORTHERN STATES POWER CO. (MCANTICELLO PLANT, UNIT 1)	12 NRC 301 (1980)	4.6
ALAB-613	PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2)	12 NRC 317 (1980)	2.11.2 2.11.2.8 2.11.3 2.11.4 2.11.6
ALAB-614	DAIRYLAND POWER COOPERATIVE (LA CROSSE BOILING WATER REACTOR)	12 NRC 347 (1980)	3.1.4.2

ALAB-616 COMMONWEALTH EDISON CO. (ZION STATION, UNITS 1 AND 2), 12 NRC 419 (1980)	2.5.1 3.1.2.1 3.4 5.13.2
ALAB-619 NORTHERN INDIANA PUBLIC SERVICE CO. (BAILY GENERATING STATION, NUCLEAR-1), 12 NRC 558 (1980)	2.5.1 2.9.4.1.4 3.1.2.1 3.4 3.4.5 6.24 6.24.1.1 6.24.1.2
ALAB-620 NORTHERN STATES POWER CO. (MONTICELLO PLANT, UNIT 1), 12 NRC 574 (1980)	3.4.3
ALAB-621 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 12 NRC 578 (1980)	3.15
ALAB-622 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 2 AND 3), 12 NRC 667 (1980)	3.18.1 3.18.2
ALAB-623 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 12 NRC 670 (1980)	6.25
ALAB-629 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 13 NRC 75 (1981)	3.5 3.5.2.3 3.5.5 6.15.1.2
ALAB-630 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 13 NRC 84 (1981)	3.1.4.1 3.15 5.12.2.1

ALAB-631 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 13 NRC 87 (1981) 5.2

ALAB-633 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 13 NRC 94 (1981) 5.4

ALAB-634 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 13 NRC 96 (1981) 5.12.2.1

ALAB-635 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 13 NRC 309 (1981) 5.12.2
5.12.2.1

ALAB-636 CONSUMERS POWER CO.
(BIG ROCK POINT PLANT), 13 NRC 312 (1981) 5.1.2.5
5.10.2.2
6.15.1.2
6.15.4
6.15.9

ALAB-639 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 13 NRC 469 (1981) 2.11.2.4
5.12.2.1
5.8.3.2
5.23.3.1

ALAB-640 PHILA. ELEC. CO.; MET. EDISON CO.; PUB. SERVICE ELEC. AND GAS CO.
(PEACH BOTTOM UNITS 2,3; ISLAND UNIT 2; HOPE CREEK UNITS 1,2), 13 NRC 487 (1981) 3.17

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CLI-83-31 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 18 NRC 1303 (1983)	2.11.2.4
CLI-83-32 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1309 (1983)	1.8 2.9.9 3.1.2.1.1 3.1.2.3 3.14.2 3.4.1 4.6 6.14.3 6.15.1 6.15.1.1 6.15.6 6.16.1 6.20.4
CLI-83-4 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 17 NRC 75 (1983)	6.5.1

CLI-83-5	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 17 NRC 331 (1983)	6.5.1
CLI-83-6	TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 17 NRC 333 (1983)	5.7
CLI-84-11	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 1 (1984)	2.9.5.7 3.4.1 5.6.1
CLI-84-17	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 801 (1984)	5.7.1
CLI-84-19	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 20 NRC 1055 (1984)	6.1
CLI-84-20	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1061 (1984)	3.1.4.1
CLI-84-21	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1437 (1984)	5.7.1
CLI-84-5	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 19 NRC 953 (1984)	6.26
CLI-84-6	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNIT 2), 19 NRC 975 (1984)	2.9.4.1.1 2.9.5.1 3.4.5
CLI-84-8	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 1154 (1984)	3.1.1 6.19

CLI-84-9 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 1323 (1984)	6.15.1.1
CLI-85-10 SOUTHERN CALIFORNIA EDISON CO. (SAN ONOPE NUCLEAR GENERATING STATION, UNIT 1), 21 NRC 1569 (1985)	6.26
CLI-85-12 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION), 21 NRC 1587 (1985)	6.15.1.1
CLI-85-13 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 22 NRC 1 (1985)	5.7
CLI-85-14 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 22 NRC 177 (1985)	5.18 5.7.1
CLI-85-15 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 22 NRC 184 (1985)	2.11.1 2.9.5 3.1.4.1 5.7
CLI-85-2 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 282 (1985)	2.11.5.2 2.2 2.9.10.1 2.9.2 2.9.4.1.1 2.9.9 3.1.2.5 3.11.1.1 3.12 3.12.3 3.12.4 3.14.2 3.4.4 3.7 3.7.1 3.7.2 3.7.3.7 4.2.2

CLI-85-2	METROPOLITAN EDISON CO.	4.4.1 4.4.1.1 5.6.1
CLI-85-4	GENERAL PUBLIC UTILITIES NUCLEAR CORP.	
	(THREE MILE ISLAND NUCLEAR STATION, UNITS 1 AND 2), (OYSTER CREEK NUCLEAR GENERATING STATION), 21 NRC 561 (1985)	6.24.1
CLI-85-5	METROPOLITAN EDISON CO.	
	(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 566 (1985)	3.1.4.2
CLI-85-7	METROPOLITAN EDISON CO.	
	(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 1104 (1985)	2.11.1 4.4.2 4.4.4
CLI-85-8	METROPOLITAN EDISON CO.	
	(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 1111 (1985)	3.14.2
CLI-85-9	METROPOLITAN EDISON CO.	
	(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 1118 (1985)	3.7.3.7 6.10.1
CLI-86-1	LOUISIANA POWER AND LIGHT CO.	
	(WATERFORD STEAM ELECTRIC STATION, UNIT 3), 23 NRC 1 (1986)	2.11.1 3.1.2.3 4.4.1 4.4.2 6.5.4.1
CLI-86-12	PACIFIC GAS AND ELECTRIC CO.	
	(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 24 NRC 1 (1986)	5.7.1 6.1.4
CLI-86-13	LONG ISLAND LIGHTING CO.	
	(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 24 NRC 22 (1986)	1.8

CLI-86-15	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 24 NRC 397 (1986)	3.4.5
CLI-86-17	SEQUOYAH FUELS CORP. (SEQUOYAH UF6 TO UF4 FACILITY), 24 NRC 489 (1986)	2.2
CLI-86-18	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 24 NRC 501 (1986)	4.4.2 5.6.1 6.4.2 6.5.1
CLI-86-19	SEQUOYAH FUELS CORP. (UF6 PRODUCTION FACILITY), 24 NRC 508 (1986)	6.24.1.3
CLI-86-20	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 24 NRC 518 (1986)	2.10.2
CLI-86-21	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 24 NRC 681 (1986)	4.7
CLI-86-22	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 24 NRC 685 (1986)	1.8 5.15.1
CLI-86-23	AMERICAN NUCLEAR CORP. (REVISION OF ORDERS TO MODIFY SOURCE MATERIALS LICENSES), 24 NRC 704 (1986)	6.20.4
CLI-86-24	CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 24 NRC 769 (1986)	2.2
CLI-86-4	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 23 NRC 113 (1986)	3.4.5 5.7.1 6.1.4

CLI-86-6 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 23 NRC 130 (1986)	4.4.1 4.4.2
CLI-86-7 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 23 NRC 233 (1986)	3.14.2 4.4.2 4.4.4
CLI-86-8 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 241 (1986)	2.9.5 2.9.5.1 2.9.5.4 2.9.5.5 3.13.1 7.17 6.5.4.1
CLI-87-1 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 25 NRC 1 (1987)	5.7
CLI-87-12 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 383 (1987)	2.11.1 2.9.5.6 5.1 5.2 5.6.3
CLI-87-5 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 25 NRC 884 (1987)	4.4.2
CLI-87-6 BRAUNKOHLE TRANSPORT, USA (IMPORT OF SOUTH AFRICAN URANIUM ORE CONCENTRATE), 25 NRC 891 (1987)	2.9.4.1.3 3.3.6
CLI-87-8 HOUSTON LIGHTING AND POWER CO (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 26 NRC 6 (1987)	6.10

CLI-88-10	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 573 (1988)	6.20.4 6.8
CLI-88-11	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 603 (1988)	2.11.5.2
CLI-88-12	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 28 NRC 605 (1988)	2.9.3.3.3
CLI-88-3	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 1 (1988)	4.4.1 4.4.2 4.5
CLI-88-6	STATE OF ILLINOIS (SECTION 174 AGREEMENT), 28 NRC 75 (1988)	3.1.2.6
CLI-88-7	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 271 (1988)	6.8
CLI-88-8	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 419 (1988)	2.9.5.5 4.4.2
CLI-88-9	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 567 (1988)	3.3.1.1
CLI-89-1	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 29 NRC 89 (1989)	4.4.2
CLI-89-10	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 30 NRC 1 (1989)	6.15.1.1

CLI-89-11 DIA INVESTIGATION
30 NRC 11 (1989)

2.11.5

CLI-89-12 JOSEPH J. MACKTAL
30 NRC 19 (1989)

2.11.2.5

CLI-89-13 JOSEPH J. MACKTAL
30 NRC 27 (1989)

2.11.2.5

CLI-89-14 JOSEPH J. MACKTAL
30 NRC 85 (1989)

5.16.1

CLI-89-15 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2). 30 NRC 96 (1989)

5.7.1
5.15.1.1

CLI-89-17 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNIT 2). 30 NRC 105 (1989)

5.7

CLI-89-18 JOSEPH J. MACKTAL
30 NRC 167 (1989)

5.16.1

CLI-89-2 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1). 29 NRC 211 (1989)

2.11.5.2

CLI-89-20 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 30 NRC 231 (1989)

6.2

CLI-89-21 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR POWER PLANT, UNITS 1 AND 2). 30 NRC 325 (1989)

2.2
2.9.4.1.1

CLI-89-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 29 NRC 234 (1989)

2.9.5.1
2.9.5.4
4.5
6.20.4
6.8

CLI-89-4 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 29 NRC 243 (1989)

5.3.2

CLI-89-5 TEXAS UTILITIES ELECTRIC CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 29 NRC 348 (1989)

2.9.3.3
4.5

CLI-89-7 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 29 NRC 395 (1989)

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CLI-89-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 29 NRC 399 (1989)

5.7.1
6.15.1.1
6.20.4

CLI-90-10 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 32 NRC 218 (1990)

4.4.2

CLI-90-11 STATE OF ILLINOIS
32 NRC 333 (1990)

2.2

CLI-90-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 31 NRC 219 (1990)

3.1.2
5.15
5.7.1

CLI-90-4 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 31 NRC 333 (1990)

2.9.5
2.9.5.5
3.15
6.15.4

CLI-90-4 VERMONT YANKEE NUCLEAR POWER CORP.
 6.15.7

CLI-90-5 ROCKWELL INTERNATIONAL CORP.
 (ROCKETDYNE DIVISION), 31 NRC 337 (1990)
 2.9.3
 3.1.2.5
 3.1.2.7
 5.12.2

CLI-90-6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
 (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 483 (1990)
 4.4.1.1
 4.4.2

CLI-90-7 VERMONT YANKEE NUCLEAR POWER CORP.
 (VERMONT YANKEE NUCLEAR POWER STATION), 32 NRC 129 (1990)
 2.9.5
 2.9.5.5
 3.15
 6.15.4
 6.15.7

CLI-90-8 LONG ISLAND LIGHTING CO.
 (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 32 NRC 201 (1990)
 6.15.1.1

CLI-90-9 STATE OF ILLINOIS
 32 NRC 210 (1990)
 2.2

CLI-91-1 LONG ISLAND LIGHTING CO.
 (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 1 (1991)
 6.15.1.1

CLI-91-2 LONG ISLAND LIGHTING CO.
 (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 61 (1991)
 3.1.2.7
 3.10
 6.15.1.1

CLI-91-3 LONG ISLAND LIGHTING CO.
 (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 76 (1991)
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 5.12.2
 5.12.2.1

LBP-73-29	TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), 6 AEC 682 (1973)	3.5
LBP-73-31	LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 6 AEC 717 (1973)	2.9.3.4
LBP-73-41	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 6 AEC 1057 (1973)	2.9.3.5 2.9.8
LBP-74-22	DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 7 AEC 659 (1974)	3.10
LBP-74-25	DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 2), 7 AEC 711 (1974)	3.10
LBP-74-26	NIAGARA MOHAWK POWER CORP. (FINE MILE POINT NUCLEAR STATION, UNIT 2), 7 AEC 758 (1974)	3.10
LBP-74-36	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 7 AEC 877 (1974)	1.9 3.5 3.5.3
LBP-74-5	DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 7 AEC 82 (1974)	3.10
LBP-74-54	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 8 AEC 112 (1974)	3.7
LBP-74-63	BOSTON EDISON CO. (PILGRIM NUCLEAR STATION, UNIT 2), 8 AEC 330 (1974)	2.9.3.3.3

LBP-74-74 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 8 AEC 669 (1974)	2.11.5
LBP-75-10 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 1 NRC 246 (1975)	3.5
LBP-75-19 NORTHEAST NUCLEAR ENERGY CO. (MONTAGUE NUCLEAR POWER STATION, UNITS 1 AND 2), 1 NRC 436 (1975)	1.8 6.5.3.1
LBP-75-28 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 1 NRC 513 (1975)	2.11.2.4
LBP-75-62 PUBLIC SERVICE ELECTRIC AND GAS CO. (ATLANTIC GENERATING STATION, UNITS 1 AND 2), 2 NRC 702 (1975)	2.11.5.2
LBP-75-67 OFFSHORE POWER SYSTEMS (MANUFACTURING LICENSE FOR FLOATING NUCLEAR POWER PLANTS), 2 NRC 813 (1975)	2.11.5.2 2.9.2 3.3.2.1 3.3.2.4
LBP-75-9 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 1 NRC 243 (1975)	3.5.2.2
LBP-76-10 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1 AND 2), 3 NRC 209 (1976)	2.9.3.1 2.9.5.1
LBP-76-7 BOSTON EDISON CO. (PILGRIM NUCLEAR STATION, UNIT 2), 3 NRC 156 (1976)	2.9.9.5 3.6
LBP-76-8 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 3 NRC 195 (1976)	2.11.2.2

LBP-77-11	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 5 NRC 481 (1977)	2.9.4.1.2
LBP-77-13	ALLIED-GENERAL NUCLEAR SERVICES (BARNWELL FUEL RECEIVING AND STORAGE STATION), 5 NRC 489 (1977)	2.11.2 2.11.2.2
LBP-77-14	TENNESSEE VALLEY AUTHORITY (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2), 5 NRC 494 (1977)	6.15
LBP-77-15	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS 3 AND 5), 5 NRC 643 (1977)	3.1.2.2 6.19 6.19.1
LBP-77-16	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS 3 AND 5), 5 NRC 650 (1977)	2.9.3
LBP-77-17	PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 657 (1977)	2.9.4.1.1
LBP-77-18	PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 671 (1977)	2.11.2.2 3.12.4.1
LBP-77-20	DUKE POWER CO. (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 2), 5 NRC 680 (1977)	3.17 3.5.3
LBP-77-21	LONG ISLAND LIGHTING CO. (JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), 5 NRC 684 (1977)	6.15.3 6.15.3.1
LBP-77-23	FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT UNITS 1 AND 2; TURKEY POINT, UNITS 3 AND 4), 5 NRC 789 (1977)	2.9.3.3.3

LBP-77-2a FLORIDA POWER AND LIGHT CO.
 3-12-1-1

LBP-77-2d ALABAMA POWER CO.
 (JOSEPH M. FARLEY NUCLEAR PLANT, UNITS 1 AND 2), 5 NRC 904 (1977)
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LBP-77-35 SOUTHERN CALIFORNIA EDISON CO.
 (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 5 NRC 1290 (1977)
 3-12-2
 6-20-1

LBP-77-37 NORTHERN STATES POWER CO.
 (TYRONE ENERGY PARK, UNIT 1), 5 NRC 1298 (1977)
 2-11-5-2

LBP-77-5 OMAHA PUBLIC POWER DISTRICT
 (FORT CALHOUN STATION, UNIT 2), 5 NRC 437 (1977)
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LBP-77-60 TENNESSEE VALLEY AUTHORITY
 (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2), 6 NRC 647 (1977)
 6-15-4-2

LBP-77-61 PUGET SOUND POWER AND LIGHT CO.
 (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 6 NRC 674 (1977)
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LBP-77-69 PORTLAND GENERAL ELECTRIC CO.
 (TROJAN NUCLEAR PLANT), 6 NRC 1179 (1977)
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LBP-77-7 TOLEDO EDISON CO.
 (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1, 2, 3), 5 NRC 452 (1977)
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LBP-77-9 PUBLIC SERVICE ELECTRIC AND GAS CO.
 (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 5 NRC 474 (1977)
 2-9-3-3

LBP-78-1 DETROIT EDISON CO.
 (EMERCO FERMI ATOMIC POWER PLANT UNIT 2), 7 NRC 381 (1978)
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LBP-78-11	DETROIT EDISON CO.	2.9.4.1.2 2.9.4.1.4 2.9.4.2 3.1.2.1 3.1.2.5 6.1.4.4 6.15 6.15.6 6.16.1
LBP-78-13	DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 583 (1978)	2.9.3.6 2.9.4.1.1 6.3 6.3.1
LBP-78-15	PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 7 NRC 643 (1978)	3.12
LBP-78-16	NEW ENGLAND POWER CO. (NEP UNITS 1 AND 2), 7 NRC 932 (1978)	2.9.3.3.3
LBP-78-2	CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 7 NRC 63 (1978)	4.4 4.4.1.1 4.4.2
LBP-78-20	PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 7 NRC 1038 (1978)	2.11.2 2.11.2.2
LBP-78-22	CAROLINA POWER AND LIGHT CO. (H. B. ROBINSON, UNIT 2), 7 NRC 1052 (1978)	6.15.8.4
LBP-78-23	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 8 NRC 71 (1978)	2.6 2.9.3 2.9.3.1 3.1.2.2

LBP-78-24 WISCONSIN PUBLIC SERVICE CORP (KEWAUNEE NUCLEAR POWER PLANT), B NRC 78 (1978)	2.9.3.1 2.9.3.3.3
LBP-78-26 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), B NRC 102 (1978)	6.15.1 6.15.5 6.19.2
LBP-78-27 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), B NRC 275 (1978)	2.6.3.3 2.9.3.1 2.9.4 2.9.7 5.8.1
LBP-78-28 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), B NRC 281 (1978)	6.15
LBP-78-31 UNION ELECTRIC CO. (CALLAWAY PLANT, UNITS 1 AND 2), B NRC 366 (1978)	3.1.2.1 6.10
LBP-78-32 PORTLAND GENERAL ELECTRIC CO. (TROJAN NUCLEAR PLANT), B NRC 413 (1978)	3.16
LBP-78-33 GENERAL ELECTRIC CO. (VALLECITOS NUCLEAR CENTER, GENERAL ELECTRIC TEST REACTOR), B NRC 461 (1978)	2.11.2.4
LBP-78-36 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), B NRC 567 (1978)	3.12.4
LBP-78-37 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), B NRC 575 (1978)	1.7.1 2.11.1 2.11.2.1 2.9.4

LBP-78-37	DETROIT EDISON CO.		
			2.9.4.1.2
			2.9.5.2
LBP-78-40	PORTLAND GENERAL ELECTRIC CO. (TROJAN NUCLEAR PLANT), 8 NRC 717 (1978)		6.1.3.1
			6.1.4.4
LBP-78-5	PUBLIC SERVICE ELECTRIC AND GAS CO. (ATLANTIC GENERATING STATION, UNITS 1 AND 2), 7 NRC 147 (1978)		2.8.1.3
LBP-78-6	SOUTH CAROLINA ELECTRIC AND GAS CO. (VIRGIL C. SUMNER NUCLEAR STATION, UNIT 1), 7 NRC 209 (1978)		2.9.2.3.3
LBP-78-9	NEW ENGLAND POWER CO. (NEP UNITS 1 AND 2), 7 NRC 271 (1978)		1.5.1
			1.8
			3.1.2.5
			6.15.1
LBP-79-1	DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 9 NRC 73 (1979)		2.9.3.1
			2.9.4.1.1
			2.9.4.1.2
			2.9.4.1.4
			3.16
LBP-79-10	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC 439 (1979)		2.9.4.1.1
			2.9.4.1.2
			3.17
			6.15
LBP-79-14	PUBLIC SERVICE ELECTRIC AND GAS CO. (SALEM NUCLEAR GENERATING STATION, UNIT 1), 9 NRC 557 (1979)		3.5.1.2
			3.5.3

LBP-79-15 OFFSHORE POWER SYSTEMS
(FLOATING NUCLEAR POWER PLANTS), 9 NRC 653 (1979)

6.15.2

LBP-79-16 PUGET SOUND POWER AND LIGHT CO.
(SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 9 NRC 711 (1979)

2.9.3.3.3

LBP-79-17 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 9 NRC 723 (1979)

2.9.2

LBP-79-20 CONSUMERS POWER CO.
(PALISADES NUCLEAR PLANT), 10 NRC 106 (1979)

2.9.4.1.1
2.9.4.1.2
2.9.4.1.4
2.9.5.1
6.15.1.1

LBP-79-21 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT NUCLEAR GENERATING UNITS 3 AND 4), 10 NRC 183 (1979)

2.5.3
2.9.3.3.3
2.9.5.5

LBP-79-22 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 10 NRC 213 (1979)

2.9.5.5

LBP-79-23 PHILADELPHIA ELECTRIC CO.
(FULTON GENERATING STATION, UNITS 1 AND 2), 10 NRC 220 (1979)

3.1.2.5
6.24
6.6

LBP-79-24 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 10 NRC 226 (1979)

3.1.2.1
3.1.2.2
6.13

LBP-79-27 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 10 NRC 563 (1979)

3.1.2.7
3.17
6.3

LBP-79-4 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR PLANT, UNIT 2), 9 NRC 164 (1979)

2.11.2
6.3.3
6.3.3.1

LBP-79-5 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC 193 (1978)

2.11.2.6
2.11.5

LBP-79-6 PENNSYLVANIA POWER AND LIGHT CO.
(SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 9 NRC 294 (1978)

2.9.5.10
2.9.5.4
6.15.6.1
6.9.1

LBP-79-7 WASHINGTON PUBLIC POWER SUPPLY SYSTEM
(WPPSS NUCLEAR PROJECT NO. 2), 9 NRC 330 (1979)

2.9.4.1.2
2.9.4.1.4

LBP-80-14 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 11 NRC 570 (1980)

2.9.3.3.3

LBP-80-15 PUERTO RICO ELECTRIC POWER AUTHORITY
(NORTH COAST NUCLEAR PLANT, UNIT 1), 11 NRC 765 (1980)

2.9.10.1
3.1.2.2
3.5.1.1

LBP-80-17 METROPOLITAN EDISON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 11 NRC 893 (1980)

2.11.5.2

LBP-80-18 PENNSYLVANIA POWER AND LIGHT CO.
(SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 11 NRC 906 (1980)

2.11.2.2
2.1.1
6.15.8.1

LBP-80-22 NORTHERN INDIANA PUBLIC SERVICE CO.
(BAILLY GENERATING STATION, NUCLEAR-1), 12 NRC 191 (1980)

2.9.4.1.4

LBP-80-22	NORTHERN INDIANA PUBLIC SERVICE CO.	6.1.4.2
LBP-80-26	DAIRYLAND POWER COOPERATIVE (LA CROSSE BOILING WATER REACTOR), 12 NRC 367 (1980)	2.2 6.24.7 6.24.8
LBP-80-27	PUBLIC SERVICE ELECTRIC AND GAS CO. (SALEM NUCLEAR GENERATING STATION, UNIT 1), 12 NRC 435 (1980)	6.15
LBP-80-28	DUKE POWER CO. (AMENDMENT TO DCONEE SSM LICENSE), 12 NRC 459 (1980)	5.15.1.2
LBP-80-29	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 1), 12 NRC 561 (1980)	5.14
LBP-80-30	COMMONWEALTH EDISON CO. (BYRON STATION, UNITS 1 AND 2), 12 NRC 683 (1980)	2.9.5.1 2.9.5.6 2.9.5.7 2.9.5.8 6.15.5
LBP-80-31	NORTHERN INDIANA PUBLIC SERVICE CO. (RAILLY GENERATING STATION, NUCLEAR-1), 12 NRC 699 (1980)	3.4.5
LBP-80-7	COMMONWEALTH EDISON CO. (ZION STATION, UNITS 1 AND 2), 11 NRC 245 (1980)	6.15.1.1
LBP-81-1	DUKE POWER CO. (CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 13 NRC 27 (1981)	2.9.3.1 2.9.3.2 2.9.3.6 2.9.4.2

LBP-81-11 SOUTH CAROLINA ELECTRIC AND GAS CO.
(VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), 13 NRC 420 (1981)

2 9.3.3.3

LBP-81-14 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT PLANT, UNITS 3 AND 4), 13 NRC 577 (1981)

6.1.4.4
6.15.1.2
6.15.4

LBP-81-15 ILLINOIS POWER CO.
(CLINTON POWER STATION, UNITS 1 AND 2), 13 NRC 708 (1981)

3.4.1

LBP-81-18 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 14 NRC 71 (1981)

3.4.1
6.14

LBP-81-2 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR STATION), 13 NRC 36 (1981)

3.5.3

LBP-81-23 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 NRC 159 (1981)

3.4.2

LBP-81-24 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 175 (1981)

2.9.4.1.1
3.17

LBP-81-25 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 NRC 241 (1981)

2.11.2
2.11.2.B
2.9.5

LBP-81-28 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR PLANT, UNIT 2), 14 NRC 333 (1981)

6.3.2

LBP-81-29 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
(UCLA RESEARCH REACTOR), 14 NRC 353 (1981)

3.13.2

LBP-81-30 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT PLANT, UNITS 3 AND 4), 14 NRC 357 (1981)

5.7.5

LBP-81-30-A COMMONWEALTH EDISON CO.
(BYRON STATION, UNITS 1 AND 2), 14 NRC 364 (1981)

2.11.1
2.11.4
2.9.2
3.1.2.2

LBP-81-31 DAIRYLAND POWER COOPERATIVE
(LA CROSSE BOILING WATER REACTOR), 14 NRC 375 (1981)

3.3.6

LBP-81-34 HOUSTON LIGHTING AND POWER CO.
(ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 14 NRC 637 (1981)

3.5

LBP-81-35 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 682 (1981)

2.11.4
2.3.3.3
2.9.5.3
2.9.9.2.1
3.7.3.2

LBP-81-36 SOUTHERN CALIFORNIA EDISON CO.
(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 14 NRC 691 (1981)

3.1.3.3
3.4.2
5.14

LBP-81-39 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 819 (1981)

3.1.2.4

LBP-81-42 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 842 (1981)

2.9.5.7

LBP-81-44 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 850 (1981)

3.1.2.4

LBP-81-45	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 853 (1981)	3.1.2.4 3.4.1
LBP-81-46	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 852 (1981)	3.1.2.4
LBP-81-48	LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 14 NRC 877 (1981)	3.5 3.5.3
LBP-81-5	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 13 NRC 226 (1981)	3.4.1 4.4 4.4.2 6.15.1.1
LBP-81-50	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 14 NRC 888 (1981)	6.11 6.23 6.23.1
LBP-81-51	TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 NRC 896 (1981)	2.9.5.7
LBP-81-52	COMMONWEALTH EDISON CO. (BYRON STATION, UNITS 1 AND 2), 14 NRC 901 (1981)	2.11.4
LBP-81-54	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 14 NRC 918 (1981)	3.1.2.5 3.4.2
LBP-81-55	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 1017 (1981)	3.3.7 3.4.1 3.5.3 6.23.3.1

LBP-81-57	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 1037 (1981)	6.21.2
LBP-81-58	FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 14 NRC 1167 (1981)	3.17
LBP-81-6	NORTHERN INDIANA PUBLIC SERVICE CO. (BAILLY GENERATING STATION, NUCLEAR-1), 13 NRC 253 (1981)	3.4.5
LBP-81-60	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 14 NRC 1724 (1981)	3.4.1
LBP-81-61	ILLINOIS POWER CO. (CLINTON POWER STATION, UNIT 1), 14 NRC 1735 (1981)	2.11.2.1 2.11.4 2.9.3.1
LBP-81-62	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 1747 (1981)	6.23
LBP-81-63	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 14 NRC 1768 (1981)	2.11.2.6 3.12 6.5.4.1
LBP-81-7	DAIRYLAND POWER COOPERATIVE (LA CROSSE BOILING WATER REACTOR), 13 NRC 257 (1981)	6.24.5
LBP-81-8	PENNSYLVANIA POWER AND LIGHT CO. AND ALLEGHENY ELECTRIC COOPERATIVE INC. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 13 NRC 335 (1981)	3.5 3.5.2.3 3.5.3
LBP-82-1	CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT NO. 2), 15 NRC 37 (1982)	1.7.1

LBP-82-1 CONSOLIDATED EDISON CO. OF N.Y.

2.9.3.3.3

LBP-82-1A CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 15 NRC 43 (1982)

2.9.5.7
6.9.1

LBP-82-10 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 341 (1982)

2.11.5.2
3.7.2

LBP-82-100 LOUISIANA POWER AND LIGHT CO.
(WATERFORD STEAM ELECTRIC STATION, UNIT 3), 16 NRC 1550 (1982)

6.15.3
6.9.1

LBP-82-101 CONSUMERS POWER CO.
(PALISADES NUCLEAR POWER FACILITY), 16 NRC 1594 (1982)

2.9.9.5

LBP-82-102 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1597 (1982)

2.11.2.2

LBP-82-103 ILLINOIS POWER CO.
(CLINTON POWER STATION, UNIT NO. 1), 16 NRC 1603 (1982)

2.10.2
2.9.5.7
3.4
6.13
6.8

LBP-82-105 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3), 16 NRC 1629 (1982)

2.9.5
3.6
6.20.3

LBP-82-106 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 16 NRC 1649 (1982)

2.9.3.1
2.9.3.2
2.9.5
2.9.5.3

LBP-82-106 PUBLIC SERVICE CO. OF NEW HAMPSHIRE

2.9.5.7
4.5
5.12.2.1
6.15.7

LBP-82-107 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 15 NRC 1667 (1982)

3.1.2.7
3.12.1

LBP-82-107A DUKE POWER CO.
(CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 16 NRC 1791 (1982)

3.17
6.9.1

LBP-82-108 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNIT 1), 16 NRC 1811 (1982)

2.9.5
2.9.9.5
3.6

LBP-82-111 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 15 NRC 348 (1982)

2.9.5.5
2.9.5.7

LBP-82-113 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3), 16 NRC 1907 (1982)

2.11.3

LBP-82-114 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1909 (1982)

3.1.2.5
3.5

LBP-82-115 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 1923 (1982)

2.11.5.2
2.9.9.9
3.1.2.1
3.1.2.7
6.17.1

LBP-82-116 DUKE POWER CO
(CATAMBA NUCLEAR STATION, UNITS 1 AND 2). 16 NRC 1937 (1982)

2.11.1
2.11.2
2.11.2.4
2.11.2.5
2.11.2.8
2.11.5
2.9.5

LBP-82-117A ARIZONA PUBLIC SERVICE CO.
(PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3). 16 NRC 1964 (1982)

3.1.2.1
3.1.2.6
6.15
6.15.1.2
6.15.6

LBP-82-117B ARIZONA PUBLIC SERVICE CO.
(PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3). 16 NRC 2024 (1982)

2.9.3
2.9.3.3.3
4.4.2

LBP-82-118 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2). 16 NRC 2034 (1982)

6.21

LBP-82-119A CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY
(SHEARON HARRIS NUCLEAR POWER PLANT, UNITS 1 AND 2). 16 NRC 2069 (1982)

2.9.1
2.9.3.1
2.9.5.6
6.20.4
6.5.3.2

LBP-82-12 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2). 15 NRC 354 (1982)

3.1.1
3.1.2.3

LBP-82-12A CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3). 15 NRC 515 (1982)

3.1.2.4

LBP-82-12B CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3). 15 NRC 523 (1982)

3.1.2.4

LBP-82-14 GENERAL ELECTRIC CO.
(GE MORRIS OPERATION SPENT FUEL STORAGE FACILITY). 15 NRC 530 (1982) 3.5.2

LBP-82-15 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2). 15 NRC 555 (1982) 2.9.5.5
2.9.5.7

LBP-82-17 TEXAS UTILITIES GENERATING CO.
(COMMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2). 15 NRC 593 (1982) 3.5.2

LBP-82-18 TEXAS UTILITIES GENERATING CO.
(COL-ACHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2). 15 NRC 598 (1982) 2.11.1

LBP-82-19 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1). 15 NRC 601 (1982) 2.10.2
5.9.2.1

LBP-82-19A WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2). 15 NRC 623 (1982) 3.1.2.4

LBP-82-19B CONSUMERS POWER CO.
(BIG ROCK POINT PLANT). 15 NRC 627 (1982) 3.1.2.3
3.5.2

LBP-82-2 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2). 15 NRC 48 (1982) 3.1.2.7
6.23

LBP-82-21 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE PLANT, UNIT NO. 2). 15 NRC 639 (1982) 6.3

LBP-82-23 CONSOLIDATED EDISON CO. OF N.Y. : POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3). 15 NRC 647 (1982) 3.1.2.1
5.14

LBP-82-24 ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE
(COBALT-60 STORAGE FACILITY). 15 NRC 652 (1982)

2.9.3.3.3
2.9.4.1.2

LBP-82-24A WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2). 15 NRC 661 (1982)

3.1.2.2

LBP-82-25 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3). 15 NRC 715 (1982)

2.10.2
2.9.4.1.2

LBP-82-26 PUGET SOUND POWER AND LIGHT CO.
(SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2). 15 NRC 74 (1982)

2.9.4.1.1

LBP-82-3 SOUTHERN CALIFORNIA EDISON CO.
(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3). 15 NRC 61 (1982)

3.17

LBP-82-33 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2). 15 NRC 887 (1982)

6.23

LBP-82-34A METROPOLITAN EDISON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1). 15 NRC 914 (1982)

3.14.2

LBP-82-36 NUCLEAR FUEL SERVICES, INC. AND N.Y.S. ENERGY RESEARCH AND DEVELOPMENT AUTHORITY
(WESTERN NEW YORK NUCLEAR SERVICE CENTER). 15 NRC 1075 (1982)

2.9.4.1.1
2.9.4.1.4
3.1.2.5

LBP-82-4 MAINE YANKEE ATOMIC POWER CO.
(MAINE YANKEE ATOMIC POWER STATION). 15 NRC 199 (1982)

2.9.3.1
2.9.3.3.3

LBP-82-41 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1). 15 NRC 1295 (1982)

3.4.5

LBP-82-42 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 130 (1982)

6.23.3.1

LBP-82-43A PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2), 15 NRC 142 (1982)

2.9.3
2.9.4.1.1
2.9.4.1.2
2.9.4.2
3.4.1
6.15
6.15.1

LBP-82-45 ARIZONA PUBLIC SERVICE CO.
(PALD VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 15 NRC 152 (1982)

6.15.8

LBP-82-46 SOUTHERN CALIFORNIA EDISON CO.
(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 15 NRC 1531 (1982)

3.14.2

LBP-82-47 CINCINNATI GAS AND ELECTRIC CO.
(WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 15 NRC 1538 (1982)

2.11.2.2

LBP-82-48 CINCINNATI GAS AND ELECTRIC CO.
(WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 15 NRC 1549 (1982)

4.2.2

LBP-82-5 COMMONWEALTH EDISON CO.
(BYRON STATION, UNITS 1 AND 2), 15 NRC 209 (1982)

2.11.5.2

LBP-82-5A WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 216 (1982)

3.1.1
3.1.2.3
3.1.2.4
6.23.3
6.4.1.1

LBP-82-51 DUKE POWER CO.
(CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 15 NRC 167 (1982)

2.9.5.9

LBP-82-51A CONSUMERS POWER CO.
(BIG ROCK POINT PLANT), 16 NRC 180 (1982)

4.2

LBP-82-52 COMMONWEALTH EDISON CO.
(DRESDEN NUCLEAR POWER STATION, UNIT 1), 16 NRC 183 (1982)

2.9.4.1.1
2.9.4.1.2
2.9.5.1

LBP-82-53 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 196 (1982)

2.9.3.3.3
5.18

LBP-82-54 CINCINNATI GAS AND ELECTRIC CO.
(ZIMMER NUCLEAR POWER STATION, UNIT 1), 16 NRC 210 (1982)

2.9.3.3.3
2.9.4.1.2
3.14.2

LBP-82-56 METROPOLITAN EDISON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 16 NRC 281 (1982)

3.1.2.1
6.14

LBP-82-58 DAIRYLAND POWER COOPERATIVE
(LA CROSSE BOILING WATER REACTOR), 16 NRC 512 (1982)

3.5
3.5.1
3.5.2
3.5.2
6.15.4
6.15.5
6.15.6
6.15.7

LBP-82-59 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 16 NRC 533 (1982)

2.11.2.4

LBP-82-6 WISCONSIN ELECTRIC POWER CO.
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 281 (1982)

3.1.1
3.1.2.3
4.5

LBP-82-62 ARIZONA PUBLIC SERVICE CO.
(PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 16 NRC 565 (1982)

LBP-82-63 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 16 NRC 571 (1982)

LBP-82-67 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 734 (1982)

LBP-82-69 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 751 (1982)

LBP-82-72 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2), 16 NRC 968 (1982)

LBP-82-73 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 974 (1982)

LBP-82-74 PUGET SOUND POWER AND LIGHT CO.
(SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), 16 NRC 981 (1982)

LBP-82-75 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 986 (1982)

5.12.1.1

2.9.3.1
2.9.3.2.3
2.9.5.5
6.15.6
6.21
6.8

2.11.2.B

3.1.2.1

6.14
6.15.8
6.15.8.4

3.1.2.7

2.9.3
2.9.3.3
2.9.3.3.3
2.9.4.1.1
2.9.4.1.22.9.5
2.9.5.1

LBP-82-76 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 16 NRC 102 (1982)

1 7 1
2 10 2
2 9 5 1
3 1 2 1 1
3 17
4 15 1 1

LBP-82-77 CONSUMERS POWER CO.
(BIG ROCK POINT PLANT), 16 NRC 109 (1982)

3 7

LBP-82-78 CONSUMERS POWER CO.
(BIG ROCK POINT PLANT), 16 NRC 110 (1982)

6 15 1 1

LBP-82-79 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 111 (1982)

2 9 5 5
3 1 2 3

LBP-82-8 CONSUMERS POWER CO.
(BIG ROCK POINT PLANT), 15 NRC 299 (1982)

2 2
3 5
3 5 2 1
6 5 1

LBP-82-80 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 112 (1982)

6 23 3 1

LBP-82-81 DUKE POWER CO.
(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 16 NRC 112 (1982)

1 5

LBP-82-82 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 114 (1982)

2 11 2 4
2 11 2 5
2 11 2 6
2 11 4

LBP-82-84 SOUTH CAROLINA ELECTRIC AND GAS CO.
(VIRGIL C. SUMNER NUCLEAR STATION, UNIT 1), 16 NRC 1183 (1982)

3 1 2 1

LBP-82-84	SOUTH CAROLINA ELECTRIC AND GAS CO.	
LBP-82-86	METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 16 NRC 1150 (1982)	4.4.2 5.7.1
LBP-82-87	TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 16 NRC 1195 (1982)	2.1.2.1
LBP-82-88	WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 16 NRC 1335 (1982)	2.2 3.1.2 6.4.2
LBP-82-89	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1355 (1982)	3.7.2
LBP-82-9	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 15 NRC 339 (1982)	2.7.5.5 3.1.2.3
LBP-82-90	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1359 (1982)	2.9.5.5
LBP-82-91	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 16 NRC 1364 (1982)	2.9.5.5 6.16.1
LBP-82-92	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 16 NRC 1376 (1982)	2.9.2.3 3.1.2.1 6.20.4
LBP-82-93	THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), 16 NRC 1391 (1982)	3.5.2

LBP-82-95 CONSOLIDATED POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 16 NRC 1401 (1982)

6.15.6

LBP-82-96 ENRICO FUEL PROCESSING CORPORATION
(ENRICO FUEL PROCESSING PLANT, UNIT 2), 16 NRC 1408 (1982)

2.9.3.3.3

LBP-82-98 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1459 (1982)

2.9.5

LBP-83-11 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2), 17 NRC 413 (1983)

6.15.5
6.15.8
6.15.8.5

LBP-83-12 CINCINNATI GAS AND ELECTRIC CO.
(WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 17 NRC 466 (1983)

3.1.2.1

LBP-83-13 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 NRC 469 (1983)

2.10.2

LBP-83-15 NUCLEAR FUEL SERVICES, INC. AND N. Y. S. ENERGY RESEARCH AND DEVELOPMENT AUTHORITY
(WESTERN NEW YORK NUCLEAR SERVICE CENTER), 17 NRC 476 (1983)

2.7.2.1

LBP-83-16 WASHINGTON PUBLIC POWER SUPPLY SYSTEM
(MPPSS NUCLEAR PROJECT NO. 1), 17 NRC 479 (1983)

2.11.2.5
2.9.4.1.2
6.23.3.1

LBP-83-17 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 17 NRC 490 (1983)

2.11.2
2.11.2.4
2.11.2.6
2.11.2.8

LBP-83-18 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 17 NRC 501 (1983)

6.17.1

LBP-83-19 GENERAL ELECTRIC CO.
(GETR VALLECITOS), 17 NRC 573 (1983)

2.5
2.9.3
2.9.4
2.9.5

LBP-83-20 PACIFIC GAS AND ELECTRIC CO.
(STANISLAUS NUCLEAR PROJECT, UNIT 1), 17 NRC 45 (1983)

1.9

LBP-83-20A PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 17 NRC 586 (1983)

2.11.5.2
3.7.2

LBP-83-21 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 (RC 593 (1983)

2.12.7
5.12.2

LBP-83-22 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 NRC 608 (1983)

6.16.2
9.20.3

LBP-83-25 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2), 17 NRC 681 (1983)

3.12.1
5.6.1
5.8.10

LBP-83-26 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 17 NRC 945 (1983)

2.10.2

LBP-83-27A CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY
(SHEPARD HARRIS NUCLEAR POWER PLANT, UNITS 1 AND 2), 17 NRC 971 (1983)

6.15.6

LBP-83-28 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 17 NRC 987 (1983)

2.9.9
2.9.9 2.2
3.13

LBP-83-29 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 17 NRC 1117 (1983)

3.13

LBP-83-29A DUKE POWER CO.
(CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 17 NRC 1121 (1983)

2.11.5.2

LBP-83-3 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 17 NRC 59 (1983)

3.5.2.3
3.5.3

LBP-83-30 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 NRC 1132 (1983)

2.10.2
2.9.5.9
3.14.2
3.4.4
4.3
4.4
4.4.1

LBP-83-32A PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 17 NRC 1170 (1983)

3.5.2.3
2.5.3

LBP-83-33 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 27 (1983)

3.1.1

LBP-83-34 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 36 (1983)

3.17

LBP-83-35 ARIZONA PUBLIC SERVICE CO.
(PALO VERDE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 18 NRC 45 (1983)

1.8
3.1.2.1
3.1.2.5

LBP-83-36 ARIZONA PUBLIC SERVICE CO.

6.15.1.1
6.15.2
6.15.1

LBP-83-37 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 18 NRC 52 (1983)

2.9.5.5
6.8

LBP-83-38 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 61 (1983)

6.13
6.15.1.1

LBP-83-39 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNITS 1 AND 2), 18 NRC 67 (1983)

1.8
2.5.5.5
2.9.5.8
3.0
3.4

LBP-83-40 COMMONWEALTH EDISON CO.
(BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 18 NRC 93 (1983)

3.11.1.5
6.23.1

LBP-83-41 COMMONWEALTH EDISON CO.
(BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 18 NRC 104 (1983)

3.14.2
4.4.1
4.4.2

LBP-83-42 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 112 (1983)

2.9.3.3.1
2.9.5.5

LBP-83-45 NIAGARA MOHAWK POWER CORP.
(NINE MILE POINT NUCLEAR STATION, UNIT 2), 18 NRC 213 (1983)

2.10.2
2.9.4.1
2.9.4.1.1

LBP-83-46 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 218 (1983)

3.5.3

LBP-83-49 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 18 NRC 239 (1983)

5.20.4

LBP-83-5 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y.
(INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 17 NRC 134 (1983)

2.9.5

LBP-83-52 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 256 (1983)

3.1.2

LBP-83-52A GULF STATES UTILITIES CO.
(RIVER BEND STATION, UNITS 1 AND 2), 18 NRC 265 (1983)

2.9.9.2.2

LBP-83-53 CONSUMERS POWER CO.
(MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 282 (1983)

2.11.2
2.11.3.4

LBP-83-55 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 415 (1983)

3.14
3.14.2

LBP-83-57 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 445 (1983)

1.8
2.9.9
3.1.2.5
3.11.2
3.14.2
3.16
3.6.1
6.15.1.1
6.15.6
6.9.1
6.9.2.2

LBP-83-58 CINCINNATI GAS AND ELECTRIC CO.
(WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 18 NRC 540 (1983)

2.9.5.5

LBP-83-58	CINCINNATI GAS AND ELECTRIC CO.	3.1.2.1
LBP-83-59	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 18 NRC 667 (1983)	2.9.3
LBP-83-61	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 700 (1983)	2.11.3 2.11.1.5
LBP-83-62	CONSUMERS POWER CO. (BIG ROCK POINT PLANT), 18 NRC 708 (1983)	3.1.2.1
LBP-83-64	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 756 (1983)	2.11.2 2.11.2.4
LBP-83-65	ROCKWELL INTERNATIONAL CORP. (ENERGY SYSTEMS GROUP SPECIAL NUCLEAR MATERIALS LICENSE NO. SNM-21), 18 NRC 774 (1983)	2.2 2.9.4.1.1 6.13
LBP-83-66	WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 18 NRC 760 (1983)	2.9.5.3 2.9.5.5
LBP-83-70	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 1094 (1983)	2.11.2.4
LBP-83-71	UNION ELECTRIC CO. (CALLAWAY PLANT, UNIT 1), 18 NRC 1105 (1983)	1.8
LBP-83-72	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 1221 (1983)	2.11.2.4

LBP-83-73 ROCHESTER GAS AND ELECTRIC CORP.
(R. E. GINNA NUCLEAR PLANT, UNIT 1), 18 NRC 1231 (1983)

2.5.4
2.5.10.1

LBP-83-75A TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 1260 (1983)

2.9.5
2.9.5.1
2.9.5.5

LBP-83-76 METROPOLITAN EDYSON CO.
(THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 18 NRC 1266 (1983)

2.9.5.1
2.9.5.6
2.9.5.7
3.4

LBP-83-77 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1365 (1983)

5.4

LBP-83-79 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1400 (1983)

2.11.1

LBP-83-8 U. S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY
(CLINTON RIVER BREEDER REACTOR PLANT), 17 NRC 158 (1983)

6.19.2

LBP-83-8A DUKE POWER CO.
(CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 17 NRC 282 (1983)

3.3.1

LBP-83-80 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1404 (1983)

2.0.3.3.3
2.5.5.5

LBP-83-81 TEXAS UTILITIES GENERATING CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 1410 (1983)

2.12.4
4.2

LBP-83-9 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 17 NRC 403 (1983)	2.10.2
LBP-84-1 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 19 NRC 29 (1984)	2.9.5 2.9.5.1 2.9.5.5
LBP-84-10 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 19 NRC 509 (1984)	3.12.4 4.2 4.3.1 5.12.1
LBP-84-13 HOUSTON LIGHT AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 19 NRC 659 (1984)	3.7.1.7
LBP-84-15 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR PLANT, UNITS 1 AND 2), 19 NRC 837 (1984)	3.1.2.5 3.12.3 3.5.2.3 3.5.3
LBP-84-16 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 19 NRC 857 (1984)	3.1.2.1 3.4.1 6.13
LBP-84-17 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 19 NRC 878 (1984)	2.9.3.3 2.5.3.3.3
LBP-84-17A WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 3), 19 NRC 1011 (1984)	2.9.3.3.2
LBP-84-18 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 19 NRC 1020 (1984)	2.9.5.8

LBP-84-19	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 19 NRC 103 (1984)	6.1.4
LBP-84-2	COMMONWEALTH EDISON CO. (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 19 NRC 36 (1984)	3.1.2.5 6.16.1.3
LBP-84-20	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 19 NRC 1285 (1984)	1.5.2 2.9.5.4 2.9.5.5 3.7.3.7 4.4.2
LBP-84-22	THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), 19 NRC 1382 (1984)	1.9.2 6.4.1
LBP-84-23	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 19 NRC 1412 (1984)	6.1.4
LBP-84-24	DUKE POWER CO. (CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 19 NRC 1418 (1984)	2.11.1 3.13.1
LBP-84-25	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 19 NRC 1589 (1984)	3.5
LBP-84-26	KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 20 NRC 53 (1984)	3.4.2 4.2.2 6.16.1.3
LBP-84-28	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 20 NRC 129 (1984)	2.9.5.1

LBP-84-29A	SUFFOLK COUNTY AND NYS MOTION FOR DISQUALIFICATION OF CHIEF AJ COTTER (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 385 (1984)	3.1.4.1
LBP-84-3	CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 19 NRC 282 (1984)	3.14.2 4.4.1
LBP-84-30	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 426 (1984)	2.9.5.5
LBP-84-31	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 20 NRC 446 (1984)	6.15.3
LBP-84-23	CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 20 NRC 765 (1984)	1.9
LBP-84-35	GEORGIA POWER CO. (ALVIN W. VOSTLE NUCLEAR PLANT, UNITS 1 AND 2), 20 NRC 887 (1984)	2.9.5.1 3.7.3.2 6.20.4 6.8
LBP-84-39	MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 20 NRC 1031 (1984)	6.1.4
LBP-84-42	KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 20 NRC 1296 (1984)	3.1.2.1 3.4 6.15.6
LBP-84-43	PHILADELPHIA ELECTRIC CO. (FULTON GENERATING STATION, UNITS 1 AND 2), 20 NRC 1333 (1984)	1.9
LBP-84-45	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1343 (1984)	6.19

LBP-84-47 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 1405 (1984)	4.2.2
LBP-84-50 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 20 NRC 1464 (1984)	2.11.2.4
LBP-84-53 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1531 (1984)	5.19.3 6.5.4.1
LBP-84-54 GENERAL ELECTRIC CO. (GETR VALLECITOS), 20 NRC 1637 (1984)	2.9.3.3.3 3.6
LBP-84-6 DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 2), 19 NRC 393 (1984)	2.10.2 2.9.4.1.1 2.9.4.1.2 2.9.5.1 2.9.5.7
LBP-84-7 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR PLANT, UNITS 1 AND 2), 19 NRC 432 (1984)	3.1.2.5 3.12.3 3.5.2.3 3.5.3
LBP-84-9 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 19 NRC 497 (1984)	3.4.5
LBP-85-1 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 21 NRC 11 (1985)	2.11.2 2.11.2.4
LBP-85-11 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 21 NRC 609 (1985)	2.9.5 2.9.5.1

LBP-85-11	COMMONWEALTH EDISON CO.		
LBP-85-12	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 21 NRC 644 (1985)	2.9.5.5 3.17 6.5.4.1	
LBP-85-19	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 1707 (1985)	1.8 3.1.2.6	
LBP-85-2	CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 21 NRC 24 (1985)	4.4.1.1 4.4.2 5.6.1 6.4.2.3	
LBP-85-20	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 21 NRC 1737 (1985)	2.9.9.3 2.9.9.4	
LBP-85-24	BOSTON EDISON CO. (PILGRIM NUCLEAR POWER STATION), 22 NRC 97 (1985)	2.9.5 2.9.5.1 2.9.5.4 3.13.1	
LBP-85-27	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 126 (1985)	2.9.3.3.3 2.9.4 2.9.4.1.1	
LBP-85-27A	CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 207 (1985)	2.9.5.9 5.5.1	3.5 3.5.2.3 3.5.3

LBP-85-28 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 232 (1985)	5.4
LBP-85-29 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 22 NRC 300 (1985)	3.5 3.5.1.2 3.5.2 3.5.2.3 3.5.3 3.5.5
LBP-85-3 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 21 NRC 244 (1985)	5.12.2 6.15.3 6.16.1
LBP-85-32 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 22 NRC 434 (1985)	2.11.2.2 3.5.2.2 6.16.1.3
LBP-85-33 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 22 NRC 442 (1985)	2.9.5.6 6.20.4
LBP-85-34 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA POWER STATION, UNITS 1 AND 2), 22 NRC 481 (1985)	6.15.4
LBP-85-39 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 22 NRC 755 (1985)	3.11.1.1
LBP-85-4 GENERAL ELECTRIC CO. (GETR VALLECITOS), 21 NRC 399 (1985)	3.17 3.5
LBP-85-40 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 759 (1985)	2.11.2.4

LBP-85-41 TEXAS UTILITIES ELECTRIC CO.
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 22 NRC 765 (1985) 2.11.4

LBP-85-42 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 27 NRC 795 (1985) 4.4.1
4.4.2

LBP-85-43 COMMONWEALTH EDISON CO.
(BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 805 (1985) 6.15.8

LBP-85-45 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 22 NRC 819 (1985) 4.4.1.1
4.4.2
6.4.2

LBP-85-46 KERR-MCGEE CHEMICAL CORP.
(WEST CHICAGO RARE EARTHS FACILITY), 22 NRC 830 (1985) 2.11.1
3.1.2.6

LBP-85-48 KERR-MCGEE CHEMICAL CORP.
(KRESS CREEK DECONTAMINATION), 22 NRC 843 (1985) 2.11.5.2
3.1.2.6

LBP-85-49 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY
(SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 899 (1985) 1.8
2.9.5.5
3.4.2

LBP-85-6 HOUSTON LIGHTING AND POWER CO.
(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 447 (1985) 6.5.4.1

LBP-85-7 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY
(CLINCH RIVER BREEDER REACTOR PLANT), 21 NRC 507 (1985) 1.9

LBP-85-8	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 516 (1985)	3.1.2.3
LBP-85-9	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 524 (1985)	2.9.5.5
LBP-86-10	GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 283 (1986)	2.9.5 3.17
LBP-86-11	CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 23 NRC 294 (1986)	1.8 6.16.2
LBP-86-12	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 414 (1986)	3.11.1.1.1 3.5 3.5.2.3 3.5.3
LBP-86-14	GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 553 (1986)	3.1.2.7 3.6 6.15.1.3 6.5.4.1
LBP-86-15	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 595 (1986)	3.5 3.5.2.3 3.5.3 4.4.2 4.4.4 6.4.1.1 6.5.4.1
LBP-86-16	PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 23 NRC 789 (1986)	6.14.3

LBP-86-17	GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 792 (1986)	6.16.1.3
LBP-86-20	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 23 NRC 844 (1986)	3.1.2
LBP-86-21	PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 23 NRC 849 (1986)	2.9.5 3.1.1 6.1 6.15.7
LBP-86-22	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 103 (1986)	2.9.9
LBP-86-24	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 132 (1986)	2.10.2 5.2 6.20.4
LBP-86-25	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 141 (1986)	6.20.4
LBP-86-27	FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 24 NRC 255 (1986)	3.5.2.3
LBP-86-30	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 437 (1986)	3.5.2.3 3.5.3
LBP-86-31	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 24 NRC 451 (1986)	6.16.1
LBP-86-34	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 549 (1986)	2.9.9 6.14.3

LBP-86-34	PUBLIC SERVICE CO. OF NEW HAMPSHIRE	6.16.1
LBP-86-35	RADIOLOGY ULTRASOUND NUCLEAR CONSULTANTS, P.A. (STRONTIUM-90 APPLICATOR), 24 NRC 557 (1986)	6.13
LBP-86-36A	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 24 NRC 575 (1986)	2.9.5.5
LBP-86-37	PUBLIC SERVICE CO. OF INDIANA AND WABASH VALLEY POWER ASSOCIATION (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 24 NRC 719 (1986)	1.9 3.1.2.1
LBP-86-38A	LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 24 NRC 819 (1986)	3.1.2.1
LBP-86-4	KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 23 NRC 75 (1986)	2.11.2 2.11.2.8 2.11.4 2.11.5.2
LBP-86-5	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 89 (1986)	6.9.1
LBP-86-7	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 177 (1986)	2.11.2 2.11.2.6
LBP-86-8	HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 182 (1986)	2.9.5 6.9.1
LBP-86-9	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNIT 1), 23 NRC 273 (1986)	2.9.3.1 2.9.3.3.3

LBP-87-11	TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1), 25 NRC 287 (1987)	6.15.1.3
LBP-87-12	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NRC 324 (1987)	6.20.4
LBP-87-13	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 25 NRC 449 (1987)	4.2.2
LBP-87-15	INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 25 NRC 671 (1987)	3.10 3.8
LBP-87-17	VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 25 NRC 838 (1987)	2.9.5 2.9.5.1 3.17 6.1.4.4 6.15.7 6.15.9 6.15.3
LBP-87-18	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 25 NRC 945 (1987)	2.11.2 2.11.2.2
LBP-87-19	COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 25 NRC 950 (1987)	3.1.2.1
LBP-87-2	FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR POWER PLANT, UNIT 2), 25 NRC 32 (1987)	2.9.3 2.9.4 2.9.4.2
LBP-87-20	TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 25 NRC 953 (1987)	2.11.2.4

LBP-87-21 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 25 NRC 958 (1987)	4.4.1 4.4.2 4.4.4
LBP-87-22 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 26 NRC 41 (1987)	3.1.2.1
LBP-87-23 ALFRED J MORABITO (SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 26 NRC 81 (1987)	3.1.2.1 3.7
LBP-87-24 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 26 NRC 159 (1987)	2.9.5 2.9.5.7
LBP-87-26 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 201 (1987)	3.5.2 3.5.2.3 3.5.3
LBP-87-27 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 26 NRC 228 (1987)	2.11.2
LBP-87-28 ALFRED J MORABITO (SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 26 NRC 297 (1987)	6.23.1
LBP-87-29 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 302 (1987)	3.5.2 3.5.2.3 3.5.3 5.14
LBP-87-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NRC 71 (1987)	2.9.5.5 4.4.1 4.4.2

- LBP-87-5 U.S. ECOLOGY, INC.
(SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 25 NRC 96 (1987) 6.13
- LBP-87-7 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 25 NRC 116 (1987) 2.9.3
2.9.4.1.2
- LBP-88-1A FINLAY TESTING LABORATORIES, INC.
27 NRC 19 (1988) 3.3.2.1
- LBP-88-10A FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR POWER PLANT, UNIT 1), 27 NRC 452 (1988) 2.9.4.1.4
2.9.5
6.1.4.4
6.15.7
6.15.9
6.16.2
- LBP-88-12 PHILADELPHIA ELECTRIC CO.
(LIMERICK GENERATING STATION, UNIT 1), 27 NRC 495 (1988) 3.5.2.3
- LBP-88-13 LONG ISLAND LIGHTING CO
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 27 NRC 509 (1988) 3.10
- LBP-88-15 DAIRYLAND POWER COOPERATIVE
(LA CROSSE BOILING WATER REACTOR), 27 NRC 576 (1988) 3.4
3.1.2.1
6.15.1.1
- LBP-88-19 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 145 (1988) 3.1.2.1
3.1.2.2
6.1.4.4
- LBP-88-20 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 28 NRC 161 (1988) 6.16.1

LBP-88-21 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 28 NRC 170 (1988)

5.12.2
5.12.2.1

LBP-88-23 GENERAL PUBLIC UTILITIES NUCLEAR CORP.
(THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 28 NRC 178 (1988)

3.5.2.3

LBP-88-24 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 31; (1988)

2.11.5.2

LBP-88-25 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 394 (1988)

2.11.1
2.11.4

LBP-88-25A VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 435 (1988)

2.11.1
2.11.4

LBP-88-26 VERMONT YANKEE NUCLEAR POWER CORP.
(VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 440 (1988)

2.9.5
2.9.5.5
6.15.4
6.15.7

LBP-88-27 FLORIDA POWER AND LIGHT CO.
(ST. LUCIE NUCLEAR POWER PLANT, UNIT 1), 28 NRC 455 (1988)

3.5.2.3
3.5.3

LBP-88-28 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 28 NRC 537 (1988)

2.11.2.5

LBP-88-29 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 637 (1988)

3.1.4.2

LBP-88-3 RADIOLOGY ULTRASOUND NUCLEAR CONSULTANTS, P. A.
(STRONTIUM-90 APPLICATOR), 27 NRC 220 (1988)

6.13

LBP-88-30 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 644 (1988)

6.16.1

LBP-88-31 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 28 NRC 652 (1988)

3.5.2.3
3.5.3

LBP-88-32 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 28 NRC 667 (1988)

1.8

LBP-88-4 PACIFIC GAS AND ELECTRIC CO.
(HUMBOLDT BAY POWER PLANT, UNIT 3), 27 NRC 236 (1988)

6.1.4

LBP-88-5 ALFRED J MORABITO
(SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 27 NRC 241 (1988)

6.16.1

LBP-88-6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 27 NRC 245 (1988)

2.9.5.1
3.1.2.1

LBP-88-7 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 27 NRC 289 (1988)

9.1.2.1

LBP-88-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2), 27 NRC 293 (1988)

6.03

LBP-89-1 LONG ISLAND LIGHTING CO.
(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 29 NRC 5 (1989)

2.9.5.10
2.9.5.6
3.1.2.3
5.12.2.1

LBP-89-10	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 297 (1989)	6.8
LBP-89-11	ADVANCED MEDICAL SYSTEMS (ONE FACTORY ROW, GENEVA, OHIO 44041), 29 NRC 306 (1989)	3.1.2.2
LBP-89-14	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 29 NRC 487 (1989)	3.18.1
LBP-89-15	FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 29 NRC 493 (1989)	3.1.2.1 3.17 6.1.4.4
LBP-89-16	KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 29 NRC 508 (1989)	2.9.5.5
LBP-89-19	PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 30 NRC 55 (1989)	3.1.2.1
LBP-89-23	COMBUSTION ENGINEERING, INC. (HEMATITE FUEL FABRICATION FACILITY), 30 NRC 140 (1989)	2.9.3 2.9.4.1.1 2.9.4.1.2 6.13
LBP-89-25	COMBUSTION ENGINEERING, INC. (HEMATITE FUEL FABRICATION FACILITY), 30 NRC 187 (1989)	6.13
LBP-89-28	PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 271 (1989)	2.2 2.9.5.1 3.17 4.4.2

LBP-89-29 ROCKWELL INTERNATIONAL CORP.
(ROCKETDYNE DIVISION). 30 NRC 299 (1989)

3.1.2.7

LBP-89-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 29 NRC 51 (1989)

3.17
6.15.7

LBP-89-30 NORTHERN STATES POWER CO.
(PATHFINDER ATOMIC PLANT). 30 NRC 311 (1989)

2.9.4
2.5.4.1.1
2.9.4.1.2
2.9.4.1.4

LBP-89-32 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 30 NRC 375 (1989)

1.8
3.1.2.5
3.10
3.11.4
6.15.1.3

LBP-89-33 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 30 NRC 656 (1989)

3.1.2

LBP-89-35 KERR-MCGEE CHEMICAL CORP.
(WEST CHICAGO RARE EARTHS FACILITY). 30 NRC 677 (1989)

2.11.5.2
3.1.2.1
3.5.2.3
6.15.3

LBP-89-38 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 30 NRC 725 (1989)

3.5.1
4.4.1
6.20.5

LBP-89-39 WRANGLER LABORATORIES, LARSEN LABS., ORION CHEMICAL CO., AND JOHN P. LARSEN
30 NRC 746 (1989)

6.16.1.1
6.16.2
6.20.5

LBP-89-4 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 62 (1989)	2.9.5.4 2.9.5.5 3.1.2.1 4.4.1 4.4.2 6.16.1
LBP-89-6 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 29 NRC 127 (1989)	2.9.5 2.9.5.5 3.15 6.15.4 6.15.7
LBP-89-7 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 29 NRC 138 (1989)	3.12.4
LBP-89-9 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 271 (1989)	3.5.2.3
LBP-90-1 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 19 (1990)	2.9.5.5 4.4.1 4.4.2
LBP-90-10 ROCKWELL INTERNATIONAL CORP. (ROCKETDYNE DIVISION), 31 NRC 293 (1990)	3.11.1.1
LBP-90-11 ROCKWELL INTERNATIONAL CORP. (ROCKETDYNE DIVISION), 31 NRC 320 (1990)	3.11.1.3
LBP-90-12 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 427 (1990)	2.10.2 2.9.3.5 2.9.9.5 3.6 4.4.1.1 4.4.2

LBP-90-15 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNIT 1), 31 NRC 501 (1990)

2.9.4.1.1

LBP-90-16 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 31 NRC 509 (1990)

2.9.3.5
2.9.5.1

LBP-90-17 ADVANCED MEDICAL SYSTEMS
(ONE FACTORY ROW, GENEVA, OHIO 44041), 31 NRC 540 (1990)

3.5.2.3
6.24.3

LBP-90-18 CURATORS OF THE UNIVERSITY OF MISSOURI
31 NRC 559 (1990)

2.2
2.9.4.1.2
6.1.4
6.13

LBP-90-22 CURATORS OF THE UNIVERSITY OF MISSOURI
31 NRC 592 (1990)

3.1.2.7

LBP-90-23 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 7 (1990)

6.20.4

LBP-90-24 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 32 NRC 12 (1990)

2.9.3.5
2.9.4.2

LBP-90-25 CLEVELAND ELECTRIC ILLUMINATING CO.
(PERRY NUCLEAR POWER PLANT, UNIT 1), 32 NRC 21 (1990)

2.9.4.1.1

LBP-90-26 ALL CHEMICAL ISOTOPE ENRICHMENT, INC.
32 NRC 30 (1990)

3.5.2.3
6.26

LBP-90-27 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 40 (1990)

3.1.2.7

LBP-90-28 ROBERT L. DICIPHERBER AND COMMONWEALTH EDISON CO.
(QUAD CITIES NUCLEAR POWER STATION), 32 NRC 85 (1990)

3.18.1

LBP-90-29 GEORGIA POWER CO.
(ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 32 NRC 89 (1990)

2.9.3
2.9.4.1.2
2.9.4.1.4

LBP-90-30 NORTHERN STATES POWER CO.
(PATHFINDER ATOMIC PLANT), 31 FRC 40 (1990)

2.9.4.1.2
2.9.4.1.4
6.13

LBP-90-30 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 95 (1990)

2.9.4.1.2
5.7.1

LBP-90-32 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 32 NRC 181 (1990)

3.1.2.3

LBP-90-33 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 245 (1990)

3.1.2.7

LBP-90-34 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 253 (1990)

6.5.4.1

LBP-90-35 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 259 (1990)

5.7.1

LBP-90-4 FLORIDA POWER AND LIGHT CO.
(TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 31 NRC 54 (1990)

3.5.3
6.20.4

LBP-90-42 TULSA GAMMA RAY, INC.
32 NRC 387 (1990) 2.5.1

LBP-90-43 TULSA GAMMA RAY, INC.
32 NRC 390 (1990) 2.5.2

LBP-90-44 PUBLIC SERVICE CO. OF NEW HAMPSHIRE
(SEABROOK STATION, UNITS 1 AND 2). 32 NRC 433 (1990) 3.5.2.3

LBP-90-45 CURATORS OF THE UNIVERSITY OF MISSOURI
32 NRC 449 (1990) 1.5.1

LBP-90-46 ST. MARY MEDICAL CENTER-HOBART AND ST. MARY MEDICAL CENTER-GARY
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