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NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1995



U.S. NUCLEAR REGULATORY COMMISSION

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Vol. 42, No. 6
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NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1995

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

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

U.S. NUCLEAR REGULATORY COMMISSION

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

COMMISSIONERS

Shirley A. Jackson, Chairman
Kenneth C. Rogers

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

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman¹

In the Matter of

**Docket No. 40-8027-EA
(Decontamination and
Decommissioning Funding)**

**SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site)**

December 14, 1995

The Commission reverses the portion of the Atomic Safety and Licensing Board's Order, LBP-95-5, 41 NRC 253 (1995), that entered a provision in a protective order restricting the NRC Staff from referring confidential information obtained through discovery to other NRC offices without first obtaining Board approval. The Commission vacates that provision and directs the Board to enter a new provision in accordance with this opinion.

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTION

The Atomic Safety and Licensing Board may not place itself in the position of deciding whether the NRC Staff should be permitted to refer information obtained through discovery to NRC investigatory staff offices.

ADJUDICATORY BOARDS: RESPONSIBILITIES

The licensing board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence.

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

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTIONS

The regulation permitting the Board to enter protective orders, 10 C.F.R. § 2.740, is procedural and may not be read to enlarge the Licensing Board's authority into areas that the Commission has clearly assigned to other offices.

MEMORANDUM AND ORDER

On June 29, 1995, the Commission granted the NRC Staff's petition for interlocutory review of an Atomic Safety and Licensing Board order issued on April 18, 1995. LBP-95-5, 41 NRC 253. That order imposed a protective order, the terms of which were unobjectionable to all parties, except for paragraph 7. Paragraph 7 restricts the NRC Staff from referring confidential information obtained through discovery to other NRC offices without first obtaining Board approval. The NRC Staff opposes paragraph 7 on the ground that a requirement for prior Board approval interferes with NRC investigatory and enforcement activities. The Staff asks the Commission to reverse the Board's order with respect to paragraph 7. The Licensee, Sequoyah Fuels Corporation (SFC), and its parent, General Atomics (GA), support the Board's decision.²

The proceeding is currently being held in abeyance pending settlement negotiations between the NRC Staff and GA. The Board recently approved a settlement agreement between the NRC Staff and SFC. LBP-95-18, 42 NRC 150 (1995) (Petition for Review Pending). Some discovery already has taken place and more likely will ensue should the proceeding resume. Therefore, despite the delay in the proceeding and despite GA's suggestion that issuance of a decision with the Commission not at "full strength" (*see note 1, supra*) would be "imprudent," the Commission believes that this matter should be resolved now.³

For the reasons stated below, the Commission reverses LBP-95-5 with respect to paragraph 7 of the protective order and vacates paragraph 7. In addition, the Commission directs the Board to enter a new paragraph 7 in accordance with this opinion.

BACKGROUND

This proceeding stems from an NRC Staff enforcement order holding SFC and GA jointly and severally liable for providing financial assurance for the

² Native Americans for a Clean Environment and the Cherokee Nation are also parties to this proceeding. They did not participate in this appeal.

³ See GA's Answer to NRC Staff's Brief in Support of Partial Reversal of LBP-95-5 (July 28, 1995), at 4.

decontamination and decommissioning of SFC's facility near Gore, Oklahoma. See 58 Fed. Reg. 55,087 (Oct. 25, 1993). The present controversy began after initial discovery requests were filed by the NRC Staff, SFC, and GA. These parties attempted to reach an agreement on the terms of a protective order proposed by SFC to control access to its confidential documents requested in discovery, but these attempts failed. As a result, SFC filed before the Licensing Board a motion under 10 C.F.R. § 2.740(c) requesting that the Board approve a protective order to control the disclosure and use of confidential discovery material obtained by Staff. GA joined in this motion seeking the same restrictions for its confidential documents.

Because the NRC Staff agreed that a document-by-document review to determine if a document may be considered exempt from public disclosure would significantly delay discovery, see 10 C.F.R. § 2.790(b), it agreed to the concept of a protective order. However, the NRC Staff, SFC, and GA could not agree on language for the order's paragraph 7. The Licensing Board ultimately imposed essentially the version of paragraph 7 proposed by SFC and GA.⁴

The version of paragraph 7 acceptable to SFC/GA and the one entered by the Licensing Board states:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order without first obtaining the approval of the Licensing Board.

41 NRC at 269. The NRC Staff proposal, supported by Native Americans for a Clean Environment and the Cherokee Nation but rejected by the Board, states:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from disclosing such to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff, but such NRC Staff shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order. Notwithstanding any other provision contained in this Protective Order, the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their Staff may use or refer such Protected Discovery Materials as is appropriate in the legitimate exercise of their respective duties.

41 NRC at 255-56.

⁴Judges Gleason and Kline ruled in favor of imposing the protective order, including the current version of paragraph 7. Judge Bollwerk dissented with respect to paragraph 7, but otherwise concurred in the majority's decision.

The principal difference between the two proposals is that the SFC/GA version requires the Staff to seek prior Board approval before it may refer confidential information, even information that it believes evidences wrongdoing, to NRC investigative or enforcement offices. The staff's version of paragraph 7 would permit "in-house" referral to other NRC offices, including the Office of the Inspector General (OIG), the Office of Investigations (OI), and the Office of the Executive Director for Operations (EDO) "as is appropriate in the legitimate exercise of their respective duties."

The Board imposed the SFC/GA version on the ground that SFC and GA had adequately substantiated the need for protection from inadvertent releases by demonstrating that some discoverable financial and commercial documents are legitimately confidential or privileged information. The Board noted that on a showing of good cause it had the authority "to issue orders to protect against discovery disclosures of a party's trade secrets, confidential research, development, or commercial information or to require that disclosures of such information be made in a designated way." 41 NRC at 258 (citing 10 C.F.R. § 2.740(c)). The Board concluded that the Staff is not exempt from section 2.740(c) and that pursuant to this section the Board is authorized to restrict intraoffice Staff dissemination of information where good cause for such restrictions is demonstrated. In weighing the interests of the parties, the Board found compelling the advantage to be gained by imposing the blanket protective order to avoid the parties proceeding "*seriatim* pursuant to the regulations governing the obtaining of protected information, 10 C.F.R. §§ 2.740(c) and 2.790 . . . [which would] requir[e] the observance of good cause and other procedural requirements of the regulations, [and] would consume further argument and unnecessary time." 41 NRC at 264.

Under the Board order, if the Staff believes that information should be referred to investigative or enforcement offices, the Staff is permitted to make an *in camera, ex parte* presentation to the Board on why the matter should be referred. 41 NRC at 265. The Board would then "rapidly" make a determination on whether to permit the referral. 41 NRC at 257. Apparently the Board would apply a "reasonableness" standard in making this determination. *Id.* If the Board deems the referral unreasonable, the matter would be sent immediately to the Commission for resolution.

Judge Bollwerk dissented from the majority with respect to paragraph 7. He expressed grave concern "with the Board's incursion into a regulatory area in which it has no authority or expertise." 41 NRC at 273. He would have modified paragraph 7 to delete any requirement of preclearance by the Board and instead require that, if Staff litigators determined that a referral was necessary, the Staff simultaneously with the referral would inform the Commission, rather than the Board, of its action. 41 NRC at 278.

ANALYSIS

The central issue before the Commission is the appropriate role, if any, of the Licensing Board in determining whether the Staff may refer confidential information obtained through discovery to NRC investigatory offices. This issue raises a number of complex and difficult questions that the Commission has not previously faced. After careful consideration the Commission concludes that the screening of investigatory information is not an appropriate function of the Board. The circumstances of this case warrant some protection to GA and SFC's documents, but not the type of protection contemplated under the current version of paragraph 7 of the protective order.

Protective orders are an important procedural device in Commission adjudicatory practice. The Commission encourages the Licensing Board to use protective orders to expedite discovery and at the same time protect legitimate interests in confidentiality. In this instance, parties on both sides of the controversy seem to agree that without a protective order discovery would be significantly delayed. Although the Staff contested the Board-imposed version of paragraph 7, it agreed to the desirability of a protective order to avoid the burdens of *seriatim* review. NRC Staff's Reply to General Atomics' Brief in Support of Motion for a Protective Order at 7-8 (Jan. 6, 1995).

The Commission agrees that the imposition of a protective order to avoid *seriatim* review is necessary and useful in the circumstances of this case. The Commission does not agree, however, that the protective order should establish the Licensing Board as a screen between NRC Staff and NRC investigatory offices.

The Licensing Board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence. Even in enforcement cases or in instances where one party is accused of making a material false statement or omission in its representations to the Board, the Board is not required to consider the policy priorities inherent in deciding whether and when to institute an investigation or enforcement action.⁵ Yet the type of Board review contemplated by the current protective order puts the Board in exactly that role by making it in effect an investigatory gatekeeper. The Board may have to decide whether certain information should be reviewed by NRC investigatory or enforcement offices, or whether any investigation at all is appropriate. These inquiries may have nothing at all to do with the matters at issue in the adjudicatory controversy before the Board. They are functions clearly delegated

⁵ See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1239-40 (1982) (alleged material false statement had an indirect relevance to the Licensing Board proceeding, but OI is not bound by the suggestions of the Licensing Board regarding the course of further investigation).

to the Staff, not the Board.⁶ As the dissenting Licensing Board Judge stated, reviewing factual information for its investigatory significance is an inquiry "that a Board's experience and expertise make[] it ill-equipped to make." 41 NRC at 275.

Not only is the gatekeeper role outside the Board's traditional functions, it also seems unworkable in practical terms, as demonstrated by the Board's own vagueness on how it would exercise its review in this case. The Board referred only to a general "reasonableness" standard. 41 NRC at 257, 265. If "reasonableness" means a searching Board inquiry into the need for an investigation or the relevance of certain information to an investigation, the Commission cannot approve such a Board role, for it is outside the Board's expertise and authority. If, on the other hand, "reasonableness" means simply ensuring that discovery documents contain the information the NRC Staff says they do, the Board role becomes so minimal as to offer meaningless "protection" to GA and SFC. The Commission, in short, is unwilling to approve a vague reasonableness review that either establishes a meaningless procedural step or poses the risk of unnecessarily entangling the Board in investigatory matters that are clearly outside of the scope of its responsibilities.

The Board incorrectly relied on section 2.740 to give it authority to conduct the type of review contemplated under the protective order. This regulation is procedural and may not be read to enlarge the Licensing Board's authority into areas that the Commission has clearly assigned to other offices. As the Licensing Board itself recognized, it could not exercise its "protective order" powers to prohibit the Staff from referring to other Staff offices information obtained through discovery that has immediate public health and safety implications. 41 NRC at 264. The Commission concludes that the same is true of investigatory or enforcement information.

While GA's brief suggests in elliptical fashion that as a matter of law the NRC Staff might be barred from referring documents obtained through discovery to NRC investigatory or enforcement offices, this case at bottom involves no such claim. The protective order, for example, does not even apply to nonconfidential documents, so there is no restriction whatever on their dissemination. Moreover, the order explicitly permits intrastaff referral of confidential material, albeit with prior approval from the Board. The Board and GA cite various judicial cases on protective orders, but none bars an agency receiving discovery documents in its

⁶ As part of its mission, the NRC is authorized to "make such studies and investigations" and "obtain such information" as is necessary to assist it in exercising its statutory authority. Atomic Energy Act, § 161(c); 42 U.S.C.A. § 2201(c). The Commission has delegated to OI the Commission's authority pursuant to section 161(c) to conduct investigations into allegations of wrongdoing of licensees, applicants, their contractors or vendors. NRC Management Directive 9.8, chap. 0119-03; see also 10 C.F.R. § 1.36(a). And, by statute, the OIG is given broad powers to investigate possible agency fraud, waste, and abuse. See Inspector General Act, 5 U.S.C. app. § 7(a); see also 10 C.F.R. § 1.12(d).

own adjudicatory proceeding from referring them to its investigative offices. See LBP-95-5, 41 NRC at 263-64; GA's Answer to NRC Staff's Brief in Support of Partial Reversal of LBP-95-5 (July 28, 1995), at 7-9. At most these cases stand for the proposition that a corporation's interest in confidentiality may provide good cause for restricting agencywide dissemination of discovery material. See, e.g., *Harris v. Amoco Production Co.*, 768 F.2d 669, 684-85 (5th Cir. 1985). The cases certainly do not require the Board-review device created by paragraph 7.

Although the Commission does not approve the Board's version of paragraph 7, the Commission agrees with the Board that GA and SFC have demonstrated a legitimate, significant interest in protecting their confidential documents. Thus, the question remaining is what device is appropriate to protect the interest of GA and SFC. The Commission fails to see why the Board's review of a Staff referral is essential to protect the confidentiality of GA's and SFC's business documents. Indeed, upon analysis, such review provides very little protection of confidentiality. Under the current protective order the NRC Staff must determine that a document contains evidence of possible wrongdoing and then seek the Board's approval for a referral. The Board must then approve or disapprove the Staff's reasons for the referral before any documents are transferred. Virtually all of the Staff requests presumably would be approved.⁷ Once the Board gives its approval, the current paragraph 7 provides no limits on further dissemination within the Staff.

Because the current paragraph 7 is deficient, the Commission imposes a substitute provision that eliminates any prescreening by the Board and, in the Commission's view, provides more protection than what now exists. The new paragraph 7 shall provide:

- (1) The NRC litigation staff is to refer confidential documents to staff investigatory or enforcement offices, not involved in the litigation, only after it has made a threshold determination that the documents reasonably contain evidence of possible wrongdoing.
- (2) Once referred, further dissemination within the NRC Staff will be limited to a "need to know" basis.
- (3) Upon any referral, the Staff will inform the Board in writing, *in camera* and *ex parte*, that a referral was necessary and that the referral is consistent with the restrictions contained in paragraph 7.

The Licensing Board is free to consider motions to modify the protective order. As the Board has already stated in this case, "[i]n the event that the

⁷ A Board finding against referral seems highly unlikely. As Judge Bollwerk stated "any instance that [the Board] would withhold information would probably be information that is so far off track that [it is] hard to believe the Staff would be interested in turning [it] over to OI anyway." Transcript of Oral Argument on the Terms of Protective Order at 13 (Jan. 27, 1995).

parties desire to pursue additional discussions regarding the provisions of this order, they are of course free to do so." 41 NRC at 266.

CONCLUSION

For these reasons, the Commission *REVERSES* LBP-95-5 with respect to paragraph 7 of the protective order and vacates paragraph 7. The Commission directs the Board to enter a new paragraph 7 in accordance with this opinion.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman*

In the Matter of

Docket Nos. 70-00270
30-02278-MLA
(TRUMP-S Project)
(Byproduct License
No. 24-00513-32; Special
Nuclear Materials License
No. SNM-247)

CURATORS OF THE UNIVERSITY
OF MISSOURI

December 14, 1995

The Commission denies the Intervenors' petition for reconsideration of an order (CLI-95-11, 42 NRC 47 (1995)) imposing a condition upon the University of Missouri regarding its TRUMP-S experiments. The Commission rules that the NRC Chairman had sufficient authority to approve CLI-95-11 despite the absence of a three-person Commission; the Commission's acknowledgment in CLI-95-11 that the site of the experiments is highly accessible to the public did not necessitate a reexamination of the safety of the TRUMP-S Project; and a challenged licensing condition, imposed by the Commission in CLI-95-11, regarding the Licensee's actions during an Alert is adequate to protect the public.

NRC REORGANIZATION PLAN NO. 1 OF 1980

Pursuant to section 3 of the NRC Reorganization Plan No. 1 of 1980, an order may be issued on the authority of only one Commissioner rather than the quorum of three called for by the Energy Reorganization Act of 1974.

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

**EMERGENCY PLAN: AMENDMENT; CONTENT (CHANGES);
LICENSING CONDITION; PUBLIC HEALTH AND SAFETY**

An amendment to an Emergency Plan is unnecessary if it would not enhance the public safety and would not make a requirement previously imposed by a Commission order any more enforceable than it already is.

**RULES OF PRACTICE: AD HOMINEM ATTACKS; ATTORNEY
CONDUCT; CANON OF ETHICS; RESPONSIBILITIES OF
COUNSEL; SANCTIONS**

Counsel's derogatory description of the NRC Staff constitutes intemperate, even disrespectful, rhetoric and is wholly inappropriate in legal pleadings.

**ADJUDICATORY PROCEEDINGS: STATUS OF NRC STAFF
ADMINISTRATIVE TRIBUNALS: AUTHORITY**

**NUCLEAR REGULATORY COMMISSION: AUTHORITY;
DELEGATION TO STAFF**

RULES OF PRACTICE: STAFF MEETING WITH PARTIES

An adjudicator at the Commission has the authority to delegate to the NRC Staff the responsibility of verifying that the licensee or applicant has responded adequately to a license condition imposed by the adjudicator. Because meetings between NRC Staff and a licensee under such delegated authority are public, such delegation does not deprive Intervenors of an opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. The Intervenors would receive advance notice of, and would be permitted to attend, such meetings.

**ADJUDICATORY PROCEEDINGS: STATUS OF NRC STAFF
ADMINISTRATIVE TRIBUNALS: AUTHORITY**

**NUCLEAR REGULATORY COMMISSION: AUTHORITY;
DELEGATION TO STAFF; SUPERVISORY AUTHORITY**

RULES OF PRACTICE: STAFF MEETING WITH PARTIES

ENFORCEMENT ACTIONS

If the Intervenors disagree with conclusions reached at a meeting between Staff and licensee regarding whether the licensee had complied with the Commission's licensing conditions, the Intervenors may seek further agency action

by filing a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission itself.

MEMORANDUM AND ORDER **(Petition for Reconsideration)**

The Intervenors seek reconsideration of a Commission decision issued on August 22, 1995. CLI-95-11, 42 NRC 47. In that decision, the Commission denied the University of Missouri's petition for reconsideration of an emergency classification issue and *sua sponte* ordered the University either to (i) require evacuation of all persons (except emergency personnel) to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials or (ii) provide the NRC Staff sufficient information to allow it to determine that the existing Emergency Plan and procedures (or any proposed modifications of the Plan and procedures) adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials.

The Intervenors assert that CLI-95-11 is flawed in three respects: (1) the NRC Chairman's alleged lack of authority to approve the order; (2) a failure to reexamine the safety of the TRUMP-S Project in light of the Commission's acknowledgment that the site of the experiments is highly accessible to the public; and (3) the alleged inadequacy of one of the Commission's remedial conditions. The Commission finds these claims to be without merit and therefore denies the Intervenors' petition for reconsideration.

A. Chairman Jackson's Authority to Authorize Issuance of CLI-95-11

The Intervenors first argue that the order was issued on the authority of only one Commissioner (Chairman Jackson) rather than the quorum of three called for by the Energy Reorganization Act of 1974, § 201(a)(1), 42 U.S.C. § 5841. The Intervenors assert that, because section 3 of the NRC Reorganization Plan No. 1 of 1980 (5 U.S.C. App. I, § 3) gives the Chairman authority to act alone only in an emergency, CLI-95-11 was *ultra vires*. Petition at 2-3. The flaw in this argument is that the Chairman exercised authority to issue the order not under section 3, which deals with emergencies, but rather under section 1, which allows the Commission to delegate authority to one of its members. See 60 Fed. Reg. 34,561-62 (July 3, 1995).

B. Ramifications of Commission's Conclusions Regarding the Openness of the MURR Facility Site

Next, according to the Intervenor, the Commission's belated acknowledgment in CLI-95-11 that there is no "site boundary" around the Alpha Lab undercuts the Commission's earlier safety findings, and those findings must therefore be reconsidered. Petition at 5. The Intervenor's argument ignores the fact that CLI-95-8 recognized that there is no "site boundary," in the sense of a fence, around the University's research reactor (MURR) facility which houses the Alpha Lab, and that the Commission factored this into its safety findings. See CLI-95-8, 41 NRC 386, 391-92 (1995). See generally CLI-95-1, 41 NRC 71, 153 (1995); CLI-95-11, 42 NRC at 48.

C. Adequacy of Remedies Regarding University's Actions During an Alert

The Intervenor asserts that neither of the two alternative remedial conditions concerning the University's actions during an Alert is adequate to protect the public. First, the Intervenor argues that the Commission should require the University to amend its MURR Facility Emergency Plan to include the first alternative remedy (i.e., to require evacuation of all persons [except emergency personnel] to a point at least 150 meters from the Alpha Lab whenever an Alert is declared as a result of a fire involving TRUMP-S materials). Petition at 5. The Commission sees nothing to be gained by such a modification. Such an amendment would not make the requirement imposed by CLI-95-11 any more enforceable than it already is, would not enhance the public safety, and is therefore unnecessary.

The Intervenor also argues that the second alternative remedy (permitting the University to provide the NRC Staff sufficient information to determine that the existing Emergency Plan and procedures, or any proposed modifications thereto, adequately protect the public within the site boundary in the case of a fire involving TRUMP-S materials) deprives the Intervenor of any opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. Petition at 4.

According to the Intervenor, a resolution of this safety issue through a private conversation between Staff and the University would deprive the Intervenor of their statutory right to a hearing and their constitutional right to due process.¹

¹ In support of this contention, the Intervenor asserts that this alternative remedy leaves the safety determination in the hands of NRC Staff which, in the Intervenor's words, "is totally incapable of making that determination in a sensible fashion." *Id.* Intervenor counsel's derogatory description of NRC Staff is another example of
(Continued)

The Intervenor's fears are unfounded. The second alternative would not deprive Intervenor of an opportunity to know what communications transpire between the University and Staff, or to know the basis of any Staff determination, or to contest such determination. Meetings such as one contemplated under the second alternative are public meetings. The Intervenor would receive advance notice of, and would be permitted to attend, such meetings.² If the Intervenor concludes that an alternative to which Staff and the University agree does not provide equivalent protection to the public as compared with the 150-meter evacuation alternative,³ the Intervenor would then be free to seek further agency action by filing a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission itself.

Finally, we note that it is hardly unusual for an adjudicator at this Commission to delegate to the NRC Staff the authority to verify that the licensee or applicant has responded adequately to a license condition imposed by the adjudicator.⁴ Indeed, the Presiding Officer in this very proceeding did exactly that in his Final Initial Decision — without complaint or appeal from the Intervenor.⁵

the "intemperate, even disrespectful, rhetoric" (CLI-95-8, 41 NRC 386, 392 (1995)) that has characterized their pleadings throughout this proceeding. Such language is wholly inappropriate in legal pleadings. See 10 C.F.R. § 2.713(a), (c)(1); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-38 (1974); American Bar Association's *Model Code of Professional Responsibility* ("Model Code"), DR 7-101(A)(1), found in *ABA/BNA Lawyers' Manual on Professional Conduct* ("Manual") at p. 01:338 (1995); Model Rule 3.5, Comment, found in *Manual* at 01:151. Cf. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 627, *aff'd*, ALAB-849, 24 NRC 523 (1986).

Intervenor also claim that Staff's prior determinations in this proceeding have been determined by both the Administrative Judge and the Commission to be "hopelessly wrong." *Id.* The Commission can find nothing in either its own or the Licensing Board's decisions that even remotely supports this proposition.

² See NRC Management Directive 3.5, "Public Attendance at Certain Meetings Involving the NRC Staff" (Oct. 13, 1994); NRC Handbook 3.5, "Public Attendance at Certain Meetings Involving the NRC Staff" (Oct. 13, 1994).

³ CLI-95-11 stated that any alternatives to the 150-meter requirement must provide "adequate[] protect[ion]." 42 NRC at 49. This statement implies equivalence between the 150-meter requirement and any alternative approach.

⁴ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-91-3, 33 NRC 49, 50-51 (1991) (directing Staff to oversee compliance with commitments); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-20, 31 NRC 581, 587-88 (1990) (directing Staff to ensure that the evacuation time estimates conformed to the provisions of a related Appeal Board order); *Wangler Laboratories*, LBP-89-39, 30 NRC 746, 788 (1989) (barring licensees from taking certain actions prior to Staff's confirmation of the licensee's compliance with the conditions of the Board order), *rev'd on other grounds*, ALAB-951, 33 NRC 505 (1991); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 436, 650 (1989) (directing Staff to verify applicant's conformance with the Board's findings, provisos, conditions, and expectations and granting the Staff "broad discretion in the timing and manner of conformance consistent with the [Board's] findings and . . . intent"), *aff'd as to this ruling*, CLI-90-3, 31 NRC 219, 251 (1990), *aff'd sub nom. Massachusetts v. Nuclear Regulatory Commission*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991).

⁵ See *Curators of the University of Missouri*, LBP-91-31, 34 NRC 29, 130 (1991), instructing the University to take three safety-related actions and to report the details of those actions to Staff, and then instructing Staff to verify the adequacy of those actions.

D. Conclusion

The petition for reconsideration is DENIED. The Commission will consider no further Petitions for Reconsideration in this proceeding.⁶
It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 1995.

⁶ See *Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2)*, CLI-80-41, 12 NRC 650, 652 (1980) ("Reconsideration is at the discretion of the Commission"), citing *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946).

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

B. Paul Cotter, Jr., * *Chief Administrative Judge*
James P. Gleason, * *Deputy Chief Administrative Judge (Executive)*
Frederick J. Shon, * *Deputy Chief Administrative Judge (Technical)*

Members

Dr. George C. Anderson	Dr. Richard F. Foster	Dr. Kenneth A. McCollom
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G. Paul Bollwerk III*	Dr. Frank F. Hooper	Dr. Peter A. Morris
Dr. A. Dixon Callihan	Elizabeth B. Johnson	Thomas D. Murphy*
Dr. James H. Carpenter	Dr. Charles N. Kelber*	Dr. Richard R. Parizek
Dr. Richard F. Cole*	Dr. Jerry R. Kline*	Dr. Harry Rein
Dr. Thomas E. Elleman	Dr. Peter S. Lam*	Lester S. Rubenstein
Dr. George A. Ferguson	Dr. James C. Lamb III	Dr. David R. Schink
Dr. Harry Foreman	Dr. Emmeth A. Luebke	Dr. George F. Tidey

*Permanent panel members

LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy, Alternate Member

in the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

December 18, 1995

ORDER
(Modification of Protective Order)

In a Memorandum and Order dated December 14, 1995, CLI-95-16, 42 NRC 221, the Commission reversed a prior decision of this Board with regard to paragraph 7 of a Protective Order limiting the conduct of discovery between the parties to this proceeding. Under the direction of the Commission, we hereby amend our prior acceptance of the Protective Order by deleting the original paragraph 7 in its entirety and replacing it with the following language:

7.a. Upon determining that Protected Discovery Materials reasonably contain evidence of possible wrongdoing, NRC Staff authorized to receive Protected Discovery Materials shall refer such documents to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staffs for such use as

is appropriate in the legitimate exercise of their respective duties, but NRC Staff making the referral shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order.

b. Once Protected Discovery Material has been referred to NRC Staff investigatory or enforcement offices in accordance with clause (a) of this paragraph, further dissemination within the NRC Staff shall be limited to a "need to know" basis as determined by those NRC Staff investigatory or enforcement offices receiving the material, and those persons to whom further dissemination is made shall be informed by the NRC Staff investigatory or enforcement office making the disclosure that the material was obtained from documents covered by this Protective Order.

c. Upon any referral of Protected Discovery Material in accordance with clause (a) of this paragraph, NRC Staff making the referral shall inform the Board in writing, *in camera* and *ex parte*, that such referral is necessary and is consistent with the restrictions contained in this paragraph.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 18, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. James C. Lamb III
Lester S. Rubenstein

In the Matter of

Docket No. 30-32493-CivP
(ASLBP No. 95-709-02-CivP)
(EA 93-072)
(Byproduct Materials License
No. 29-28685-01)

RADIATION ONCOLOGY CENTER
AT MARLTON
(Marlton, New Jersey)

December 20, 1995

In a civil penalty proceeding, the Licensing Board enters a Prehearing Conference Order setting forth issues in controversy and establishing schedules for the proceeding.

CIVIL PENALTIES: DISCRETIONARY CHARACTER

Although recognizing the Staff's broad discretion in determining the amount of a civil penalty, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case. A nexus to the current proceeding would have to be shown, and differing circumstances might well explain seemingly disparate penalties in various cases.

PREHEARING CONFERENCE ORDER (Issues and Schedules for Proceeding)

On October 11, 1995, the Licensing Board held a prehearing conference at the NRC headquarters in Rockville, Maryland, to define appropriate issues for litigation in this enforcement proceeding.¹ Participating, in addition to the Licensing Board, were representatives of Radiation Oncology Center at Marlton (ROCM or Licensee) and the NRC Staff.

Prior to the conference, at the request of the Licensing Board, ROCM and the Staff each had filed proposed statements of issues to be litigated. The Staff stated that it did not wish to raise any specific issues beyond those set forth in the Order Imposing Civil Monetary Penalty and which may be properly raised by the Licensee.² For its part, the Licensee set forth seventy-six issues that it wished to litigate.³

At the conference, the Board considered the following questions:

1. Motion to Stay Proceedings

On August 31, 1995, ROCM had filed a Motion to Stay Proceedings. The Staff on September 20, 1995, filed its response in opposition to ROCM's motion. At the conference, ROCM indicated it was withdrawing its motion to stay, and the Board accepted that withdrawal (Tr. 4-5).

2. Applicable Enforcement Policy

All parties agreed (Tr. 6-7) that the enforcement policy governing this proceeding is that one set forth in 10 C.F.R. Part 2, Appendix C, as in effect during the period of the alleged violation. Subsequent to that time, effective June 30, 1995, those provisions were superseded by a General Statement of Policy and Procedures for NRC Enforcement Actions (NUREG-1600), which differed in some respects from the Appendix C Statement of Policy.

3. Issues: Comparison with Other Proceedings

One of the major matters of disagreement between the parties is the manner in which the Staff exercises enforcement discretion in assessing penalties. The

¹ See Notice of Prehearing Conference, dated August 28, 1995, published at 60 Fed. Reg. 45,750 (Sept. 1, 1995). See also this Licensing Board's Memorandum and Order (Agenda for Prehearing Conference), dated September 28, 1995.

² NRC Staff Response to Memorandum and Order (Schedules for Proceeding), dated July 24, 1995.

³ Preliminary Report on Issues for Adjudication and Related Discovery, dated July 24, 1995.

Staff stated that it would defend at the hearing its use of discretion in this proceeding but strongly objected to any comparison with the results reached or the manner in which the Staff had exercised discretion in other seemingly similar cases (Tr. 9-10). On the other hand, ROCM sought to compare the Staff's exercise of discretion here with its exercise in other cases. It claims that the penalty in this case far exceeds those imposed in other similar cases (Tr. 13-15).

The Board ruled that, although recognizing the Staff's broad discretionary authority in enforcement matters, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case (Tr. 22). Such possible abuse of discretion is, of course, well within our authority to consider. "While [NRC's] enforcement discretion may be at its zenith as the agency decides whether to initiate enforcement action, that discretion does not negate the participatory rights in agency proceedings under statute or regulation once a proceeding has been initiated or a matter set for hearing." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994). Licensing boards previously have considered penalties in other cases. See *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297 (1991).⁴ The Board stated that it would permit the Licensee to raise questions about differing Staff treatment in similar cases, although a nexus to the current proceeding will have to be shown (Tr. 21-22, 91-92). Further, the Board observed that, as claimed by the Staff, differing circumstances might well explain seemingly disparate penalties in various cases (Tr. 22).

4. Issues: Specific Matters

Following our ruling on the foregoing issue (comparison with penalties assessed in other proceedings), the Staff suggested that many of its differences with the Licensee could be resolved by rewording some of ROCM's issues. We recessed the conference to permit the parties to reconcile their differences (Tr. 79). They later requested that they be permitted to submit a revised list of issues at a later date (deleting at least two to which they agreed to stipulate, and eliminating others that appeared repetitive or subsets of broader issues), and the Board accepted their request. On October 25, 1995, the Staff forwarded the joint list of issues to the Board, taking into account the ruling with respect to

⁴ In one civil penalty proceeding, however, an Administrative Law Judge declined to consider penalties in other cases that the Staff was attempting to advance to justify the penalty it was there seeking. *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 236-37 (1987). We find ample reason to distinguish *Hurley* from this case. There, the Staff attempted to bring in other proceedings to justify a level of penalty, whereas here a Licensee is attempting to establish that it is being unfairly singled out. Further, the ALJ in *Hurley* premised his ruling in part on lack of adequate notice to the Licensee, based on failure of the Notice of Violation (NOV) to have included the references sought to be included in Staff testimony (*id.* at 237 n.5) — a ruling not relevant here.

other proceedings set forth above, together with certain clarifications of ROCM's issues discussed at the conference.

Set forth in the Appendix to this Order are those issues approved by the Board. We have basically accepted all of the issues submitted to us, although we have made several minor modifications that do not appear to change the intent of ROCM's issues.

5. *Discovery*

At the prehearing conference, the Licensee and Staff each expressed preference to defer setting discovery schedules until a schedule in a related case (*Oncology Services Corp.*, Docket No. 030-31765-CivP) became better known (Tr. 94-95). On October 30, 1995, the Licensing Board in that case issued a Memorandum and Order denying a motion to stay that proceeding and establishing a schedule for pre-discovery dispositive motions. With that in mind, this Board held a telephone prehearing conference on Thursday, December 14, to establish a discovery schedule. Participating were Judges Bechhoefer and Rubenstein (Judge Lamb was unavailable to participate), representatives of the Licensee and Staff, as well as Lee Dewey, counsel to the Atomic Safety and Licensing Board Panel.

Based on the discussion during that call, the Board hereby approves the following agreed-upon schedule:

Monday, January 29, 1996	Last day for filing interrogatories and requests for production of documents.
Friday, March 15, 1996	Filing of responses to interrogatories and requests for production of documents.
Friday, July 12, 1996	Termination of discovery (including depositions).
Friday, August 30, 1996	Filing of prefiled testimony or (where oral testimony is to be presented) names and background statements of oral witnesses, including a summary description of proposed testimony.

Under this schedule, the hearing would likely be held in mid to late September or early October 1996.

* * *

Pursuant to 10 C.F.R. § 2.752(c), objections to this Order may be filed by ROCM within five (5) days after service of the Order. The Staff may file objections within ten (10) days after service.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 20, 1995

APPENDIX

Specific Issues

The Board accepts the following issues (numbers reference the revised statement of issues and comparable ROCM proposed issues, several of which have been slightly rewritten by the Board):

1. Whether, if all of the violations did occur, as alleged by the NRC, a penalty of \$80,000 is consistent with penalties imposed by the NRC on other licensees based on similar severity-level violations.
2. Whether it was appropriate for the NRC to use its enforcement policy discretion in this matter.
3. Purpose of NRC in imposing the \$80,000 penalty.
- 4-6. [Withdrawn.]
7. Whether the corrective action taken by the Licensee (as set forth in exhibits A and B to ROCM's proposed issues) were appropriately considered by the NRC in assessing the civil penalties.
8. Whether corrective actions by licensees in general are taken into consideration by the NRC and, if so, the precise criteria utilized by the NRC in such considerations.
9. Whether it was inappropriate not to reduce the penalty in light of the fact that items A3 and G of the Notice of Violation (NOV) were withdrawn by the NRC. (*Cf. Tulsa Gamma Ray*, LBP-91-40, *supra.*)
10. [Withdrawn.]

11. In what specific situations does and has the NRC used its enforcement policy discretion.
12. Whether the Licensee had "notice" that such a penalty could and/or would be used for such alleged violation.
13. Whether it is appropriate for the Licensee to be chosen at random to be the example for other licensees engaged in similar activities.
14. Whether the NRC has ever used its enforcement policy discretion in a similar matter and, if so, when, where and why.
- 15-16. The Board rejects issues concerning the constitutionality of certain alleged Staff practices for discovery purposes but will permit argument of these issues in proposed findings of fact and conclusions of law, based on facts established at the evidentiary hearing. *See* Tr. 55-77. Factual bases for such questions are encompassed in other issues set forth herein.
17. Whether a misadministration ever occurred at the Licensee's facility.
18. Whether a recordable event ever occurred at the Licensee's facility.
19. Whether having the RSO or physicist present in the Center on June 4, September 16, and December 9, 1992, was adequate to meet NRC requirements.
20. Whether if the RSO or physicist did not observe source exchanges on June 4, September 16, or December 9, 1992, there was a serious risk to health or safety.
21. Whether having the RSO or physicist inside the facility during source exchanges but not physically present in the treatment room would, standing alone, constitute a violation and, if so, what severity level.
22. Whether the actions or inactions by the Licensee as stated in the NOV ever posed a serious threat to public health or safety.
- 23-25. [Withdrawn.]
26. Whether "observation" as it is used in the license requires physical presence in the treatment room.
27. Whether having the RSO or physicist inside the facility, but not observing source exchanges, created a risk to public health and safety and, if so, why.
28. Whether surveys of radiation levels in adjacent areas and controlled areas were performed by anyone during the source exchanges on March 5, June 4, September 16, and December 9, 1992.
29. Whether, if surveys of radiation levels in certain adjacent areas and controlled areas were performed by Omnitron for the benefit of the Licensee during source exchanges on March 5, June 4, September 16, and December 9, 1992, a violation of the license occurred.
30. Whether, if surveys of radiation levels in certain adjacent areas and controlled areas were not performed, did such pose a threat to public health and safety.

31. Whether, if surveys of radiation levels in certain adjacent areas and/or controlled areas were not performed and if such constituted a license violation, at what level would such violation, standing alone, be typically classified.

32. [Withdrawn.]

33. Whether and under what circumstances it is appropriate for the NRC to aggregate multiple penalties typically classified at levels IV and V to create a level II violation.

34. Whether the matters set forth in the Notice of Violation are so significant that they support a severity level II violation.

35. [Withdrawn.]

36. Whether the "HDR operator/users" did individually demonstrate competence in the emergency procedures during "dry run" emergencies.

37. [Withdrawn.]

38. Whether, if the HDR operator/users were trained in emergency procedures but did not individually do multiple types of dry runs, such created a public health and/or safety risk.

39. Whether, if the HDR operator/users were trained in emergency procedures but did not individually do multiple types of dry runs, such, standing alone, typically constitutes a violation and, if so, what severity level.

40. Whether, if all the facts alleged in the Order are true and constitute a violation, an order imposing a penalty of \$80,000 would be supported or should be sustained.

41. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such satisfies item 9.1.C of the license.

42. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such constituted a violation of the license or created a risk to public health and safety.

43. Whether, where the Licensee possessed a backup PrimeAlert in case of failure of the wall-mounted PrimeAlert, as opposed to having a battery backup on the wall-mounted PrimeAlert, such standing alone constitutes a violation and, if so, what severity level.

44. Whether the Licensee violated 10 C.F.R. § 19.12.

45. Whether the Licensee violated 10 C.F.R. § 35.25(a)(1).

46. [Withdrawn.]

47. Whether the dosimetrist was instructed in the proper use of the hand-held radiation survey meter.

48. Whether the dosimetrist knew the meaning of the error messages from the HDR machine.

49. If the Licensee violated 10 C.F.R. § 19.12, at what severity level would such violation, standing alone, typically be classified.

50. If the Licensee violated 10 C.F.R. § 35.25(a)(1), at what severity level would such violation, standing alone, typically be classified.
51. [Withdrawn.]
52. Whether the Licensee violated 10 C.F.R. § 35.31.
53. If the Licensee violated 10 C.F.R. § 35.31, whether such violation constituted a threat to public health and safety.
54. If the Licensee violated 10 C.F.R. § 35.31, at what severity level would such violation, standing alone, typically be classified.
55. [Withdrawn.]
56. Whether, from March 1992 through December 1992 the Licensee had a quality management program in place.
57. Whether, as of February 5, 1993, the Licensee had established and maintained a written quality management program as required by 10 C.F.R. § 35.32.
58. Whether failure to have the apparent exposure rate conspicuously noted on a check source (along with the date of calibration) in itself typically constitutes a violation and, if so, at what severity level.
59. Whether, where the Licensee had present at the facility current copies of the license, 10 C.F.R. Parts 19 and 20, and form NRC-3, but where those documents were in a file and not actually posted, such constitutes a public health or safety risk.
60. Whether, where the Licensee had present at the facility current copies of the license, 10 C.F.R. Parts 19 and 20, and form NRC-3, but where those documents were in a file and not actually posted, such standing alone typically constitutes a violation and, if so, at what severity level.
61. Whether, if the matters set forth in the NOV constitute a severity level II violation, it is appropriate for the NRC to use its discretionary enforcement policy in order to impose a civil penalty of \$80,000.
62. Whether any precedent exists for the actions of the NRC in imposing an \$80,000 civil penalty for multiple violations that, standing alone, typically would be evaluated at no more than severity level IV or V violations.
63. [Withdrawn.]
64. Whether precedent of any nature exists for the monetary actions taken by the NRC against the Licensee and, if so, what are they.
65. [Withdrawn.]
66. Whether the surveys that were completed on March 5, June 4, September 16, and/or December 9, 1992, were adequate to satisfy item 10.12 of the license.
67. Whether failure to have a quality management program in place between March 1992 and December 1992 constitutes a violation of 10 C.F.R. § 35.32.

68. Whether the matters cited constitute a violation of 10 C.F.R. § 35.21(a).

69. Whether a violation of 10 C.F.R. § 35.21(a), standing alone, typically would constitute a severity level II violation.

70. Whether a severity level II violation has ever given rise to a civil penalty of \$80,000 or use of the NRC's enforcement policy discretion.

71. Whether the violation involved a "high potential impact on the public."

72. Whether it is legally appropriate for the NRC to link the Indiana, Pennsylvania accident to this separate Licensee and, if so, why.

73. What cases, if any, did the NRC rely on to determine what penalty should be imposed herein.

74. Whether there was a failure of Licensee management in this action.

75-76. [Withdrawn.]

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Plant)	Docket No. 50-309 (License No. DPR-36)
OMAHA PUBLIC POWER DISTRICT (Fort Calhoun, Unit 1)	Docket No. 50-285 (License No. DPR-40)
BALTIMORE GAS AND ELECTRIC COMPANY (Cavert Cliffs, Units 1 and 2)	Docket Nos. 50-317 50-318 (License Nos. DPR-53, DPR-69)
NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Unit 2)	Docket No. 50-336 (License No. DPR-65)
FLORIDA POWER AND LIGHT COMPANY (St. Lucie Nuclear Power Plant, Unit 1)	Docket No. 50-335 (License No. DPR-67)
	December 6, 1995

The Director of the Office of Nuclear Reactor Regulation has denied a petition filed by John F. Doherty, J.D., requesting that six pressurized-water reactors be shut down and that the steam generator tubes at each of those plants be inspected. The petition is based on a recent inspection of the Maine Yankee plant using the Point Plus system which allegedly revealed steam generator tubes on the verge of rupture. Because the other plants identified in the petition were built by the same manufacturer and are of similar operating age, Mr. Doherty asks that they be shut down and immediately inspected using the Point Plus probe system. The reasons for the denial are fully set forth in the Decision.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On May 2, 1995, Mr. John F. Doherty, J.D. (Petitioner), filed a petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206. The Petitioner requested that the following six pressurized-water reactors be immediately shut down: Maine Yankee, Fort Calhoun Unit 1, Calvert Cliffs Units 1 and 2, Millstone Unit 2, and St. Lucie Unit 1. In addition, the Petitioner requested that steam generator tubes be inspected immediately at those plants. The Petitioner stated that an inspection by the licensee in April 1995 of the Maine Yankee plant using the newly developed Point Plus system revealed that the steam generator tubes are on the verge of rupture, threatening the release of radioactive liquid and gaseous material into the environment and consequent harm to human health and safety. Because the other plants the Petitioner identified were built by the same manufacturer (Combustion Engineering, or CE) and are of similar operating age, the Petitioner asked that they, along with Maine Yankee, be immediately shut down and that all steam generator tubes be immediately inspected using the Point Plus probe system.

On June 28, 1995, I informed the Petitioner that the petition had been referred to my office for preparation of a Director's Decision. I further informed the Petitioner that his request for immediate shutdown and inspection was denied because continued operation of these units until their next scheduled outage posed no undue risk to public health and safety. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time.

II. DISCUSSION

The Petitioner requested that six CE-designed plants be shut down and their steam generator tubes be inspected with the Plus Point inspection probe. The request appears to be based on concerns that without inspections using the Plus Point probe, the steam generators in these plants may be susceptible to one or more steam generator tube ruptures (SGTRs). However, the results of examinations of tubes removed from the Maine Yankee steam generators and in-situ pressure tests of the most severely degraded tubes in the Maine Yankee steam generators have demonstrated that the tubes, although severely degraded, still had a significant margin before failure even under postulated accident conditions. Furthermore, the NRC has taken actions to ensure that other plants have performed appropriate steam generator tube inspections to ensure tube integrity. These important actions are discussed below in greater detail.

The NRC applies a defense-in-depth approach toward protecting public health and safety from the potential consequences of events involving the rupture of steam generator tubes. Steam generator tube degradation is managed through a combination of several different elements, including inservice inspection, tube repair criteria, primary-to-secondary leak rate monitoring, water chemistry, and analyses to ensure that safety objectives are met.

The primary means for assessing steam generator tube degradation is through inservice inspections. Plant technical specifications require a periodic inspection of the steam generator tubes. Any tubes with identified degradation in excess of the repair criteria are repaired or removed from service. In order to assess the condition of steam generator tubing, the industry primarily relies on eddy-current inspection techniques, which include the motorized rotating pancake coil (MRPC) test. Circumferential cracking in steam generator tubing has been identified at expansion transitions, small-radius U-bends, dented tube support plate intersections, and sleeved joints. Based on the utilities' responses to GL 95-03, the inservice CE steam generators (i.e., not including retired CE steam generators) have been inspected in these areas with techniques capable of detecting circumferential cracking and, to date, such cracking was found only at the expansion transitions.

Experience to date, including experience at the Maine Yankee plant, shows that the standard MRPC probe is a reliable means for detecting structurally significant cracking in steam generator tubes. The use of an MRPC probe in conjunction with adequate inspection procedures is a reliable means for detecting circumferential cracking in steam generator tubes. As discussed above, metallographic examinations of removed tubing and in-situ pressure testing of degraded tubes continue to support the Staff's conclusion that properly conducted MRPC inspections can identify circumferential cracking before the cracking exceeds the structural limits.

In addition to requiring periodic steam generator tube inspections, the NRC requires an operational leak rate limit to provide reasonable assurance that, should a primary-to-secondary leak be experienced during service, it will be detected and the plant will be shut down in a timely manner before rupture occurs and with no undue risk to public health or safety. Requiring operation within these limits decreases the possibility that steam generators may be vulnerable to tube ruptures during postulated accidents such as a main steamline break or a loss-of-coolant accident.

Inspection findings at Maine Yankee in 1994 revealed indications of large circumferential cracks that had been missed in previous inspections because of inadequacies in MRPC test and analysis procedures. The test and analysis procedures were upgraded accordingly. However, subsequent inspections at Maine Yankee performed with the MRPC in early 1995 revealed circumferential indications that were more numerous and larger than expected based on the short

operating interval since the previous inspection. The 100% MRPC inspection of the expansion transitions were supplemented by inspections with the recently developed Plus Point probe and a specially wound high-frequency MRPC coil. These latter probes offer improved sensitivity to inner-diameter-initiated circumferential cracks of the type present at the Maine Yankee expansion transitions and identified substantial numbers of relatively small circumferential cracks not detected with the conventional MRPC.

Three tubes were removed from these steam generators in early 1995. Before the tubes were removed, they were tested by ultrasonic, visual (fluorescent penetrant dye), and eddy-current techniques to confirm the nature of the indications. Eddy-current methods included examination with a standard rotating pancake coil, a Plus Point coil, and a high-frequency pancake coil. The indications were sized with various techniques and the tubes were then destructively examined so that the actual size of the indications could be determined. The results of the destructive examinations are provided in NRC Information Notice 95-40, "Supplemental Information Pertaining to Generic Letter 95-03, 'Circumferential Cracking of Steam Generator Tubes.'" The destructive-examination results and data obtained with a high-frequency pancake coil suggest that many of the indications may not have been as structurally significant as the standard pancake coil appeared to indicate.

In-situ pressure tests were conducted on the tubes with the largest MRPC indications, and the results indicate acceptable margins against burst under normal operating and postulated accident conditions. The NRC had a review conducted by an independent contractor of the in-situ test method used at Maine Yankee and determined that it provides a reasonable simulation of the hydraulic pressure loads induced during a postulated main steamline break.

Thus, it has been demonstrated that the tubes with the largest indications at Maine Yankee continued to exhibit adequate structural integrity at the time they were found. This finding is attributable to the morphology of the cracks as determined from metallographic examinations of pulled tube specimens from Maine Yankee. This morphology consists of cracks that were not coplanar but, rather, of short circumferential length and staggered around the circumference over a short axial region with ligaments of material between the cracks. These ligaments add considerably to the strength of the tube, but these ligaments are generally not detectable by the MRPC.

The findings at Maine Yankee nevertheless raised the concern that large undetected circumferential cracks could possibly exist at other plants. Therefore, the NRC issued Generic Letter (GL) 95-03, "Circumferential Cracking of Steam Generator Tubes," on April 28, 1995, notifying licensees of the Maine Yankee experience and requesting that they evaluate recent operating experience concerning the detection and sizing of circumferential cracks and the potential applicability of this experience to their plants. On the basis of the results of this

evaluation, past inspections and the results thereof, and other relevant factors, licensees were requested to develop a safety assessment justifying continued operation until the next scheduled steam generator tube inspections were to be performed. The generic letter also requested that licensees develop and submit their plans for the next steam generator tube inspection as they pertain to the detection of circumferential cracks. The utilities were required to respond to GL 95-03 within 60 days. By now, the utilities that own the six plants listed in the petition have responded to GL 95-03 and the responses have been evaluated by the Staff.

Based on the utilities' responses to GL 95-03, with the exception of Millstone Unit 2, the CE plants listed in the petition have been inspected in those areas susceptible to circumferential cracking with improved eddy-current inspection probes equally capable to the Point Plus system in detecting circumferential cracking. All tubes with detected cracks have been removed from service. The licensee for Millstone Unit 2 replaced the original CE steam generators during an outage that ended in January 1993. The new steam generators incorporated many new design features that are expected to eliminate or greatly reduce the potential for circumferential tube cracking. These include the use of Inconel 690, a material that has significantly greater resistance to cracking and hydraulic expansion of tubes, which reduces the potential for cracking in the expansion transitions. The limited operational time, improvements in design, and favorable plant operating conditions minimize the potential for the development of circumferential cracking in the Millstone Unit 2 steam generators. Millstone Unit 2 steam generators will continue to be inspected during refueling outages.

The NRC has studied the risk and potential consequences of a range of SGTR events in NUREG-0844, "NRC Integrated Program for the Resolution of Unresolved Safety Issues A-3, A-4, and A-5 Regarding Steam Generator Tube Integrity." The Staff estimated the risk contribution due to the potential for single and multiple SGTRs. The study also examined the expected consequences of SGTR scenarios, including beyond-design-basis situations, such as the potential for release as a result of containment bypass because of failed tubes concurrent with a breach of secondary system integrity. A combination of circumstances and conditions is required to produce such simultaneous failures: (1) main steamline break or other less severe loss of secondary system integrity, (2) the potential that a population of tubes susceptible to rupture exists in a particular steam generator, (3) the potential that operators would not take actions to avoid high differential pressures; and (4) the probability that a large number of tubes would actually fail simultaneously. In the NUREG-0844 assessment, the Staff concluded that the probability of simultaneous multiple tube failure was small (approximately 10^{-5}), and that the risk resulting from releases during SGTRs with loss of secondary system integrity was small (about 10^{-7} latent fatalities per reactor year).

III. CONCLUSION

Based on the fact that (1) adequate steam generator tube inspections have been performed, (2) primary-to-secondary leakage is being monitored on a continuing basis, and (3) the risk of multiple SGTR events is low, I have concluded that an immediate shutdown and Plus Point probe inspection of Maine Yankee, Fort Calhoun Unit 1, Calvert Cliffs Units 1 and 2, St. Lucie Unit 1, and Millstone Unit 2 are not warranted.

The Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied. As provided in 10 C.F.R. § 2.206(c), a copy of the Decision will be filed with the Secretary of the Commission for the Commission's review. This Decision will constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 6th day of December 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-245
(License No. DPR-21)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station,
Unit 1)

December 19, 1995

The Director of the Office of Nuclear Reactor Regulation has denied a petition by Anthony J. Ross. The Petitioner requested that the NRC take enforcement action against certain individuals at Millstone Nuclear Power Station Unit 1 for deliberate misconduct in connection with the site paging and site siren evacuation alarm system in the facility maintenance shop. Following a review of the issues raised by the Petitioner, the Director has concluded that no substantial health and safety issues have been raised that would warrant the action requested by the Petitioner.

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: emergency plans.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On January 8, 1995, Mr. Anthony J. Ross (Petitioner) filed a petition with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206. In the petition, the Petitioner raised

concerns regarding the site paging and site siren evacuation alarm system in the Millstone Nuclear Power Station, Unit 1 maintenance shop.

The Petitioner alleged that on numerous occasions since January 1994, his department manager had instructed the Petitioner's coworkers to shut off or turn down the volume on the site paging and site siren evacuation alarm system in the Millstone Unit 1 maintenance shop, and the Petitioner's first-line supervisor and coworker had complied with this request in violation of Technical Specification (TS) 6.8.1 and NUREG-0654. The Petitioner requested that the NRC impose at least three sanctions against his department manager, and impose sanctions against the Petitioner's coworker and maintenance first-line supervisor for engaging in deliberate misconduct in violation of 10 C.F.R. § 50.5.

On February 23, 1995, I informed the Petitioner that the petition had been referred to me pursuant to section 2.206 of the Commission's regulations. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the specific concerns raised in the petition. On the basis of a review of the issues raised by the Petitioner as discussed below, I have concluded that no substantial health and safety issues have been raised that would warrant the action requested by the Petitioner.

II. DISCUSSION

In the petition, the Petitioner raised a concern that on numerous occasions since January 1994, his department manager had instructed the Petitioner's coworkers to shut off or turn down the volume on the site paging and site siren evacuation alarm system in the Millstone Unit 1 maintenance shop, and the Petitioner's first-line supervisor and coworker had complied with this request in violation of TS 6.8.1 and NUREG-0654.

Licensees for nuclear power plants are required to have emergency plans that meet the standards of 10 C.F.R. § 50.47(b) and the requirements of 10 C.F.R. Part 50, Appendix E. Under 10 C.F.R. § 50.47(b)(8), adequate emergency facilities and equipment to support the emergency response must be provided and maintained. Appendix E of Part 50 establishes minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness. Section IV.E.9, in part, requires at least one onsite communications system.

NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," provides guidance for developing radiological emergency plans and improving emergency preparedness. Section II.F.1.e states that each emergency plan shall include provisions for alerting or activating emergency personnel in each response organization. Section II.J.1 states that each licensee shall establish

the means and time required to warn or advise onsite individuals and individuals who may be in areas controlled by the licensee. Technical Specification 6.8.1, in part, requires that procedures be established, implemented, and maintained covering emergency plan implementation.

The topic of this petition was one of the maintenance-related issues the NRC Staff raised to Northeast Nuclear Energy Company (NNECO), Licensee for Millstone Unit 1, in letters dated December 5 and 28, 1994. In those letters, the NRC Staff requested NNECO to review the issues and submit a written response. Specifically, the NRC requested NNECO to review the following: (1) that NNECO management had shut off the site paging and site siren evacuation alarm system or directed workers to shut off the system in the Unit 1 maintenance shop during morning meetings, (2) that on several occasions the system was not turned back on for hours, and (3) that the on/off switches for the speakers in question had been installed without a work order.

The Licensee's investigation into this matter, which was described in its January 26, 1995 response to the NRC request, confirmed that the site paging and site siren evacuation alarm system had been routinely turned off at one of the two speakers located in the Millstone Unit 1 maintenance shop area during meetings, and that this practice was not consistent with Emergency Preparedness Department guidance and NUREG-0654.¹ However, NNECO management stated that it was confident that personnel could still hear the other speaker. This configuration was also tested during a special test conducted by NNECO. The results of the test verified that one of the two speakers had sufficient capacity to support event notification in the maintenance shop area. Since the single speaker could be heard, personnel in the maintenance area would be alerted if an emergency existed. NNECO's investigation also concluded that the on/off switches were installed without a work order in 1973 consistent with work performance processes at that time.

NNECO's corrective actions to address this concern included prohibiting the use of any switch that disables any feature of the site paging and site siren evacuation alarm system, removing the two speaker switches, and performing a walkdown of all other system speakers to verify that no other similar switches existed in the system.

The NRC conducted a special safety inspection from May 15 through June 23, 1995, at the Millstone station. During this inspection, the Staff reviewed a number of the concerns, the topic of this petition being one of them, and issued

¹ NUREG-0654, §1.1, states that each licensee shall establish the means and time required to warn or advise onsite individuals and individuals who may be in areas controlled by the licensee. Emergency Preparedness Department guidance (Emergency Plan Administrative Procedure [EPAP] 1.15), at the time, required that the unit services director monitor and maintain emergency preparedness facilities and equipment. In Attachment 2 of EPAP 1.15, the Unit 1 public announcement speakers and evacuation alarm were included as emergency preparedness equipment.

the findings in Inspection Report (IR) 50-245/95-22, 50-336/95-22, 50-423/95-22 (95-22), dated July 21, 1995.

The NRC inspector reviewed the results of the monthly page and siren tests, which were done in accordance with Procedure C-OP-605, and the separate test conducted in the Millstone Unit 1 maintenance shop area. The review of the last two monthly tests showed that the site alarm was audible over ambient noise in all the tested areas. The review of the separate Millstone Unit 1 maintenance shop test showed that either switch, when in the off position, would not disable the system and that with one of the speakers turned off, the other speaker had sufficient capacity to support event notification.

Emergency Preparedness Department guidance (EPAP 1.15) required that emergency preparedness equipment be maintained. The purpose of the guidance, as it related to the speakers, was to warn or advise onsite individuals. Since the single speaker could still be heard, the Petitioner's department manager stated in a meeting with the NRC inspectors that he believed the Emergency Preparedness Department guidance was still being met. Therefore, the Petitioner has not supported his assertion that the department manager and, indirectly, his first-line supervisor and coworker, deliberately violated Millstone procedures or technical specifications, 10 C.F.R. § 50.47(b), or 10 C.F.R. Part 50, Appendix E, or failed to meet the guidance in NUREG-0654.

The inspector reviewed NNECO's corrective actions and confirmed that a work order had been processed to disconnect and remove the cutoff switches and that this work was completed. The inspector reviewed several Millstone site daily news articles ("To the Point") that reinforced the message of not adjusting speaker volume. The articles clearly stated that management expectations and emergency preparedness guidance were that personnel were not to tamper with emergency preparedness equipment. The inspector also discussed the results of a walkdown of the entire system with a Licensee representative. The representative stated that one additional speaker on/off switch had been found in the Unit 3 instrumentation and controls area. This speaker's on/off switch was subsequently removed.

NNECO's investigation had also concluded that the switches were installed in 1973 without the use of a work order. The work control process has been enhanced significantly at Millstone Unit 1 since 1973. Performing modifications to equipment important to safety, such as the site paging and site alarm siren evacuation system, would now require engineering and operations department review. It would also require consideration of relevant regulatory requirements. During these reviews it would be expected that modifications of this type (i.e., done without such a work order) would be rejected and not implemented. The NRC inspector concluded that NNECO's current work control practices would require an automated work order for this type of modification and that these switches could not have been installed without such a work order under

the current work control procedures. Therefore, since a work order for this modification was not required in 1973, no enforcement action is warranted.

The NRC inspector concluded in the Inspection Report that turning off the site paging and site siren evacuation alarm system speaker was in violation of the Licensee's emergency preparedness plan (and thus a violation of TS 6.8.1) and not in conformance with the guidance in NUREG-0654. Therefore, this issue and three others were collectively cited as a Severity Level IV violation.² However, the Inspection Report stated that since the operators in the maintenance shop were still able to hear information provided by the other speaker in the maintenance area, this event was of low safety significance and that it appeared NNECO had taken effective corrective action to correct the problem.

The NRC Staff has concluded that the enforcement action already taken is sufficient in this case and, therefore, no additional enforcement action is warranted. The NRC Staff has also concluded that although the Petitioner's department manager turned off or had the Petitioner's coworkers turn off one of the speakers, the Petitioner has not supported his assertion that his department manager and coworkers deliberately violated NRC regulations or the Millstone Unit 1 operating license and, thereby, violated the provisions of section 50.5.

III. CONCLUSION

The institution of proceedings pursuant to section 2.206 is appropriate only if substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner, or other enforcement action, is warranted.

On the basis of the above assessment, I have concluded that no substantial health and safety issues have been raised regarding Millstone Nuclear Power Station, Unit 1, that would require initiation of additional enforcement action as requested by the Petitioner.

The NRC has taken appropriate enforcement action for the events referenced in the petition. The Petitioner's request for additional action is denied. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. This Decision will

² The three other issues involved violations of Millstone Procedure ACP-QA-4.02B, "Receipt, Control and Identification of QA Material," ACP-QA-4.01A, "System and Component Housekeeping," and DC-1, "Administration of Millstone Procedures and Forms" (NRC Inspection Report 50-245/95-22, 50-336/95-22, 50-423/95-22, dated July 21, 1995).

constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 19th day of December 1995.