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NUCLEAR REGULATORY COMMISSION ISSUANCES

November 1991

U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
Vol. 34, No. 5
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NUCLEAR REGULATORY COMMISSION ISSUANCES

November 1991

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 Denials of 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
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

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

CONTENTS

Issuances of the Nuclear Regulatory Commission

Issuance of the Atomic Safety and Licensing Board

Issuance of Director's Decision

Commission Issuances

COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

In the Matter of

Docket No. 50-443-OLA
(Transfer-of-Ownership
Amendment)

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, *et al.*
(Seabrook Station, Unit 1)

November 15, 1991

The Commission considers the petitioner's appeal of a licensing board decision denying its petition to intervene and for hearing on a proposed amendment to the operating license to permit a transfer of ownership. The Commission dismisses the appeal for the petitioner's failure to file its brief on time and affirms, though on different grounds, the licensing board's order denying the petitioner standing.

RULES OF PRACTICE: APPELLATE REVIEW

Briefs filed beyond the 10-day period prescribed for appeals in 10 C.F.R. § 2.714a are justifiable only if there is a showing of good cause for the failure to have filed on time.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

Participants in NRC proceedings are expected to familiarize themselves with the applicable rules of practice and to adhere to deadlines.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission applies contemporaneous concepts of standing in determining whether a petitioner has established a right to intervene and to a hearing in NRC proceedings; i.e., the petitioner must show that the proposed action will cause injury in fact to the petitioner's interest and that the injury is within the "zone of interests" protected by the applicable statutes.

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

The petitioner must establish that he or she will suffer a distinct and palpable harm that constitutes the injury in fact, that the injury can be traced fairly to the proposed action, and that the injury is likely to be redressed by a favorable decision in the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

The petitioner failed to show that favorable action in the instant proceeding would abate its claimed injury where it appears that the petitioner's alleged harm would still occur from the grant of a separately noticed license amendment that the petitioner failed to challenge.

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 28, 1991, the Seacoast Anti-Pollution League (SAPL) filed a notice of appeal from the Atomic Safety and Licensing Board's Memorandum and Order, LBP-91-28, 33 NRC 557 (1991), which denied SAPL's petition for leave to intervene and for hearing on a proposed amendment to the operating license for the Seabrook Station. The proposed amendment would permit the Public Service Company of New Hampshire (PSNH), one of the licensed owners of the facility, to transfer its ownership interest in Seabrook to the North Atlantic Energy Corporation (NAEC). Although SAPL's notice of appeal was timely under our rules of practice, SAPL did not file a supporting brief at the same time as prescribed in 10 C.F.R. § 2.714a(a). Both the Nuclear Regulatory Commission (NRC) Staff and the Licensees oppose SAPL's appeal and argue that the Commission has ample grounds either to dismiss the appeal for SAPL's

failure to submit its brief on time or, alternatively, to deny the appeal on its merits.[1] For the reasons stated in this Memorandum and Order, we dismiss the appeal and otherwise affirm the Licensing Board's denial of SAPL's intervention petition.

II. BACKGROUND

On February 28, 1991, the NRC Staff published a notice of opportunity for hearing on the proposed issuance of an amendment to the Seabrook operating license, which would authorize NAEC to acquire PSNH's ownership interest in the Seabrook Station. 56 Fed. Reg. 8373 (Feb. 28, 1991). PSNH, on behalf of itself and the other Seabrook co-licensees, had submitted an application for the proposed amendment in a letter dated November 13, 1990, from Ted C. Feigenbaum to the NRC, which was further supplemented in a letter dated January 14, 1991, from Mr. Feigenbaum. As described in the *Federal Register* notice and the amendment application, transfer of PSNH's ownership interest to NAEC is contemplated under the reorganization plan ordered by the Bankruptcy Court to resolve the pending PSNH bankruptcy proceedings. The reorganization plan involves the acquisition of PSNH by Northeast Utilities (NU) and, through a merger, the formation of NAEC and "Reorganized PSNH" as two wholly owned NU subsidiaries. NAEC will acquire PSNH's 35.56942% ownership share of Seabrook, but will not assume responsibility for management, operation, and maintenance of Seabrook. Responsibility for those functions is proposed to be transferred, however, to another NU subsidiary pursuant to another amendment application, notice of which was published at 56 Fed. Reg. 9384 (Mar. 6, 1991).

SAPL filed its petition for leave to intervene and for hearing on the ownership transfer amendment on April 1, 1991, within the time prescribed in the February 28 notice, and its petition was subsequently referred to a Licensing Board established to rule on such petitions and to preside over the proceeding in the event that a hearing was ordered.[2] In its petition, SAPL described itself as a citizens' organization with its principal place of business in Portsmouth, New Hampshire, which represents the interests of citizens in New Hampshire and northeastern Massachusetts, most of whom reside within the 10-mile emergency

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[1] The Staff responded on July 15, 1991, in opposition to SAPL's notice of appeal, noting SAPL's failure to file a supporting brief. The Licensees filed a motion to dismiss the appeal on July 17, which the Staff supported in an answer dated July 29. SAPL filed a brief in support of its appeal on July 23. By order of July 29, 1991, we permitted the Staff and Licensees to respond to SAPL's brief on the merits, without prejudice to our consideration whether the appeal should be dismissed owing to SAPL's untimely filing. The Licensees and the Staff filed briefs on August 6 and August 8, 1991, respectively, in response to our order.

[2] 56 Fed. Reg. 22,016 (May 13, 1991). SAPL initially filed its petition with the Licensing Board convened to hear offsite emergency planning issues in the Seabrook operating license proceeding. The proposed amendment is unrelated to the remaining issues in the operating license proceeding, and SAPL did not submit its petition in the form of a motion to reopen that proceeding.

planning zone for the Seabrook Station.[3] SAPL has previously intervened in both the construction permit and the operating license proceedings for Seabrook. SAPL averred that the transfer of PSNH's ownership interest to NAEC may cause a "material increase in the hazard of operation" of Seabrook on the basis of pending NRC investigations of alleged harassment and intimidation by Northeast Utilities (NU) of its employees at the Millstone Nuclear Power Plant in Connecticut. In SAPL's words, "[t]he fact of the NRC's investigation into NU's operation of Millstone, and its negative treatment of whistleblowers raises genuine concerns regarding the propriety of the transfer of Seabrook to that company." SAPL's Response to Licensees' Answer at 2 (Apr. 24, 1991). SAPL also pointed to comments in the Staff's Systematic Appraisal of Licensee Performance report for Millstone which, SAPL believes, indicate weaknesses in management's resolution of employee concerns.

The NRC Staff and the Licensees opposed SAPL's petition. The Licensees argued that SAPL had not demonstrated either that the interests it sought to protect or the relief it sought were within the scope of the proceeding, because the amendment at issue dealt only with ownership of the plant, not operational responsibility. The Staff made similar arguments against granting intervention but also emphasized that "the mere pendency of an investigation is not material to licensing issues and does not show a particularized harm." NRC Staff Response to SAPL Petition at 8 (Apr. 22, 1991).

On June 18, 1991, the Licensing Board denied SAPL's petition to intervene in the amendment proceeding on the transfer of ownership. The Board viewed its jurisdiction to be limited to matters related to the transfer of ownership, and not operation, of the plant. In this context, the Board found that "allegations concerning NRC investigations of regulatory violations by a parent organization at another licensed facility . . . have no place and cannot be reviewed in the instant proceeding," and that "the mere pendency of an investigation is not germane to licensing issues and does not show particularized harm." LBP-91-29, 33 NRC at 559. The Board held that SAPL had not demonstrated injury in fact or an affected interest within the scope of the proceeding and, consequently, that SAPL lacked standing to intervene.

The Board noted that its order could be appealed to the Commission within 10 days of service of the order in accordance with 10 C.F.R. § 2.714a(a). 33 NRC at 560. SAPL filed a notice of appeal on June 28, 1991, with the Commission, but did not submit a brief in support of its appeal until July 23, 1991. This

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[3] In its April 1 petition, SAPL did not identify a member of the organization for whom it was acting as a representative, as usually is required to establish organizational standing. The Licensees and the Staff both noted this defect in SAPL's petition, and SAPL then identified the names of two members residing near the Seabrook plant in its April 24, 1991 response to the Licensees' Answer to the Petition (April 11, 1991). The Licensing Board accepted SAPL's representation as curing the deficiency in its original petition. LBP-91-28, 33 NRC at 558 n.4.

matter comes before us in accordance with the interim appellate procedures in effect at the time of the Licensing Board's decision.[4]

III. ANALYSIS

A. Whether SAPL's Appeal Should Be Dismissed

We consider first the question whether SAPL's appeal should be dismissed for its failure to submit a supporting brief with its notice of appeal as required under 10 C.F.R. § 2.714a(a). Both the Staff and the Licensees urge dismissal on this ground.

There is no doubt that 10 C.F.R. § 2.714a governs any appeal from the Licensing Board's order. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238 (1991). Section 2.714a(a) applies to circumstances, like those here, in which the Licensing Board's order wholly denies a petition for leave to intervene or request for hearing. To assert an appeal under this provision, a party must file a notice of appeal and accompanying supporting brief within 10 days after service of the Board's order. The Licensing Board specifically noted the applicability of section 2.714a(a) in its order, 33 NRC at 560, and SAPL concedes that it should have filed its brief with its notice of appeal.[5] Although the provisions in section 2.714a may not be jurisdictional in the sense that they absolutely preclude consideration of appeals that are not perfected within the prescribed time, further consideration of the appeal is warranted only if good cause is shown for the failure to file on time. *Turkey Point*, CLI-91-5 *supra*, 33 NRC at 240.

To explain its failure to file on time, SAPL states that it mistakenly treated its appeal as an appeal under 10 C.F.R. § 2.762 from an initial decision for which SAPL would have had 30 days from the filing of its notice of appeal to file its supporting brief.[6] SAPL attributes its error to "oversight" and its "long standing practice of filing briefs" in the operating license proceeding. In view of its long participation as an intervenor in Seabrook proceedings and the timeliness of its notice of appeal, SAPL asks that we not foreclose consideration of its late brief.

For their part, the Licensees and the Staff argue that SAPL's reasons for its late filing are unpersuasive and that, on the strength of our recent decision in *Turkey Point*, CLI-91-5, *supra*, SAPL's appeal should be dismissed.[7] In

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[4] *See* 10 C.F.R. § 2.785 note (b), *published at* 55 Fed. Reg. 42,944 (Oct. 24, 1990).

[5] Brief Supporting Intervenor's Notice of Appeal of LBP-91-28 at 3 (July 23, 1991).

[6] *Id.*

[7] Licensees' Motion to Dismiss Appeal (July 17, 1991); NRC Staff Response in Support of Licensee's Motion to Dismiss Appeal (July 29, 1991). Licensees' counsel notes that SAPL did not file a motion for leave to file its

(Continued)

particular, both believe that SAPL's long participation in NRC proceedings and the Licensing Board's specific reference to 10 C.F.R. § 2.714a in its order undercut SAPL's argument that its late filing be overlooked.

We agree with the Licensees and the Staff. Neither SAPL nor its counsel is a novice to NRC proceedings. SAPL's failure to follow the applicable procedures is not excused by its averment that it was accustomed to handling other matters differently. We do not think it too much to expect participants in our proceedings to read and otherwise familiarize themselves with the applicable rules of practice. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980). Even in instances involving lay litigants, we expect adherence to deadlines to ensure the orderly administration of the adjudicatory process. *See Turkey Point*, CLI-91-5, *supra*, 33 NRC at 241. Because we do not believe that SAPL has shown sufficient cause for its failure to timely file its brief, SAPL's appeal from the Licensing Board's decision denying its petition to intervene is dismissed.

B. The Licensing Board's Denial of Standing

While we have decided that SAPL's tardy filing warrants dismissal of the appeal, we have determined on review of the Licensing Board's decision and the positions of the parties that the Board was correct in denying SAPL standing. Although we are satisfied that the Licensing Board reached the appropriate result, we rest our determination on somewhat different grounds than did the Licensing Board. SAPL has not shown, even accepting its claim of injury, that a remedy in this proceeding will abate the alleged harm.

There is no dispute over the basic principles governing the standing determination. The Commission has long applied contemporaneous judicial concepts of standing in determining whether a petitioner has established a right to intervene and to a hearing in NRC proceedings. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332-33 (1983); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). To establish standing, the petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332. In making this showing, the petitioner must establish that he or she will suffer a distinct and palpable harm

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brief out of time. Such a motion would have been appropriate, *see Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 126 (1977), but we have considered, in any event, SAPL's arguments for accepting its brief for purposes of our decision here.

that constitutes the injury in fact, that the injury can be traced fairly to the challenged action, and that the injury is likely to be redressed by a favorable decision in the proceeding. *See Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

The Licensing Board found that SAPL had "not demonstrated any injury in fact and has alleged no basis for an interest within the scope of this proceeding." LBP-91-28, *supra*, 33 NRC at 559. Although SAPL's claim of injury rests on a somewhat tenuous chain of inferences, it is not clear that harms arising from a co-owner's relationship to or influence over the plant operator are wholly beyond the scope of an ownership transfer proceeding.[8] Nonetheless, we find that SAPL has not satisfied the threshold standing requirements, because it has failed to describe how any remedy in this proceeding can provide relief where, without objection, a separate amendment will permit an NU subsidiary to operate and manage the plant.

SAPL's position is premised on NU's alleged harassment and intimidation of employees at its Millstone plant. In SAPL's view, the alleged conduct, should it occur at Seabrook, would make operation of the plant more hazardous. SAPL's objection to NAEC's holding an ownership interest rests on the purported influence of NU through its subsidiary over the plant operator. But in order to establish its standing, SAPL bears the burden of showing that, but for the particular action it challenges, its injury would abate. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Dellums v. NRC*, *supra*, 863 F.2d at 971.

About a week after the notice of the ownership transfer amendment was published, a notice appeared in the *Federal Register* of a separate amendment by which operational authority over Seabrook would be transferred from PSNH to NAESCO, a different NU subsidiary. 56 Fed. Reg. 9373-74, 9384 (Mar. 6, 1991). The latter amendment would authorize NAESCO to manage, operate, and maintain the Seabrook plant,[9] matters that are at the heart of SAPL's concern and claim of potential injury. Yet, despite its objection to NU's involvement with the Seabrook project, SAPL did not respond to that notice by filing a petition for leave to intervene or for hearing on that amendment, nor has SAPL since

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[8] *Cf. Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 200 (1978) (co-owner must be licensed in view of influence owner can exert over the actions and attitudes of its agents without being in "possession" of the premises); *General Electric Co.* and Southwest Atomic Energy Associates, 3 AEC 99 (1966) (foreign corporation's ownership, control, or domination an issue in construction permit proceeding).

[9] As indicated in the notice, however, the reorganization plan contemplates that the transfer of managerial authority will be accomplished by transferring *existing* Seabrook staff and contractor support to NAESCO for the management and operation of Seabrook.

sou ght permission for late intervention.[10] No other challenge to the amendment has been filed. Even if SAPL were granted the relief it requests with respect to the ownership transfer amendment, it appears that the harm that SAPL claims it will suffer would still occur from an amendment SAPL has left unchallenged. Thus, we are satisfied that SAPL has not sufficiently demonstrated its standing to intervene in this proceeding concerning the ownership transfer amendment. SAPL has not shown that its alleged harm would abate if it were granted relief on the amendment at issue in this proceeding.

IV. CONCLUSION

For the reasons stated in this decision, SAPL's appeal is *dismissed* and the Licensing Board's order in LBP-91-28 is otherwise *affirmed*.

IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of November 1991.

[10] In the November 13 letter from Mr. Feigenbaum that transmitted the application for the ownership transfer amendment, PSNH noted its intent to separately seek both amendments. The two amendment applications were distinguished in the Secretary's transmittal of SAPL's intervention petition to the Licensing Board. *See* Memorandum for B. Paul Cotter, Jr., Chief Administrative Judge, from Samuel J. Chilk, Secretary of the Commission (Apr [illegible] 1991). In addition, both the Licensees and the NRC Staff had noted SAPL's failure to seek intervention on the amendment involving MAESCO in their initial responses to SAPL's petition on the ownership transfer amendment.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

In the Matter of

Docket Nos. 50-440-A
50-346-A
(Suspension of
Antitrust Conditions)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

November 20, 1991*

The Commission *sua sponte* exercises its inherent supervisory power over an adjudicatory proceeding initiated by applicants' request for amendments that would remove certain antitrust licensc conditions pertaining to the Perry and Davis-Besse nuclear plants. The Commission directs its Licensing Board to suspend consideration of all matters, except for two issues referred to as the "bedrock" legal issue.

*Re-served November 21, 1991, because of correction to note 3.

DECISIONAL BIAS (NRC STAFF)

STAFF BIAS

The Commission notes that consideration of an issue of decisional bias is unprecedented in its proceedings and defers providing guidance where the "bedrock" legal issue has the potential to be dispositive of the proceeding.

ORDER

The instant proceeding was initiated by Ohio Edison Company's, Cleveland Electric Illuminating Company's, and Toledo Edison Company's (Applicants) requests for amendments to the operating licenses for the Perry and the Davis-Besse nuclear plants. The amendments would remove certain antitrust license conditions that were attached to the licenses as a result of the Commission's initial antitrust review pursuant to section 105c of the Atomic Energy Act of 1954, as amended. The opportunity for a formal adjudicatory hearing was afforded the Applicants on the occasion of the NRC Staff's announcement that after administrative consideration, it would deny the amendment request. *See* 56 Fed. Reg. 20,057 (1991). A Licensing Board was constituted to consider requests for hearing and intervention. Applicants requested the hearing on the denial and other parties sought to intervene on the basis of their interest. Intervention was granted to United States Department of Justice, City of Cleveland, American Municipal Power-Ohio, Inc., and the Alabama Electric Cooperative.[1] The NRC Staff is also a party.

The Licensing Board has recently issued orders memorializing its rulings during a prehearing conference and announcing a hearing and providing for limited appearance requests. Among other things, the Board ruled that it had jurisdiction to conduct the proceeding,[2] admitted licensee Ohio Edison's contention relating to alleged decisional bias by the NRC Staff, and provided an opportunity to submit a joint statement setting forth the "bedrock" legal issue (or issues) in this proceeding that thereafter will be the subject of possibly dispositive summary disposition motions. LBP-91-38, 34 NRC 229 (1991).

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[1] Alabama Electric Cooperative's intervention was granted as a matter of discretion and was limited in various respects not here relevant.

[2] We acknowledge that the City of Cleveland, which was admitted as an intervenor in the proceeding, has appealed (relying on 10 C.F.R. § 2.714a) the Licensing Board's jurisdictional ruling in the proceeding. We will consider Cleveland's filing, and any responses thereto, in due course.

Under the Board's order the parties will for the next approximately 6 months be briefing what they have all acknowledged is a "bedrock" legal issue.[3] Ohio Edison has volunteered that the decision on the legal issue has the potential of allowing applicants to proceed to an evidentiary proceeding or of terminating the hearing in favor of maintaining the license conditions.

While intimating no opinion on this issue or any other issue before the Board, we hereby exercise our inherent supervisory power over adjudicatory proceedings to direct the Licensing Board to suspend its consideration of all matters in this proceeding with the sole exception of the so-called "bedrock" legal issue. We take this action today because the bedrock issue has the potential to be dispositive of this proceeding and particularly in light of the nature of the contention on decisional bias by the NRC Staff. The admission of such a contention appears to be without precedent in our proceedings. Thus, there is no current guidance available to the Licensing Board on this kind of issue, and the Commission is not inclined to consider how such guidance is to be provided while the possibility remains that the proceeding will be resolved without any need to reach the issue.[4]

IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of November 1991.

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[3] The parties have informed the Licensing Board that all of the parties have agreed upon the following as the "bedrock" legal issue (or issues) in this proceeding:

> Is the Commission without authority as a matter of law under section 105 of the Atomic Energy Act to retain antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?

and

> Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

See Letter from R. Goldberg and C. Strother, Jr., Counsel for the City of Cleveland, to Judges Miller, Bechhoefer, and Hollaway (Nov. 7, 1991).

[4] We note the Staff's Response to Ohio Edison Company's Interrogatories to the Nuclear Regulatory Commission Staff was filed October 23, 1991. Ohio Edison responded with a motion to compel seeking further answers from the NRC Staff.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. George A. Ferguson
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-322-OLA-2
(ASLBP No. 91-631-03-OLA-2)
(Possession-Only License)

LONG ISLAND LIGHTING
COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

November 15, 1991

In this Memorandum and Order, the Licensing Board finds that none of the petitioner's proferred contentions are admissible and, therefore, it denies petitioner's intervention petition.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

The Commission has made it clear that the new pleading requirements of 10 C.F.R. §2.714(b) are to be enforced vigorously and that licensing boards are not free to assume any missing information in a contention. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

REGULATORY GUIDES: STATUS

It is well settled that regulatory guides are just that — guides, not regulations — and compliance with them is not required. *See, e.g., Petition for Emergency*

and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

RULES OF PRACTICE: CONTENTIONS

A motion for reconsideration of a portion of the Licensing Board's earlier ruling on petitioner's standing is not a proper subject for a contention as that term is used in 10 C.F.R. § 2.714(b). The petitioner's contentions must focus on the issues identified in the notice of hearing, the applicant's amendment application, and the staff's environmental responsibilities relating to that application, not on the petitioner's own standing to raise issues concerning these matters.

MEMORANDUM AND ORDER
(Ruling on Contentions)

I.

The history of this proceeding for a "possession-only license" (POL) amendment for Long Island Lighting Company's (applicant's) Shoreham Nuclear Power Station is set forth in several earlier Commission and Licensing Board opinions and need not be repeated here.[1] It suffices to note that, in LBP-91-26, the Licensing Board (as then constituted) ruled that petitioner, Scientists and Engineers for Secure Energy, Inc. ("SE2"), had alleged sufficient injury in its intervention petition to establish standing to raise certain issues under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and the Commission's implementing environmental regulations, 10 C.F.R. Part 51.[2] SE2 then filed a supplemental petition containing seven contentions.[3] The applicant and the NRC staff both opposed the admission of any of the proffered con-

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[1] *See* CLI-91-1, 33 NRC 1 (1991), LBP-91-26, 33 NRC 537, *reconsideration denied*, LBP-91-32, 34 NRC 132 (1991); LBP-91-7, 33 NRC 179 (1991).

[2] *See* 33 NRC at 543, 547.

[3] *See* Petitioners' Amendment and Supplement to Petitions to Intervene [hereinafter Petitioner's Supplement] (July 1, 1991).

Although a second petitioner, Shoreham-Wading River Central School District (SWRCSD), joined SE2 in filing a joint supplemental petition, that petitioner's initial intervention petition was earlier denied. *See* LBP-91-26, 33 NRC at 545-47. Although SWRCSD has filed an appeal from that ruling with the Commission, only SE2 remains as a petitioner before us.

tentions.[4] Thereafter, the Board held a prehearing conference at which it heard argument on the admissibility of the petitioner's contentions.[5]

For the reasons that follow, we conclude that none of the petitioner's proffered contentions are admissible. Accordingly, SE2's petition to intervene is denied. Below, we address seriatim each of the petitioner's contentions.

II.

A. The petitioner's first contention asserts that, before issuing the POL, the NRC must prepare an environmental impact statement (EIS) to consider the impacts of the proposal to decommission Shoreham. This is so, the contention states, because the POL is within the scope of the proposal to decommission Shoreham and the decommissioning proposal is itself a major federal action significantly affecting the quality of the human environment. Next, quoting the definitions from the NEPA regulations of the Council on Environmental Quality (CEQ) that have been adopted by the NRC in 10 C.F.R. § 51.14(b), the contention claims that the POL is within the scope of the proposal to decommission Shoreham "because it is an 'interdependent [part] of [that] larger action and depend[s upon (*sic*)] the larger action for [its] justification.' "[6] Finally, and again relying on definitions from CEQ's regulations adopted by the NRC, the contention asserts that the POL is also a cumulative action that should be discussed in a comprehensive EIS on the decommissioning of Shoreham.

In arguing that the petitioner's first contention is inadmissible, the applicant and the staff both assert that the contention does not meet the requirements for an admissible Shoreham contention laid down by the Commission in several recent rulings. They also argue that the petitioner's contention fails to meet the general standards of 10 C.F.R. § 2.714(b)(2)(ii), which requires that a contention set forth the facts or expert opinion supporting it.

The applicant and the staff are correct that the petitioner's first contention does not meet the special requirements for an admissible contention enunciated in earlier rulings by the Commission for proceedings involving Shoreham. In the first of those decisions, CLI-90-8,[7] the Commission addressed the intervention petitions of SE2 and SWRCSD in an earlier chapter of the Shoreham saga. At issue were the validity of a confirmatory order in which the applicant agreed not to refuel the reactor without agency permission and two license

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[4] *See* LILCO's Opposition to SE2's Contentions on "Possession Only" License Amendment (July 12, 1991); NRC Staff Response to Petitioners' July 1, 1991 Amended Petition and Supplement (July 22, 1991).

[5] On September 24, 1991, the Licensing Board was reconstituted to include the current Chairman. *See* 56 Fed. Reg. 49,808 (1991).

[6] Petitioner's Supplement at 7.

[7] 32 NRC 211 (1990), *reconsideration denied*, CLI-91-2, 33 NRC 61 (1991).

amendments involving changes to the applicant's security plan and offsite emergency preparedness. The petitioners argued that these agency actions amounted to a de facto decommissioning of Shoreham that could be approved under NEPA only after the NRC prepared an EIS considering the resumed operation of the facility as an alternative to decommissioning. The Commission responded that the applicant's determination not to operate Shoreham was a purely private action that did not involve the agency. As a consequence, only its decision on the method of decommissioning, not its decision whether to decommission, requires NRC approval. Further, the Commission stated that because "[t]he alternative of 'resumed operation' — or other methods of generating electricity — are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration,"[8] such alternatives "need not be considered under NEPA" so that no EIS is needed.[9] With this guidance, the Commission then forwarded the intervention petitions to the Licensing Board for further proceedings.

Thereafter, in CLI-91-4,[10] the Commission denied, as interlocutory, the appeal of the same petitioners from a Licensing Board ruling finding that they lacked standing, but permitting them to rectify the deficiencies in their petitions.[11] The Commission took the opportunity in CLI-91-4, however, to correct another portion of that ruling in which the Board decided, based on CLI-90-8, that the petitioners' claims regarding the illegal segmentation of the Shoreham decommissioning process were outside the scope of the amendment proceeding. In explaining its earlier ruling, the Commission opined that while it doubted the petitioners could credibly show that the three actions at issue were part of the decommissioning process, its decision in CLI-90-8 nonetheless was not intended to preclude an improper segmentation claim. At the same time, the Commission stated that any such contention

> will at a minimum need to offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan *and* how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.[12]

Finally, in CLI-91-1, an opinion involving the present POL proceeding handed down between the two earlier discussed decisions, the Commission addressed the threshold question whether a POL request must be preceded by the applicant's decommissioning plan. It concluded that "[n]either regulations,

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[8] 32 NRC 207 (footnote omitted).
[9] *Id.* at 208.
[10] 33 NRC 233 (1991).
[11] *See* LBP-91-1, 33 NRC 15 (1991).
[12] 33 NRC at 237 (emphasis in original).

NEPA, nor policy considerations require a decommissioning plan to be submitted in conjunction with the POL application."[13] The Commission stated that

> the decommissioning rules do not contemplate that a POL would, in normal circumstances, need to be preceded by submission of any particular environmental information or accompanied by any NEPA review related to decommissioning. Accordingly, we do not believe that NEPA or 10 C.F.R. Part 51 serves as a basis for linking a POL with the filing or review of any preliminary decommissioning plan. Of course there may be special circumstances where some NEPA review for a POL may be warranted despite the categorical exclusion [of 10 C.F.R. § 51.22(c)(9)], for example if the POL clearly could be shown actually to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate some significant environmental impact. But, from the papers filed with us at this preliminary stage, no such special circumstance appears in this case.[14]

It then forwarded the petitions to the Licensing Board for further proceedings "in accordance with the opinions expressed herein and in CLI-90-8."[15]

Taken together, these Commission decisions direct that, in this POL proceeding, an admissible NEPA contention must meet two tests. First, the contention must "offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan."[16] In other words, the contention must explain why the environmental impacts of decommissioning Shoreham fall outside the envelope of impacts already considered by the Commission in the agency's Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (GEIS).[17] That GEIS formed the basis for the Commission's current decommissioning rules.[18] It also is the underpinning for the deletion of the former regulatory provision requiring an EIS for the decommissioning of every plant.[19] Because the Commission already has determined on the basis of the GEIS that the relative impacts of decommissioning a reactor are comparable from one plant to another, no purpose is served by duplicating, in a plant-specific EIS, the conclusions contained in the GEIS.[20]

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[13] 33 NRC at 6.

[14] *Id.* at 6-7.

[15] *Id.* at 7.

The Licensing Board thereafter determined that the Commission's guidance in CLI-91-4 is fully applicable to this POL proceeding. The Board reasoned that, because CLI-91-4 is a modification of CLI-90-8, the modification must be followed as well. *See* LBP-91-26, 33 NRC at 342.

[16] CLI-91-4, 33 NRC at 237.

[17] NUREG-0586 (August 1988).

[18] *See* 53 Fed. Reg. 24,018 (1988).

[19] *See* 10 C.F.R. § 51.20(b)(5) (1988).

[20] As the Commission stated in the Statement of Considerations accompanying the final decommissioning regulation:

> The Commission's primary reason for eliminating a mandatory EIS for decommissioning is that the impacts have been considered generically in a GEIS. The Commission determined that examination of these impacts and their cumulative effect on the environment and their integration into the waste disposal

(Continued)

Thus, to satisfy the Commission's first test, the contention must distinguish the impacts of decommissioning Shoreham from the range of impacts already considered in the GEIS. Second, the contention must plausibly explain how the granting of the POL involves special circumstances likely to foreclose one or more of the alternatives for decommissioning Shoreham so that such agency action constitutes an illegal segmentation of the EIS process.[21] In its rulings, the Commission mandated that *both* these requirements must be met, making a contention's failure to meet either fatal to its admissibility.[22] Additionally, of course, the contention must satisfy the pleading requirements of 10 C.F.R. § 2.714(b).

The petitioner's first contention fails to meet either part of the Commission's two-prong test. In an apparent attempt to satisfy the first requirement, the contention asserts that an EIS is required because the proposal to decommission Shoreham is a major federal action significantly affecting the quality of the human environment. This assertion is completely inadequate to meet the first part of the test, requiring a reasonable explanation why the GEIS is inapplicable to the decommissioning of Shoreham. Nothing in the petitioner's first contention even hints at such an explanation.

Nor does the petitioner's contention satisfy the second requirement that it provide a "plausible explanation" of how the POL amendment constitutes an illegal segmentation of the EIS process.[23] Petitioner's contention attempts to confront this requirement by relying upon the definitions in 40 C.F.R. § 1508.25 of the CEQ regulations to claim that the POL is an interdependent part of the Shoreham decommissioning process that depends upon decommissioning for its justification. The contention also claims, again solely relying upon the definitions in the CEQ regulations, that the POL amendment is a cumulative action that has cumulatively significant impacts with decommissioning and, therefore, the POL should be discussed as part of the EIS on the decommissioning of Shoreham. Further, at the prehearing conference, the petitioner argued that it was raising only a legal argument in attempting to meet the second prong of the Commission's test.[24] But the Commission's direction that the contention contain

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process could best be examined generically . . . . The GEIS shows that the difference in impacts among the basic alternatives for decommissioning is small, and the dose impact of decommissioning is small, whatever alternative is chosen, in comparison with the impact accepted from 40 years of licensed operation. The relative impacts are expected to be similar from plant to plant, so that a site-specific EIS would result in the same conclusions as the GEIS with regard to methods of decommissioning. Although some commenters correctly point out that an EA is much less detailed in its assessment of impacts than an EIS, if the impacts for a particular plant are significantly different from those studied generically because of site-specific considerations, the environmental assessment would discover those and lay the foundation for the preparation of an EIS. If the impacts for a particular plant are not significantly different, a Finding of No Significant Impact would be prepared.

53 Fed. Reg. at 24,039.

[21] *See* CLI-91-4, 33 NRC at 237; CLI-91-1, 33 NRC at 7.

[22] 33 NRC at 237.

[23] *Id.*

[24] Tr. at 16.

a "plausible explanation" requires much more than merely quoting regulatory definitions. In order to provide a sufficient explanation, the contention, at a minimum, must spell out how the POL amendment is an interdependent part of the decommissioning process and how that amendment is unjustified except as part of that process. Similarly, the contention must elucidate how the POL has cumulatively significant impacts with decommissioning. Because these matters are not self-evident, fulfillment of the Commission's test requires a much fuller explanation in order to make the proffered explanation "plausible," even if the petitioner seeks to raise only a legal issue.

Additionally, the adequate explanation component of the Commission's two-pronged test dovetails with the pleading requirements of 10 C.F.R. § 2.714(b)(ii) and (iii). Those provisions direct, respectively, that the petitioner provide "[a] concise statement of the alleged facts . . . which support the contention" and "[s]ufficient information . . . to show that a genuine dispute exists . . . on a material issue of law or fact." Judged by either of these standards, the petitioner's contention is inadequate for the same reasons that the contention fails to meet the Commission's "plausible explanation" requirement. Further, the Commission has made it clear that the new pleading requirements of section 2.714(b) are to be enforced rigorously and that we are not free to assume any missing information in a contention.[25] When viewed in light of these strictures, it is apparent that the petitioner's first contention is inadmissible.

B. The petitioner's second contention asserts that the agency's GEIS does not apply to the proposal to decommission Shoreham because the generic impact statement is limited in its scope to facilities at the end of their useful life or to reactors closed prematurely due to an accident. Because neither situation is applicable to Shoreham, the contention claims that the NRC must apply its now abrogated regulation, 10 C.F.R. § 51.20(b)(5) (1988), that required an EIS for each decommissioning proposal.

In opposing the admission of the petitioner's second contention, the staff argues that the contention fails to establish the essential nexus between the proposed POL amendment and the decommissioning of Shoreham. Further, the staff argues that the contention fails to meet both prongs of the Commission's test for an admissible Shoreham contention. The applicant, on the other hand, argues that the second contention should be rejected because the petitioner's real intent is to raise the issue of the resumed operation of Shoreham, contrary to the Commission's earlier directives.

The petitioner's second contention is identical to a contention it filed in the earlier Shoreham confirmatory order and license amendments proceeding. In LBP-91-35, the Licensing Board rejected that contention on the grounds

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[25] *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

that it was premised on the erroneous and unestablished premise that the three actions at issue required the preparation of an EIS.[26] That same reasoning is applicable here because the petitioner's second contention is footed upon the same mistaken premise. In this proceeding, the petitioner alleged in its first contention that the NRC must prepare an EIS on the Shoreham decommissioning before issuing the POL amendment because the POL was within the scope of that decommissioning proposal. Having rejected this contention, the instant one, which deals exclusively with the need for an EIS on the decommissioning of Shoreham without mentioning the POL, has no logical foundation. Stated otherwise, in order for the issue of Shoreham decommissioning — the sole subject of the second contention — to become relevant, the petitioner must first establish that the POL amendment — the only licensing action involved in this proceeding — is part of the proposal to decommission Shoreham. As the staff correctly argues, having failed to establish this crucial linkage, the petitioner's second contention is inadmissible.

The staff is also correct that the petitioner's contention does not meet the second prong of the Commission's test for an admissible Shoreham contention. The contention contains no explanation of how the POL amendment constitutes an illegal segmentation of the EIS process by foreclosing any decommissioning methods. Thus, the contention also must be rejected for this reason.

C. In its third contention, the petitioner asserts simply that "LILCO's environmental report should be in the format prescribed by Regulatory Guide 4.2 (Rev. 2, July 1976)."[27] The staff and the applicant both argue that the contention must be rejected for failing to raise a litigable issue. The applicant also asserts that the contention is inadmissible because it does not meet the Commission's test for an acceptable Shoreham contention.

The petitioner's third contention is clearly inadmissible. This contention also is identical to one the petitioner filed in the earlier Shoreham confirmatory order and license amendments proceeding. In LBP-91-35, the Licensing Board rejected the contention for failing to present a litigable issue. Observing that regulatory guides are not mandatory regulations, the Board concluded that even if the contention was proven, it would be of no consequence in the proceeding so as to entitle the petitioner to relief.[28] That reasoning is equally applicable here. It is well settled that regulatory guides are just that — guides, not regulations — and compliance with them is not required.[29] Indeed, the very regulatory guide cited by the petitioner specifically notes that conformance with the format set

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[26] 34 NRC 163, 171-72 (1991).

[27] Petitioner's Supplement at 8.

[28] 34 NRC at 172-73

[29] *See, e.g., Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

forth in the guide is not required.[30] Accordingly, the contention fails to raise a litigable issue and, pursuant to 10 C.F.R. § 2.714(d)(2)(ii), it must be rejected.[31]

D. The petitioner's fourth contention relies upon selective quotations from the agency's GEIS and asserts that an EIS is required for the decommissioning of Shoreham because the decommissioning plan submitted by the Long Island Power Authority, and adopted by the applicant, proposes to use the DECON method. According to the contention, the use of that method will foreclose consideration of the SAFSTOR and ENTOMB decommissioning methods thereby forfeiting the advantage of reduced occupational exposures offered by the latter two alternatives. Finally, the contention asserts that because only the DECON method calls for radioactive contaminants to be removed from the site, adoption of the POL amendment permitting the applicant to ship certain reactor fuel support pieces off site for disposal effectively prejudices consideration of the SAFSTOR and ENTOMB decommissioning alternatives.

For slightly different reasons, the staff and the applicant both claim that the petitioner's fourth contention should be rejected for failing to meet the two prongs of the Commission's test for an admissible Shoreham contention. They both agree, however, that the contention neglects the first prong by offering no explanation why the GEIS is inapplicable to the decommissioning of Shoreham.

Although the petitioner's fourth contention clearly attempts to address the second requirement of the Commission's two-part test, the staff and the applicant are correct that it is fatally flawed for ignoring the first requirement. In its contention, the petitioner has not even attempted to explain why the environmental impacts of decommissioning Shoreham fall outside the envelope of impacts already considered in the GEIS. Regardless of how liberally we read it, the contention contains absolutely no language that can be construed as offering an explanation satisfying the first prong of the Commission's test. Further, in view of the fact that none of the petitioner's other contentions are admissible,

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[30] NRC Regulatory Guide 4.2 (Rev. 2), "Preparation of Environmental Reports for Nuclear Power Stations" (July 1976) at ix.

[31] At the prehearing conference, the petitioner, in effect, sought to amend Contention 3 stating that:

> We have put the contention in terms of the format prescribed by Regulatory Guide 4.2. However, that format is illustrative of the scope to be considered[.] [F]ormat in this sense does not refer to the particular numbering of chapters or subsections but to the centers required for an environmental report under NEPA.
>
> The issue there would be the legal issue of whether the licensee or the Staff can show that the prescribed contents for environmental reports under NEPA as illustrated by 4.2 have been met by an acceptable and relevant environmental report for the proposal to decommission.

Tr. at 20. Putting to one side the precedents holding that the petitioner is bound by the literal terms of its own contention, *see Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986); *Limerick*, ALAB-819, 22 NRC at 709, the petitioner's attempt to change the meaning of its contention does nothing to enhance its admissibility. In order for a contention challenging the contents of an environmental report to be admissible, the Commission's regulations require that it identify the alleged errors in the report and state the reasons why the report is in error. *See* 10 C.F.R. § 2.714(b)(2)(iii). Even as orally altered at the prehearing conference, the petitioner's third contention is still woefully deficient.

there is no basis for incorporating the required explanation from another contention, even if that were appropriate. Because a contention must meet both parts of the Commission's test to be admissible, petitioner's failure to address the first prong requires that it be rejected.

E. The petitioner's fifth contention avers that the Licensing Board's earlier ruling in LBP-91-26 erred in disapproving one of SE2's standing arguments. According to the petitioner, it claimed that the Commission's action granting a FOL to the applicant in order to relieve Shoreham of the provisions of its operating license is arbitrary and capricious because the Commission has not provided similar relief to other licensed plants undergoing long outages.

The staff and the applicant both argue that the petitioner's so-called fifth contention is not a contention at all, but rather an improperly justified motion for reconsideration of LBP-91-26. They also argue that the contention must be rejected because the Licensing Board there ruled that SE2 had standing only to raise NEPA issues and this filing raises no such issues.

On its face, the petitioner's purported "contention" is concerned solely with the Licensing Board's alleged error in earlier rejecting one of SE2's standing arguments. Hence, this so-called "contention" is, in reality, a request to reconsider a portion of the Board's prior ruling on standing in LBP-91-26. A motion for reconsideration, however, is not a proper subject for a contention as that term is used in 10 C.F.R. § 2.714(b). In the instant license amendment proceeding, the petitioner's contentions must focus on the issues identified in the notice of hearing, the applicant's amendment application, and the staff's environmental responsibilities relating to that application, not on the petitioner's own standing to raise issues concerning these matters.

Moreover, even if the petitioner's filing could be considered a contention, it still must be rejected. As the applicant correctly notes, the Licensing Board previously ruled that SE2 had standing only to raise NEPA issues.[32] Because this so-called contention does not raise such issues, it is not admissible.[33]

F. The petitioner's sixth contention declares that the EIS required for the decommissioning of Shoreham must include a consideration of the indirect effects of permitting decommissioning, including the construction of fossil-fuel plants and associated transmission lines. In opposing the admission of this contention, the staff argues that the petitioner's filing is another improperly pled motion for reconsideration, this time aimed at the Licensing Board's ruling in

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[32] *See* 33 NRC at 543, 547.

[33] At the prehearing conference, the petitioner stated that "[i]nsofar as [Contention 5] may be considered a motion for reconsideration, we hereby ask the Board to treat it as such." Tr. at 68. Even as a motion for reconsideration, however, the petitioner's filing is deficient in form and content. *See* 10 C.F.R. § 2.730(b). Nowhere in its filing does the petitioner explain how the Licensing Board's reasoning is in error. Nor does the petitioner's filing correct the deficiencies that the Board noted in SE2's standing argument. Thus, even if petitioner's fifth contention is viewed charitably as a motion for reconsideration, its filing fails to provide any basis for granting such relief.

LBP-91-26 that these same indirect effects of decommissioning Shoreham are outside the scope of the proceeding. Similarly, the applicant argues that the contention should be rejected because it only raises a question of law that the Licensing Board already held is not in issue in this POL proceeding.

In filing this contention, the petitioner disregarded the Licensing Board's earlier explicit ruling with respect to raising any issue involving the building of fossil-fuel plants and associated transmission lines to replace the loss of Shoreham. In LBP-91-26, the Board stated:

> Such indirect effects would be outside the scope of any required NEPA review in this proceeding. It is clear beyond cavil that the Commission has held that restart will not be considered nor will other methods of generating electricity, which include fossil fuel plants. Likewise, the effects of fossil fuel plants are beyond the scope of the proceeding.[34]

Accordingly, the Board's earlier ruling forecloses the admission of this contention.

G. The petitioner's seventh and last contention states that SE2's pursuit of a judicial stay of the POL amendment does not deprive the Licensing Board of jurisdiction to enforce 10 C.F.R. §§ 51.100 and 51.101(a)(2).[35] The staff argues that contention should be rejected because it involves regulations that only apply when an EIS is required, and the contention does not establish that the POL amendment requires a NEPA review. In a similar vein, the applicant argues that the contention is inadmissible because, even if it is accepted as true, it does not entitle the petitioner to any relief.

Although labeled a "contention," petitioner's filing is merely a statement to the effect that the Licensing Board has jurisdiction to enforce 10 C.F.R. §§ 51.100 and 51.101(a)(2), while the petitioner pursues a judicial stay of the POL amendment. As written, this purported contention is clearly inadmissible because, even if true, it would not entitle the petitioner to any relief.[36] Furthermore, even if the petitioner's filing is somehow read to claim that the agency must enforce the cited regulations, those provisions are only applicable to proposals requiring an EIS. To be admissible under this theory, the petitioner still would need to establish that the POL amendment requires the preparation of an EIS. The petitioner has made no such showing, so the contention must be rejected.

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[34] 33 NRC at 545. *See* CLI-90-8, 32 NRC at 207.

[35] Section 51.100 prohibits the agency from making any decision on a proposal requiring an EIS until the impact statement has been made available for public comment. Section 51.101(a)(2) provides that an applicant may be denied a license for a project requiring an EIS if the applicant takes any step that has an adverse environmental impact or limits the choice of reasonable alternatives before the EIS process is completed.

[36] *See* 10 C.F.R. § 2.714(d)(2)(ii).

Order

For the foregoing reasons, we find that none of the petitioner's proffered contentions are admissible. In order to become a party to the proceeding, 10 C.F.R. § 2.714(b)(1) requires that a petitioner must have at least one contention admitted. Having failed to meet this requirement, petitioner SE2's intervention petition is *denied*.

Pursuant to 10 C.F.R. § 2.714a, the petitioner, within 10 days of service of this Memorandum and Order, may appeal this Order to the Commission by filing a notice of appeal and accompanying brief.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

George A. Ferguson
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 15, 1991

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-302

FLORIDA POWER CORPORATION
(Crystal River Nuclear Generating
Plant, Unit 3) November 3, 1991

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Louis D. Putney, on behalf of Edward S. Wollesen, requesting action with regard to the Crystal River Unit 3 Nuclear Generating Plant (CR-3). Specifically, the Petition alleged that 1500 to 3000 safety-related instruments are not properly identified and are not in a proper calibration program, that the Security and Fire Protection Programs are insufficiently defined and are not auditable, that Florida Power Corporation has not adequately defined and does not know the exact requirements of the plant's Technical Specifications, that the uncontrolled Plant Review Committee Guidelines Manual includes mandatory instructions for nuclear operations, and that because no verification of calibration was performed when instrument calibration stickers were removed from plant instruments there is no assurance that the instruments are in calibration. The Petitioner requests that the NRC institute a proceeding pursuant to 10 C.F.R. § 2.202 to suspend or revoke the operating license of CR-3 or take such other action as may be proper.

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

INTRODUCTION

Louis D. Putney, on behalf of his client, Edward S. Wollesen, filed a request (Petition) dated June 25, 1991, with the Executive Director for Operations,

pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), that the United States Nuclear Regulatory Commission (NRC) institute a proceeding pursuant to 10 C.F.R. § 2.202 to suspend or revoke the operating license of the Florida Power Corporation's (FPC or the Licensee) Crystal River Unit 3 Nuclear Generating Plant (CR-3), or take such other action as may be proper. In response to an NRC request, this Petition was supplemented by a letter from Mr. Wollesen (Petitioner) dated July 23, 1991,[1] which provided additional details and clarification regarding each allegation in the Petition. The original allegations are summarized as follows:

1. 1500 to 3000 safety-related instruments are not properly identified and are not in a proper calibration program. They do not appear on plant engineering diagrams and the diagrams do not represent the actual plant configuration.
2. FPC's Security and Fire Protection Programs are not sufficiently defined as to be auditable.
3. FPC has not adequately defined and does not know the exact requirements of the plant's Technical Specifications (TS).
4. The uncontrolled Plant Review Committee Guidelines Manual includes mandatory instructions for nuclear operations, contrary to NRC requirements.
5. Since no verification of calibration was performed when instrument calibration stickers were removed from the plant's instruments, there is no assurance that these instruments are in calibration.

NRC Inspection Report 50-302/91-15, dated September 11, 1991, documents the results of an inspection by a Region II inspection team covering the issues raised in the Petition and the July 23, 1991 letter. FPC provided its response to the Petition by letter dated September 20, 1991. Both of these documents were considered in evaluating the Petitioner's allegations.

DISCUSSION

A. Plant Instruments Not Calibrated and Not on Engineering Diagrams

The statement of this concern in the Petition is as follows:

> 1,500 to 3,000 instruments in the nuclear plant, most of which are identified to be safety related or important to safety, are not being controlled as required by the regulations of the Nuclear Regulatory Commission, that is, they are not properly identified and are not in a proper calibration program. Therefore, the operability of these instruments, which are relied

[1] Issues related to Petitioner's complaint to the United States Department of Labor regarding the termination of his employment with FPC were raised in the July 23, 1991 letter, but are not addressed herein.

upon by the nuclear operators, is questionable. This is obviously a very serious nuclear safety concern. In more technical terms, these instruments are not in Florida Power's Configuration Management Information System (CMIS), therefore there are no controlled calibration data sheets relating to these instruments. As a result, it is impossible for Florida Power to determine that the instruments meet or remain within their engineering design standards as required by the NRC. Further, the engineering diagrams of the nuclear plant do not include these instruments, and the diagrams are not representative of the actual configuration of the plant, as required by the NRC.

As elaborated by the July 23, 1991 letter, the Petitioner's allegation can be summarized as follows.

Some 1500 to 3000 instruments were removed from the Master Instrument List and do not appear in the Configuration Management Information System (CMIS). As a result, they are not in a proper calibration program and have no controlled calibration data sheets. Therefore, FPC cannot determine if these instruments meet their engineering design standards. The plant engineering diagrams do not show these instruments, particularly those used to monitor the emergency diesel generators which have previously been identified as overdue for calibration.

To correct the shortcomings in its earlier instrument calibration program, the Licensee initiated an enhanced program in early 1988 that simplified and improved the control of instrument calibration. FPC is implementing this new program under FPC's Preventive Maintenance Program, which is supported by a new computerized work control system, the Maintenance Activity Control System (MACS) and the new CMIS. More than half of the 15,000 instruments previously on the Master Instrument List have been deleted from the program because they do not require periodic calibration or are no longer in use. FPC recently removed a number of instrument data sheets, roughly corresponding to the 1500-3000 specified by the Petition, from the Document Control System because the instruments do not require periodic calibration.

Since the 1500-3000 instruments specified by the allegation were not identified, the NRC inspectors examined a random sample of eighty-three instruments on the Master Instrument List dated January 29, 1986. Of these eighty-three instruments, seven were not in the current MACS/CMIS system. However, a valid basis existed for the removal of each instrument from the program, such as removal of the instrument from the plant or installation in a system no longer used in the plant. The remaining seventy-six instruments are listed in MACS/CMIS.

The inspection team also examined a sample of fifty-two plant instruments to determine their current calibration status and schedule for routine calibration.

Some minor deficiencies were noted and identified to the Licensee for correction.[2]

Although procedures implementing MACS and CMIS were found to be generally adequate, the minor deficiencies and the lack of clarity in assignment of responsibility for maintaining instrument categories in CMIS reported by the inspection team indicate that these areas are not fully covered in the procedures and that a comprehensive procedure for controlling and using MACS and CMIS data bases for instrument calibration would be helpful. This was also identified to the Licensee.

However, the above discrepancies have not resulted in instruments not being calibrated as necessary, with no identified exceptions of importance to safety. In general, instruments reviewed by the inspection team are being calibrated even if calibration is shown as not required in CMIS or MACS. Instruments subject to calibration have calibration data sheets controlled within the FPC Documentation Control System. Other significant design information is cross-referenced by one or more CMIS functions.

The inspection team compared the engineering drawings for 21 of the instruments in the 52-instrument sample with the actual plant configuration and found two minor discrepancies which were identified to the Licensee for correction.[3] The inspection team also performed a walkdown of several emergency diesel generator systems on both diesels. For the approximately fifty instruments in the diesel generator systems, no significant discrepancies between the actual systems configuration and the drawings were found. In addition, approximately a dozen diesel-related instruments were reviewed for calibration status, and one was found to be overdue for calibration.

The Licensee has been engaged in a major program to upgrade its overall configuration management program, including a system-by-system evaluation of all components and field validation. After completion of this program on 60%

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[2] Two instruments of the fifty-two were out of calibration, but were so identified in MACS, and work requests were in place to perform calibrations. The one accessible instrument had a deficiency tag on it. Another two of the fifty-two instruments, a flow element and flow transmitter in the reactor building vent mid-range and high range radiation monitor, were not routinely calibrated, because they were classified as not requiring calibration. These instruments are used for post-accident historical data. The Licensee has undertaken to calibrate these instruments in the future, but has not agreed that the classification is incorrect. Four additional instruments were incorrectly classified as not requiring calibration, but were in fact in calibration and scheduled for routine calibration via recurring work request. Another instrument did not have an instrument category assigned in CMIS, and as a result, was incorrectly not required by MACS to be calibrated. However, the instrument was in calibration and was scheduled for routine calibration. The inspection team requested a listing of all instruments with no assigned instrument category, and found that 90% of the 739 such instruments on the list were in fact devices that cannot be calibrated, such as thermowells and solenoid valves. The inspection team reviewed a sample of the remaining 10% of the instruments on the list and found that all the instruments in the sample were in fact calibrated and scheduled for routine calibration. The deficiency in category assignments in CMIS was identified to the Licensee for correction.

[3] Piping drawing WD-101-FE was incorrect in that the integral flow element and transmitter were shown as separate instruments, and there were no flow-element isolation valves. In addition, the drawing label for FS-65-71, fire main pressure at the inlet to the automatic deluge valve, did not agree with the label on the instrument.

of the systems, no programmatic problems have been identified. The program ensures correction of individual discrepancies as found.

Based on the above, we conclude that although many instruments were removed from the Master Instrument List and do not appear in CMIS, they are not required to be in the current calibration program because they either do not require periodic calibration or are not in use in the plant. We further conclude that there is no significant programmatic inadequacy in the Licensee's current instrumentation calibration program, although some specific deficiencies exist and have been identified to the Licensee for correction. The Licensee maintains the necessary calibration data sheets, and the reviewed instruments requiring calibration have, in almost all cases, been calibrated and are scheduled for periodic routine calibration. Emergency diesel generator instruments reviewed were not found overdue for calibration, and no significant discrepancies between these (and other) instruments and plant engineering drawings have been identified. Therefore, we conclude that no substantial safety issue has been raised in the Petition regarding this allegation.

B. Security and Fire Protection Programs Not Adequately Defined

The statement of this concern in the Petition is as follows:

> Florida Power stated in recent Quality Audit Reports (which are required by the NRC under Florida Power's license commitments) that various audited programs, including Security and Fire Protection, complied with NRC requirements. The reports also stated that the programs needed to be defined. In fact, the audited programs are not sufficiently defined so as to be auditable as required by the NRC. These unaudited safety related programs give cause for great concern for the safety of the nuclear plant.

In the July 23, 1991 letter, the Petitioner noted that various FPC audit teams recommended that implementing procedures be listed in the program documents and questioned the procedure review process. The same kinds of questions about the procedure review process are repeated in Allegation C and are addressed in the discussion of Allegation C, below. The NRC addressed only the Security and Fire Protection programs because the Petitioner specifically identified only these programs as examples of "various audited programs."

The inspection team reviewed seven different Licensee and contractor audit reports issued between March 1990 and May 1991 that addressed security or fire protection. No report concluded that the Security or Fire Protection programs needed to be defined. One report concluded that, except for specific findings unrelated to this allegation, the Fire Protection Program was adequately defined. Another recommended that a listing of the fire protection implementing procedures be included in the Fire Protection Plan as an aid, but that, with the

exception of three unrelated findings, the Fire Protection Program was effectively controlled and implemented.

The inspection team found that cross-references between the Fire Protection Plan and implementing procedures are included in individual paragraphs in the Plan. In response to a Licensee QA audit, a separate listing of Fire Protection Plan implementing procedures is being prepared for inclusion in the Plan. In addition, the FPC Nuclear Operations Commitment System (NOCS) was sampled and shown to provide cross-references between selected Plan paragraphs, originating requirements or commitments, and implementing procedures.

The requirements for fire protection at nuclear power plants are defined in considerable detail in 10 C.F.R. § 50.48, 10 C.F.R. Part 50, Appendix R, 10 C.F.R. Part 50, Appendix A, Criterion 3, and, for CR-3 in particular, in its TS. FPC audits and NRC inspections have addressed this program without identifying significant deficiencies in definition or auditability. *See* NRC Inspection Reports 50-302/89-33 and 91-15.

The CR-3 Security Plan has been, and continues to be, in conformance with regulatory requirements. The Security Plan was originally reviewed and approved by the NRC in its Safety Evaluation for the CR-3 operating license dated July 5, 1974. Many specific changes have been reviewed and approved since that time, and review and approval of a full revision of the entire plan was completed in early 1991. (*See* letters dated July 31, 1990, and February 11, 1991, from William E. Cline (NRC) to Percy M. Beard, Jr. (FPC)). Periodic NRC inspections have demonstrated that implementation of the Security Plan is acceptable. *See* NRC Inspection Report 50-302/91-07 (SALP), at 13. The inspection team noted that the NOCS adequately cross-references the Security Plan requirements to the various implementing procedures.

Based on the above, we conclude that the Security and Fire Protection Programs are satisfactorily defined and therefore auditable. Moreover, we have found no evidence that the programs are deficient. Accordingly, we conclude that no substantial safety issue has been raised in the Petition regarding this allegation.

C. Technical Specifications Not Defined, Exact Requirements Unknown to FPC

The statement of this allegation in the Petition is as follows:

> Florida Power's license requirements with the NRC require it to meet the Technical Specifications (TS) for the nuclear plant. Florida Power has not adequately defined and does not know the exact requirements of the Technical Specifications for the nuclear plant,

therefore, Florida Power cannot accurately report that it is complying with the TS, and it is impossible to audit the TS program. This is a serious nuclear safety concern.

In the July 23, 1991 letter, the Petitioner narrowed the allegation considerably, so that the thrust of the allegation is now as follows.

1. The review required by TS 6.8.2.1.a of the implementing procedures for the Security Plan and Fire Protection Plan, and of Administrative Instructions, by the Plant Review Committee (PRC), is not defined and PRC members are not qualified to review implementing procedures.
2. Appendix A of NRC Regulatory Guide (RG) 1.33 "Quality Assurance Program Requirements," identifies certain Administrative Procedures that each licensee must prepare and maintain. Some of the implementing procedures for these Administrative Procedures are not in the group identified as Administrative Instructions, and therefore may not be reviewed at all, or may be reviewed by Qualified Reviewers (rather than the PRC), which would be a reduction in quality.

The Licensee originally proposed complete TS in its operating license application. These were reviewed thoroughly and approved by the NRC. All changes to the TS are likewise reviewed and approved by the NRC prior to issuance. Compliance with the TS is monitored by NRC inspectors. Where there has been evidence of inadequate or incorrect TS, they have been revised. The NRC has no evidence of general lack of definition of the TS or lack of knowledge of its requirements by FPC.

The following addresses the specific allegations of the July 23, 1991 letter.

1. TS 6.5.1.2 specifies areas from which supervisory personnel are to be chosen as members of the PRC, among which is Security. FPC confirmed that members are selected on the basis of qualifications and experience required for their positions. The inspection team found that the PRC "consists of a diverse group of senior nuclear plant managers." The latest NRC SALP report, Inspection Report 50-302/91-07, dated June 28, 1991, states that the PRC "continued to be staffed with qualified personnel." The inspection team further notes that FPC document AI-300, "Plant Review Committee Charter," contains requirements for training PRC members and that FPC maintains a record of such training.

   The Licensee notes that PRC procedure review is performed in accordance with existing guidelines and procedures (AI-300), although there is no checklist defining all the factors the PRC must consider. Rather, the broad experience and qualifications of the members permit an effective review of implementing procedures by collegial discussion. Although individual cases of deficiencies in plant procedures have come to the attention of the NRC (and have been corrected by

the Licensee), the NRC has no evidence that PRC review of those procedures was ineffective because of lack of PRC review definition.

2. The inspection team found that four of the required RG 1.33 Administrative Procedures are not implemented by those FPC procedures categorized as Administrative Instructions, nor are they required to be. Therefore, in accordance with TS 6.8.2.1.b, these must be reviewed by the Qualified Reviewer process, with the PRC being required to review only the 10 C.F.R. § 50.59 safety evaluation. However, the PRC in practice does more than just review the section 50.59 safety evaluation. For other than minor or routine procedure changes, the author of the change or other knowledgeable representative from the responsible department typically makes a presentation to the PRC on the change.

   The classification of "Administrative Instructions" or "other procedures" is not made on the basis of safety importance. Many of the "other procedures" are of significant importance to the safe operation of the nuclear plant, such as procedures for combatting nuclear plant emergencies and for controlling radioactivity.

   Administrative Instructions typically cover matters of general policy or broad applicability, and therefore warrant PRC review. Other procedures involve areas of narrower applicability and greater technical detail. These other procedures must be reviewed by an intradepartmental Qualified Reviewer, and where appropriate, by interdisciplinary Qualified Reviewer(s) in interfacing departments, and be approved by the responsible Superintendent or Manager. Qualified Reviewers are typically experienced personnel with a high level of technical knowledge in a particular area who also have specialized training in review of procedures. NRC requirements for training and qualifications of Qualified Reviewers are contained in TS 6.8.2.2.

Based on the above, we conclude that the CR-3 TS are adequately defined and that the Licensee has adequate knowledge of their requirements. We further conclude that PRC members are qualified and adequately trained to review implementing procedures, that PRC review of such implementing procedures complies with TS 6.8.2.1.a, and that PRC review is adequately defined. We also conclude that review of implementing procedures of the four required RG 1.33 Administrative Procedures in accordance with TS 6.8.2.1.b (Qualified Reviewer process) is acceptable. Furthermore, there is no reason to conclude that the Qualified Reviewer process constitutes a reduction in quality. Therefore, no substantial safety issue has been raised in the Petition regarding this allegation.

D. Mandatory Instructions in Uncontrolled Documents

The statement of this concern in the Petition is as follows:

> The NRC requires that Florida Power not include mandatory instructions in uncontrolled manuals used by nuclear operations (ANSI Standard N45.2.10-1973). This is because uncontrolled manuals may be outdated, causing personnel to implement the wrong procedure. Florida Power's Plant Review Committee Guidelines Manual, an uncontrolled manual, includes mandatory instructions for nuclear operations. This is a serious nuclear safety concern.

The July 23, 1991 letter indicated that the "mandatory instructions for nuclear operations" contained in the uncontrolled PRC Guidelines Manual were instructions to comply with the TS (presumably TS 6.8) governing PRC activities, and Administrative Instruction AI-300, "Plant Review Committee Charter."

The inspection team examined copies of the PRC Guidelines Manual, and found that they contained outdated TS pages and an outdated copy of AI-300. Both the TS pages and AI-300 include mandatory instructions for conduct of the PRC. Although the PRC Guidelines Manual contains the word "guidelines," it was officially distributed to PRC members for use in performing PRC duties, and is listed in AI-300 as an implementing reference. Therefore, TS requirements and implementing procedures contained in the Guidelines Manual should be up to date. Accordingly, a noncited violation was identified (NCV 91-15-02). This violation was not cited in a Notice of Violation because criteria specified in 10 C.F.R. Part 2, Appendix C, § V.A (NRC Enforcement Policy) were satisfied. This was an isolated Severity Level V violation, and the Licensee initiated appropriate corrective action before the inspection ended, as discussed below. The NRC considers this violation to be of minor safety significance. FPC stated that it considered the PRC Guidelines Manual to be a "guidance" document and, as an uncontrolled document, did not rely on it to provide mandatory instructions of any kind. Training of PRC members includes a review of the current revision of AI-300 and emphasizes that employees refer to the latest revision of plant documents. AI-300 and the TS are controlled documents, and it is not likely that outdated copies in the PRC Guidelines Manual would have caused a PRC member to take erroneous action or to take any action that would negatively affect nuclear safety. Moreover, the Licensee took prompt initial corrective action, including revising AI-300 to delete the PRC Guidelines Manual from the list of implementing references and recalling all copies of the PRC Guidelines Manual. The NRC will review the Licensee's final corrective action.

Based on the above, we conclude that no substantial safety issue has been raised in the Petition regarding this allegation.

E. Knowledge of Instrument Calibration Status

The statement of this concern in the Petition is as follows:

> The January 1991 QPS Audit identified problems with instrument calibration at the nuclear plant. Florida Power had recently adopted a program to remove the instrument calibration stickers from the plants instruments. The stickers were the only place to obtain current information on the instruments. In implementing this program, no verification of calibration was performed, therefore, there is no assurance these safety related instruments are in calibration as required by the NRC. When this problem was identified, audit management and the nuclear plant management told the audit team to forget the issue. This is a serious nuclear safety concern.

The July 23, 1991 letter indicates that the Petitioner's concern focused on operator knowledge of the calibration status of the instruments and the alleged failure of the new calibration program to properly inform operators of instruments past due for calibration.

A system of instrument tags is the principal method by which operators are provided the required information on the status of instrument calibration. Organizations responsible for calibration of instruments attach yellow stickers to instruments overdue for calibration. Operators have been directed to assume that any instrument not so tagged is in calibration, and any instrument with a tag is either overdue for calibration or in need of maintenance. Operators are not to use such tagged instruments without further review. Although MACS provides the calibration status of individual instruments and also lists all out-of-calibration instruments associated with a particular surveillance procedure, it appears that operator training in and ability to utilize MACS is not fully effective. This was identified to the Licensee as a weakness.

Regarding the Petitioner's allegation that the calibration stickers formerly in use were the only place to obtain current calibration information on the instrument, the inspection team found that the Licensee's official record of instrument calibration was and continues to be the instrument calibration data sheets. These are retained in document control and information therein is entered into a computer data base separate from MACS and accessible from many computers, including those in the control room. The Licensee also stated that in a recent audit, random checks by each audit team member did not identify any instruments out of calibration.

Based on the above, we conclude that adequate information is readily available to operators to ascertain the calibration status of instruments. Therefore, no substantial safety issue has been raised in the Petition regarding this allegation.

CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only when 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, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). The NRC has applied this standard to determine if the actions requested in the Petition are warranted. For the reasons discussed above, the NRC has no basis for taking the actions requested in the Petition, since no substantial health and safety issues have been raised by the Petition. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied.

A copy of this decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 3d day of November 1991.