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NUCLEAR REGULATORY COMMISSION ISSUANCES

November 1995

U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
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NUCLEAR REGULATORY COMMISSION ISSUANCES

November 1995

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

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

U.S. NUCLEAR REGULATORY COMMISSION

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

COMMISSIONERS

Shirley A. Jackson, Chairman
Kenneth C. Rogers

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

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman[1]

In the Matter of **Docket Nos. 50-424-OLA-3**
50-425-OLA-3

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2) **November 21, 1995**

The Commission reviews an interlocutory Atomic Safety and Licensing Board decision made orally on the record (Sept. 6, 1995, Tr. at 13,154-58), ordering the Licensee to produce notes taken by the Licensee's attorney on communications with a Licensee employee. The Commission concludes that the notes are protected under the attorney-client privilege, and vacates the Licensing Board's order.

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DISCOVERY ORDERS)

Typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review.

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DISCOVERY ORDERS)

Immediate review may be appropriate in exceptional circumstances, when the potential difficulty of later unscrambling and remedying the effects of an

[1] This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

improper disclosure of privileged material would likely result in an irreparable impact.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

The attorney-client privilege protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. The privilege is applicable when a corporation is the client.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

Not every communication by an employee to counsel is privileged. Communications made for business or personal advice are not covered by the privilege. Privileged communications concern matters within the scope of the employee's duties.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

The attorney-client privilege protects only the communications of facts from client to attorney, not the underlying facts themselves.

MEMORANDUM AND ORDER

I. INTRODUCTION

We have before us a petition by the Georgia Power Company (GPC) for interlocutory review of an Atomic Safety and Licensing Board order made orally on the record on September 6, 1995 (Tr. at 13,154-58). The order compels GPC to produce notes taken by a GPC attorney on communications with a GPC employee, Ms. Ester Dixon. GPC claims the attorney notes are protected from disclosure under both the attorney-client privilege and the work-product doctrine. The NRC Staff takes no position in this dispute. The Commission grants

interlocutory review, concludes that the notes are privileged, and accordingly vacates the Licensing Board's order.

I. BACKGROUND

The Intervenor, Allen Mosbaugh, seeks notes taken by John Lamberski, an attorney for GPC, during 1992 interviews with Ester Dixon, a GPC employee (the "Dixon notes"). In her capacity as a secretary at the Vogtle facility, Ms. Dixon typed certain documents that were used by GPC in a presentation to the NRC made on April 9, 1990. These documents are relevant to the Intervenor's allegations that GPC misled the NRC about the condition of the Vogtle diesel generators following a loss of offsite power that occurred at Plant Vogtle on March 20, 1990. The Intervenor alleges that GPC presented false and misleading information on the number of successful consecutive starts of the diesel generators. Particularly at issue is a factual dispute over the sequence in which GPC prepared two documents on the diesel generator starts.

The Intervenor deposed Ms. Dixon in July 1994. She testified in this proceeding on June 9, 1995. The Intervenor claims that Ms. Dixon's testimony before the Board is inconsistent with her earlier deposition statements, and that on both occasions she has been unable to recall significant facts. To resolve any differences in Ms. Dixon's statements between the 1994 deposition and the 1995 hearing testimony, and to obtain factual information that Ms. Dixon may have since forgotten, the Intervenor seeks the notes of Ms. Dixon's 1992 statements to GPC counsel.

On June 30, 1995, the Intervenor moved to compel production of the Dixon notes. GPC asserted both the attorney-client privilege and work-product immunity. GPC stated that the notes were taken by Mr. Lamberski during his own investigations into allegations of inaccurate diesel start information. Those allegations arose first in 1990 and prompted an NRC Office of Investigations (OI) investigation and a Department of Justice inquiry. In response to these inquiries, GPC's counsel, John Lamberski, conducted his own investigation into the events surrounding the diesel generator starts. Mr. Lamberski states that, in August 1992, he interviewed Ms. Dixon on one occasion at the Vogtle facility, and later spoke with her on the telephone on three occasions.[2] He took three pages of notes on these discussions. GPC states that Ms. Dixon was aware that the purpose of the interviews was for the corporation to obtain legal advice.

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[2] Lamberski Affidavit at 3, attached to Georgia Power Company's Petition for Review of Order to Produce Attorney Notes of Privileged Communications (GPC Appeal Brief) (Sept. 20, 1995).

The Licensing Board ordered GPC to present the notes for an *in camera* inspection. LBP-95-15, 42 NRC 51 (1995). After GPC moved for reconsideration of the Board's order, the Board requested the parties to brief the standards for the attorney-client privilege provided under *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (Tr. at 10,820-21). The Board subsequently denied the motion for reconsideration (Tr. at 12,942). Following an *in camera* inspection of the notes, the Board concluded that "there was no material that required protection because it's attorney's work product and would reveal the workings of Mr. Lamberski's mind," and ordered release of the notes to the parties (Tr. at 13,154).

GPC indicated that it would appeal and moved for a stay of the Board's order, pending appellate review. The Commission on September 13, 1995, stayed the effectiveness of the order, pending receipt of the parties' briefs and a Commission decision on whether to take review. The Commission now grants GPC's petition for review and, for the reasons in this Decision, vacates the Licensing Board's order.

III. INTERLOCUTORY REVIEW

The Commission does not ordinarily entertain interlocutory appeals. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). A petitioner for interlocutory review must demonstrate that review is warranted because the Board order affects the proceeding in a "pervasive or unusual manner" or because it results in "irreparable impact." *See* 10 C.F.R. § 2.786(g)(1)-(2). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994). Given the circumstances in this proceeding, GPC has satisfied the "irreparable impact" criterion. Although, typically, discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review, here an erroneous disclosure of documents ruled later to be absolutely privileged could prove irreparable. The potential difficulty of unscrambling and remedying the impact of an improper disclosure in this lengthy, complex, and contentious proceeding, which spans years of litigation and has generated a massive record, presents exceptional circumstances, making immediate review appropriate.[3] This dispute poses a discrete legal question, more easily resolved now, lest we be unable later to tailor meaningful relief. Moreover, "maintenance of the attorney-client privilege up to its proper limits

[3] *See, e.g., In re Bieter Co.*, 16 F.3d 929, 931-32 (8th Cir. 1994); *Admiral Insurance Co. v. United States District Court for the District of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989).

has substantial importance to the administration of justice,"[4] and here the Licensing Board's decision appears in conflict with federal common law standards on the privilege.

IV. ANALYSIS

Pursuant to 10 C.F.R. § 2.740(b)(1), parties in formal administrative proceedings may obtain discovery regarding any matter "not privileged," relevant to the subject matter involved in the proceeding. The oldest common law privilege for confidential communications, the attorney-client privilege, protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. *See Upjohn*, 449 U.S. at 389-96. It has long been established that the attorney-client privilege also applies when a corporation is the client. *See id.* at 390. In *Upjohn*, the Supreme Court addressed the scope of the privilege as applied to communications by corporate employees, and held that each case should be evaluated individually to determine whether applying the privilege would further its underlying purposes. *See id.* at 396-97.

One such purpose, the Court observed, is to "encourage full and frank communication between attorneys and their clients." *Id.* at 389. Sound legal advice "depends upon the lawyer's being fully informed by the client." *Id.* Therefore, the lawyer's first task when faced with a legal problem is to obtain the full factual background, "sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. Because the employees who possess relevant information needed by counsel to render legal advice often are middle- and lower-level employees, the Court in *Upjohn* rejected limiting application of the privilege to the "control group" of a corporation, i.e., officers and agents. *Id.* at 392. Accordingly, the Court ruled that questionnaires sent by corporate counsel to corporate managers abroad, regarding questionable payments to foreign officials, and the memoranda and notes of interviews conducted by counsel with the recipients of the questionnaires, fell within the scope of the attorney-client privilege. The Court noted that the communications between the Upjohn Company employees and counsel (1) were needed as a basis for legal advice sought by the corporation; (2) involved matters within the scope of the employee's duties; (3) were made by employees sufficiently aware that they were being questioned for the corporation to obtain legal advice; and (4) were considered confidential when made and maintained confidential. *Id.* at 394-95.

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[4] *In re Bieter Co.*, 16 F.3d at 931 (*quoting Harper & Row Publishing Co. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971)).

Here, the Licensing Board found *Upjohn* distinguishable. In *Upjohn*, reasoned the Board, the managers who responded to counsel's questions might have feared consequences to themselves from revealing possible illegal activities, and therefore the confidentiality of communications with counsel was crucial. In contrast, Ms. Dixon's "interest in confidentiality was at a minimum" because "[t]he only thing she needed to do was to share basically ministerial-type facts" (Tr. at 12,942-43).

In its petition for review, GPC submits that whether or not the information provided by Ms. Dixon was "ministerial" is irrelevant, and instead what matters is that Ms. Dixon was questioned about information needed by GPC counsel to advise the corporation. GPC Appeal Brief at 5. GPC argues that the circumstances here are closely analogous to those of *Upjohn*. Specifically, GPC contends that (1) the information Ms. Dixon provided was necessary as a basis for providing legal advice to the corporation, and was not available from "control group" officers; (2) the interviews concerned matters within the scope of Ms. Dixon's duties; (3) the statements were considered confidential when made and kept so; and (4) Ms. Dixon was aware that the purpose of the questioning was for the corporation to obtain legal advice. GPC Appeal Brief at 6.

Applying *Upjohn*'s principles, the Commission finds the Dixon notes protected by the attorney-client privilege. GPC sufficiently has shown that the notes would not have been created but for GPC's need for legal counsel. At the time of the August 1992 conversations with Ms. Dixon, GPC was already the subject of inquiries by OI and the Department of Justice into Intervenor's allegations concerning the diesel generator starts. Mr. Lamberski states that he interviewed Ms. Dixon as part of his own investigation, as GPC's counsel, into the diesel generator matter. He next states that his questions to Ms. Dixon focused on the typing of documents, a function within her duties at GPC. Mr. Lamberski also states that Ms. Dixon was aware at the time of the interview that she was being questioned for GPC to obtain legal advice concerning the diesel allegations. He further states that the interview notes have been treated as privileged material.[5]

The Intervenor claims that because Ms. Dixon's actions did not subject GPC to possible liability, she was in effect a mere third-party "fact witness" to the actions of others.[6] The Intervenor relies upon a state-court decision in Arizona, which held that the memoranda of interviews conducted with a nurse and scrub technician present during an operation were not privileged because "[i]f the employee is not the one whose conduct gives rise to potential corporate liability,

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[5] *See generally* Lamberski Affidavit. None of the facts stated in Mr. Lamberski's affidavit has been called into dispute by counteraffidavits or other evidence.

[6] *See* Intervenor's Opposition to GPC's Petition for Review of Order to Produce Attorney Notes (Intervenor's Appeal Brief) (Oct. 3, 1995) at 10-11.

then it is fair to characterize the employee as a 'witness' rather than as a client." *Samaritan Foundation v. Goldfarb*, 176 Ariz. 497, 862 P.2d 870, 877 (1993).

The Commission declines to follow this interpretation of *Upjohn*. To the Commission's knowledge, it is espoused nowhere else but in *Samaritan*. That case is not controlling here. *Cf.* Fed. R. Evid. 501 (federal courts apply federal common law of privilege, except where state law governs particular controversy). The Commission notes, additionally, information recently brought to our attention by GPC, indicating that the Arizona legislature by statute specifically has overruled *Samaritan*, to bring the elements of Arizona's attorney-client privilege into accord with the approach of federal courts.[7]

The federal common law standard, derived from *Upjohn*, focuses upon the primary purpose of the communication, not the specific behavior of the employee. Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know.[8] These factors "form the crux of the justification for the privilege and allow courts to apply the privilege on a case by case basis."[9]

Not every communication by an employee to counsel is privileged, however. Otherwise, a corporation could conceal information simply by routing it to counsel. Communications made for business or personal advice, for example, are not covered by the privilege.[10] Accordingly, a corporate status report or the minutes of a meeting do not become protected simply because they are transmitted to counsel, where no request for legal advice was involved.[11]

Upjohn thus has been interpreted as finding privileged "communications made by corporate employees concerning matters pertinent to their job tasks, regardless of echelon, if sought by the corporation's attorney in order to formulate and render legal advice to the corporation."[12] Contrary to the approach taken by the Arizona Supreme Court in *Samaritan*, the federal courts have articulated no apparent exception for communications made by employees who have not

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[7] *See* Letter from Ernest L. Blake, Jr., GPC counsel, to Office of Commission Appellate Adjudication (Oct. 25, 1995), referencing Arizona Revised Statutes § 12-2234 (signed into law Apr. 26, 1994).

[8] *See Securities and Exchange Commission v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 681 (D.D.C. 1981).

[9] *Id.*

[10] *Id.*

[11] *See In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385 n.9 (1978).

[12] *In re LTV Securities Litigation*, 89 F.R.D. 595, 602 (N.D. Tex. 1981). *See also First Chicago International v. United Exchange Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (privileged communication resulted from corporation's need for legal advice); *Command Transportation, Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 96 (D. Mass. 1987) (*Upjohn*'s "legacy" is to encourage focus on whether applying privilege would promote flow of information to counsel regarding issues on which corporation seeks legal advice); *Leucadia, Inc. v. Reliance Insurance Co.*, 101 F.R.D. 674, 679 (S.D.N.Y. 1983) (counsel's factual investigation for purpose of rendering legal advice), *cert. denied*, 490 U.S. 1107 (1989); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385, 387 (D.D.C. 1978) (focus on relevance of the communication to particular legal problem).

embroiled the corporation in legal conflict. *See, e.g., In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (accountant hired only after period of questionable activity aided corporate counsel in counsel's internal investigation of accounting improprieties).

The attorney-client privilege "rests on the need of the advocate and counselor to know *all* that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Upjohn*, 449 U.S. at 389 (emphasis added) (*citing Trammel v. United States*, 445 U.S. 40, 51 (1980)). The Supreme Court rejected the "control group" test because it would hamper the communication of "relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. That concern is difficult to reconcile with *Samaritan*. Limiting application of the privilege to those communications made by employees whose actions necessarily have subjected the corporation to liability, as *Samaritan* proposes, would frustrate the ability of corporate counsel to obtain critical information particular employees may have gleaned in the course of their corporate duties.[13]

The corporate employee's personal "interest in confidentiality," apparently the focus of the Licensing Board, is not determinative. In the corporate setting, the attorney-client privilege does not belong to the employee; it belongs to the corporation and can be waived by the corporation. Any interest the employee may have had in the confidentiality of the communications will be protected only so long as the corporation chooses.

The Intervenor also argues that the attorney notes must be disclosed because Georgia Power employed Mr. Lamberski not for legal advice, but merely "to investigate facts associated with the submission of false information concerning diesel starts,"[14] which, in the Intervenor's view, was a "business function," unencompassed by the attorney-client privilege.[15] The Commission cannot agree. That GPC officers could have themselves undertaken an investigation of the allegations and drafted a response to the NRC does not eclipse the special role and training that an attorney might bring to bear in "sifting through the facts" for the legally relevant,[16] particularly given that at the time GPC was the subject of at least two federal investigations into alleged serious regulatory and criminal violations.

Of course, the attorney-client privilege protects only the communications of facts from client to attorney, not the underlying facts themselves. *Upjohn*, 449 U.S. at 395-96. Ms. Dixon herself can be and has been questioned by the

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[13] Moreover, it would be no easy task to discern whether a particular employee's actions may have subjected a corporation to liability. Employees performing even "ministerial-type" duties might be knowing participants in an illegal scheme.

[14] Intervenor's Appeal Brief at 16.

[15] *See generally id.* at 15-18.

[16] *Upjohn*, 449 U.S. at 390-91; *see also In re LTV Securities Litigation*, 89 F.R.D. at 601.

Intervenor's counsel about the documents that she typed. During the hearing the Intervenor had the opportunity to question Ms. Dixon about any changes or discrepancies between her deposition statements and her testimony before the Board. Given the absolute nature of the attorney-client privilege, the Intervenor cannot use Mr. Lamberski's notes to obtain further information on Ms. Dixon's activities.[17]

The Commission adds a final word of caution. Many companies — including NRC licensees — employ attorneys to investigate incidents involving possible regulatory or statutory violations. While the Commission has ruled above that *Upjohn* may confer an attorney-client privilege upon communications between the attorney involved in such an investigation and a company employee, it is equally clear that *Upjohn* does not eliminate any reporting requirements imposed by NRC regulations or any other authority. Accordingly, if an attorney investigating a matter for a client discovers information that is required to be reported to the NRC, that reporting requirement is still legal, valid, and binding upon the company. *Upjohn* may not be used as a shield to avoid providing required information.

V. CONCLUSION AND ORDER

The Commission agrees with GPC that the Dixon attorney notes are protected from discovery under the attorney-client privilege. Consistent with the foregoing opinion, the Commission hereby orders:

(1) The Georgia Power Company's petition for review dated September 20, 1995, is *granted.*

(2) The Atomic Safety and Licensing Board's order made orally on the record on September 6, 1995, compelling production of Mr. Lamberski's notes, is *vacated.*

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 1995.

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[17] Having found the notes privileged material, we need not address the applicability of the work-product doctrine.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-Ren
ASLBP No. 95-704-01-Ren
(Renewal of Facility License No. R-97)

GEORGIA INSTITUTE OF TECHNOLOGY
(Georgia Tech Research Reactor, Atlanta, Georgia)

November 1, 1995

With respect to a contention challenging the physical security of the site during the 1996 Summer Olympic Games, the Licensing Board determines that the Applicant's proposed removal of fuel from the site prior to the Olympic Games and not replacing it until after the Olympic Games makes the contention moot, notwithstanding the Applicant's failure to remove other radioactive materials under the control of the State of Georgia as an Agreement State (concerning which the Board lacks jurisdiction).

*Corrected version.

RULES OF PRACTICE: MOOTNESS

Mootness is not necessarily dependent upon a party's views that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists.

PARTIAL INITIAL DECISION
(Mootness of Security Contention)

Georgia Institute of Technology (Applicant) and the NRC Staff each appealed to the Commission this Board's admission (by majority vote) of Contention 5 of Georgians Against Nuclear Energy (GANE or Intervenor), concerning security of the site during the forthcoming 1996 Olympic Games. LBP-95-6, 41 NRC 281 (1995). By its Memorandum and Order dated July 26, 1995, CLI-95-10, 42 NRC 1, the Commission vacated our decision on this contention and remanded it to us for reconsideration in light of newly emerging circumstances.

The newly emerging circumstances arose as a result of the Applicant's advice to the Commission, by documents dated June 21, 1995, July 12, 1995, and July 25, 1995, that it would remove the high-enriched uranium (HEU) fuel currently in the reactor prior to the Olympic Games and replace it with low-enriched uranium (LEU) fuel after the Olympic Games are concluded.[1] In its remand, the Commission inquired as to whether the contention is now moot. By Memorandum and Order (Consideration of Mootness of Contention 5), dated August 1, 1995 (unpublished), we directed the parties (and permitted the Staff) to confer on this subject and report back to us as to whether Contention 5 is indeed moot, together with some related inquiries. All three parties responded.

A. Positions of the Parties

GANE claims that its contention encompasses "all of the radioactive materials" at the site.[2] GANE commends the Applicant for offering to remove both the HEU fuel and a cesium-137 source, but it claims that its contention is not moot "as long as Georgia Tech plans to retain the 250,000 curies of cobalt-60

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[1] By Order dated June 16, 1995, the Staff ordered Georgia Tech to convert from HEU fuel to LEU fuel. In response to a Notice of Opportunity for Hearing on that order, published in 60 Fed. Reg. 32,516 (June 22, 1995), GANE has petitioned to intervene in that proceeding to challenge certain procedural aspects of the change, although not the change itself. That proceeding is pending before a licensing board with the same members as this Board.

[2] Georgians Against Nuclear Energy (GANE) Comments on Security at the Georgia Tech Reactor Facility Following Georgia Tech's Decision to Remove the Reactor Fuel Before the 1996 Olympic Games (GANE Response), dated August 31, 1995.

on the site." GANE goes on to describe some of the dangers that the cobalt-60 may pose to Olympic visitors. GANE recognizes that the cobalt-60 is under the jurisdiction of the State of Georgia but claims that NRC has authority to override that authority under "special circumstances," such as the occurrence of the Olympic Games.

For their parts, the Applicant and the Staff each took the position that Contention 5 is indeed moot, inasmuch as Georgia Tech will remove from the site all the radioactive materials of concern to GANE other than the cobalt-60, and this Board has no jurisdiction over the cobalt-60.[3] As set forth by the Staff, "the cobalt-60 located at the facility is not covered by the NRC license and is not an appropriate subject for consideration in this NRC license renewal proceeding."[4] In addition, both the Applicant and Staff take the position that the security of the cobalt-60 was not part of the initial contention, which (they claim) was focused solely on the HEU fuel.

The Staff further asserts that the residual materials that GANE generally references (most particularly, the cobalt-60) are not sufficient to comprise an admissible contention, under the generally applicable contention requirements of 10 C.F.R. § 2.714(b)(2) and (d)(2), which require that contentions must fall within the scope of matters appropriate for hearing in a particular proceeding and that they cannot constitute an attack on applicable statutory requirements. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Staff asserts that we should dismiss Contention 5, subject to the Licensee's timely performance of the commitments set forth in its letter of July 25, 1995.[5]

In response to our further inquiry concerning the scope of NRC's authority to override an Agreement State,[6] both the Applicant and Staff opined that this Licensing Board, for varying reasons, has no authority to do so.[7] The Applicant essentially rested its response on its previously expressed view that the cobalt-60 is not encompassed within Contention 5. The Applicant additionally provided examples of how the State is exercising control over the cobalt-60, through ongoing inspections. For its part, the Staff reiterated its view that cobalt-60 is not within the scope of Contention 5 but, additionally, provided a reasoned and thorough discussion of circumstances under which NRC has taken action

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[3] Georgia Institute of Technology's Statement as to Issue of Mootness of Contention 5, dated August 28, 1995 [Applicant 8/28/95 Response]; NRC Staff's Response to Licensing Board's Memorandum and Order of August 1, 1995, dated September 1, 1995 [Staff 9/1/95 Response].

[4] Staff Response at 5-6.

[5] *Id.* at 4, 8.

[6] Memorandum and Order (Responses Concerning Mootness), dated September 7, 1995.

[7] Georgia Institute of Technology's Response to Board's Memorandum and Order of September 7, 1995, dated September 18, 1995 [Applicant 9/18/95 Response]; NRC Staff's Response to Licensing Board's Memorandum and Order of September 7, 1995, dated September 22, 1995 [Staff 9/22/95 Response].

to override or take back state authority, concluding that no such circumstances exist here.

B. Board Ruling

At the outset, we reject the Applicant's and the Staff's position that cobalt-60 was not intended to be part of GANE's contention. We construe GANE's reference to "hazardous materials" in its Contention 5 as intended to encompass the onsite cobalt-60 — that material was explicitly referenced in other proposed contentions (1 and 2) and was thoroughly discussed at the first prehearing conference (e.g., Tr. 65-68, 70, 75, 81, 109-12, 116, 126-27, 132, 138). Our opinion on mootness, therefore, is not based on the alleged failure of Contention 5 to include cobalt-60.

But we agree with the NRC Staff that this Licensing Board has no jurisdiction at this time to consider the security protection of the cobalt-60 (as well as the cesium-137 source) to be provided during the Olympic Games. As set forth by the Staff, the cobalt-60 is licensed to Georgia Tech by the State of Georgia, under Georgia Radioactive Material License No. GA 147-1 (SNM), Amendment No. 50 (June 23, 1993).[8] The cesium-137 source is likewise licensed by the State under the same license. To the extent that GANE seeks to have us consider the security of the cobalt-60 or the cesium-137 source during the Olympic Games, therefore, we must deny that request.

In our view, as set forth by the Staff, the Commission and Agreement States (such as Georgia) do not share "dual or concurrent jurisdiction" over such materials. Full authority rests with the State. The Commission, however, would have authority to override the transfer of authority to Georgia in extraordinary circumstances. Under section 274j of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(j), the Commission is empowered to suspend or terminate a state's regulatory authority over materials if the Commission were to find that such action is required to protect the public health and safety.

The Olympic Games appear to present a circumstance where the Commission might choose to exercise such authority were Georgia providing inadequate protection. We have no indication, however, that such is the case here, although GANE claims that the State has been unresponsive to its concerns.[9] Although we express no conclusion on this question, the State inspection reports that Georgia Tech provided to us with its September 18, 1995 Response could be deemed to suggest that Georgia is taking its regulatory responsibilities seriously. In any

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[8] Staff September 22, 1995 Response at 4.
[9] GANE Response at 6.

event, we must leave it to the Commission to take any additional action that it considers appropriate. As the Staff has observed, a full panoply of cooperative measures, including discussions, are available to the Commission to enhance the protection to the public from radioactive materials provided by a State.[10]

Mootness, in our view, is not necessarily dependent upon a party's view that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. *See, generally, Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993). That is the case here, notwithstanding GANE's view that the cobalt-60 and the cesium-137 source also should be removed from the site during the Olympic Games — relief that we are not authorized to grant.

We agree with the Staff, however, that timely performance by the Applicant of its commitments to remove fuel from the site prior to the Olympic Games is necessary to ensure mootness of GANE's claims. As a condition of our resolution of Contention 5, and subject to enforcement by the Staff, we are conditioning any license renewal that may be warranted upon the successful completion of commitments made by Georgia Tech to remove the fuel from the site prior to the Olympic Games and not to bring the new LEU fuel back until the Games have been completed.

In the meantime, we call upon the Staff to provide assurance that the Applicant's commitments are carried out in a timely fashion. We are separating our decision on the security contention from that on the remainder of the proceeding and, to ensure applicability prior to the Olympic Games, we find good cause for making this condition immediately effective.

C. Order

Based on the entire record, and for the reasons stated, it is, this 1st day of November 1995, ORDERED:

1. Contention 5, concerning security of the site during the 1996 Olympic Games, is *resolved*, subject to a condition requiring Georgia Tech to remove all fuel from the site prior to the 1996 Olympic Games and barring return of fuel until after completion of the Olympic Games.

2. The security provided for the only residual radioactive materials as to which GANE seeks further action (cobalt-60 and the cesium-137 source) is not within our authority to resolve and hence cannot comprise an acceptable contention under 10 C.F.R. § 2.714(b) and (d).

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[10] Staff September 22, 1995 Response at 11-12. The Staff acknowledges the broad authority of licensing boards and concludes that the Commission could appoint boards to oversee state agreements but asserts that the Commission has instead delegated such authority to the Office of State Programs. *Id.* at 15-16. We see no reason to disagree.

3. A copy of this Partial Initial Decision will be transmitted to the Commission, for its information or further action, as appropriate.

4. For good cause shown, and as set forth in 10 C.F.R. § 2.764, this Partial Initial Decision shall be immediately effective.

5. This Partial Initial Decision is subject to review by the Commission pursuant to 10 C.F.R. § 2.786. To seek review, any party may file a petition for review within fifteen (15) days after service of this Decision. Such petition must comply with the requirements spelled out in 10 C.F.R. § 2.786.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 1, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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

In the Matter of

Docket No. 40-8681-MLA-3
(ASLBP No. 94-693-02-MLA-3)
(Source Material License No. SUA-1358)

ENERGY FUELS NUCLEAR, INC.

November 3, 1995

MEMORANDUM AND ORDER
(Terminating Proceeding)

This informal proceeding convened under 10 C.F.R. Part 2, Subpart L, involves an amendment application submitted by Energy Fuels Nuclear, Inc. ("Licensee" or "EFN") proposing to dispose of United States Department of Energy ("DOE") mill tailings at EFN's White Mesa Mill near Blanding, Utah. Subsequent to the submittal of EFN's amendment request, Norman Begay, a member of the White Mesa band of the Ute Mountain Native American Tribe, petitioned for a hearing and the petition was granted.[1]

During the early stages of this proceeding, EFN informed the parties that the Department of Energy had made a decision to utilize a disposal site other than the White Mesa Mill facility. Intervenor Begay then sought to discontinue the proceeding by arguing that the amendment application had become moot by DOE's decision. At that time, EFN was actively pursuing discussions with DOE in an attempt to reverse the DOE decision not to use the White Mesa Mill as a

[1] LBP-94-33, 40 NRC 151 (1994).

disposal site. After consultation with the parties, the Presiding Officer found no reason to discontinue the proceeding. EFN was given until October 1, 1995, to conduct negotiations with DOE, at which time the matter was set to be revisited by the Presiding Officer and the parties.[2]

On October 2, 1995, Counsel for EFN submitted a Motion to Dismiss Hearing Request. As grounds for the Motion, EFN states that on September 29, 1995, it notified the NRC Staff that EFN has withdrawn its request for an amendment to License No. SUA-1358 for disposal of the DOE mill tailings. The withdrawal request was "conditioned [by EFN] upon the option of EFN to re-open the request at some future date without prejudice or bias."[3]

The NRC Staff's Response to the Licensee's Motion suggests that the Presiding Officer should dismiss this proceeding as moot, without prejudice either to EFN's ability to refile its license amendment application in the future or to Intervenor Norman Begay's right to request a hearing on any such future application. The Staff correctly argues that the sanction of a dismissal with prejudice should be reserved for "unusual situations which involve substantial prejudice to the opposing party or to the public interest in general."[4]

Under the Commission's Rules of Practice, withdrawal of a license application after the issuance of a notice of hearing may be conditioned upon such terms as the presiding officer may prescribe.[5] In supporting conditions on the withdrawal of a license application, the record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate.[6] An intervenor has an affirmative duty to demonstrate a legal injury to a private or public interest, as a proponent of any conditions being placed on the withdrawal of a license application.[7]

In the record before us, there is nothing to support placing onerous conditions on the withdrawal of the EFN license application. Given ample opportunity to do so, the Intervenor has not come forward with any demonstration of harm to himself or his interests that would flow from the withdrawal of the application. If

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[2] Memorandum and Order (Extending Proceeding in Abeyance and Establishing Conference Date) (July 12, 1995) (unpublished); for further background *see* Memorandum and Order (Teleconference of January 17, 1995) (Feb. 1, 1995) (unpublished), Tr. 51-60.

[3] Letter from Harold R. Roberts, President, Energy Fuels Nuclear, Inc., to Joseph J. Holonich, Branch Chief, High Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, dated September 29, 1995. As a procedural matter, this proceeding could only be "reopened" if the proceeding was ongoing, i.e., held in abeyance. What EFN seeks is no less than a termination of the proceeding by a "dismissal" of the Begay hearing request. Thus, the Licensee's motion would have been more appropriately addressed as a motion to terminate the proceeding. It is so considered here.

[4] NRC Staff's Response to Licensee's Motion to Dismiss Hearing Request at 2, citing *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981), and *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981).

[5] 10 C.F.R. § 2.107(a).

[6] *See Sequoyah Fuels Corp.*, LBP-93-25, 38 NRC 304 (1993), *aff'd*, CLI-95-2, 41 NRC 179 (1995); *Fulton*, ALAB-657, *supra* note 4, 14 NRC at 978-79.

[7] *Sequoyah*, CLI-95-2, *supra* note 6, 41 NRC at 192-93.

EFN chooses to refile a new license amendment application in the future, under the Commission's Rules of Practice, Mr. Begay would again be afforded the opportunity to petition to intervene in the proceeding. However, the Presiding Officer finds meritorious the Staff's suggestion that the Licensee provide written notice to Mr. Begay of any future filing of a license amendment application to dispose of the DOE mill tailings at the White Mesa Mill.[8]

Therefore, on the basis of the record before me, it is hereby ORDERED:

1. As a condition of the Licensee's withdrawal of its license amendment application, the Licensee shall provide written notice to Mr. Begay (at his last known address) of any filing of a new license amendment application to dispose of the DOE mill tailings at the White Mesa Mill site at the time such application is submitted to the NRC Staff;

2. With the single condition listed immediately above, the motion of Energy Fuels Nuclear, Inc., to withdraw its license amendment application is hereby granted and this proceeding is terminated without prejudice to the Licensee's ability to submit a new license amendment application for the disposal of DOE mill tailings at the White Mesa Mill site.

This Memorandum and Order is effective upon issuance and will constitute the final action of the Commission thirty (30) days after issuance, unless any party petitions the Commission for review pursuant to 10 C.F.R. § 2.786 or the Commission takes review *sua sponte*. Any petition for review must be filed within fifteen (15) days of service of this Memorandum and Order.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 3, 1995

[8] Staff Response at 3.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of **Docket No. IA-94-011**
(ASLBP No. 94-696-05-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement in NRC-Licensed Activities) **November 13, 1995**

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Dismissing Proceeding)

By immediately effective order dated May 10, 1994, the NRC Staff (1) prohibited Dr. James E. Bauer from being named on an NRC license in any capacity and from otherwise performing licensed activities for a period of five years from the date of the order; and (2) required for two years thereafter that Dr. Bauer notify the NRC of any involvement in licensed activities to assure that the NRC can monitor the status of Dr. Bauer's compliance with the Commission's regulatory requirements. *See* 59 Fed. Reg. 25,673 (1994). This proceeding was convened at the request of Dr. Bauer to contest the validity of the Staff's order. *See* 59 Fed. Reg. 30,376 (1994). Now, by joint motion dated November 2, 1995, Dr. Bauer and the Staff request that we approve a settlement agreement they have provided and dismiss this proceeding.

Among other things, the settlement agreement reduces to three years the prohibition on Dr. Bauer's involvement in licensed activities. It also outlines the Staff's agreement not to take any additional enforcement action against Dr. Bauer based on either the facts set forth in the May 10, 1994 order or the

facts and assertions revealed by a related Staff investigation (No. 1-93-065R). Additionally, it provides that the settlement should not be considered as either an admission regarding or a resolution of any of the matters that formed the basis for the May 1994 Staff enforcement order.

Pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2111, 2201(b), 2201(o), and 10 C.F.R. § 2.203, we have reviewed the parties' settlement accord to determine whether approval of the agreement and termination of this proceeding is in the public interest. Based on that review, and according due weight to the position of the Staff, we have concluded that both actions are consonant with the public interest. Accordingly, we grant the parties' joint motion to approve the settlement agreement and dismiss this proceeding.

For the foregoing reasons, it is, this 13th day of November 1995, ORDERED that:

1. The November 2, 1995 joint motion of the parties is *granted* and we *approve* their November 3, 1995 "Settlement Agreement," which is attached to and incorporated by reference in this Memorandum and Order.[1]
2. This proceeding is *dismissed.*

THE ATOMIC SAFETY AND
LICENSING BOARD[2]

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 13, 1995

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[1] The settlement agreement attached to the parties November 2, 1995 motion was dated November 1, 1995. This document was a facsimile copy that did not have the original signatures of Dr. Bauer and his counsel. By letter dated November 7, 1995, Staff counsel provided the settlement agreement with the original signatures of Dr. Bauer and his counsel. That document, which is dated November 3, 1995, is attached to this Memorandum and Order.

[2] Copies of this Memorandum and Order are being sent this date to counsel for Dr. Bauer by facsimile transmission and to Staff counsel (without the accompanying attachment) by E-mail transmission through the agency's wide area network system.

ATTACHMENT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of **Docket No. IA-94-011**
(ASLBP No. 94-696-03-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement in NRC-Licensed Activities)

SETTLEMENT AGREEMENT

On May 10, 1994, the staff of the Nuclear Regulatory Commission (Staff) issued an "Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately)" (Staff's Order) to Dr. James E. Bauer. 59 Fed. Reg. 25,673 (May 17, 1994). On May 26, 1994, Dr. Bauer answered the Staff's Order, denying the violations alleged in the Staff's Order and requesting a hearing. "Answer and Request for Hearing of James E. Bauer, M.D. M.Div. to May 10, 1994 Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)."

The parties to the above-captioned proceeding, the Staff and James E. Bauer, M.D., agree that it is in the public interest to terminate the above-captioned proceeding, without further litigation and agree to the following terms and conditions:

1. Dr. Bauer agrees to withdraw his request for a hearing, dated May 26, 1994.

2. Dr. Bauer further agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities for a period of three years from the date of the Order Prohibiting Involvement in NRC-Licensed Activities, i.e., from May 10, 1994, through May 10, 1997. Such prohibition includes any and all activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

3. For a period of two years following the above-specified three-year period, i.e., from May 10, 1997, through May 10, 1999, in the event that Dr. Bauer becomes involved with NRC-licensed activities, Dr. Bauer agrees to provide, within 20 days of his acceptance of any employment offer involving NRC-licensed activities or any time he otherwise becomes involved in NRC-licensed activities, written notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission. Washington, D.C. 20555 of the name, address, and telephone number of the employer or the licensed entity where the licensed activities are or will be conducted and a detailed description of his duties and activities in which he is or will be involved.

4. In consideration of Dr. Bauer's agreement to the conditions of paragraphs 2 and 3 of this Settlement Agreement, the Staff agrees not to take any further enforcement action against Dr. Bauer based on (a) the same facts outlined in the Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately), dated May 10, 1994 and (b) any other facts or assertions revealed as a result of the NRC's Office of Investigation's investigation (No. 1-93-065R) relating to Dr. Bauer's activities. In the event that Dr. Bauer fails to comply with the conditions set forth in either paragraph 2 or 3 of this Settlement Agreement, the Staff expressly reserves the right to take whatever action necessary and appropriate to enforce the terms of this Settlement Agreement.

5. The Staff and Dr. Bauer understand and agree that this Settlement Agreement is limited to the issues in and the parties to the above-captioned proceeding.

6. The Staff and Dr. Bauer agree that this Settlement Agreement does not constitute and should not be construed to constitute any admission or admissions in any regard by Dr. Bauer regarding any matters set forth by the NRC in the Order Prohibiting Involvement in NRC-Licensed Activities.

7. The Staff and Dr. Bauer also agree that the matters upon which the Order is based have not been resolved as a result of this Settlement Agreement. This Settlement Agreement shall not be relied upon by any person or other entity as proof or evidence of any of the matters set forth in the Order Prohibiting Involvement in NRC-Licensed Activities.

8. The Staff and Dr. Bauer shall jointly move the Atomic Safety and Licensing Board for an order approving this Settlement Agreement and terminating the above-captioned proceeding.

FOR JAMES E. BAUER, M.D.:

Marcy L. Colkitt
Counsel for James E. Bauer, M.D.

James E. Bauer, M.D.

FOR THE NRC STAFF:

Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland,
this 3d day of November 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry Kline
Dr. Charles Kelber

In the Matter of

Docket Nos. 30-32190-EA
30-32190-EA-2
IA-94-024
(ASLBP Nos. 94-699-09-EA
95-702-01-EA-2
95-703-02-EA)

WESTERN INDUSTRIAL X-RAY INSPECTION COMPANY, INC., and LARRY D. WICKS

November 16, 1995

The Atomic Safety and Licensing Board dismissed this case based on an agreement among the parties. After holding a telephone conference, the Board was persuaded that it should dismiss the case because it had no further questions about why the agreement might not be consistent with the public interest.

FINAL INITIAL ORDER
(Approval of Settlement and Dismissal)

Western Industrial X-Ray Inspection Co., Inc. (WIX), Larry D. Wicks, and the Staff of the United States Nuclear Regulatory Commission (Staff) have reached an agreement in settlement of these proceedings, the terms of which agreement are set forth in full in Attachment A, "Stipulation for Settlement of

Proceedings." After studying this agreement, the Atomic Safety and Licensing Board had some questions concerning the appropriateness of the settlement. Accordingly, it held a transcribed teleconference on November 3, 1995, which resolved the Board's questions.

In the course of the teleconference, we became satisfied that:

- WIX has an adequate reason for selecting Mr. Heath as Radiation Safety Officer. Though he is not a trained RSO, he has an engineering degree and radiation safety background and will be required to take appropriate training. Paragraph 5 of the Settlement Agreement provides further assurance by requiring audits of operations. The Staff is satisfied with this arrangement. Tr. 17-19.
- Mr. John Phillips, who has a one-third financial interest in the company and is the company lawyer and a local municipal court judge, will take management responsibility. Mr. Larry Wicks will be restricted to a role in sales and business acquisition and as an advisor to Mr. Phillips about commercial practices in the industry. Mr. Wicks will not play any role in employee evaluation. Tr. 20-25, 29-30, 30-32.
- Although Mr. Wicks may be reinstated in WIX after two years upon application to the Staff, this process will not be automatic and will entail Staff discretion. Tr. 25-29, 32-33, 34.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 15th day of November 1995, ORDERED that:

1. The Western Industrial X-Ray Inspection Co., Inc. (WIX) motions to withdraw its requests for hearing are *granted.* The withdrawn requests for hearing relate to (a) the Staff's Order to WIX of June 16, 1994 ("Order Suspending License (Effective Immediately) and Demand for Information," 59 Fed. Reg. 33,027 (June 27, 1994) ("Suspension Order"), dated July 1, 1994) and (b) the Staff's Orders to WIX of September 27, 1994 ("Order to Transfer Material (Effective Immediately) and Order Revoking License," 59 Fed. Reg. 50,931 (Oct. 6, 1994) ("Revocation Order"), dated October 14, 1994).

2. WIX is dismissed as a party in the proceedings pertaining to those orders and to this proceeding.

3. The motion of Larry Wicks to withdraw his request for hearing on the Staff's Order to Mr. Wicks of September 27, 1994 ("Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 59 Fed. Reg. 50,932 (Oct. 6, 1994) ("Prohibition Order"), dated October 14, 1994) is *granted.*

4. Mr. Wicks is dismissed as a party in the proceeding pertaining to that Order.

5. The "Stipulation for Settlement of Proceedings," contained in Attachment A to this Memorandum and Order is adopted as an Order of this Atomic Safety and Licensing Board.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry Kline
ADMINISTRATIVE JUDGE

Dr. Charles Kelber
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

11/2/95

ATTACHMENT A[1]

STIPULATION FOR SETTLEMENT OF PROCEEDINGS[2]

THIS AGREEMENT is made by and between Western Industrial X-Ray Inspection Co., Inc. ("WIX" or "the Licensee"), Larry D. Wicks ("Wicks") and the Staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff"), to wit:

WHEREAS WIX holds Byproduct Material License No. 49-27356-01 issued by the NRC pursuant to 10 C.F.R. Parts 30 and 34, which license authorizes WIX to possess sealed sources of iridium-192 in various radiography devices for use in performing industrial radiography activities in accordance with the conditions specified therein, and is due to expire on August 31, 1996; and

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[1] The heading contained in the stipulation of the parties has been omitted as redundant. Page numbers have been changed for consistency with this document.

[2] In the course of the Telcconference of November 3, the Board admitted two exhibits. Tr. 16. On further consideration, it is not necessary that those exhibits be admitted. This Attachment is sufficient. Accordingly, the two Board exhibits shall not be admitted. This Order and its attachment may be read in conjunction with the official Transcript. No further exhibits are necessary.

WHEREAS Wicks is and has been at all times relevant hereto the principal shareholder, President, and Radiation Safety Officer ("RSO") of WIX, with responsibilities, *inter alia,* involving compliance with NRC requirements for radiation protection; and

WHEREAS on June 16, 1994, the NRC Staff issued an "Order Suspending License (Effective Immediately) and Demand for Information," 59 Fed. Reg. 33,027 (June 27, 1994) ("Suspension Order"), based, *inter alia,* upon a finding that WIX had engaged in numerous violations of NRC radiation safety regulatory requirements, including several violations which were found to be of a recurring nature and/or were committed deliberately by Licensee employees, including WIX's President and RSO, in violation of 10 C.F.R. § 30.10; and

WHEREAS the Suspension Order suspended License No. 49-27356-01, pending further order, effective immediately, and also demanded information from the Licensee in order to assist the NRC in determining whether the license should be revoked and whether Wicks should be prohibited from performing NRC-licensed activities; and

WHEREAS on September 27, 1994, the NRC Staff issued (1) further Orders directed to WIX, "Order to Transfer Material (Effective Immediately) and Order Revoking License" 59 Fed. Reg. 50,931 (October 6, 1994) ("Revocation Order"); and (2) an Order directed to Wicks, "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 59 Fed. Reg. 50,932 (October 6, 1994) ("Prohibition Order"), based, *inter alia,* upon a finding that the NRC lacked adequate assurance that the public health and safety would be protected if WIX retains possession of licensed material, or if licensed activities are conducted by WIX and/or its President and RSO in the future; and

WHEREAS the Revocation Order required the Licensee, *inter alia,* to transfer all NRC-regulated material in its possession to the manufacturer or other person authorized to possess the material and revoked License No. 49-27356-01, effective immediately; and

WHEREAS the Prohibition Order, *inter alia,* prohibited Wicks from engaging in NRC-licensed activities (including any supervising, training or auditing) for either an NRC licensee or Agreement State licensee performing licensed activities in areas of NRC jurisdiction in accordance with 10 C.F.R. § 150.20 for a period of five (5) years from the date of that Order; and

WHEREAS requests for hearing were filed by WIX concerning the Suspension Order and Revocation Order on July 1 and October 14, 1994, respectively, and a request for hearing was filed by Wicks concerning the Prohibition Order on October 14, 1994, in response to which adjudicatory proceedings have been convened and remain pending before an Atomic Safety and Licensing Board ("Licensing Board") at this time; and

WHEREAS the undersigned parties recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise

of the matters now pending in litigation between them, including, without limitation, the elimination of further litigation expenses, uncertainty and delay, and other tangible and intangible benefits, which the parties recognize and believe to be in the public interest; and

WHEREAS, pursuant to 10 C.F.R. § 2.203, the Staff, WIX and Wicks have stipulated and agreed to the following provisions for settlement of the above-captioned proceedings, subject to the approval of the Licensing Board, before the taking of any testimony or trial or adjudication of any issue of fact or law; and

WHEREAS WIX and Wicks are willing to waive their hearing and appeal rights regarding these matters, in consideration of the terms and provisions of this Stipulation and settlement agreement; and

WHEREAS the terms and provisions of this Stipulation, once approved by the Licensing Board, shall be incorporated by reference into an order, to be issued in accordance with subsections b, i, and o of section 161 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2201, and into License No. 49-27356-01, issued pursuant to section 81 of the Act, 42 U.S.C. § 2111, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*;

NOW, THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Wicks agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities up to and including June 15, 1999, five years from the date of the NRC "Order Suspending License (Effective Immediately)," dated June 16, 1994. For purposes of this Stipulation and Agreement, the definition of "NRC-licensed activities," as set forth above, is understood to include any and all activities that are conducted pursuant to a specific license issued by the NRC or general license conferred by NRC regulations, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20, but does not include marketing, other business activities or ownership of an interest in WIX.

2. For a period of five years after the above-specified five-year period of prohibition has expired, i.e., from June 16, 1999, through June 15, 2004, Wicks shall, within 20 days of his acceptance of each and any employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined above, provide written notice to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76011, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities, and a detailed description of his duties and the activities in which he is to be involved.

3. In the first notification provided pursuant to Paragraph 2 above, Wicks shall include a statement of his commitment to compliance with NRC regulatory

requirements and an explanation of the basis why the Commission should have confidence that he will comply with applicable NRC requirements.

4. Notwithstanding the above, it is understood that Wicks may request reconsideration of the Prohibition Order after WIX has conducted two (2) years of resumed NRC-licensed activities; however, it is understood that the NRC Staff shall have the sole discretion to determine whether any such reconsideration is warranted, with respect to which determination Wicks hereby waives any right to or opportunity for hearing or appeal before the NRC and/or a court of law.

5. It is hereby agreed by the parties that WIX shall be allowed to resume its conduct of NRC-licensed activities upon approval of this Stipulation and Agreement by the Licensing Board, but it is expressly understood and agreed that Wicks is prohibited from participation in the conduct of any such activities in accordance with Paragraph 1 above. In furtherance of this understanding, WIX and Wicks further agree that License No. 49-27356-01 shall be modified to include the following requirements, prior to any resumption of NRC-licensed activities, which shall remain in effect up to and including June 15, 1999, or until such other time as may be explicitly stated herein:

(a) WIX (1) shall retain Mr. Ray Heath, or other person approved by the NRC Staff to serve as RSO or successor RSO until at least June 15, 1999, who shall at all times be responsible for performing the duties of an RSO and shall be responsible for maintenance of all NRC-required records; (2) shall establish the minimum number of hours to be devoted to RSO duties; and (3) shall describe the responsibilities and audits to be performed by the RSO under the radiation safety program. WIX shall submit the qualifications of any person it proposes to serve as RSO, other than Mr. Heath, to the NRC Staff for prior approval; the statement of qualifications should demonstrate that the person has not previously been employed by WIX, that he/she is likely to exercise independence from Wicks, and that he/she meets the NRC's minimum criteria established for an RSO.

(b) Prior to restart, Mr. Heath (if he is selected by WIX to serve as RSO) must successfully complete an Industrial Radiography course of at least 40 hours duration. Within six months of restart, Mr. Heath must successfully complete a Radiography Radiation Safety Officer training course of at least three days duration. Courses selected by the licensee to satisfy this condition must receive prior approval by NRC Region IV.

(c) If Mr. Heath is selected to serve as RSO, WIX shall name an Assistant Radiation Safety Officer to the license. The designated Assistant RSO must have at least five years experience as an industrial radiographer. The assistant RSO shall be readily available to respond to incidents and emergencies and shall be on call by means of a

pager, telephone, or radio at all times when radiographic operations are scheduled or in progress.

(d) If Mr. Heath is selected to serve as RSO, the RSO and Assistant RSO shall be identified by name on the license. An Assistant RSO shall be carried on the license until Mr. Heath has gained the appropriate practical radiography training and experience, or a minimum of one year.

(e) The RSO shall have full authority for radiation protection and safety, entirely independent from any involvement or interference by Wicks, with full authority to direct all aspects of radiography operations including the authority to shut down operations that are unsafe or which violate the license or NRC requirements. The RSO shall report to the person who is retained pursuant to paragraph 5(g) below, and the RSO shall have the authority to report any concerns directly to the NRC. The RSO shall notify the NRC immediately if Wicks participates or becomes involved in any NRC-licensed activities, or interferes with the RSO's independence in any way.

(f) The RSO shall certify to the NRC Staff in advance of commencing NRC-licensed activities that he/she understands (1) the terms of this Stipulation and Agreement, the license requirements, and the Commission's regulations associated with radiography, (2) that he/she may be held personally accountable for violations of the license or Commission requirements under 10 C.F.R. § 30.10 for deliberate misconduct, (3) that he/she is responsible for making reports required by NRC regulations, and (4) that Wicks is prohibited from having any involvement in NRC-licensed activities, and that the RSO is required to notify the NRC immediately if Wicks participates or becomes involved in any NRC-licensed activities, or interferes with the RSO's independence in any way.

(g) WIX will retain the services of a person, to be approved in advance by the NRC Staff, to be responsible for management of those aspects of the company's business that could affect the RSO or the conduct of radiation safety-related activities, including the authority (1) to hire and terminate the employment of the RSO or other employees engaged in the conduct of NRC-licensed activities, (2) to make and execute salary and other financial decisions which may affect such persons including the RSO, and/or the safe conduct of NRC-licensed activities, and (3) to have control over financial resources (e.g., through the establishment of an escrow account) sufficient to ensure the safe and proper conduct of NRC-licensed activities. This individual shall also notify the NRC immediately if he/she determines that Wicks is or has been involved in NRC-licensed activities.

(h) Neither Wicks nor any person related to, or in privity with, him shall have any direct or indirect involvement in or exercise control

over NRC-licensed activities, including management, supervision and financial control or participation in hiring and firing decisions which may affect the RSO and/or the safe and proper conduct of NRC-licensed activities. In addition, while Beverly Wicks (Wicks' wife) may continue to serve as WIX' secretary, she shall not participate in or have any involvement in NRC-licensed activities (including, without limitation, such tasks as mailing and receiving film badges or radiation exposure reports, handling or distributing dosimeters, and any other tasks related to radiation safety).

(i) WIX shall retain an outside independent auditor (and any successor auditor), who is to be approved in advance by the NRC Staff based upon a review of the auditor's qualifications. The auditor (and any approved successor) shall submit an audit plan for NRC approval that describes the items to be audited and the methodology to be employed, including the number of field inspections and the percentage of employees engaged in radiography who will be audited in the field. The auditor is to provide copies of all draft and final audit reports to the NRC Staff at the same time that such reports are provided to WIX. WIX shall provide a written response to the audit findings within 30 days after receipt thereof, including a description of any corrective actions taken or an explanation of why such actions were not taken. The auditor shall perform audits and examinations of the radiation safety program and operations, including the performance of field audits, as follows: An independent program audit will be performed at about three months, and no later than six months, following the resumption by WIX of NRC-licensed activities, with the results of the audit submitted to NRC Region IV for review. Following the initial audit, audits will be performed every six months. One year after restart, the NRC RIV Regional Administrator may consider, at the request of the licensee, relief in the audit requirements based on good cause shown. Further, the timing and scope of such audits shall not be disclosed to WIX or Wicks in advance; and the auditor shall be informed in advance that Wicks is prohibited from participation in any NRC-licensed activities.

(j) Any notification required to be made pursuant to this Paragraph 5 shall be made in writing to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76011.

(k) The Regional Administrator, NRC Region IV, may relax or rescind any of the conditions set forth in this Stipulation and Agreement upon a demonstration of good cause; however, it is understood that the Regional Administrator shall have the sole discretion to determine whether any such reconsideration is warranted, with respect to which

determination WIX and Wicks hereby waive any right to or opportunity for hearing or appeal before the NRC and/or a court of law.

6. The parties agree that, as an integral part of this Stipulation and upon execution hereof, and subject to the approval of this Stipulation by the Licensing Board, (a) WIX and Wicks will withdraw their July 1 and October 14, 1994 requests for hearing on the Suspension Order, Revocation Order and Prohibition Order, and (b) the parties will file a joint request for dismissal of the proceedings on the Suspension Order, Revocation Order and Prohibition Order, with prejudice, it being understood and agreed that this Stipulation and Agreement resolves all outstanding issues with respect to those Orders, that WIX and Wicks hereby waive their hearing and appeal rights regarding the matters which are the subject of these Orders, and that the Staff will take no further enforcement or other action against WIX or Wicks in connection with those Orders, subject to the terms of this Stipulation and Agreement.

7. WIX and Wicks hereby agree that a failure on their part to comply with the terms of this Stipulation and Agreement will constitute a material breach of this Agreement, and that any such breach may result in the immediate revocation or suspension of the license, effective immediately, if the NRC Staff, in its sole discretion, determines such action to be appropriate, and may result in further enforcement or other action as the NRC Staff may be determine, in its sole discretion, to be appropriate.

8. It is understood and agreed that nothing contained in this Stipulation and Agreement shall relieve the Licensee from complying with all applicable NRC regulations and requirements. Further, it is understood and agreed that nothing contained in this Agreement shall be deemed to prohibit the NRC Staff from taking enforcement or other action (a) against any entity or person for violation of this Stipulation and Agreement, or (b) against persons other than WIX or Wicks in connection with or related to any of the matters addressed in the Suspension Order, Revocation Order or Prohibition Order, should the Staff determine, in its sole discretion, that it is appropriate to do so.

9. It is understood and agreed that this Stipulation and Agreement is contingent upon prior approval by the Licensing Board and dismissal of the instant adjudicatory proceedings.

10. This Stipulation and Agreement shall be binding upon the heirs, legal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, we set our hand and seal this 2nd day of November, 1995.[3]

FOR WESTERN INDUSTRIAL X-RAY INSPECTION CO., INC., and LARRY D. WICKS:

Larry D. Wicks, individually and as President, Western Industrial X-Ray Inspection Co., Inc.

John C. Phillips
Counsel for Western Industrial X-Ray inspection Co., Inc. and Larry D. Wicks

FOR THE NRC STAFF:

Sherwin E. Turk
Counsel for NRC Staff

[3] The signed original was filed with the Board.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-OM
(ASLBP No. 95-710-01-OM)
(Order Modifying Facility Operating License No. R-97)

GEORGIA INSTITUTE OF TECHNOLOGY
(Georgia Tech Research Reactor, Atlanta, Georgia)

November 22, 1995

In a proceeding involving the proposed conversion of fuel in a research reactor from high-enriched fuel (HEU) to low-enriched fuel (LEU), the Licensing Board determines that the single petitioner for intervention has standing but has not proffered an acceptable contention and, accordingly, denies the petition for leave to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

Where there are two ongoing proceedings involving the same facility, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding.

MEMORANDUM AND ORDER
(Denial of Petition for Leave to Intervene)

I. BACKGROUND

This proceeding involves the conversion of fuel used in the Georgia Tech Research Reactor from high-enriched uranium (HEU) fuel to low-enriched uranium (LEU) fuel, in accordance with the requirements of 10 C.F.R. § 50.64 and an Order issued by the NRC Staff on June 16, 1995. As set forth in our Memorandum and Order (Intervention Petition), dated July 31, 1995, LBP-95-14, 42 NRC 5, a timely petition for leave to intervene was filed by Georgians Against Nuclear Energy (GANE). In LBP-95-14, we stated that GANE is permitted by 10 C.F.R. § 2.714(b)(1) to amend its petition to intervene with respect both to its standing and to file a contention. We permitted GANE to file its amended petition by August 21, 1995, and set a schedule for responses by Georgia Institute of Technology (Georgia Tech or Licensee) and the NRC Staff.

GANE timely filed its amended petition on August 21, 1995.[1] Georgia Tech and the NRC Staff each filed responses opposing GANE's petition.[2] We held a prehearing conference to consider the petition on November 15, 1995, in Atlanta, Georgia.[3]

As recently reiterated by the Commission, acceptance of a petition for leave to intervene (such as that submitted here by GANE) requires that the petitioner demonstrate that it has an interest in the proceeding — i.e., standing — and that it proffer at least one admissible contention. CLI-95-12, 42 NRC 111, 115, 117 (1995). Georgia Tech and the Staff challenge GANE's petition in both respects. We turn here to these questions.

II. STANDING

Under section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), the Commission must grant a hearing to any person whose interest may be affected by a proceeding. To establish standing, an organization such as GANE may rely on the interest of a member; GANE has elected to rely on the interest of one of its members, Mr. Robert Johnson.

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[1] Georgians Against Nuclear Energy Amended Petition for Leave to Intervene, dated August 21, 1995.

[2] Georgia Institute of Technology's Response to GANE's Amended Petition for Leave to Intervene, dated August 28, 1995; NRC Staff's Response to Amended Petition for Leave to Intervene on Conversion Order Filed by Georgians Against Nuclear Energy, dated September 11, 1995.

[3] *See* Notice of Prehearing Conferences, dated October 24, 1995, published in 60 Fed. Reg. 55,287 (Oct. 30, 1995).

In LBP-95-14, we discussed a proceeding in which GANE was also a participant where the Licensing Board held that, where there are two ongoing proceedings involving the same reactor, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding. LBP-95-14, *supra*, 42 NRC at 7, citing *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). We ruled that we would accept GANE's statement of standing in the ongoing license-renewal proceeding as satisfying standing requirements in this proceeding, as long as Mr. Johnson, the member upon whom GANE based its standing in both proceedings, indicated that he also wished to be represented by GANE in this proceeding.[4] (In its amended petition, GANE stated only that it "represents" Mr. Johnson in this proceeding.)

Mr. Johnson appeared at the prehearing conference and affirmed that he wishes GANE to represent his interests in this proceeding as well as the license-renewal proceeding (Tr. 4-5). His workplace, less than a mile from the reactor, permits us to presume that he may be affected by the results of this proceeding. That being so, we hold that GANE has established its standing to participate in this proceeding.

III. CONTENTION

In its amended petition, GANE stated that it agrees that the change from HEU to LEU fuel, as directed by the Staff Order, is beneficial. It commends Georgia Tech for undertaking the conversion. Its sole contention is that the reactor core must be properly reconfigured prior to using the LEU fuel, an operation that (according to GANE) would cost "several million dollars." GANE adds that, "[i]n lieu of a straight-forward, albeit expensive, approach to conversion, Georgia Tech has submitted various theories and paper proofs that the reactor as currently configured will operate, and operate safely, by inserting extra LEU into the reactor."[5]

The Licensee terms this contention "vague and difficult to interpret" and opposes its admission as lacking information called for by 10 C.F.R. § 2.714(b) and (d) — namely, a brief explanation of the contention, a concise statement of the alleged facts or expert opinion supportive of such contention, or sufficient information to show that a genuine dispute exists on a material issue of law or fact."[6] For its part, the Staff claims that GANE has not satisfied the longstanding

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[4] The Commission has upheld our ruling on standing in the license-renewal proceeding. CLI-95-12, *supra*, 42 NRC at 115-17.

[5] GANE Amended Petition at 2.

[6] Licensee's Response to GANE's Amended Petition at 2-3 (pages not in fact numbered).

basis requirement for contentions. According to the Staff, GANE questions whether the Licensee has sufficient information at this time to support continued use of the current reactor configuration with the LEU fuel, but does not provide any reason to believe the reactor configuration authorized by the Conversion Order is unsafe.

The Staff further discusses section 2.15 of the Safety Evaluation Report (SER), which GANE references for its claim that the "startup testing program" is experimental and information gained from the program will be needed to provide basic information on the acceptability of the existing core configuration. The Staff claims that GANE has misinterpreted the SER by failing to recognize that the startup report is not the source of the Staff's analysis and only will be used to verify calculations predicted by past experience at other converted reactors and by applicable safety design analyses. (The SER, *inter alia*, referenced analyses of the Oak Ridge Research Reactor.) At the prehearing conference, the Staff indicated that the initial calculations of core configuration (performed in the 1960s or 1970s) could not be located so that Georgia Tech and the Staff performed new analyses of core configuration, based both on the parameters of this reactor and comparisons with other reactors (Tr. 19-22).

GANE indicated at the prehearing conference that it earlier believed it had expert support for its claim that the core should be reconfigured. However, it also acknowledged that the expert was not willing to appear for GANE and, in any event, the expertise would not have qualified the individual to testify on this claim. As GANE's representative conceded, "basically I had all of my eggs in one basket and it turned out he wasn't an expert." (Tr. 11).

In these circumstances, having provided GANE an extra opportunity to perfect its contention (and GANE having failed to identify the source of its claim in its amended petition), we indicated at the conference (Tr. 25, 30) that GANE had failed to proffer an admissible contention and, accordingly, its petition for leave to intervene would have to be rejected. The Staff can thus order Georgia Tech to substitute LEU fuel for HEU fuel — subject, of course, to Georgia Tech's agreement in the license-renewal proceeding that it will not bring LEU fuel to the site until after the conclusion of the 1996 Summer Olympic Games.

IV. ORDER

For the reasons stated, and based on the entire record of this proceeding, it is, this 22d day of November 1995, ORDERED:

1. The petition for leave to intervene filed by Georgians Against Nuclear Energy, dated July 6, 1995, and supplemented by the amended petition dated August 21, 1995, is hereby *denied*.

2. This Order is effective immediately and will constitute the final order of the Commission in this proceeding, subject to appeal to the Commission under 10 C.F.R. § 2.714a.

3. This Order denying an intervention petition is appealable to the Commission pursuant to 10 C.F.R. § 2.714a. Such appeal must be filed within 10 days of service of this Order and shall be asserted by filing a notice of appeal and accompanying supporting brief.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 22, 1995