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PRACTICE AND PROCEDURE DIGEST

Commission, Appeal Board and Licensing Board Decisions
July 1972 - June 1991

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UNITED STATES NUCLEAR REGULATORY COMMISSION

STAFF PRACTICE AND PROCEDURE DIGEST

(The April, 1992 Update includes Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through June 30, 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.

NRC STAFF PRACTICE AND PROCEDURE DIGEST

UPDATE, APRIL 1992

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PREFACE

This Revision 2 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 June 30, 1991 interpreting the NRC's Rules of Practice in 10 CFR Part 2. This Revision 2 replaces in part earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules of Practice effective through June 30, 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 Appendix 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

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).

It is up to the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980). However, where a 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).

One aspect of the NRC role in regulating nuclear power plants is to provide criteria forming the engineering baseline against which licensee system designs, including component specifications, are judged for adequacy. It has not been the Staff's practice to certify that any particular components are qualified for nuclear service, but, rather, it independently reviews designs and analyses, qualification documentation and quality assurance programs of licensees to determine adequacy. This review approach is consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.). Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 426 (1978).

Pursuant to 10 CFR § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-32-68, 16 NRC 741, 745 (1982); 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, 1008 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 651 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 506 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear

Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693-94 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 12 (1987). In accordance with Section 50.47(a)(2), the Commission is to base its finding on a review of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented", and on a review of the NRC Staff assessment of applicant's onsite emergency plans. Zimmer, supra, 16 NRC at 745-46; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Union Electric Co. (Callaway Plant, Unit 1), ALAB-754, 18 NRC 1333, 1334-1335 (1983), affirming, LBP-83-71, 18 NRC 1105 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 652 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). However, 10 CFR § 50.47(a)(2) does not mandate that a Board's finding on the adequacy of an emergency plan must be based on a review of FEMA findings and determinations. Since 10 CFR § 50.47(a)(2) also provides that any other information available to FEMA may be considered in assessing the adequacy of an emergency plan, a Board may rely on such evidence, properly admitted into the hearing record, when FEMA findings and determinations are not available. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 531-32 (1988). In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of the adequacy of an emergency plan. Zimmer, supra, 16 NRC at 746; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing, 10 CFR § 50.47(a)(2); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 365 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 239 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 714 (1988), aff'd in part and rev'd in part on other grounds, ALAB-924, 30 NRC 331 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 397, 624 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 139 n.38 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 360 (1989). The presumptive validity of FEMA findings does not depend upon the presentation of testimony by FEMA

witnesses. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 437 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

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 is thus 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 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).

1.9 Withdrawal of Application for License/Permit

An applicant may withdraw its application without prejudice unless there is legal harm to the intervenors or the public. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing, LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976).

The filing of an application to construct a nuclear power plant is wholly voluntary. The decision to withdraw an application is a business judgment. The law on withdrawal does not require a determination of whether the decision is sound. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

The right to a voluntary dismissal without prejudice is not absolute. Perkins, supra, 16 NRC at 1135, citing, LeCompte, supra, 528 F.2d at 604.

Where the defendant has prevailed or is about to prevail, an unconditional withdrawal cannot be approved. Perkins, supra, 16 NRC at 1135, citing, 9 Wright and Miller Federal Practice and Procedure, Civil, Section 2364 (1971).

10 CFR § 2.107(a) provides, in part, that:

> (t)he Commission...may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an

> application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 581 (1988).

The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. The record must support any findings concerning the conduct and harm in question. Perkins, supra, 16 NRC at 1134, citing, LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice 41.05(1) at 41-58.

The Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm. Perkins, supra, 16 NRC at 1134, citing, LeCompte v. Mr. Chip, Inc., supra, 528 F.2d at 604.

A Licensing Board has no jurisdiction to impose conditions on the withdrawal of an application for an operating license where the applicant has filed a motion to terminate the operating license proceeding prior to the Board's issuance of a notice of hearing on the application. Public Service Co. of Indiana, and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986), citing, 10 CFR § 2.107(a). A notice of hearing is only issued after a Board considers any requests for hearing and intervention petitions which may have been submitted, and makes a determination that a hearing is warranted. Thus, the notice of receipt of an application for an operating license, notice of proposed action, and notice of opportunity for hearing are not functionally the notice of hearing referred to in 10 CFR § 2.107(a). Marble Hill, supra, 24 NRC at 723-24.

Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. Perkins, supra, 16 NRC at 1137.

The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982), citing, Jones v. SEC, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

In the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal without prejudice where the applicant has prevailed or where there has been a nonsuit as to particular issues. Perkins, supra, 16 NRC at 1136.

While Section 2.107 is phrased primarily in terms of requests for withdrawal of an application by an applicant, the Commission itself has entertained such requests made by other parties to a construction permit proceeding, Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974), and has indicated that such a request is normally to be directed to, and ruled upon by, the Atomic Safety and Licensing Board presiding in the proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-37, 8 AEC 627, n.1 (1974). Thus, it appears that a Licensing Board has the authority, under 10 CFR § 2.107, to consider a motion to compel withdrawal of an application filed by a party other than the applicant.

With regard to design changes affecting an application, where there is a fairly substantial change in design not reflected in the application, the remedy is not summary judgment against the applicant, nor is withdrawal and subsequent refiling of the application necessarily required. Rather, an amendment of the application is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974).

Following a request to withdraw an application the Board may dismiss the case "without prejudice," signifying that no disposition on the merits was made; or "with prejudice," suggesting otherwise. (10 CFR § 2.107(a), 10 CFR § 2.721(d)). A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties. It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 978-979 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing, Fed.R. Civ.P. 41(a)(1), (2); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976), citing, 5 Moore's Federal Practice, 41.05 (2d ed. 1981).

The Commission has the authority to condition the withdrawal of a license application on such terms as it thinks just (10 CFR § 2.107(a)). However, dismissal with prejudice is a severe sanction which should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981);

Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984).

General allegations of harm to property values, unsupported by affidavits or unrebutted pleadings, do not provide a basis for dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981), Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981).

Allegations of psychological harm from the pendency of the application, even if supported by the facts, do not warrant the dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing, Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983).

A Licensing Board has substantial leeway in defining the circumstances in which an application may be withdrawn (10 CFR § 2.107(a)), but the Board may not abuse this discretion by acting in an arbitrary fashion. The withdrawal terms set by the Board must bear a rational relationship to the conduct and legal harm at which they are aimed. Fulton, supra, 14 NRC at 974; Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983).

A Board may authorize the revocation of a Limited Work Authorization and the withdrawal of an application without prejudice after determining the adequacy of the applicant's site redress plan and clarifying the responsibilities of the applicant and Staff in the event that an alternate use for the site is found before redress is completed. United States Dept. of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

Where a motion for leave to withdraw a license application without prejudice has been filed with both an Appeal Board and a Licensing Board, it is for the Licensing Board, if portions of the proceeding remain before it, to pass upon the motion in the first instance. As to whether withdrawal should be granted without prejudice, the Board is to apply the guidance provided in 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). Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982).

The applicant for a license bears the cost of Staff work performed for its benefit, whether or not it withdraws its application prior to fruition. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1137 (1981). However, an

applicant which withdrew its application prior to the November 6, 1981 issuance of revised regulations may not be billed for the costs incurred by the Staff in reviewing the application. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-45, 20 NRC 1333, 1338 (1984), citing, New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982).

Ordinarily parties are to bear their own litigation expense. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1139 (1982), citing, Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240; 44 L.Ed.2d 141; 95 S. Ct. 1612 (1975).

A claim for litigation costs under the "private attorney general" theory must have a statutory basis. Perkins, supra, 16 NRC at 1139, citing, Alyeska Pipeline, supra, 421 U.S. at 269.

Recovery of litigation costs by the prevailing party as an award for winning a presumably completed law suit, must be distinguished from the practice of reimbursing litigation costs as a condition on a dismissal without prejudice. The latter is not an award for winning anything, but it is intended as compensation to defendants who have been put to the trouble and expense to prepare a defense only to have the plaintiff change his mind, withdraw the complaint, but remain free to bring the action again. Perkins, supra, 16 NRC at 1140.

The absence of specific authority does not prevent the Commission's Boards from exercising reasonable authority necessary to carry out their responsibilities, and a money condition is not necessarily barred from consideration. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1140 (1982). Payment of attorney's fees is not necessarily prohibited, as a matter of law, as a condition of withdrawal without prejudice of a construction permit application. Perkins, supra, 16 NRC at 1141. Another Licensing Board has noted, however, that the Commission is a body of limited powers. Its enabling legislation has no provisions empowering it to require the payment of a party's costs and expenses, nor do the regulations promulgated by the Commission provide for such payments. It has no equitable power it can exercise as courts have. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983).

If intervenors prevail on a need-for-power issue, there is no entitlement to attorney's fees because as the prevailing party, they received what they paid for and are barred from recovery. On the other hand, if intervenors lose on the need-for-power issue, they may not recover their attorney's fees because they will suffer no legal harm in any filing of a new application. Perkins, supra, 16 NRC at 1142.

Where an applicant abandons its construction of a nuclear facility and requests that the construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial

decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating, LBP-83-8, 17 NRC 158 (1983).

The antitrust information required to be filed under 10 CFR § 50.33a is part of the permit application; therefore, any applicant who wishes to withdraw after filing antitrust information, must comply with the Commission's rule governing withdrawal of license applications (10 CFR § 2.107(a)), even if a hearing on the application had not yet been scheduled. To instead file a Notice of Prematurity and Advice of Withdrawal is an impermissible unilateral withdrawal, and the filing will be treated as a formal request for withdrawal under 10 CFR § 2.107(a). Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

1.10 Abandonment of Application for License/Permit

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980).

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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

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, 273 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

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-642, 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 (1978); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

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 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

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, 1180-1181 (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 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 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), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

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).

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), aff'd, ALAB-952, 33 NRC 521 (1991).

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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (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), LBP-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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 441-42 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (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 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 401 (1985); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 165, 166 (1991); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), LBP-91-28, 33 NRC 557, 559 (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), LRP-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-79-20, 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 443, 444 (1991).

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); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390-91 (1991). 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, Chicano 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 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (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. Skagit/Hanford, supra, 1[illegible] 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 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; rulemaking 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-85-24, 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437 (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.

An organization has established standing by asserting that the Commission's decision not to prepare an environmental impact statement of the alleged de facto decommissioning of the Shoreham facility would injure the organization's ability to

disseminate information which is essential to its organizational purpose and is within the zone of interests protected by the National Environmental Policy Act. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 435-36 (1991). The organization's alleged injury also was sufficient to establish standing in the Shoreham possession-only license proceeding where the organization asserted that the application for a possession-only license was another step in the alleged de facto decommissioning of the Shoreham facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541-43 (1991).

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 Indiana (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). An organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational interests that is within the scope of interests of the

Atomic Energy Act or the National Environmental Policy Act. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-530 (1991). 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, 43-44 (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.

An organization was denied representational standing where the person on whom it based its standing was not an individual member of the organization, but instead was serving as the representative of another organization. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-942, 33 NRC 521, 530-31 (1991).

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). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 389 (1991).

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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 434 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541 (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 own 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).

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 § 110.84(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 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 (1973); 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 25 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).

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"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), aff'd, ALAB-952, 33 NRC 521, 532 (1991). 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, 149 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), aff'd, ALAB-952, 33 NRC 521, 532 (1991). 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 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, 228 (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.

The issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991).

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 Edisor 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 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 proferred 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), CLI-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); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-20, 33 NRC 416, 417 (1991).

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 222, 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).

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 (1983).

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. 39728 (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). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991).

Contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the 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 986, 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 (South 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-88-6, 27 NRC 245, 254 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 371-372 & n.310 (1991).

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 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); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411 (1991).

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 (1983), 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, 687 (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)(2)(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). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of 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. Allens 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-86-8, 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), appeal dismissed as moot, ALAB-946, 33 NRC 2[illegible] (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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

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, [illegible] F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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 [illegible], 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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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 360, 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-807, 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 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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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 (DES) 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),

appeal dismissed as moot, ALAB-946, 33 NRC 245 (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, 35-36 (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 609, 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); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 410 (1991).

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) (intervenors 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); 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), ALA3-806, 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 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

Where contentions are defective, for whatever reason, 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). See also Arizona Public Service Co. (Palo

Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 406-408, 412-413 (1991).

It is the responsibility of the intervenor, not the Licensing Board, to provide the necessary information to satisfy the basis 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), dismissed as moot, ALAB-946, 33 NRC 245 (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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991). 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-259, 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). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 241 (1991).

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. (Allens 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. 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).

A Licensing Board ruling on a discretionary intervention request will be reversed only if the Licensing Board abused its discretion. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532 (1991).

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 of 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 282 (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 Allegheny 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, reconsid. den., 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, 4[illegible] (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).

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, 13 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, 190-91 (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-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-13, 33 NRC 259, 262-63 (1991). 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).

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 700 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) [96 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 Intervenors' 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 Intervenors

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 appearees are not parties to any proceeding, statements by limited appearees 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 appearee 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 appearee 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).

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(l) 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, 814 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), LBP-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).

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, ALAB-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, 428-29 (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 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-85-1, 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 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 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 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, supra, 16 NRC at 1158, citing, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

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, 1468-1469 (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 a 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 [illegible]ty School District of New York, 86 F.R.D. 548, 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 766 (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).

When the NRC Staff seeks the disclosure of the identities of sources of information alleging public health and safety violations at a facility, the Staff must explore any possible alternative means of obtaining the requested information from the individuals in order to protect their confidentiality and to minimize the intrusion into their First Amendment association rights. Richard E. Dow, CLI-91-9, 33 NRC 473, 478-80 (1991), citing, United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

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. Merril, 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.

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).

2.11.2.5 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), reconsid. 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

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 it 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-31-25, 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), ALAB-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.D. 312, 315 (E.D. Pa. 1980).

To the extent the interrogatory seeks to uncover and exa[m] 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 Hampsh[ire] (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 49[3]-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), CL[I]-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), AL[A]-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-82-32, 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 compel'ing 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 FMC 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. Pacif. 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 the Director of Office of Inspection and Enforcement, does not bar the 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).

The Commission denied a motion to quash a Staff subpoena where the subpoenaed individual simply alleged that the records sought by the subpoena contained information of Staff [illegible] Richard E. Dow, CLI-91-9, 33 NRC 473, 478-79 (1991).

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 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 NPC 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 423 (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-89-2, 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).

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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Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A Licensing Board may conduct separate hearings on environmental, and radiological health and safety issues. Absent persuasive reasons against segmentation, contentions raising environmental questions need not be heard at the health and safety stage of a proceeding notwithstanding the fact they may involve public health and safety considerations. Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 908 (1980).

It is impractical to delay licensing proceedings to await ASME action. The responsibility of the Board is to form its own independent conclusions about licensing issues. Regulations that reference the ASME code were not intended to give over the Commission's full rulemaking authority to a private organization on an ongoing basis; nor is a private organization intended to become the authority concerning criteria necessary to the issuance of a license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-33, 18 NRC 27, 35 (1983).

3.1.2 Powers/Duties of Licensing Board

The Licensing Board has the right and duty to develop a full record for decisionmaking in the public interest. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1199 (1982).

Licensing Boards are authorized to certify questions or refer rulings to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 989 n.1 (1983).

When new information is submitted to the Licensing Board, it has the responsibility to review the information and decide whether it casts sufficient doubt on the safety of a facility. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256. 258 (1983).

A Licensing Board is required to issue an initial decision in a case involving an application for a construction permit even if the proceeding is uncontested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 489 (1984), citing, 10 CFR § 2.104(b)(2) and (3).

Although the limited work authorization 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. Clinch River, supra, 19 NRC at 492, citing, 10 CFR §§ 2.718, 2.714(f),(g) (formerly, 10 CFR §§ 2.714(e),(f)).

A Licensing Board has authorized the issuance of a full power operating license for the Seabrook facility even though several emergency planning issues remanded by the Appeal Board and a number of intervenors' motions for the admission of new contentions were still pending before the Licensing Board. The Board believed that the issuance of a full power operating license prior to the resolution of these open matters was appropriate where the Board determined that none of the open matters involved significant safety or regulatory matters which would undermine the Board's ultimate conclusion that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Seabrook facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-33, 30 NRC 656, 657-58 (1989), appeal dismissed as moot, ALAB-947, 33 NRC 299, 378 & n.331 (1991), citing, Massachusetts v. NRC, 924 F.2d 311, 330-32 (D.C. Cir. 1991). The Commission conducted an immediate effectiveness review pursuant to 10 CFR § 2.764, and determined that the Licensing Board's authorization of the issuance of a full power operating license should be allowed to take effect. The Commission denied the intervenors' motion for relief in the nature of mandamus on the ground that there was no clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending the completion of remand proceedings or resolution of all pending matters. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229-231 (1990).

A Board may express its preliminary concerns based on its review of early results from an applicant's intensive review program which seeks to verify the design and construction quality assurance of the facility. The Board's expression of its concerns during an early stage of the program may enable the applicant to modify its program in order to address more effectively the Board's concerns and questions. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-86-20, 23 NRC 844, 845 (1986).

3.1.2.1 Scope of Jurisdiction of Licensing Board

A Licensing Board has only the jurisdiction and power which the Commission delegates to it. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 725 (1986); Long Island

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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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 (Bailly 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 B (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. (Diablo 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 (1986), 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, 683 (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.

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); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-18, 33 NRC 394, 395-96 (1991). 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, 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 Beach Nuclear Plant, Units 1 and 2), LBP-82-12, 15 NRC 354, 356 (1982).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental maiter. See 10 CFR §§ 2.760a, 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. 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). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980). An adjudicatory board's decision to exercise its sua sponte authority must be based on evidence contained in the record. A board may not engage in discovery in an attempt to obtain information upon which to establish the existence of a serious safety or environmental issue. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986).

A Licensing Board may, under 10 CFR § 2.760a, raise and decide, sua sponte, a serious safety, environmental, or common defense and security matier, should it determine such a serious issue exists. The limitations imposed by regulation on a Board's review of a matter not in contest (and therefore not subject to the more intense scrutiny afforded by the adversarial process) do not override a Board's authority to invoke 10 CFR § 2.760a. The Commission may, however, on a case-by-case basis relieve the Boards of any obligation to pursue uncontested issues. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1112 and n.58 (1983), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 n.7 (1978).

A Licensing Board has ruled that exercise of its sua sponte authority to examine certain serious issues is not dependent on either (1) the presence of any party to raise or pursue those issues in the proceeding, or (2) the particular stage of the proceeding. Thus, the Licensing Board determined that it could properly retain jurisdiction over an intervenor's admissible contentions even though the intervenor had been dismissed from the proceeding prior to the issuance of a notice of hearing. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-32, 32 NRC 181, 185-86 (1990).

3.1.2.4 Expedited Proceedings; Timing of Rulings

Licensing Boards have broad discretion regarding the appropriate time for ruling on petitions and motions filed with them. Absent clear prejudice to the petitioner from a Licensing Board's deferral of a decision on a pending motion, an Appeal Board is constrained from taking any action since the standard of review of a Licensing Board's deferral of action is whether such deferral is a clear abuse of discretion. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A Licensing Board has authority under 10 CFR § 2.711(a) to extend or lessen the times provided in the Rules for taking any action. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

As a general matter, when expedition is necessary, the Commission's Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening, even drastically in some circumstances, the various time limits for the party's filings and limiting the time for, and type of, discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.711; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

Procedures for expediting a proceeding, however, should not depart substantially from those set forth in the Rules of Practice, and steps to expedite a case are appropriate only upon a party's good cause showing that expedition is essential. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.711.

Under extraordinary circumstances, it is appropriate for the Licensing Board to address questions to an applicant even before formal action has been completed concerning admission of an intervenor into a license amendment proceeding. These questions need not be considered sua sponte issues requiring notification of the Commission. The Board may also authorize a variety of special filings in order to expedite a proceeding and may even grant petitioners the right to utilize discovery even before they are admitted as parties. However, special sensitivity must be shown to intervenor's procedural rights when the cause for haste in a proceeding was a voluntary decision by the applicant concerning both the timing and content of its request for a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-39, 14 NRC 819, 821, 824 (1981); LBP-81-55, 14 NRC 1017 (1981).

Under exceptional circumstances, Board questions may precede discovery by the parties. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-44, 14 NRC 850, 851 (1981).

When time pressures cause special difficulties for intervenors, discovery against intervenors may be restricted in order to prevent interference with their preparation for a hearing. A presiding officer has discretionary power to authorize specially tailored proceedings in the interest of expedition. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 NRC 862, 863 (1981).

When quick action is required on a license amendment, it is appropriate to interpret petitioner's safety concerns broadly and to admit a single broad contention that will permit wide-ranging discovery within the limited time without the need to decide repeated motions for late filing of new contentions. But the contentions must still relate to the license amendment which is requested. Petitioner may not challenge the safety of activities already permitted under the license. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981).

Though the Board may admit a single broad contention in the interest of expedition, its liberal policy towards admissions may be rescinded when the time pressure justifying it is relieved. However, issues already raised under the liberal policy are not retroactively affected by its rescission. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-19A, 15 NRC 623, 625 (1982).

In Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of New York (Indian Point, Unit No. 3), LBP-82-12A, 15 NRC 515 (1982), the intervention petitioner filed a motion requesting permission to observe the emergency planning exercise scheduled to be held two days later for the Indian Point Facility. The Licensing Board ruled that, although 10 CFR § 2.741 directs that a party first seek discovery of this sort from another party and that only after a 30-day opportunity to respond can the party apply to the Board for relief, in this case, strict adherence to the rule would not be required. Where, as here, the exigencies of the case do not permit a 30-day response period, procedural delicacy will not be allowed to frustrate the purpose of the hearing -- especially where no party is seriously disadvantaged by expediting the action. Indian Point, 15 NRC at 518. Furthermore where the issue of adequacy of emergency planning was clearly an issue to be fully investigated and the observations of the potential intervenors the next day would be useful to the Board in its deliberations, the Board would

deny licensee's request for stay and certification to the Commission, since to grant these motions would render the issue moot. 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-82-128, 15 NRC 523, 525 (1982).

3.1.2.5 Licensing Board Relationship to the NRC Staff

A Licensing Board may not delegate its obligation to decide issues in controversy to the Staff. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); 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]), citing, Perry, supra, 2 NRC at 737.

The rule against delegation applies even to issues a Licensing Board raises on its own motion in an operating license proceeding. Byron, supra, 19 NRC at 211, citing, Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The rule against delegation applies, in particular, to quality assurance issues. Byron, supra, 19 NRC at 212, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). However, where there is nothing remaining to be adjudicated on a quality assurance issue, the adequacy of a 100 percent reinspection of a contractor's work may be delegated to the Staff to consider post-hearing. Byron, supra, 19 NRC at 216-17.

On the other hand, with respect to emergency planning, the Licensing Board will accept predictive findings and post-hearing verification by Staff of the formulation and implementation of aspects of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); 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), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361-362 (1991).

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). In this vein, a more recent case reiterating the rule that a Licensing Board may not delegate its obligation to decide significant issues to the NRC Staff is Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978).

A Licensing Board does not have the power, under 10 CFR § 2.718 or any other regulation, to direct the Staff in the performance of its independent responsibilities. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); 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). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

Whether a Board may modify an order or action of the Staff depends on the relationship of the order to the subject matter of a pending proceeding. If closely related, a Staff order may not be issued, or is subject to a stay until resolution of the contested issue. If far removed from the subject matter of a pending proceeding, a Staff order should not be considered by the Board. Finally, there are matters which are properly the subject of independent Staff action, but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board is also appropriate. 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, 1082 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979).

Issues relating to NRC Staff compliance with and implementation of a Licensing Board order, rather than the order itself, should be presented to the Licensing Board in the first instance, rather than to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 (1982).

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a Licensing Board interfere in the review activities of the Staff. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

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).

The decision whether to approve a plan for construction during the period in which certain design engineering and construction management, and possibly construction responsibilities, are being transferred from one contractor to another is initially within the province of the NRC Staff. But because of the safety significance of the work to be performed, and its clear bearing on whether, or on what terms, a project should be licensed, and on the resolution of certain existing contentions, consideration of the adequacy of, and controls to be exercised by, the applicants and NRC Staff over such work falls well within the jurisdiction of the Licensing Board. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 919-20 (1981).

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's functions should bring the matter to the Commission's attention or certify the matter to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). Ordinarily Licensing Boards should not decide whether a given action significantly affects the environment without the record support provided by the Staff's environmental review. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330 (1981).

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).

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), review declined, CLI-82-10, 15 NRC 1377 (1982).

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 Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

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 been 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).

For a Licensing Board to accept unsupported NRC Staff statements would be to abrogate its ultimate responsibility and would be substituting the Staff's judgment for its own. On ultimate issues of fact, the Board must see the evidence from which to reach its own independent conclusions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1916 (1982).

Should a Staff review demonstrate the need for corrective action, the decision on the adequacy of such a corrective action is one that the Licensing Board may not delegate. Case law suggests that even in cases where a Board resolves an issue in an applicant's favor leaving the Staff to perform what is believed to be a confirmatory review, the Staff should inform the Board should it discover that corrective action is

warranted. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 520 n.21 (1983).

3.1.2.6 Licensing Board's Relationship with Other Agencies

The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977). In this case, the Wisconsin Public Service Commission decided that some of the applicants were "foreign corporations" and could not construct the Tyrone facility. Although the Appeal Board would not question the State's ruling, it remanded the case to reconsider financial and technical qualifications in light of the changes in legal relationships of the co-applicants that resulted from the State determination. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 899 (1985).

In the absence of a controlling contrary judicial precedent, the Commission will defer to a State Attorney General's interpretation of State law concerning the designation of representatives of a State participating in an NRC proceeding as an interested State. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148 (1987).

The Commission lacks the authority to disqualify a State official or an entire State agency based on an assertion that they have prejudged fundamental issues in a proceeding involving the transfer of jurisdiction to a State to regulate nuclear waste products. A party must pursue such due process claims under State law. State of Illinois (Section 274 Agreement), CLI-88-6, 28 NRC 75, 88 (1988).

A Licensing Board does not have jurisdiction in a construction permit proceeding under the Atomic Energy Act to review the decision of the Rural Electrification Administration to guarantee a construction loan to a part owner of the facility being reviewed. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 267-68 (1978).

It would be improper for a Licensing Board to entertain a collateral attack upon any action or inaction of sister Federal agencies on a matter over which the Commission is totally devoid of any jurisdiction. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Thus, a Licensing Board refused to review whether FEMA complied with its own agency regulations in performing its emergency planning

responsibilities. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18-19 (1989).

As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the Council on Environmental Quality. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 461 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 228-29 (9th Cir. 1988).

Although the Commission will take cognizance of activities before other legal tribunals when the facts so warrant, it should not delay its licensing proceedings or withhold a license merely because some other legal tribunal might conceivably take future action which may later impact upon the operation of a nuclear facility. Palo Verde, supra, 16 NRC at 1991, citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978); Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974); and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 900 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 & n.9 (1985), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 847 (1985).

3.1.2.7 Conduct of Hearing by Licensing Board

The Atomic Energy Act does not itself specify the nature of the hearings required to be held pursuant to Section 189(a), 42 U.S.C. § 2239; its reference to a hearing neither distinguishes between rulemaking and adjudication nor states explicitly whether either must be conducted through formal on-the-record proceedings. However, the Commission has invariably distinguished between the two, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submissions and non-record interviews. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1673-74 (1982), citing, Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C. Cir. 1968); Citizens For a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1021 (3rd Cir. 1974).

The presiding officer has the duty to conduct a fair and impartial hearing, to maintain order and to take appropriate action to avoid delay. Specific powers of the presiding officer are set forth in 10 CFR § 2.718. While the Licensing Board has broad discretion as to the manner in which a hearing is conducted, any actions pursuant to that discretion must be supported by a record that indicates that such action was based on a consideration of discretionary factors. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978).

A Licensing Board has considerable flexibility in regulating the course of a hearing and designating the order of procedure. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 (1985), citing, 10 CFR §§ 2.718(e), 2.731. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245-46 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Although the Commission's Rules of Practice set forth a general schedule for the filing of proposed findings, a Licensing Board is authorized to alter that schedule or to dispense with it entirely. Limerick, supra, 22 NRC at 727, citing, 10 CFR § 2.754(a).

Pursuant to 10 CFR § 2.718, the Licensing Board has the duty to conduct a fair and impartial hearing under the law, which includes the responsibility to impose upon all parties to a proceeding the obligation to disclose all potential conflicts of interest. Fundamental fairness clearly requires disclosure of potential conflicts so as to enable the Board to determine the materiality of such information. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-73, 16 NRC 974, 979 (1982).

A Board may refer a potential conflict of interest matter to the NRC General Counsel, who is responsible for interpreting the NRC's conflict of interest rules. 10 CFR § 0.735-27. Once the matter has been handled in accordance with NRC internal procedures, a Board will not review independently either the General Counsel's determination on the matter or the judgment on whether any punitive measures are required. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 583-584 (1985).

While a Licensing Board should endeavor to conduct a licensing proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13

NRC 452, 454 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 730 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 558 (1986).

The procedures set forth in the Rules of Practice are the only ones that should be used (absent explicit Commission instructions in a particular case) in any licensing proceeding. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.718; 10 CFR Part 2, Appendix A.

A Board must use its powers to assure that the hearing is focused upon the matters in controversy and that the hearing process is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1152 (1984), citing, 10 CFR Part 2, Appendix A, § V. A Board may limit cross-examination, redirect a party's presentation of its case, restrict the introduction of reports and other material into evidence, and require the submittal of all or part of the evidence in written form as long as the parties are not thereby prejudiced. Shoreham, supra, 20 NRC at 1151-1154, 1178.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

A Commission-ordered discretionary proceeding before a Licensing Board held to resolve issues designated by the Commission, although adjudicatory in form, was not an "on-the-record" proceeding within the meaning of the Atomic Energy Act. Therefore, in admitting and formulating contentions and subissues and determining order of presentation, the Board would not be bound by 10 CFR Part 2. As to all other matters, 10 CFR Part 2 would control. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1, 5 n.4 (1981), clarified, CLI-81-23, 14 NRC 610, 611 (1981).

In order that a proper record is compiled on all matters in controversy, as well as sua sponte issues raised by it, a hearing board has the right and responsibility to take an active role in the examination of witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 893 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498-499 (1985). Although a Board may exercise broad discretion in determining the extent of its direct participation in the hearing, the Board should

avoid excessive involvement which could prejudice any of the parties. Perry, supra, 21 NRC at 499. This does not mean that a Licensing Board should remain mute during a hearing and ignore deficiencies in the testimony. A Board must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 741 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

The presiding officer in a materials licensing proceeding is authorized to submit written questions to the applicant in order to develop a complete hearing record. However, such authority may not be exercised until a notice of hearing has been published and the hearing file has been created. Rockwell International Corp. (Rocketdyne Division), LBP-89-29, 30 NRC 299, 302-303 nn. 5, 10 (1989), citing, 10 CFR § 2.1233(a) and 54 Fed. Reg. 8269 (February 28, 1989). Upon discretionary interlocutory review, the Appeal Board clarified the role of the presiding officer under the 10 CFR Part 2, Subpart L informal adjudication procedures. Although the presiding officer is given sustantial discretion and an enhanced role as a technical fact finder, the authority to control the development of the hearing record may be exercised only after: (1) a determination of whether the petitioners have the requisite standing and interests to intervene, 10 CFR § 2.1205(g); (2) the preparation of the hearing file by the NRC Staff, 10 CFR § 2.1231(a), (b); and (3) the parties' submittal of their initial evidentiary presentations, 10 CFR § 2.1233(a). Only after the issues have been defined by the parties is it then appropriate for the presiding officer to submit written questions to the parties. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-18 (1989), aff'd, CLI-90-5, 31 NRC 337, 339 (1990). A presiding officer has denied intervenors leave to respond to an NRC Staff response to questions which the presiding officer had addressed to all the parties where the intervenors failed to describe sufficiently the alleged deficiencies in the Staff response. Curators of the University of Missouri, LBP-91-14, 33 NRC 265, 266 (1991). The presiding officer may encourage the parties to reach a settlement. However, the presiding officer may not participate in any private and confidential settlement negotiations among the parties. Any settlement conference conducted by the presiding officer pursuant to 10 CFR § 2.1209(c) must be open to the public, absent compelling circumstances. Rockwell, supra, 30 NRC at 720-21, aff'd, CLI-90-5, 31 NRC 337, 339-340 (1990).

The presiding officer in a Subpart L informal adjudicatory proceeding, who was concerned about an incomplete hearing file, ordered the Staff to include in the hearing file any NRC

report (including inspection reports and findings of violation) and any correspondence between the NRC and the licensee during the previous 10 years which the intervenors could reasonably believe to be relevant to any of their admitted areas of concern. Curators of the University of Missouri, 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 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), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (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, 21 n.26 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 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).

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, 618 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 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 "unavai able 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.

Potomac 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).

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-296, 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-88-1A, 27 NRC 19, 23-26 (1988), citing, Barker v. Wingo, 407 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 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, 992-93 (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 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-936, 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 (Bailly 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, 1259, 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 NRC 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 I (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 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 generic 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 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 NRC 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 (1976). 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-85-40, 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-869, 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 issues 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-83-30, 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, 386-387 (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-86-4, 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 558 (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).

An intervenor's concerns about substantive safety issues are inadmissible in a construction permit extension proceeding. Such concerns are more appropriately raised in an operating license proceeding or in a 10 CFR 2.206 petition for NRC Staff enforcement action against the applicant. Comanche Peak, supra, 23 NRC at 121 & n.6, 123.

The test for determining whether a contention is within the scope of a construction permit extension proceeding is a two-pronged one. First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatory." If both prongs are met, the delay is without "good cause." WPPSS, supra, CLI-82-29, 16 NRC at 1231; ALAB-722, 17 NRC at 551; Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-84-9, 19 NRC 497, 502 (1984), aff'd, ALAB-771, 19 NRC 1183, 1189 (1984).

"Dilatory conduct" in the sense used by the Commission in defining the test for determining whether a contention is within the scope of a construction permit extension proceeding means the intentional delay of construction without a valid purpose. WPPSS, supra, ALAB-722, 17 NRC at 552; WPPSS, supra, LBP-84-9, 19 NRC at 502, aff'd, ALAB-771, 19 NRC at 1190.

An intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. WPPSS, supra, LBP-84-9, 19 NRC at 504, aff'd, ALAB-771, 19 NRC at 1190.

The Licensing Board should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives. It is not the Board's mission to superintend utility management when it makes business judgments for which it is ultimately responsible. WPPSS, supra, ALAB-771, 19 NRC at 1190-91, citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 757-58 (1978).

Unless an applicant is responsible for delays in completion of construction and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such a proceeding and is proven true, the Atomic Energy Act and implementating regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed. WPPSS, supra, ALAB-722, 17 NRC at 553.

A consideration of the health, safety or environmental effects of delaying construction cannot be heard at the construction permit extension proceeding but must await the operating license stage. WPPSS, supra, LBP-84-9, 19 NRC at 506-07, aff'd, ALAB-771, 19 NRC at 1189.

There is no basis in the Atomic Energy Act or in the regulations for challenging the period of time in the requested extension on the grounds that the period requested is too short. WPPSS, supra, LBP-84-9, 19 NRC at 506, aff'd, ALAB-771, 19 NRC at 1191.

3.4.6 Export Licensing Proceedings Issues

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 focuses on non-proliferation and safeguards concerns, and not on foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-261 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981). (See also 6.29.2)

3.5 Summary Disposition

In Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974), the Appeal Board found that summary disposition, governed by 10 CFR § 2.749, was analogous to and had a judicial counterpart in Rule 56 of the Federal Rules of Civil Procedure which authorizes the filing of a motion for summary judgment. See also Dairyland Power Cooperative (La

Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-754 (1977); 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).

Decisions arising under the Federal Rules may serve as guidelines to Licensing Boards in applying 10 CFR 2.749. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Perry, supra, 6 NRC at 754; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878-879 (1974). Subsequent decisions of Licensing Boards have analogized 10 CFR § 2.749 to Rule 56 to the extent that the Rule applied in the cases in question. See, e.g., Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787 n.51 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878 (1974). (See also 5.8.5)

Under the concept of summary disposition (or summary judgment), the motion is granted only where the movant is entitled to judgment as a matter of law, where it is quite clear what the truth is and where there is no genuine issue of material fact that remains for trial. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), LBP-73-29, 6 AEC 682, 688 (1973). A contention will not be summarily dismissed where the Licensing Board determines that there still exist controverted issues of material fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 640-41 (1981). Admission as a party to a Commission proceeding based on one acceptable contention does not preclude summary disposition nor guarantee a party a hearing on its contentions. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 n.15 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Section 2.749, like Rule 56, is a procedural device to be used as part of a screening mechanism for eliminating unnecessary consideration of assertions which do not involve factual controversy. Use of summary disposition to resolve tenuous issues raised in petitions to intervene has been encouraged by the Commission and the Appeal Board. See, e.g., Northern States Power Co (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 (1981); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973);

Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981). If the issue is demonstrably insubstantial, it should be decided pursuant to summary disposition procedures to avoid unnecessary and possibly time-consuming hearings. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

The Commission's summary disposition rule (10 CFR § 2.749) gives a party a right to an evidentiary hearing only where there is a genuine issue of material fact. An important effect of this principle is that applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 301 (1982).

On its face, 10 CFR § 2.749 provides a remedy only with regard to matters which have not already been the subject of an evidentiary hearing in the proceedings at bar, but which are susceptible of final resolution on the papers submitted by the parties in advance of any such hearing. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-554, 10 NRC 15, 19 (1979).

A Board may grant summary disposition as to all or any part of the matters involved in an operating license proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 634 (1986), citing, 10 CFR § 2.749(a). In a construction permit proceeding, summary disposition may only be granted as to specific subordinate issues and may not be granted as to the ultimate issue of whether the permit should be authorized. 10 CFR § 2.749(d).

In an interesting approach seeking to avoid relitigation of matters considered in a prior proceeding concerning the same reactor, a Licensing Board invited motions for summary disposition which rely on the record of the prior proceeding. In response, the intervenor was expected to indicate why the prior record was inadequate and why further proceedings might be necessary. The Licensing Board planned to take official notice of the record in the prior proceeding and render a decision as to whether further evidentiary hearings were necessary. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 408 (1985).

If intervenors present evidence or argument that directly and logically challenges the basis for summary disposition, creating a genuine issue of fact for resolution by the Board, then summary disposition cannot be granted. On the other hand, if intervenors' facts are fully and satisfactorily explained by other parties, without any direct conflict of evidence, then intervenors will have failed to show the presence of a genuine issue of material fact. However, after finishing the process of reviewing facts

contained in the intervenor's response, the Board must also examine the motion to see whether the movant's unopposed findings of fact establish the basis for summary disposition. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1913 (1982).

With the consent of the parties, the Board may adopt a somewhat more lenient standard for granting summary disposition than is provided under 10 CFR § 2.749. For example, the Board may grant summary disposition whenever it decides that it can arrive at a reasonable decision without benefit of a hearing. That test would permit the Board to grant summary disposition under some circumstances in which it would otherwise be required to find that there is a genuine issue of fact requiring trial. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-25, 19 NRC 1589, 1591 (1984).

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), aff'd on other grounds, ALAB-949, 33 NRC 484, 490 n.19 (1991).

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, 566-567 (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).

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 for summary judgment will not be defeated. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 NRC 593, 595-96 (1982).

A summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same allegation. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-632 (1982).

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).

3.5.2.1 Time For Filing Motions for Summary Disposition

A motion for summary disposition may be filed at any time during a proceeding. 10 CFR § 2.749(a), 54 Fed. Reg. 33168, 33181 (August 11, 1989); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); 46 Fed. Reg. 30328, 30330, 30331 (June 8, 1981). If the Licensing Board determines that there are not genuine issues of material fact, it may grant summary disposition even before discovery is otherwise completed if the party opposing the motion cannot identify what specific information it seeks to obtain through further discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.749(c); Fed. R. Civ. P.

56(f); Sec. & Exch. Comm'n v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981); Donofrio v. Camp, 470 F.2d 428, 431-432 (D.C. Cir. 1972).

A Licensing Board convened solely to rule on petitions to intervene lacks the jurisdiction to consider filings going to the merits of the controversy. Consequently, such a Board cannot entertain motions for summary disposition. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). The filing of such motions must, therefore, await the appointment of a hearing board.

In Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 336 (1982), the Board permitted late filing of affidavits in support of a motion for summary disposition where: (1) blizzard conditions and misunderstandings as to late filing requirements existed; (2) no serious delay in the proceedings resulted; and (3) the testimony and affidavits submitted were particularly helpful and directly relevant to the safety of the spent fuel pool amendment being sought.

3.5.2.2 Time for Filing Response to Summary Disposition Motion

The ambiguity in the provisions of 10 CFR § 2.749, when considered in light of the requirements of 10 CFR § 2.730, with regard to the time for filing responses to motions for summary disposition (see Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-9, 1 NRC 243, 244 (1975)) has been removed by amendments to Section 2.749. Section 2.749(a), as amended, requires that responses to motions for summary disposition be filed within 20 days after service of the motion. But see Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 436 (1985) (the Licensing Board extended the time period for the Applicants' response to an intervenor's motion for summary disposition where the Applicants, pursuant to a Management Plan to resolve design and quality assurance issues, were gathering information to establish the adequacy and safety of the plant).

A party who seeks an extension of the time period for the filing of its response to a motion for summary disposition should not merely assert the existence of potential witnesses who might be persuaded to testify on its behalf. A party should provide some assurances that the potential witnesses will appear and will testify on pertinent matters. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 143 (1987).

3.5.2.3 Contents of Motions/Responses (Summary Disposition)

The general requirements as to contents of motions for summary disposition and responses thereto are set out in 10 CFR § 2.749.

A grant of summary disposition is proper where the pleadings and affidavits on file "show 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). Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980); 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, 632 (1986); Florida Power and Light Co. (Turkey Point Nuclear 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); Rhodes-Sayre & Associates, Inc., LBP-91-15, 33 NRC 268, 271-72 (1991).

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 f . 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). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 451 (1991). 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). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 500-501 (1991).

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), LBP-90-4, 31 NRC 54, 67, 69 (1990), aff'd, ALAB-950, 33 NRC 492 (1991). 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); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 450 (1991). 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).

Even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. An intervenor that does respond to a motion for summary disposition but that fails to file the required "separate statement" should be no worse off than one who fails to respond at all. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 62 (1983).

The regulations do not require merely the showing of a "material issue of fact" or an "issue of fact." They require a genuine issue of material fact. To be genuine, the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983).

Where the existing record is insufficient to allow summary disposition, it is not improper for a Licensing Board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition

motion. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 752 (1977).

When summary disposition is requested before discovery is completed, the Board may deny the request either upon a showing of the existence of a genuine issue of material fact or upon a showing that there is good reason for the Board to defer judgment until after specific discovery requests are made and answered. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1021 (1981).

The limitation on summary disposition in a construction permit proceeding does not apply in a construction permit amendment proceeding. Summary disposition may be granted in a CP amendment proceeding where there is no genuine issue as to any material fact that warrants a hearing and the moving party is entitled to a decision in its favor as a matter of law. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 and n.14 (1984).

In an operating license proceeding, where significant health and safety or environmental issues are involved, a Licensing Board should grant a motion for summary disposition only if it is convinced from the material filed that the public health and safety or the environment will be satisfactorily protected. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977); 10 CFR § 2.760a; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986).

In an operating license proceeding, summary disposition on safety issues should not be considered or granted until after the Staff's Safety Evaluation Report and the ACRS letter have been issued. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 NRC 680, 681 (1977).

An answer filed in response to a summary disposition motion, in support of the motion, was not considered by the Licensing Board because 10 CFR § 2.749 provided only for answers "opposing the motion." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557 (1979). Subsequently, the holding in Salem, supra, was rendered invalid by a change to 10 CFR § 2.749(a) which specifically permits responses in support of, as well as in opposition to, motions for summary disposition. 45 Fed. Reg. 68919 (Oct. 17, 1980).

In responding to a statement filed in support of a motion for summary disposition, a party who opposes the motion may only address new facts and arguments presented in the statement.

The party may not raise additional arguments beyond the scope of the statement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 439 n.1 (1986).

When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. Where the movant has satisfied his initial burden and has supported his motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983).

A movant for summary disposition is generally prohibited from filing a reply to another party's answer to the motion. 10 CFR § 2.749(a). However, pursuant to its general authority under 10 CFR § 2.718(e), a Licensing Board may lift the prohibition if the movant can establish a compelling reason or need to file a reply. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 204 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499-500 (1991).

In the summary disposition area, health effects contentions have been differentiated from other contentions. An opponent of summary disposition in the health effects area must have some new (post-1975) and substantial evidence that casts doubt on the BEIR estimates. Furthermore, he must be prepared to present that evidence through qualified witnesses at the hearing. 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, 437 (1984), reconsid. den., LBP-84-15, 19 NRC 837, 838 (1984), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 277 (1980).

3.5.4 Content of Summary Disposition Order

In granting summary judgment, the Licensing Board should set forth the legal and factual bases for its action. Where it has not, the Appeal Board will examine the record and see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

3.5.5 Appeals from Rulings on Summary Disposition

As is the case under Rule 56 of the Federal Rules, a denial of a motion for summary disposition is interlocutory and, therefore, not appealable. Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), ALAB-

220, 8 AEC 93 (1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 331 (1985). This applies as well to denials of partial summary disposition. Waterford, cited in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551 (1981). An order granting summary disposition of an intervenor's sole contention is not interlocutory since the consequence is intervenor's dismissal from the proceeding. As such, it is immediately appealable. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981). An order summarily dismissing some, but not all, of an intervenor's contentions which does not have the effect of dismissing the intervenor from the proceeding is interlocutory in nature and an appeal must await the issuance of an initial decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1198 n.3 (1985); Turkey Point, supra, 22 NRC at 331.

Where a Licensing Board has not set forth the legal and factual basis for its action on a summary judgment motion, the Appeal Board will examine the record to see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

3.6 Attendance at and Participation in Hearings

An intervenor may not step in and out of participation in a particular issue at will. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975). According to one Licensing Board, an intervenor who raises an issue and then refuses to actively participate in the hearing may lose his right to appeal the licensing Board's decision. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156 (1976). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-851, 24 NRC 529, 530 (1986), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), review declined, CLI-83-2, 17 NRC 69 (1983). A party's total failure to assume a significant participational role in a proceeding (e.g., his failure to appear at hearings and to file proposed findings), at least in combination with other factors militating against his being retained as a party, will, upon motion of another party, result in his dismissal from the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558, 560 (1976).

If an intervenor "walks out" of a hearing, it is nevertheless proper for the Licensing Board to proceed in his absence. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224,

8 AEC 244, 251 (1975); 10 CFR § 2.707(b). The best practice in such a situation is for the Board to make thorough inquiry as to the issues raised by the absent intervenor despite his absence. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 849 (1974).

A party who was dismissed from a proceeding for failing to respond, without good cause, to Board orders reactivating the proceeding, must satisfy the criteria for untimely petitions to intervene in order to be readmitted. General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1642-1643 (1984).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request presented before the date of the conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

The 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 Staff at the prehearing conference. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

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-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

A participant in an NRC proceeding should anticipate having to manipulate its resources, however limited, to meet its obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530 (1979); General

Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 559 (1986).

3.7 Burden and Means 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.

The ultimate burden of proof in a licensing proceeding on the question of whether a permit or license should be issued is upon the applicant. But where one of the other parties to the proceeding contends that, for a specific reason the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once the party has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant, which as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985). See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 103 (1976); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 15-16 (1990).

Where the Licensing Board directed an intervenor to proceed with its case first because of the intervenor's failure to comply with certain discovery requests and Board orders, the alteration in the order of presentation did not shift the burden of proof. That burden has been and remains on the licensee. 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).

Under Commission practice, the applicant for a construction permit or operating license always has the ultimate burden of proof. 10 CFR § 2.732. The degree to which he must persuade the board (burden of persuasion) should depend upon the gravity of the matters in controversy. Virginia Electric & Power Company (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17, n.18 (1975).

An applicant has the burden of proof to demonstrate that the off-site emergency plan complies with Commission rules and guidance. The burden must be carried whether or not the applicant is primarily responsible for carrying out a particular aspect of the plan. Consumers Power Co. (Big Rock Point Plant), LBP-82-77, 16 NRC 1096, 1099 (1982), citing, 10 CFR § 2.732.

An applicant has the burden of proving, prior to the issuance of a full-power license, that there is reasonable assurance that adequate protective measures can and will be taken in an emergency. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 518 (1986), citing, 10 CFR § 50.47(a)(1). However, an applicant is not required to prove and reprove essentially unchallenged factual elements of its case. An intervenor may not merely assert a need for more current information without having raised any questions concerning the accuracy of the applicant's submitted facts. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 13 (1987).

There is some authority to the effect that in show cause proceedings for modification of a construction permit, the burden of going forward is on the Staff or intervenor who is seeking the modification since such party is the "proponent of an order." Consumers Power Company (Midland Plant, Units 1 & 2), LBP-74-54, 8 AEC 112 (1974).

With respect to motions, the moving party has the burden of proving that the motion should be granted and he must present information tending to show that allegations in support of his motion are true. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977).

The general rule that the applicant carries the burden of proof 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 applicant carries the burden of proof on safety issues. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 17 (1975).

An applicant who challenges the Staff's denial of his application for an operator's license has the burden of proving that the Staff incorrectly graded or administered the operator examination. If the applicant establishes a prima facie case that the Staff acted incorrectly, then the burden of going forward with evidence shifts to the Staff. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987).

3.7.1 Duties of Applicant/Licensee

A licensee of a nuclear power plant has a great responsibility to the public, one that is increased by the Commission's heavy dependence on the licensee for accurate and timely information about the facility and its operation. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Louisiana Power and Light Co. (Waterford

Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985).

The NRC is dependent upon all of its licensees for accurate and timely information. The Licensee must have a detailed knowledge of the quality of installed plant equipment. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 712 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982).

In general, if a party has doubts about whether to disclose information, it should do so, as the ultimate decision with regard to materiality is for the decisionmaker, not the parties. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982).

The ultimate burden of persuasion rests with applicant and with NRC Staff to extent Staff supports the applicant's position. Parties saddled with this burden typically proceed first and then have the right to rebut the case presented by their adversaries. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 529 (1979).

3.7.2 Intervenor's Contentions - Burden and Means of Proof

It has long been held that an intervenor has the burden of going forward, either by direct evidence or by cross-examination, as to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1008, reconsid. den., ALAB-166, 6 AEC 1148 (1973), remanded on other grnds., CLI-74-2, 7 AEC 2, aff'd, ALAB-175, 7 AEC 62 (1974); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 589 (1983).

Where an intervenor raises a particular contention challenging a licensee's ability to operate a nuclear power plant in a safe manner, the intervenor necessarily assumes the burden of going forward with the evidence to support that contention. 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).

An intervenor must come forward with sufficient evidence to require reasonable minds to inquire further, and it has an

obligation to reveal pursuant to a discovery request what the evidence is. That requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination. Seabrook, supra, 17 NRC at 589.

This requirement has, on occasion, been questioned by the courts in those situations in which the information is in the hands of the Staff and/or applicant. See, e.g., York Committee for a Safe Environment v. NRC, 527 F.2d 812 at n.12 (D.C. Cir. 1975).

The scope of the "burden of going forward" rule has also been questioned by the courts. In Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir, 1976), the Court of Appeals indicated that an intervenor, in commenting on a draft EIS, need only bring sufficient attention to an issue "to stimulate the Commission's consideration of it" in order to trigger a requirement that the NRC consider whether the issue should receive detailed treatment in an EIS. The court stated that this test does not support the imposition of the burden of an affirmative evidentiary showing. Id. at n.12. Aeschliman was reversed in this regard by the U.S. Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978). Therein, the Court held that it is "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Id. at 553. The Court found that the NRC's use of "a threshold test," requiring intervenors to make a "showing sufficient to require reasonable minds to inquire further," was well within the agency's discretion. Id. at 554. See also Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 957 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978).

While the outlines of an intervenor's burdens with respect to its contentions may not be fully defined at this point, it is clear that the Commission's rules do not preclude an intervenor from building its case defensively, on the basis of cross-examination. Tennesee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 389 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-505 (1973).

The "threshold test," restored by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978), goes only to the matter of the showing necessary to initiate an inquiry into a specific alternative which an intervenor (or prospective intervenor) thinks should be explored, and not to

the placement of the burden of proof once such an inquiry actually has been undertaken in an adjudicatory context. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982), the Board required intervenors to file a Motion Concerning Litigable Issues, by which the burden of going forward on summary disposition (but not the burden of proof) was placed on the intervenors. However, applicant and Staff would have to respond and intervenors reply. Thereafter, the standard for summary disposition would be the same as required under the rules. This special procedure was appropriate because time pressures had caused the Board to apply a lax standard for admission of contentions, depriving applicants of full notice of the contentions in the proceeding, and because applicants had already shown substantial grounds for summary disposition of all contentions in the course of a hearing that had already been completed. The Motion for Litigable Issues was intended to parallel the Motion for Summary Disposition in all but one respect--that intervenor was required to file first and to come forward with evidence indicating the existence of genuine issues of fact before applicant had to file a summary disposition motion. Applicant retained the burden of proof demonstrating the absence of genuine issues of fact, just as it would if it had originated the summary disposition process by its own motion. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-88, 16 NRC 1335, 1339 (1982).

3.7.3 Specific Issues - Means of Proof

3.7.3.1 Exclusion Area Controls

The applicant must demonstrate constant total control of the entire exclusion area except for roads and waterways. As to those, only a showing of post-accident control is necessary. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 393-395 (1975). Note also that in certain situations there may be very narrow stretches of land (e.g., a narrow strand of beach below the mean high tide line) the lack of total control of which might readily be viewed as de minimus. Where such a de minimus situation exists, strict application of the constant total control requirements may be inappropriate. Id. at 394-395.

3.7.3.2 Need for Facility

NEPA implicitly requires that a proposed facility exhibit some benefit to justify its construction or licensing. In the case of a nuclear power plant, the plant arguably has no benefit unless it is needed. Thus, a showing of need for the

facility is apparently required to justify the licensing thereof. This need can be demonstrated either by a showing that there is a need for additional generating capacity to produce needed power or by a showing that the nuclear plant is needed as a substitute for plants that burn fossil fuels that are in short supply. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-354 (1975). See also Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978). A plant may also be justified on the basis that it is needed to replace scarce natural gas as an ultimate energy resource ("i.e. to satisfy residential and business energy requirements now being directly met by natural gas"). Wolf Creek, 7 NRC at 327. In evaluating a utility's load forecast, "the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made." Wolf Creek, 7 NRC at 328. Because of the uncertainty involved in predicting future demand and the serious consequences of not having generating capacity available when needed, an isolated forecast which is appreciably lower than all others in the record may be accepted only if the Board finds that the isolated ground." Wolf Creek, 7 NRC at 332.

Prior to recent rule changes precluding the consideration of need for power in operating license adjudications, it was held that a change in the need for power at the operating license stage must be sufficiently extensive to offset the environmental and economic costs of construction before it may be raised as a viable contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 684 (1981). Under the recent rule changes, need for power now may be litigated in operating license proceedings only if it is shown, pursuant to 10 CFR § 2.758, that special circumstances warrant waiver of the rules prohibiting litigation of need for power. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 889-890 (1984), citing, 10 CFR § 51.53(c); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 (1985).

The substitution theory, whereby the need for a nuclear power facility is based on the need to substitute nuclear-generated power for that produced using fossil fuels, has been upheld as providing an adequate basis on which to establish need for the facility. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 97-98 (1st Cir. 1978).

Considerable weight should be accorded the electrical demand forecast of a State utilities commission that is responsible by law for providing current analyses of probable electrical demand growth and which has conducted public hearings on the subject. A party may have the opportunity to challenge the analysis of such commission. Nevertheless, where the evidence

does not show that such analysis is seriously defective or rests on a fatally flawed foundation, no abdication of NRC responsibilities under NEPA results from according conclusive effect to such a forecast. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 240-241 (1978).

The U.S. Supreme Court has noted that there is little doubt that under the Atomic Energy Act of 1954 (AEA), State public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). But this Commission's responsibilities regarding need for power have their primary roots in NEPA rather than the AEA. NEPA does not foreclose the placement of heavy reliance on the judgment of local regulatory bodies charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligations to meet customer demands. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 388-389 (1978).

3.7.3.3 Burden and Means of Proof in Interim Licensing Suspension Cases

Several cases have set forth the requirements as to burden of proof and burden of going forward in interim licensing suspension cases. These rulings were promulgated in the context of the Commission's General Statement of Policy on the Uranium Fuel Cycle (41 Fed. Reg. 34707, Aug. 16, 1976) but presumably would be applicable in similar contexts that may arise in the future.

In a motion by intervenors for suspension of a construction permit in such a situation, the applicant for the CP has the burden of proof. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976); Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-346, 4 NRC 214 (1976). An applicant faced with such a motion stands in jeopardy of having the motion summarily granted where he does not make an evidentiary showing or even address the relevant factors bearing on the propriety of suspension in his response to the motion. Id. The applicant also has the burden of going forward with evidence. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). This burden of going forward is not triggered by a motion to suspend a CP which fails to state any reason which might support the grant of the motion. Id. On the other hand, the Board's duty to entertain the motion and the applicant's duty to go forward is triggered where the motion contains supporting reasons "sufficient to require reasonable minds to inquire further." Id.

3.7.3.4 Availability of Uranium Supply

In considering the extent of uranium resources, a Board should not restrict itself to established resources which have already been discovered and evaluated in terms of economic feasibility but should consider, in addition, "probable" uranium resources which will likely be available over the next 40 years. The Board should also consider the total number of reactors "currently in operation, under construction, and on order" rather than the number reasonably expected to be operational in the time period under consideration since future reactors will not be licensed unless there is sufficient fuel for them as well as previously licensed reactors. Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 323-25 (1978). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977) and ALAB-317, 3 NRC 175 (1976).

In order to establish the availability of an uranium supply, a construction permit applicant need not demonstrate that it has a long-term contract for fuel. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-347, 4 NRC 216, 222 (1976).

3.7.3.5 Environmental Costs

(RESERVED)

3.7.3.5.1 Cost of Withdrawing Farmland from Production

The environmental cost of withdrawing farmland is "deemed to be the costs of the generation (if necessary) of an equal amount of production on other land." Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 335 (1978). The Appeal Board has specifically rejected the analytical approach in which the lost productivity is compared to available national cropland resources as "an 'empty ritual' with a predetermined result" since this approach will always lead to the conclusion that withdrawal will have an insignificant impact. Id. (See also 6.15.6.1.1)

3.7.3.6 Alternate Sites Under NEPA

To establish that no suggested alternative site is "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).

3.7.3.7 Management Capability

Under the Atomic Energy Act, the Commission is authorized to consider a licensee's character or integrity in deciding whether to continue or revoke its operating license. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1) ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). A licensee's ethics and technical proficiency are both legitimate areas of inquiry insofar as consideration of the licensee's overall management competence is at issue. Three Mile Island, supra, 19 NRC at 1227.

Candor is an especially important element of management character because of the Commission's heavy dependence on an applicant or licensee to provide accurate and timely information about its facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985), citing, Three Mile Island, supra, 19 NRC at 1208.

Another measure of the overall competence and character of an applicant or licensee is the extent to which the company management is willing to implement its quality assurance program. Waterford, supra, 22 NRC at 15 n.5, citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973). A Board may properly consider a company's efforts to remedy any construction and related QA deficiencies. Ignoring such remedial efforts would discourage companies from promptly undertaking such corrective measures. Waterford, supra, 22 NRC at 15, 53 n.64, citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371-74 (1985).

Areas of inquiry to determine if a utility is capable of operating a facility are outlined in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-5, 11 NRC 408 (1980); Carolina Power and 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); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659 (1984).

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

The generally applicable standard for licensee character and integrity is whether there is reasonable assurance that the licensee has the character to operate the facility in a manner consistent with the public health and safety and NRC requirements. To decide that issue, the Commission may consider evidence of licensee behavior having a rational connection to safe operation of the facility and some reasonable relationship to licensee's candor, truthfulness, and willingness to abide by regulatory requirements and accept responsibility to protect public health and safety. In this regard, the Commission can rest its decision on evidence that past inadequacies have been corrected and that current licensee management has the requisite character. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

3.8 Burden of Persuasion (Degree of Proof)

For an applicant to prevail on each factual issue, its position must be supported by a preponderance of the evidence. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 577 (1984), review declined, CLI-84-14, 20 NRC 285 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2). ALAB-819, 22 NRC 681, 720 (1985). See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 360 (1978), reconsideration denied, ALAB-467, 7 NRC 459 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 405 n.19 (1976).

The burden of persuasion (degree to which a party must convince the Board) should be influenced by the "gravity" of the matter in controversy. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17 n.18 (1975).

A Licensing Board has utilized the clear and convincing evidence standard with regard to findings concerning the falsification and manipulation of test results by a licensee's personnel because such findings could result in serious injuries to the reputations of the individuals involved. The Board also believed that a more stringent evidentiary standard was justified where the events in question allegedly occurred seven or eight years before the hearing and the memories of the witnesses had faded. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 691 (1987).

3.8.1 Environmental Effects Under NEPA

It is not necessary that environmental effects be demonstrated with certainty. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1191-92 (1975).

It is appropriate to focus only on whether a partial interim action will increase the environmental effects over those analyzed for the full proposed action where there is no reasonable basis to foresee that the full action will not be permitted in the future. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 629 n.76 (1983).

3.9 Stipulations

10 CFR § 2.753 permits stipulation as to facts in a licensing proceeding. Such stipulations are generally encouraged. See, e.g., Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-74-2, 7 AEC 2, 3 n.1 (1974). However, in the NEPA context, Licensing Boards retain an independent obligation to assure that NEPA is complied with and its policies protected despite stipulations to that effect. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-75-14, 2 NRC 835, 838 (1975).

3.10 Official Notice of Facts

Under 10 CFR § 2.743(i), official notice may be taken of any fact of which U.S. Courts may take judicial notice. In addition, Licensing Boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. In any event, parties must have the opportunity to controvert facts which have been officially noticed.

Pursuant to this regulation, Licensing and Appeal Boards have taken official notice of such matters as:

(1) a statement in a letter from the AEC's General Manager that future releases of radioactivity from a particular reactor would not exceed the lowest limit established for all reactors at the same site. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-74-25, 7 AEC 711, 733 (1974);

(2) Commission records, letters from applicants and materials on file in the Public Document Room to establish the facts with regard to the Ginna fuel problem as that problem related to an appeal in another case. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), ALAB-75, 5 AEC 309, 310 (1972);

(3) portions of a hearing record in another Commission proceeding involving the same parties and a similar facility design. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-5, 7 AEC 82, 92 (1974);

(4) a statement, set forth in a pleading filed by a party in another Commission proceeding, of AEC responses to interrogatories propounded in a court case to which the agency was a party. Catawba, supra, 7 AEC at 96;

(5) Staff reports and WASH documents. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-22, 7 AEC 659, 667 (1974);

(6) ACRS letters on file in the Public Document Room. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 332 (1973);

(7) the existence of an applicant's Federal Water Pollution Control Act Section 401 certificate. Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973).

In most of these cases, the basis for taking official notice was that the document or material noticed was within the knowledge of the Commission as an expert body or was a part of the public records of the Commission (See, e.g., cases cited in items 1, 2, 3, 5 and 6 supra).

In the same vein, it would appear that nothing would preclude a Licensing Board from taking official notice of reports and documents filed with the agency by regulated parties, provided that parties to the proceeding are given adequate opportunity to controvert the matter as to which official notice is taken. See, e.g., Market Street Ry v. Railroad Commission of California, 324 U.S. 548, 562 (1945) (agency's decision based in part on officially noticed monthly operating reports filed with agency by party); State of Wisconsin v. FPC, 201 F.2d 183, 186 (1952), cert. den., 345 U.S. 934 (1953) (regulatory agency can and should take official notice of reports filed with it by regulated company).

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), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991).

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), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

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.

Parties in civil penalty proceedings are exempt from the general requirement for filing prefiled written direct testimony. Tulsa Gamma Ray, Inc., LBP-91-25, 33 NRC 535, 536 (1991), citing, 10 CFR § 2.743(b)(3).

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.

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 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, 3[illegible] (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 dates of publication. Rockwell International Corp. (Rocketdyne 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 902 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), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). 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 (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 Eastern 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-925, 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 details of the analysis to permit the correctness of the conclusion to be evaluated. North Anna, supra, 10 NRC at 27.

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, 658-59 (1971).

3.12.4.1 Fees for Expert Witnesses

Commission regulations provide for expert witness fees in connection with depositions (10 CFR § 2.740(h)) and for subpoenaed witnesses (10 CFR § 2.720(d)). Although these regulations specify that the fees will be those "paid to witnesses in the district courts of the United States," there had been some uncertainty as to whether the fees referred to were the statutory fees of 28 U.S.C. § 1821 or the expert witness fees of Rule 26 of the Federal Rules of Civil Procedure. In Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977), the Licensing Board ruled that the fees referred to in the regulations were the statutory fees. The Board suggested that payment of expert witness fees is especially appropriate when the witness was secured because of his experience and when the witness' expert opinions would be explored during the deposition or testimony. The Board relied on 10 CFR § 2.720(f), which permits conditioning denial of a motion to quash subpoenas on compliance with certain terms and conditions which could include payment of witness fees, and on 10 CFR § 2.740(c), which provides for orders requiring compliance with terms and conditions, including payment of witness fees, prior to deposition.

3.13 Cross-Examination

Cross-examination must be limited to the scope of the contentions admitted for litigation and can appropriately be limited to the scope of direct examination. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 698, affirmed, CLI-82-11, 15 NRC 1383 (1982); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 867, 869 (1974); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985).

In exercising its discretion to limit what appears to be improper cross-examination, a Licensing Board may insist on some offer of proof or other advance indication of what the cross-examiner hopes to elicit from the witness. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978); San Onofre, supra, 15 NRC at 697; Prairie Island, supra, 8 AEC at 869.

The authority of a Board to demand cross-examination plans is encompassed by the Board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. 10 CFR §§ 2.718(e), 2.757(c). Such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457

(1981); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 377 (1985). 10 CFR § 2.743 clearly gives the presiding officer the discretion to require the submittal of a cross-examination plan from any party seeking to conduct cross-examination. The plan must contain a brief description of the issues on which cross-examination will be conducted, the objectives to be achieved by cross-examination, and the proposed line of questions designed to achieve those objectives. 10 CFR §§ 2.743(a), (b)(2), 54 Fed. Reg. 33168, 33181 (August 11, 1989). Civil penalty proceedings and proceedings for the modification, suspension, or revocation of a license are exempt from these requirements. 10 CFR § 2.743(b)(3).

Even if cross-examination is wrongly denied, such denial does not constitute prejudicial error per se. THe complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding. Waterford, supra, 17 NRC at 1096; San Onofre, supra, 15 NRC at 697 n.14; San Onofre, supra, 15 NRC at 1384; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 76 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 495 (1986).

Cross-examination, though subject to restriction, is a fundamental right conferred on parties to formal adjudication in NRC proceedings by the Administrative Procedure Act and by the Commission's Rules of Practice. Cross-examination during a deposition, which might suffice under truly exceptional circumstances, is not otherwise a ready substitute for cross-examination before the presiding officer. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), LBP-83-29, 17 NRC 1117, 1120 (1983).

3.13.1 Cross-Examination By Intervenors

The ability to conduct cross-examination in an adjudication is not such a fundamental right that its denial constitutes prejudicial error per se. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

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-214, 8 AEC 857 (1974). In the case of a reopened proceeding, permissible inquiry through cross-examination necessarily extends to every matter within the reach of the testimony submitted by the applicants and

accepted by the Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977).

It is error to preclude cross-examination on the ground that intervenors have the burden of proving the validity of their contentions through their own witnesses since it is clear that intervenors may build their case "defensively" through cross-examination. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1745 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

Calculations underlying a mathematical estimate which is in controversy are clearly relevant since they may reveal errors in the computation of that estimate. Hartsville, supra, 7 NRC at 355-56. A Licensing Board might be justified in denying a motion to require production of such calculations to aid cross-examination on the estimate as a matter of discretion in regulating the course of the hearing. See, e.g., Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 32-36 (1976). However, an Appeal Board will not affirm a decision to cut off cross-examination on the basis that it was within the proper limits of a Licensing Board's discretion when the record does not indicate that the Licensing Board considered this discretionary basis. Hartsville, supra, 7 NRC at 356.

An intervenor's cross-examination may not be used to expand the number or scope of contested issues. Prairie Island, supra, 8 AEC at 867. To assure that cross-examination does not expand the boundaries of issues, a Licensing Board may:

(1) require in advance that an intervenor indicate what it will attempt to establish on cross-examination;

(2) limit cross-examination if the Board determines that it will be of no value for development of a full record on the issues;

(3) halt cross-examination which makes no contribution to development of a record on the issues; and

(4) consolidate intervenors for purposes of cross-examination on the same point where it is appropriate to do so in accordance with the provisions of 10 CFR § 2.715a.

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).

While an intervenor has a right to cross-examine on any issue in which he has a discernible interest, the

Licensing Board has a duty to monitor and restrict such cross-examination to avoid repetition. CLI-75-1 supra, 1 NRC 1. The Board is explicitly authorized to take the necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination, and the Board may properly limit cross-examination which is merely repetitive. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Prairie Island, supra, ALAB-244, 8 AEC 857, 868. Moreover, cross-examination must be strictly limited to the scope of the direct examination. Prairie Island, CLI-75-1, 1 NRC 1 and ALAB-244, 8 AEC 857 at 867. As a general proposition, no party has a right to unfettered or unlimited cross-examination and cross-examination may not be carried to unreasonable lengths. The test is whether the information sought is necessary for a full and true disclosure of the facts. Prairie Island, supra, ALAB-244, 8 AEC 857, 869 n.16; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1674-1675 (1982), citing, Section 181 of the Atomic Energy Act; Section 7(c) of the APA, 5 U.S.C. § 556(d). This limitation applies equally to cross-examination on issues raised sua sponte by the Licensing Board in an operating license proceeding. Id. at 8 AEC 869.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

Unnecessary cross-examination may be limited by a Licensing Board, in its discretion, to expedite the orderly presentation of each party's case. Cross-examination plans (submitted to the Board alone) are encouraged, as are trial briefs and pre-filed testimony outlines. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

Licensing Boards are authorized to establish reasonable time limits for the examination of witnesses, including cross-examination, under 10 CFR §§ 2.718(c) and 2.757(c), Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) and relevant judicial decisions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1428 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986). See MCI Communications Corp. v. AT&T, 85 F.R.D. 28 (N.D. Ill. 1979), aff'd, 708 F.2d 1081, 1170-73 (7th Cir. 1983).

A Licensing Board has the authority to direct that parties to an operating license proceeding conduct their initial cross-examination by means of prehearing examinations in the nature

of depositions. Pursuant to 10 CFR § 2.718, a Board has the power to regulate the course of the hearing and the conduct of the participants, as well as to take any other action consistent with the APA. See also 10 CFR § 2.757, 10 CFR Part 2, App. A, IV. In expediting the hearing process using the case management method contained in Part 2, a Board should ensure that the hearings are fair, and produce a record which leads to high quality decisions and adequately protects the public health and safety and the environment. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1677 (1982), citing, Statement of Policy, supra, 13 NRC at 453.

In considering whether to impose controls on cross-examination, questions raised by the applicant concerning the adequacy of the Staffs of the Appeal Board or Commission to review a lengthy record, either on appeal or sua sponte, should not be taken into account. To the extent that cross-examination may contribute to a meaningful record, it should not be limited to accommodate asserted staffing deficiencies within NRC. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 992 (1983).

3.13.2 Cross-Examination by Experts

The rules of practice permit a party to have its cross-examination of others performed by individuals with technical expertise in the subject matter of the cross-examination provided that the proposed interrogator is shown to meet the requirements set forth in 10 CFR § 2.633(a). An expert interrogator need not meet the same standard of expertise as an expert witness. The standard for interrogators under 10 CFR § 2.733(a) is that the individual "is qualified by scientific training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination." The Regents of the University of California (UCLA Research Reactor), LBP-81-29, 14 NRC 353, 354-55 (1981).

3.13.3 Inability to Cross-Examine as Grounds to Reopen

Where a Licensing Board holds to its hearing schedule despite a claim by an intervenor that he is unable to prepare for the cross-examination of witnesses because of scheduling problems, the proceeding will be reopened to allow the intervenor to cross-examine witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.14 Record of Hearing

It is not necessary for legal materials, including the Standard Review Plan, Regulatory Guides, documents constituting Staff guidance, and industry code sections applicable to a facility, to be in the evide tiary record. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 NRC 415, 418 (1983).

3.14.1 Supplementing Hearing Record by Affidavits

Appeal Boards will not permit gaps in the record to be filled by affidavit where the issue is technical and complex. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-284, 2 NRC 197, 205-06 (1975).

There is no significance to the content of affidavits which do not disclose the identity of individuals making statements in the affidavit. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-525, 9 NRC 111, 114 (1979).

3.14.2 Reopening Hearing Record

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. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977). It may do so, for example, in order to receive additional documents in support of motion for summary disposition where the existing record is insufficient. Id. at 752. For a discussion of reopening, see Section 4.4.

Reopening a record is an extraordinary action. To prevail, the petitioners must demonstrate that their motions are timely, that the issues they seek to litigate are significant, and that the information they seek to add to the record would change the results. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 915 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1207 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. 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). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1216 (1985).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved

issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983).

A motion to reopen the evidentiary record because of previously undiscovered conclusions of an NRC Staff inspection group must establish the existence of differing technical bases for the conclusions. The conclusions alone would be insufficient evidence to justify reopening of the record. Three Mile Island, supra, 15 NRC at 916.

Reopening the record is within the Licensing Board's discretion and need not be done absent a showing that the outcome of the proceeding might be affected and that reopening the record would involve issues of major significance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-46, 15 NRC 1531, 1535 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station), 10 NRC 775, 804 (1978); Public Service Co. of New Hampshire (Seabrook Station), 6 NRC 33, 64, n.35 (1977); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973).

After the record is closed in an operating license proceeding, where parties proffering new contentions do not meet legal standards for further hearings, that the contentions raise serious issues is insufficient justification to reopen the record to consider them as Board issues when the contentions are being dealt with in the course of ongoing NRC investigation and Staff monitoring. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110 (1982). See LBP-82-54, 16 NRC 210; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 236 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

Although the standard for reopening the record in an NRC proceeding has been variously stated, the traditional standard requires that (1) the motion be timely, (2) significant new evidence of a safety question exist, and (3) the new evidence might materially affect the outcome. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 800 n.66 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 476 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1260 (1984), rev'd in part on other gnds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island

Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-8, 21 NRC 1111, 1113 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986).

The traditional standard for reopening applies in determining whether a record should be reopened on the basis of new information. The standard does not apply where the issue is whether the record should be reopened because of an inadequate record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985).

The Board must be persuaded that a serious safety matter is at stake before it is appropriate for it to require supplementation of the record. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 NRC 415, 418 (1983). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 412 n.5, 413 (1987).

In proceedings where the evidentiary record has been closed, the record should not be reopened on TMI related issues relating to either low or full power absent a showing, by the moving party, of significant new evidence not included in the record, that materially affects the decision. Bare allegations or simple submission of new contentions is not sufficient, only significant new evidence requires reopening. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The factors to be applied in reopening the record are not necessarily additive. Even if timely, the motion may be denied if it does not raise an issue of major significance. However, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have 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. (Bailly 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-[illegible], 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). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 135 (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).

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 NR 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. (Bailly 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 81, 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 blatent 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, 881 (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 NRC 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 constructon 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 (1986), 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, 669 n.2 (1980).

in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claims. 10 CFR § 2.734(b); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 734 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484 (1991). In addition, the movant is also free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversight of the facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook 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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 82 & n.18 (1990).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the

standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.13, 34 (1990), aff'd, ALAB-936, 32 NRC 75 (1990).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. 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). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 CFR § 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Id. at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Id. at 1367 n.18; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Turkey Point, supra, 25 NRC at 962; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook 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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1366-67.

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the

final decision but was received by the Board after the decision, the Board denied the motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect (referring to 10 CFR § 2.712(d)(3) -- now, 10 CFR § 2.712(e)(3) -- concerning service by mail), but did not reach the jurisdictional question since the motion was properly denied on the merits. Northern State Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant. The motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.734(a)(1). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-927, 31 NRC 137, 139 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Seabrook, supra, 31 NRC at 140.

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 445-46 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2;, ALAB-775, 19 NRC 1361, 1356 (1984), aff'd sub. nom. 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); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Diablo Canyon, supra, 19 NRC at 1369.

A motion to reopen the record in order to admit a new contention must be filed promptly after the relevant information needed to frame the contention becomes available. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990).

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The Vermont Yankee tests for reopening the evidentiary record are only partially applicable where reopening the record is

the Board's sua sponte action. The Board has broader responsibilities than do adversary parties, and the timeliness test of Vermont Yankee does not apply to the Board with the same force as it does to parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-599, 11 NRC 223, 225-226 (1980). Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

4.4.2 Grounds for Reopening Hearing

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result

would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. 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). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper

opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct cross-examination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached

had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-718, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR § 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (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); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and

2), LBP-89-4, 29 NRC 62, 71 n.17 (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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 283 n.8, 284, 292 (1989), aff'd, ALAB-940, 32 NRC 225, 241-44 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.10 (1990), aff'd, ALAB-936, 32 NRC 75 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 443 n.47 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 486 n.3 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing, Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of QA/QC personnel is insufficient, by itself, to support a motion to reopen. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, 11 NRC at 887.

Intervenors failed to raise a significant safety issue when they did not present sufficient evidence to show that an

applicant's program and continuing compliance with an NRC Staff-prescribed enhanced surveillance program would not provide the requisite assurance of plant safety. The intervenors' request for harsher measures than the NRC Staff had considered necessary, without presenting any new information that the Staff had failed to consider, is insufficient to raise a significant safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487-88 (1990).

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 799 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

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). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Generalized complaints that an alleged ex parte communication to a board compromised and tainted the board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light

Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243-44 (1990). This standard also applies to an applicant's design quality assurance program. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. 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).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15

(1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.

Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant relitigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

Speculation about the future effects of budget cuts or employment freezes does not present a significant safety issue which must be addressed. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 223 (1990).

4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

4.4.4 Discovery to Obtain Information to Support Reopening of Hearing

The Appeal Board has held that, though the period for discovery may have long since terminated, a party may obtain discovery in order to support a motion to reopen a hearing provided that party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). This Appeal Board ruling is substantially undercut by a recent Commission decision in which the Commission noted that the burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to

engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

4.5 Motions to Reconsider

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appeal an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

The Appeal Board has indicated that a motion to it 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).

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or the Appeal Board cannot be raised on a motion for reconsideration of the Appeal Board's decision. Kansas Gas & Electric Co.

(Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981).

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).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

4.6 Sua Sponte Review by the Appeal Board

Sua sponte review of a Licensing Board's decision by an Appeal Board is a long-standing Commission-approved practice that is undertaken in all cases, regardless of their nature or whether exceptions have been filed. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262 (1982), citing, Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987).

The Appeal Board has the power to conduct a de novo review of the record sua sponte to make its own independent findings. Wisconsin Electric Power Co. (Point Beach Nuclear Power Station), ALAB-73, 5 AEC 297, 298 (1972). In uncontested and/or unappealed cases, the Appeal Board will always conduct a sua sponte review of safety and environmental issues. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), ALAB-79, 5 AEC 342 (1972); Detroit Edison Co. (Enrico Fermi Atomic Power Plant), ALAB-77, 5 AEC 315 (1972); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC

1076, 1111 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1624 (1984).

In the absence of an appeal, the customary practice of an Appeal Board is to conduct a sua sponte review of an authorization of licensing action. However, an Appeal Board will not conduct a sua sponte review of a proceeding that was dismissed when the parties settled the issues. Thus, an Appeal Board will decline to conduct a sua sponte review of a license amendment proceeding where the parties agreed to proposed findings of fact and conclusions of law, and where the Licensing Board raised no significant safety or environmental issues on its own motion. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985). An Appeal Board may conduct a sua sponte review of a proceeding where all the intervenors have been dismissed as parties as a sanction. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 250-51 (1989).

An Appeal Board may undertake sua sponte review either during the course of Licensing Board proceedings or after an initial decision has been issued. 10 CFR § 2.785; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

An Appeal Board may undertake sua sponte review of a Licensing Board decision concerned with the integrity of the hearing process. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982).

It is not the Appeal Board's function in a sua sponte review of a Licensing Board decision to undertake a detailed scrutiny of the entire record. Rather, the Appeal Board usually addresses only those portions of the Licensing Board's opinion that it believes deserve clarification or correction. Further, absence of Appeal Board comment on a particular Licensing Board statement should not be construed as either agreement or disagreement with it. Midland, supra, 16 NRC at 908-909.

Upon review sua sponte of a Licensing Board's initial decision authorizing facility operation, the Appeal Board will consider operational problems coming to light as a result of facility operation during the period of review only where the problems are extraordinary and have a bearing on whether an operating license should have been issued. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977).

In any event, the following matters will not be reviewed sua sponte absent extraordinary circumstances:

(1) Procedural irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262 (1982).

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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); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 365 n.278 (1991). 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 (1986).

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

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

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); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991). 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 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-799, 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); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499 (1991). 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 (1976). 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, 18 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); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991).

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. (Bailly 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 responsibilities 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 it 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 ne. 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).

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 22 , 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (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).

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, 1074-75 (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, 16 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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (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 11, 14 n.4 (1983).

Some cases have delineated, to a certain extent, the requirements for directed certification as to specific issues and under particular circumstances. In this vein:

(1) Directed certification will not be granted unless the Licensing Board below had a reasonable opportunity to consider the question as to which certification is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 618-619, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

(2) While it may not always be dispositive, one factor favoring directed certification is that the question or order for which certification is sought is one which "must be reviewed now or not at all." Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

(3) A mere conflict between Licensing Boards on a particular question does not mean that directed certification as to that question will automatically be granted. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-485 (1975). Unless it is

shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" Licensing Board decision. Perry, supra, ALAB-675, 15 NRC at 1112-1113. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263 (1988).

(4) An Appeal Board has granted directed certification of a Licensing Board's denial of an intervenor's motion to correct the official transcript of a prehearing conference. The Appeal Board found that interlocutory review was warranted because of doubts that the transcript could be corrected at the end of the hearing. Without a complete and accurate transcript, the intervenor would suffer serious and irreparable injury because its ability to challenge the Licensing Board's rulings through an appeal would be compromised. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 50, 51 (1986).

(5) The Appeal Board does not favor certification on the question as to whether a contention should have been admitted into the proceeding. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987). A Board's rejection of an interested State's sole contention is not appropriate for directed certification when the issues presented by the State are also raised by the contentions of intervenors in the proceeding. Seabrook, supra, 23 NRC at 592-593. The admission by a Licensing Board of more late-filed than timely contentions does not, in and of itself, affect the basic structure of a licensing proceeding in a pervasive or unusual manner warranting interlocutory Appeal Board review. If the late-filed contentions have been admitted by the Board in accordance with 10 CFR § 2.714, it cannot be said that the Board's rulings have affected the case in a pervasive or unusual manner. Rather, the Board will have acted in furtherance of the Commission's own rules. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). The basic structure of an ongoing proceeding is not changed by the simple admission of a contention which is based on a Licensing Board ruling that: (1) is important or novel; or (2) may conflict with case law, policy, or Commission regulations. Thus, the Appeal Board denied directed certification of a Licensing Board ruling which admitted the

intervenor's revised quality assurance contention. The applicant argued that the Licensing Board erred in giving the intervenor the opportunity to conduct discovery in order to revise and resubmit the quality assurance contention which had been rejected earlier for lack of specificity. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 and nn. 16-17 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982).

(6) Certification will not be directed to review rulings on objections to interrogatories. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-318, 3 NRC 186 (1976). Nor will certification be directed to review orders rejecting objections to discovery on grounds of privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-300, 2 NRC 752, 769 (1975). In this vein, the Appeal Board has refused to review a discovery ruling referred to it by a Licensing Board where 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 Co. (Midland Plant, Units 1 and 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." Midland, supra. Discovery rulings rarely meet the test for discretionary interlocutory review. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 74 (1987).

(7) As to rulings on evidence, certification will not be granted, absent exceptional circumstances, on questions of what evidence or how evidence will be admitted. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981). In fact, the Appeal Board is generally disinclined to direct certification on rulings involving "garden-variety" evidentiary matters.

See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767, 768 (1977), the Appeal Board reiterated that certification will not be granted to allow consideration of interlocutory evidentiary rulings, stating that, "it is simply not our role to monitor these matters on a day-to-day basis; were we to do so, 'we would have little time for anything else.'" (citations omitted). An Appeal Board will be particularly reluctant to grant a request for directed certification where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 475 (1982), citing, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976). Adverse evidentiary rulings may turn out to have little, if any evidentiary effect on a Licensing Board's ultimate substantive decision. Therefore, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant interlocutory intercession by an Appeal Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

(8) The Appeal Board has denied certification under 10 CFR § 2.718(i) and rejected the Staff's position that a Licensing Board's ruling denying summary disposition of a part of a contention unwarrantedly expanded the scope of the issues and that the resulting necessity of trying these issues would cause unnecessary expense and delay. The Appeal Board found that the "immediate and irreparable harm" and "pervasive effect on the basic structure of the proceeding" alleged by the Staff in such a case was no different than that involved any time a litigant must go to hearing. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981). The mere expansion of issues rarely, if ever, affects the basic structure of a proceeding in a pervasive or unusual way so as to warrant interlocutory review by an Appeal Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262-63 (1988).

When an Appeal Board has granted directed certification of a Licensing Board order, it may also conduct interlocutory review of a second Licensing Board order which is based on the

first order. Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 362 (1990).

The Appeal Board's directed certification authority will be exercised "most sparingly." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

While a lack of participation below may not absolutely foreclose grant of a request for directed certification in all circumstances, it does increase the movant's already heavy burden of demonstrating that the Board's intercession is necessary. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 175-76 (1983).

An argument that future litigation may be required does not satisfy the test for directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).

Opposition to a directed certification petition should include some discussion of petitioner's claim of Licensing Board error. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Failure of a party to address the standards for directed certification in responding to a motion seeking such review may be construed as a waiver of any argument regarding the propriety of directed certification. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 n.7 (1984). Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

5.12.2.1.1 Effect of Subsequent Developments on Motion to Certify

Developments occurring subsequent to the filing of a motion for directed certification to the Appeal Board may strip the question brought of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977).

When reviewing a motion for directed certification, an Appeal Board will not consider events which occurred subsequent to the issuance of the challenged Licensing Board ruling. A party which seeks to rely upon such events must first seek appropriate relief from the Licensing Board. Public Service

Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 271 (1988).

5.12.2.1.2 Effect of Directed Certification on Uncertified Issues

The pendency of review by the Appeal Board pursuant to certification does not automatically result in a stay of hearings on independent questions not intimately connected with the issue certified. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

5.12.3 Application to Commission for a Stay After Appeal Board's Denial of Stay

Where a party's request for a stay is denied by the Appeal Board, the party may apply to the Commission for a stay under 10 CFR § 2.788(a), (h). This, rather than a petition for review under 10 CFR § 2.786(b), is the appropriate route. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), CLI-78-3, 7 NRC 307, 308 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 30 n.44 (1978). Thus, while such a request to the Commission may have the appearance of an appeal, it is not treated as such.

The application for a stay and an appeal from the Appeal Board's decision denying a stay will be denied when intervenors do not make a strong showing that they are likely to prevail on the merits or that they will be irreparably harmed pending appeal of the Licensing Board's decision. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

5.13 Appeals from Orders, Rulings, Initial Decisions, Partial Initial Decisions

Prior to recent changes in the regulations, the vehicle for an appeal of any order, ruling or decision was the filing of exceptions. An appeal is now taken by the filing of a notice of appeal pursuant to 10 CFR § 2.762.

An appeal should be filed only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes appellate jurisdiction to change the result. An appeal is unnecessary and inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-

478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973).

5.13.1 Time for Filing Appeals

5.13.1.1 Appeals from Initial and Partial Initial Decisions

Parties aggrieved by an initial decision or a partial decision must file and brief their appeals within the time limits set out in 10 CFR § 2.762. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-274, 1 NRC 497, 498 (1975). Failure to file an appeal in a timely manner amounts to a waiver of the appeal. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974). The same rule applies to partial initial decisions and a party must file its appeal therefrom without waiting for the Licensing Board's disposition of the remainder of the proceeding. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974).

5.13.1.2 Variation in Time Limits on Appeals

Only an Appeal Board may vary the time for taking appeals from that set out in 10 CFR § 2.762; Licensing Boards have no power to do so. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Of course, mere agreement of the parties to extend the time for the filing of an appeal is not sufficient to show good cause for such a time extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

5.13.2 Briefs on Appeal

Briefs in support of an appeal must be filed under 10 CFR § 2.762. Failure to file a brief can result in dismissal of the appeal. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975). Those aspects of an appeal not addressed by the supporting brief may be disregarded by the Appeal Board. Midland, supra; Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974).

When an intervenor is represented by counsel, an Appeal Board has no obligation to piece together or to restructure vague references in its brief in order to make intervenor's arguments for it. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear

Generating Station, Unit 1), ALAB-650, 14 NRC 43, 51 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3rd Cir. 1982).

Briefs in support of appeals must specify the precise portion of the record relied upon in support of the assertion of error. 10 CFR § 2.762(a) (now 10 CFR § 2.762(d)); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 424 (1980).

5.13.3 Effect of Failure to File Proposed Findings

The Appeal Board is not required to review an appeal 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); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 864 (1974). But see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21, 23 (1983).

5.13.4 Motions to Strike Appeal

A party may file a motion to strike an appeal or brief which is not in substantial compliance with the provisions of 10 CFR § 2.762. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122 (1977); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-409, 5 NRC 1391, 1396-1397 (1977). Such a motion is also appropriate to exclude improper or scandalous appeals. Hartsville, supra, 5 NRC at 1391. A motion to strike an appeal is not appropriate, however, where an assessment of its validity requires more than minimal scrutiny of the underlying record. Id.

5.14 Certification to the Commission

Pursuant to 10 CFR § 2.785(d), an Appeal Board may certify to the Commission any major or novel question of policy, law or procedure which is properly before the Appeal Board. Such certification may be at the Appeal Board's discretion or at Commission direction. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 285 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 631, 635 (1988).

The Appeal Board should exercise its authority to certify questions to the Commission sparingly. Absent a compelling reason, the Appeal Board will decline certification. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977). The same is true for the Licensing Board.

Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 2; Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982).

Certification by the Appeal Board to the Commission is proper in a case involving novel Staff action that presents a major policy question relevant to a pending application, where Appeal Board members have diverging views, and the procedural rules preclude the parties themselves from petitioning for Commission review because the matter came before the Appeal Board itself on certification. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323, 325 (1978).

The Commission's Rules of Practice contemplate that requests for relief from Licensing Board actions (for example, in matters such as discovery) be delegated to the Appeal Board, which functions as the Commission's delegate for these matters. 10 CFR § 2.785.

Absent extraordinary circumstances warranting Commission involvement, request for interlocutory review of Licensing Board rulings and other relief should be directed to the Appeal Board rather than to the Commission. 10 CFR §§ 2.730(f), 2.785. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980). In the context of initial review of Licensing Board actions, then, a certification to the Commission would go first to the Appeal Board under the specific delegation of 10 CFR § 2.785(b)(1). Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), LBP-80-29, 12 NRC 581, 591 (1980).

Referral directly to the Commission by the Licensing Board will not be granted absent a strong reason for bypassing the Appeal Board. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691 (1981).

A motion for directed certification of an interlocutory Licensing Board ruling directly to the Commission will not be granted where the Licensing Board has no need to go back to the Commission for guidance. Additionally, as with motions to Appeal Boards for directed certification, such a motion will not be granted unless the ruling either (1) threatens the movant with immediate and serious impact which as a practical matter cannot be alleviated by later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, 26 NRC 302, 312 (1987), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

5.15 Review of Appeal Board Decisions

10 CFR § 2.786 has been modified to provide for an appeal to the Commission of an Appeal Board's decision. No appeal is permitted with respect to a decision or action on referral or certification under 10 CFR §§ 2.718(i) or 2.730(f). Section 2.786 sets forth in

detail the requirements for an appeal to the Commission. 10 CFR § 2.786(b)(1) provides that a party may file a petition for review of an Appeal Board decision within 15 days after service of that decision. Consolidated Edison Co. of N.Y. (Indian Point Station, No. 2), ALAB-414, 5 NRC 1425, 1427 (1977).

The Commission's normal practice for review of Appeal Board decisions under 10 CFR § 2.786 applies even when an Appeal Board has conducted evidentiary hearings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-21, 14 NRC 595, 596 (1981), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981); Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), ALAB-578, 11 NRC 189 (1980); Northern States Power Co. (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-343, 4 NRC 169 (1976).

The selection of parties to a Commission review proceeding is clearly a matter of Commission discretion (10 CFR § 2.786(b)(6)). A major factor in the Commission decision is whether a party has actively sought or opposed Commission review. This factor helps reveal which parties are interested in Commission review and whether their participation would aid that review. Therefore, a party desiring to be heard in a Commission review proceeding should participate in the process by which the Commission determines whether to conduct a review. An interested State which seeks Commission review is subject to all the requirements which must be observed by other parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977).

Under 10 CFR § 2.786(a), the Commission may, on its own motion, review an Appeal Board decision. Under an earlier version of Section 2.786(a), the Commission held that it had no obligation to state its reasons for electing to review an Appeal Board decision. USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

In this vein, since the Commission is responsible for all actions and policies of the NRC, the Commission has the inherent authority to act upon or review sua sponte any matter before an NRC tribunal. To impose on the Commission, to the degree imposed on the judiciary, requirements of ripeness and exhaustion would be inappropriate sihce the Commission, as part of a regulatory agency, has a special responsibility to avoid unnecessary delay or excessive inquiry. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990).

Although 10 CFR § 2.786(a) sets forth the type of issues for which, and situations in which the Commission may direct certification of a record sua sponte prior to final action by a Licensing or Appeal Board below, it does not limit the Commission's inherent supervisory

authority. Id. Nevertheless, as a general rule, the Commission does not sit to review factual determinations made by its subordinate panels.

When an issue is of obvious significance and is not fact-dependent, and when its present resolution could materially shorten the proceedings and guide the conduct of other pending proceedings, the Commission will generally dispose of the issue rather than remand it. Seabrook, supra, 5 NRC at 517.

Within 30 days of an Appeal Board decision, the Commission may review it. 10 CFR § 2.786(a); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978). (Note that under 10 CFR § 2.772, the Commission may extend the time for review.)

The Commission may dismiss its grant of review of an Appeal Board decision even though the parties have briefed the issues. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982), citing, Jones v. State Board of Education, 397 U.S. 31 (1970).

The expression of tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

5.15.1 Effect of Commission's Refusal to Entertain Appeal

The Commission's refusal to entertain a discretionary appeal does not indicate its view on the merits. Nor does it preclude the Appeal Board from reconsidering the matter as to which Commission review was sought where that matter 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). However, the Commission has also stated that a decision by it not to review an Appeal Board decision upholding a Licensing Board decision authorizing issuance of an operating license reflected the Commission's belief that the Appeal Board decision was legally and factually sound. The Appeal Board decision thus constituted final agency action. However, under Commission policy, the NRC Staff does not issue full-power licenses without Commission approval on uncontested as well as contested issues. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 688, 689 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987), citing, 46 Fed. Reg. 47906 (Sept. 30, 1981).

When the Commission declines to review an Appeal Board decision, a final agency determination has been made resulting in the termination of Appeal Board jurisdiction. Metropolitan

Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

5.15.2 Stays Pending Judicial Review of Appeal Board Decision

Appeal Boards will entertain requests for stays pending judicial review of their decisions and will apply the Virginia Petroleum Jobbers criteria (see Section 5.7.1, supra) to determine if a stay is appropriate. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). The Commission itself will entertain requests for a stay pending judicial review and will apply the same criteria. Natural Resources Defense Council, CLI-76-2, 3 NRC 76 (1976).

Section 10(d) of the Administrative Procedure Act (5 U.S.C. § 705) pertains to an agency's right to stay its own action pending judicial review of that action. It confers no freedom on an agency to postpone taking some action when the impetus for the action comes from a court directive. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 783-84 (1977).

The Appeal Board suspended sua sponte its consideration of an issue in order to await the possibility of Supreme Court review of related issues, following the rendering of a decision by the First Circuit Court of Appeals, where certiorari had not yet been sought or ruled upon for such Supreme Court review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-548, 9 NRC 640, 642 (1979).

5.15.3 Stays Pending Remand After Judicial Review

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, 159-160 (1978). In such circumstances the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. 7 NRC at 160.

5.16 Review of Commission Decisions

5.16.1 Review of Disqualification of a Commissioner

Determinations on the disqualification of a Commissioner reside exclusively in that Commissioner, and are not re-

viewable by the Commission. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1 (1981), clarified, CLI-81-23, 14 NRC 610 (1981); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

When a party requests the disqualification of more than one Commissioner, each Commissioner must decide whether to recuse himself from the proceeding, but the Commissioners may issue a joint opinion in response to the motion for disqualification. Joseph J. Macktal, CLI-89-18, 30 NRC 167, 169-70 (1989), denying reconsideration of CLI-89-14, 30 NRC 85 (1989).

5.17 Reconsideration by the Commission

The Commission's ability to reconsider is inherent in the ability to decide in the first instance. The Commission has 60 days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

10 CFR § 2.771 provides that a party may file a petition for reconsideration of a final decision within 10 days after the date of that decision.

A majority vote of the Commission is necessary for reconsideration of a prior Commission decision. U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-8, 15 NRC 1095, 1096 (1982).

5.18 Jurisdiction of NRC to Consider Matters While Judicial Review is Pending

The NRC has jurisdiction to deal with supervening developments in a case which is pending before a court, at least where those developments do not bear directly on any question that will be considered by the court. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

There has been no definitive ruling as to whether the NRC has jurisdiction to consider matters which do bear directly on questions pending before a court. In any event, it is clear that the Appeal Board considers it inappropriate to do so, at least where the court has not specifically requested it, based on considerations of comity between the court and the agency. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365 (1976); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 179 (1985), citing, 28 U.S.C. § 2347(c).

While the Appeal Board considers it inappropriate to consider matters bearing directly on questions pending before a court where it

has not been directed to do so by the court, NRC must act promptly and constructively in effectuating the decisions of the courts. Upon issuance of the mandate, the court's decision becomes fully effective on the Commission, and it must proceed to implement it. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 783-784 (1977). Neither the filing nor the granting of a petition for Supreme Court certiorari operates as a stay, either with respect to the execution of the judgment below or of the mandate below by the lower courts. Id. at 781.

When the U.S. Court of Appeals has stayed its mandate pending final resolution of a petition for rehearing en banc on the validity of an NRC regulation, the regulation remains in effect, and the Board is bound by those rules until that mandate is issued. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).

Where a party petitioning the Court of Appeals for review of the 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).

The pendency of a criminal investigation by the Department of Justice does not necessarily preclude other types of inquiry into the same matter by the NRC. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The pendency of a Grand Jury proceeding does not legally bar parallel administrative action. Three Mile Island, supra, 18 NRC at 191 n.27.

5.19 Procedure on Remand

5.19.1 Jurisdiction of the Licensing Board on Remand

The question as to whether a Licensing Board, on remand, assumes its original plenary authority or, instead, is limited to consideration of only those issues specified by the Appeal Board in the remand order was, for some time, unresolved. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-389, 5 NRC 727 (1977). Of course, jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of review of the decision. Issues to be considered by the Board on remand would be shaped by that order. If the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of scope to embrace other discrete matters. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979).

More recently, however, a Licensing Board was found to be "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. This establishes that a Licensing Board has limited jurisdiction in a remanded proceeding and may consider only what has been remanded to it. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 11, 12 (1987) (the Licensing Board properly rejected an intervenor's proposed license conditions which exceeded the scope of the narrow remanded issue of school bus driver availability).

Although an adjudicatory board to which matters have been remanded would normally have the authority to enter any order appropriate to the outcome of the remand, the Commission may, of course, reserve certain powers to itself, such as, for example, reinstatement of a construction permit suspended pending the remand. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 961 (1978).

Where the Commission remands an issue to a Licensing Board it is implicit that the Board is delegated the authority to prescribe warranted remedial action within the bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

5.19.2 Jurisdiction of the Appeal Board on Remand

Under settled principles of finality of adjudicatory action, once an Appeal Board has finally determined a discrete issue in a proceeding, its jurisdiction is terminated with respect to that issue, absent a remand order. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

The Appeal Board's jurisdiction over previously determined issues is not necessarily preserved by the pendency before it of other issues in a proceeding. Three Mile Island, supra, 19 NRC at 983, citing, North Anna, supra, 9 NRC at 708-09; Seabrook, supra, 8 NRC at 695-96.

Where the Appeal Board remands the record to the existing Licensing Board for the receipt of further evidence on the

quality assurance issue, the Appeal Board may retain jurisdiction over the proceeding. Therefore, once the Licensing Board has completed the hearing on remand and rendered its supplemental decision, there will be no necessity for any party to file a new notice of appeal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1168 (1984).

5.19.3 Stays Pending Remand

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 remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 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 balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses 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) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

5.19.4 Participation of Parties in Remand Proceedings

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

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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, 142, 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.

A petition to intervene in a materials licensing proceeding must be filed within 30 days after the petitioner receives actual notice of a pending application or an agency action granting an application. 10 CFR § 2.1205(c)(2)(i). Actual notice does not require notice of the legal right to challenge the application or of the period of time within which a challenge must be filed. Nuclear Metals, Inc., LBP-91-27, 33 NRC 548, 549, 550 (1991). A petitioner still may be admitted to the proceeding if the Commission or presiding officer determines that the delay in filing the petition is excusable. 10 CFR § 2.1205(k)(1)(i). The existence of negotiations between the applicant and the petitioner to resolve the issues does not excuse the petitioner's failure to file a timely petition. Nuclear Metals, supra, 33 NRC at 549, 550-51.

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) (analagous 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), LBP-84-16, 19 NRC 957, 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).

A moving party has no right of reply to answers in NRC proceedings except as permitted by the presiding officer. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 971 (1982), citing, 10 CFR § 2.730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991).

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 petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

Prior to entertaining any suggestions that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The intervenors must be heard in response because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in Federal court. Allens Creek, supra, 10 NRC at 525.

6.14.1 Form of Motion

The requirements with regard to the form and content of motions are set forth in 10 CFR § 2.730(b).

The Appeal Board expects the caption of every filing in which immediate affirmative relief is requested to reference that fact explicitly by adverting to the relief sought and including the word "motion." The movant will not be heard to assert that it has been prejudiced by the Board's failure to take timely action on the motion in the absence of such a reference. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-457, 7 NRC 70, 71 (1978).

6.14.2 Responses to Motions

6.14.2.1 Time for Filing Responses to Motions

Unless specific time limits for responses to motions are expressly set out in specific regulations or are established by the presiding adjudicatory board, the time within which responses to motions must be filed is set forth in 10 CFR § 2.730.

If a document requiring a response within a certain time after service is served incompletely (e.g., only part of the document is mailed), 10 CFR § 2.712 would indicate that the time for response does not begin to run since implicit in that rule is that documents mailed are complete, otherwise service is not effective. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 649 n.7 (1974) (dictum).

6.14.3 Licensing Board Actions on Motions

Although an intervenor may have failed, without good cause, to timely respond to an applicant's motion to terminate the proceeding, a Board may grant the intervenor an opportunity to respond to the applicant's supplement to the motion to terminate. Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-16, 23 NRC 789, 790 (1986).

If a Licensing Board decides to defer indefinitely a ruling on a motion of some importance, "considerations of simple fairness require that all parties be told of that fact." Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442, 1444 (1977).

When an applicant for an operating license files a motion for authority to conduct low-power testing in a proceeding where the evidentiary record is closed but the Licensing Board has not yet issued an initial decision finally disposing of all contested issues, the Board is obligated to issue a decision on all outstanding issues (i.e., contentions previously litigated) relevant to low-power testing before authorizing such testing. See 10 CFR § 50.57(c). Such a motion, however, does not automatically present an opportunity to file new contentions specifically aimed at low-power testing or any other phase of the operating license application. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 801 n.72 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 553 (1986), aff'd, ALAB-854 24 NRC 783 (1986).

6.15 NEPA Considerations

NEPA expanded the Commission's regulatory jurisdiction beyond that conferred by the Atomic Energy Act or the Energy Reorganization Act. Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974). NEPA requires the Commission to consider environmental factors in granting, denying or conditioning a construction permit. It does not give the Commission the power to order an applicant to construct a plant at an alternate site or to order a different utility to construct a facility. Nevertheless, the fact that the Commission is not empowered to implement alternatives does not absolve it from its duty to consider them. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

NEPA does not establish minimal environmental standards; the environmental review mandated entails a balancing of costs and benefits rather than a measuring against absolute environmental standards. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 43 (1977). 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. Id. at 90.

NEPA requirements apply to license amendment proceedings as well as to construction permit and operating license proceedings. In license amendment proceedings, however, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975).

NEPA does not mandate that environmental issues considered in the construction permit proceedings be considered again in the operating license hearing, absent new information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1459 (1982). With regard to license amendments, it has been held that the grant of a license amendment to increase the storage capacity of a spent fuel pool is not a major Commission action significantly affecting the quality of the human environment, and therefore, no EIS is required. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC

435, 456 (1980); Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-268 (1979).

"[T]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in pari materia.'" Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 539 (1978). (emphasis in original) In fulfilling its obligations under NEPA, the NRC may impose upon applicants and licensees conditions designed to minimize the adverse environmental effects of licensed activities. Such conditions may be imposed even on other Federal agencies, such as TVA, which seek NRC licenses, despite the language of Section 271 of the Atomic Energy Act (42 U.S.C. 2018) which states, in part, that nothing in the act "shall be construed to affect the authority of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power through the use of nuclear facilities licensed by the Commission...." Phipps Bend, 8 NRC at 541-544. Unless it was explicitly made exclusive, the authority of other Federal, state or local agencies or government corporations to consider the environmental consequences of a proposed project does not preempt the NRC's authority to condition its permits and licenses pursuant to NEPA. For example, TVA's jurisdiction over environmental matters is not exclusive where TVA seeks a license from a Federal agency, such as NRC, which also has full NEPA responsibilities. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), LBP-77-14, 5 NRC 494 (1977).

Pursuant to the Nuclear Waste Policy Act of 1982, the Department of Energy (DOE) has primary responsibility for evaluating the environmental impacts related to the development and operation of geologic repositories for high-level radioactive waste. In any proceeding for the issuance of a license for such a repository, the NRC will review and, to the extent practicable, adopt the environmental impact statement (EIS) submitted by DOE with its license application. The NRC will not adopt the EIS if: 1) the action which the NRC proposes to take is different from the action described in the DOE license application, and the difference may significantly affect the quality of the human environment; or 2) significant and substantial new information or new considerations render the EIS inadequate. 10 CFR § 51 109(c). To the extent that the NRC adopts the EIS prepared by DOE, it has fulfilled all of its NEPA responsibilities. 10 CFR § 51.109(d); 54 Fed. Reg. 27864, 27871 (July 3, 1989).

NEPA directs all Federal agencies to comply with its requirements "to the fullest extent possible." (42 U.S.C. § 4332.) The leading authorities teach that an agency is excused from those NEPA duties only "when a clear and unavoidable conflict in statutory authority exists." Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545 (1978).

NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the Atomic Energy Act.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979).

While the authority of other Federal or local agencies to consider the environmental effects of a project does not preempt the NRC's authority with regard to NEPA, the NRC, in conducting its NEPA analysis, may give considerable weight to action taken by another competent and responsible government authority in enforcing an environmental statute. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-28, 8 NRC 281, 282 (1978).

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction permit review, 10 CFR § 51.21. To raise an issue in an operating license hearing concerning environmental matters which were considered at 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 related 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, 795 (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), reconsid. denied, CLI-91-8, 33 NRC 461 (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 test 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).

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), CLI-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 [illegible] 5-6 (1989), reconsid. denied and stay denied, CLI-89-15, [illegible], 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 [illegible] 23, 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 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), reconsid. denied, CLI-91-8, 33 NRC 461, 470 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390 (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 1167 (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); Peshlakai 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 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), ALAB-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 Assn'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 684 (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 634 (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 or 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 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 (1978).

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 312 (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).

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 "sham" 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, 8 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 (1982).

A reasonably foreseeable, nonspeculative, 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, 9 NRC 291, 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-86-21, 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-89-3, 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-876, 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 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 627 (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 350 (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 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 279, 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 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 783, 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


1
IMAGE EVALUATION
TEST TARGET (MT-3)
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.5
4.0
150mm
6"

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, 516-17 (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 (Seabrook 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), appeal dismissed as moot, ALAB-946, 33 NRC 245 (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. Wrangler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-89-39, 30 NRC 746, 755 (1989), rev'd and remanded, ALAB-951, 33 NRC 505, 516-18 (1991).

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).

6.16.1.2 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, 251-52, 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), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361-362 (1991).

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

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 o· other grounds, ALAB-893, 27 NRC 627 (1988). Nevertheless, . gulatory 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 tc 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 tc 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), rev'd and remanded on other grounds, ALAB-951, 33 NRC 505 (1991).

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, . NRC 1290, 1298-99 (1982), re'd in part on other ground. 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 Powe- 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, 1131 (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), reconsid. 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).

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, supra, 8 NRC at 191. A Licensing Board may deny an intervention petition as a sanction for the petitioner's failure to comply with a Board order to appear at a prehearing conference. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-13, 33 NRC 259, 262-63 (1991).

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 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 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 prelicensing authorization to engage in certain specified construction activities. These 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), LBP-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 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 2), 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, 8 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).

Licensees 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, 16 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), aff'd, ALAB-950, 33 NRC 492, 502-503 (1991). 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 peti-tion must be accompanied by an affidavit. Other parties to the proceed ng 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 circum-stances 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-860, 25 NRC 63, 67 (1987).

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 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), aff'd, ALAB 949, 33 NRC 484, 489-90 (1991); Wrangler Laboratories, Lar aboratories, Orion Chemical Co., and John P. Larsen, I(9-39, 30 NRC 746, 756 (1989), rev'd and remanded, ALAB-951, 33 NRC 505, 513-16 (1991).

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).

6.2. Rulemaking

Rulemaking procedures are cover d, 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 pendancy 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 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 request 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 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 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 cannct 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 § 2.790, 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 nondisclosure. 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 in dealing 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 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-80-16, 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. (UF_6 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. (UF_6 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).

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).

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, 105 (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 (1984). 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'g 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 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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