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NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1988

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January 1988

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Appeal Boards (ALAB), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judge (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 to have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

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Christine N. Kohl
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APPEAL BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL-1
50-444-OL-1
(Onsite Emergency Planning
and Safety Issues)

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1
and 2)

January 8, 1988

The Appeal Board in this operating license proceeding determines that the evidentiary basis of a Licensing Board's favorable finding of the environmental qualification of a type of coaxial cable used for data transmission in Seabrook's computer system is inadequate to support that finding and remands the issue to that Board for additional proceedings.

APPEARANCES

Diane Curran, Dean R. Tousley, and **Ellyn R. Weiss,** Washington, D.C., for the intervenor New England Coalition on Nuclear Pollution.

Thomas G. Dignan, Jr., George H. Lewald, and **Kathryn A. Selleck,** Boston, Massachusetts, for the applicants Public Service Company of New Hampshire, *et al.*

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

In ALAB-875[1] we confronted, *inter alia*, a challenge by the intervenor New England Coalition on Nuclear Pollution (Coalition) to the Licensing Board's disposition in its March 25, 1987 partial initial decision[2] of one of the issues the Coalition raised in the onsite emergency planning and safety issues phase of this operating license proceeding involving the Seabrook nuclear facility. Specifically, the Coalition disputed the Board's finding that the RG58 coaxial cable, used for data transmission in the facility's computer system, had been demonstrated to be "environmentally qualified" — i.e., capable of continuing to perform its intended function for such period as might be necessary after a severe (e.g., loss-of-coolant) accident.[3]

Our review of the matter did not disclose a sufficient evidentiary foundation for that finding. Accordingly, ALAB-875 returned the issue to the Licensing Board with instructions either (1) to identify the portion of the existing record that provided such a foundation; or (2) to reopen the record for a further exploration of the environmental qualification of RG58 cable.[4]

In an October 16, 1987 memorandum (unpublished), the Licensing Board pointed to what it deemed to be adequate evidentiary support for the challenged finding. Given the cited evidence, the Board informed us that it had determined that there was no need to reopen the record.

The Coalition, the applicants, and the NRC staff each took advantage of our invitation to comment on the substance of the Licensing Board's memorandum. On the basis of those comments and our own independent evaluation of the Board's analysis, we conclude that the matter must be remanded once again. For reasons that will appear, we do not believe that the evidence cited by the Licensing Board provides sufficient support for its finding that the RG58 coaxial cable is environmentally qualified. Although the applicants have brought our attention to certain other evidence that they assert does supply a satisfactory basis for the finding, we believe that the Licensing Board should evaluate that claim in the first instance.

1. As noted in ALAB-875, unlike two other types of coaxial cable (identified as RG11 and RG59) similarly supplied by the International Telephone and

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[1] 26 NRC 251 (1987).
[2] *See* LBP-87-10, 25 NRC 177.
[3] The requirement that the RG58 cable meet this standard is rooted in General Design Criterion 4 in Appendix A to 10 C.F.R. Part 50 and 10 C.F.R. 50.49(b).
[4] *See* 26 NRC at 269-71.

Telegraph Corporation (ITT), the RG58 cable was not itself tested for the purpose of determining whether it is environmentally qualified. Rather, it appeared from the applicants' equipment qualification file (EQF) pertaining to that vendor's cables that the RG58 cable was deemed qualified solely on the basis of the tests performed on the RG59 cable.[5] These two cables are indisputably similar in materials and construction. Nonetheless, because of what seemed to be significant differences in the dimensions of their conductors and insulation, it was not clear to us that the RG59 cable test results could serve as the foundation for the environmental qualification of the RG58 cable. The Licensing Board was therefore asked to refer us to disclosures in the existing record that established "that the differences in the two cables are unimportant for present purposes" or, failing that, to reopen the record to explore further the acceptability of using the RG59 cable test results to qualify the RG58 cable.[6]

In its October 16 responsive memorandum, the Licensing Board cited two segments of the EQF (not alluded to in the partial initial decision) as justifying the conclusion that the RG59 cable test results could be used to establish the environmental qualification of the RG58 cable. First, the Board pointed to the fact, revealed in Reference 1 of the EQF, that there are different operating requirements for the insulation resistance (IR) of the two cables. The requirement for the RG59 cable, which has an insulation thickness of 0.061 inch, is 10,000 megohms per 1000 feet of cable. For its part, the RG58 cable, with an insulation thickness of 0.040 inch, has an IR operating requirement per 1000 feet of one-tenth of that amount (i.e., 1000 megohms). These data led the Board to conclude that "the predicted performance of the smaller RG58 cable under conditions of environmental qualification testing would be proportional to the lower required operating resistance of its insulation."[7]

Second, the Licensing Board noted that the RG59 cable had been subjected to a high-potential test during which it was required to withstand an alternating current (ac) voltage of 80 volts per mil (0.001 inch) of insulation thickness. Inasmuch as this specific environmental qualification requirement thus takes into account the thickness of the insulation (i.e., the greater the thickness, the higher the voltage that must be withstood, and vice versa), the Licensing Board reasoned that a high-potential test of the RG58 cable would have yielded results similar to the acceptable results obtained in the testing of the RG59 cable.[8]

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[5] This EQF, identified as Electrical Equipment Qualification File No. 113-19-01, was introduced into evidence as the Coalition's Exhibit 4. One of the purposes of EQFs is to record the manner in which particular equipment is determined to be environmentally qualified.

[6] ALAB-875, 26 NRC at 271.

[7] Memorandum to the Appeal Board (October 16, 1987) at 3.

[8] *Id.* at 3-4. Insofar as the difference in the dimensions of the conductors is concerned, the Board observed that it "could find no requirements in the environmental qualification acceptance criteria, or in the environmental qualification tests themselves, that depended upon the diameter or cross-sectional area of the conductors." *Id.* at 2-3.

2. We agree with the Coalition and the staff that there is evidence in the record that casts considerable doubt on the validity of a principal underpinning of the Licensing Board's thesis — namely, that the performance of the RG58 cable could be predicted on the basis of the satisfactory test results obtained with regard to the RG59 cable. As seen, that thesis rests in large measure on the premise that, at least in the case of ITT coaxial cable, there is a fixed relationship between the thickness of the cable insulation and the specified operating insulation resistance. But that premise is torpedoed by the data in the EQF pertaining to RG11 coaxial cable.

That cable (which, according to the Licensing Board, possesses the same insulation material and construction details as the RG59 cable[9]) has an insulation thickness of 0.122 inch.[10] Because that is twice the thickness of the RG59 cable insulation, under the Licensing Board's hypothesis one would have to assume that the specified operating insulation resistance for the RG11 cable would appreciably exceed the 10,000 megohm value assigned to the RG59 cable. The actuality is, however, that the same value is specified for both cables.[11] In short, the presumed relationship between insulation thickness and operating insulation resistance simply has not been established.[12]

Turning to the second prong of the Licensing Board's analysis in its October 16 memorandum, no party appears to dispute that a high-potential test of the RG58 cable would likely have produced results similar to the acceptable results obtained in the testing of the RG59 cable. But, standing alone, that fact does not serve to justify the Board's ultimate conclusion that the RG58 cable can be considered environmentally qualified on the strength of the tests performed on the RG59 cable. In order to reach that conclusion, one would first have to determine that, of the tests utilized in probing the environmental qualification of electrical equipment, only the high-potential test has relevance in the case of the RG58 cable.

The applicants assert that the function of the RG58 cable is not the mitigation of the consequences of an accident. Rather, they insist, the EQF establishes that, should an accident occur, that cable need maintain its integrity only to the extent necessary to avoid compromising the fulfillment of the safety function of other components.[13] It follows, we are told, that the high-potential test *is* all that need be satisfied to demonstrate the environmental qualification of the cable.

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[9] *See* LBP-87-10, 25 NRC at 210-11.

[10] *See* Coalition Exhibit 4, Reference 1, Appendix A.

[11] *Id.* at Reference 1, sections 2.6.1.1.b, 2.6.1.2B.b, and 2.6.1.2C.b.

[12] For their part, the applicants contend that operating insulation resistance values should not be considered as acceptance criteria for accident conditions. If this is so, it would appear that in no event could the relationship between the 10,000 and 1000 megohm values assigned to the RG59 and RG58 cables, respectively, be used to demonstrate environmental qualification.

[13] In this regard, the applicants cite Coalition Exhibit 4, Reference 1, Appendix A, at A1; Reference 7 at 2; Reference 6.

This well may be so. Insofar as we can ascertain, however, such a line of argument was never presented to the Licensing Board. Moreover, there is nothing in either its partial initial decision or its October 16 memorandum to suggest that the Board considered and placed reliance upon the proposition that the RG58 cable has a very limited post-accident function, which, in turn, drastically reduces the scope of the environmental qualification requirements it must satisfy.

As a general matter, claims that have an asserted evidentiary foundation should be first examined by the trial tribunal. In the circumstances, then, we believe it appropriate to leave it to the Licensing Board to pass initial judgment upon the applicants' new claim. If the Board finds the claim meritorious, it should issue another memorandum setting forth its reasons. On the other hand, if the claim is rejected, our disapproval of the analysis of the operating insulation resistance matter contained in the October 16 memorandum will necessitate a reopening of the record to pursue further the question whether the RG59 cable test results can serve as the foundation for the environmental qualification of the RG58 cable.

The issue concerning the environmental qualification of RG58 cable is *remanded* to the Licensing Board for additional proceedings consistent with this opinion.[14]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[14] Should it prove necessary, the Licensing Board is to decide whether low-power operation of the Seabrook facility must await the completion of this remand.

In its comments on the Licensing Board's October 16 memorandum, the Coalition attempted to raise the question whether the tests applied to the RG59 cable were sufficient even to qualify that cable. *See* New England Coalition on Nuclear Pollution's Supplemental Memorandum Regarding Environmental Qualification of RG58 Coaxial Cable (November 4, 1987) at 6. That question was not presented on the Coalition's appeal from the partial initial decision and we therefore do not consider it.

Atomic Safety and Licensing Boards Issuances

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of

Docket No. 50-322-OL-6
(ASLBP No. 87-553-04-SP)
(Emergency Planning)

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

January 7, 1988

In this Memorandum and Order, the Licensing Board rules that Applicant's "Motion for Authorization to Increase Power to 25%" is properly filed and may be considered by the Board without any exemption from the Commission's regulations; but that due process may require a hearing on any unresolved contentions found to be relevant to the motion.

OPERATING LICENSES: AUTHORIZATION FOR LOW-POWER OPERATION; EMERGENCY PLANNING

Where only emergency planning contentions remain to be adjudicated, if an applicant submits a request under 10 C.F.R. § 50.57(c) for operation in excess of 5% power, and asserts that the unresolved contentions can be resolved for the requested power level by virtue of the "not significant for the plant in question" provision of 10 C.F.R. § 50.47(c)(1), the request must be given serious consideration by the Licensing Board.

OPERATING LICENSES: AUTHORIZATION FOR LOW-POWER OPERATION; EMERGENCY PLANNING

The plain wording of 10 C.F.R. § 50.57(c) requires the Board to consider whether pending contentions are relevant to the Applicant's request for authorization to increase power; to allow any party with contentions an opportunity to show that those contentions are so relevant; and to make findings on the application of the criteria in 10 C.F.R. § 50.57(a) to the matters in controversy.

OPERATING LICENSES: AUTHORIZATION FOR LOW-POWER OPERATION; EMERGENCY PLANNING

Where neither common defense and security, nor the plant's conformity with the application is in issue, a positive finding under subsection (a)(3) of 10 C.F.R. § 50.57 would be tantamount to a positive finding for all subsections of that section, and the Board must proceed on the assumption that a restricted power license can issue only if its issuance, the operation of the facility, and the activities authorized will all give reasonable assurance of protection of public health and safety and compliance with the regulations.

OPERATING LICENSES: AUTHORIZATION FOR LOW-POWER OPERATION; EMERGENCY PLANNING

Although the Commission has not spoken directly on this matter and there appears to be no precedential case law controlling, the Commission's emergency planning regulations are promulgated as a matter of policy, and relief from their requirements cannot generally be obtained based on probabilistic risk assessments that show low risk to public health and safety from reactor operations at restricted power levels.

OPERATING LICENSES: AUTHORIZATION FOR LOW-POWER OPERATION; EMERGENCY PLANNING

It is well established that relief from the Commission's safety regulations cannot be founded upon economic considerations. Thus, it would not be fruitful to pursue a restricted power license based on the possible economic impact of power shortages, because even if true beyond question, relief could not be granted for that reason alone.

MEMORANDUM AND ORDER
(In Re: LILCO'S Request for Authorization to Operate at 25% of Full Power)

INTRODUCTION

Before us is the Applicant's "Motion for Authorization to Increase Power to 25%" of July 14, 1987 (Motion), together with an ensuing agglomerate of answers, replies, responses, and counter responses.[1] It was at the outset by no means clear, either from the Motion or from the original Request for Authorization, exactly what path of reasoning through the legal maze the Applicant intended us to wend toward the relief it sought. Because of this we issued our Memorandum to the Parties of October 8, 1987 (unpublished). We pointed out therein that the Applicant had originally characterized its request as being under 10 C.F.R. § 50.47(c)(1), that the Commission had directed that the request, if refiled with this Board, be filed under 10 C.F.R. § 50.57(c), but that, in refiling, Applicant had merely stated that the request was under the required section but had, in effect, neither changed the previous reasoning nor demonstrated the chain of logic that linked it to the required section of the regulations.

In LILCO's Brief and LILCO's Reply the Applicant has largely ameliorated the flaw, establishing a train of reasoning that we can at least follow, although we cannot, as explained below, fully support it.

As we understand LILCO's theory of the case, the logic is as follows: The request for 25% power is made under the provision of 10 C.F.R. § 50.57(c)

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[1] These include: LILCO's "Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request" of July 14, 1987 (Designation Motion); "Suffolk County, State of New York, and Town of Southampton Statement Concerning LILCO's July 14, 1987, Motion to Increase Power to 25%" of July 27, 1987 (Governments' Opposition to Designation); "Suffolk County, State of New York, and Town of Southampton Response in Opposition to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request" of July 27, 1987 (Opposition to Designation); "NRC Staff Response to LILCO Motion for Authorization to Increase Power to 25%" of July 29, 1987 (Staff Response to Motion); "LILCO's Brief on 25% Power Questions" of November 6, 1987 (LILCO's Brief); "Views of Suffolk County, the State of New York, and the Town of Southampton in Response to the Licensing Board's October 6, 1987 Memorandum Concerning LILCO's Request to Operate at 25% Power" of November 6, 1987 (Governments' Views); "NRC Staff Response to Board Memorandum Requesting Parties' Views on Questions Raised by LILCO 25% Power Authorization Motion" of November 6, 1987 (Staff's Views); "LILCO's Reply Brief on 25% Power Questions" of November 16, 1987 (LILCO's Reply); "Reply of Suffolk County, the State of New York, and the Town of Southampton to LILCO's Brief on 25% Power Questions" of November 16, 1987 (Governments' Reply); and "NRC Staff Reply to Other Party Views on Board Questions Concerning LILCO Motion for Authorization to Operate at 25% Power" of December 15, 1987. All these filings reference or are founded upon LILCO's "Request for Authorization to Increase Power to 25% and Motion for Expedited Commission Consideration" filed before the Commission on April 14, 1987 (Request for Authorization); Governments' "Response in Opposition to LILCO's Motions for Expedited Commission Consideration" of April 27, 1987 (Governments' Opposition to Commission' Expedited Consideration); Staff's "NRC Staff Response to LILCO Motion for Expedited Consideration of Request to Authorize Operation at 25% of Full Power" of April 29, 1987 (Staff Support of Expedition); and the Commission's ensuing Memorandum and Order, CLI-87-4, 25 NRC 882 (1987).

which would allow "operations short of full power operations" upon favorable findings concerning the matters under 10 C.F.R. § 50.57(a). LILCO believes that only one numbered section of 50.57(a), § (a)(3), involves any dispute, and believes further that the showing that has been made under § 50.47(c)(1) by its Request for Authorization fully satisfies the two-pronged test of § 50.57(a)(3) by demonstrating that the 25% power operation "can be conducted without endangering the health and safety of the public" and "will be conducted in compliance with the regulations." LILCO's Brief at 5, 6.

The Governments view LILCO's implication that it has demonstrated compliance with § 50.47(c)(1) as "patently false." Governments' Reply at 4. The Governments point out that before a license can be issued under § 50.57(c) there must be an initial decision on the matters identified in § 50.57(a). Further, the Governments argue that §§ 50.57(a)(2), (3), and (6) must all be satisfied, not simply § 50.57(a)(3) alone. They point out further that LILCO has not acknowledged the important provision of § 50.57(c) that the parties have the right to be heard on relevant contentions before the required initial decision is issued. Governments' Reply at 6.

Staff cites § 50.57(c):

> Action on [a motion to operate at low power] shall be taken by the presiding officer with due regard to the rights of the parties to the proceeding, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. . . .

The Staff then notes that "[t]his language indicates that the Board should (1) consider whether pending contentions in the proceeding are relevant to the request for authorization of the activity (here 25% power operation); (2) allow any party with contentions the opportunity to show that those contentions are so relevant; and (3) make findings on the application of the § 50.57(a) criteria to the activity sought to be licensed with respect to those criteria [*sic;* contentions] placed into controversy by an opposing party." Staff's Views at 6.

We are thus confronted at the outset with the following questions:

1. Can the Applicant rely upon § 50.57(c) to obtain authorization for operation at less than full power by using § 50.47(c)(1) to meet the requirements of § 50.57(a)?
2. Which of the requirements of § 50.57(a) must be met in this manner?
3. Which, if any, of the contentions currently in litigation are "relevant to the activity to be authorized"?
4. Through which of the three permitting conditions of § 50.47(c)(1) ("not significant for the plant in question," "adequate interim com-

pensating actions," or "other compelling reasons") can § 50.57(c) be seen to function where the movant attempts to rely on the sequence in question 1, above?

ANALYSIS OF QUESTION 1

In examining the way in which § 50.47(c)(1) can be used to satisfy the requirements of § 50.57(c), it is instructive to consider the history of the section under which LILCO is presently operating the plant at 5% power, § 50.47(d). That section is of comparatively recent origin (47 Fed. Reg. 30,232 (July 13, 1982)) and postdates both § 50.57(c) and § 50.47(c)(1). Two cases, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-21, 14 NRC 107 (1981), and *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61 (1982), arose before the Commission adopted § 50.47(d), and in each the applicant sought permission to operate at low power for testing purposes while still unable to fully comply with the Commission's emergency planning requirements. *Diablo Canyon*, 14 NRC at 120 *et seq.*; *San Onofre*, 15 NRC at 191 *et seq.*

In each case the applicant argued, as LILCO does here, that operation at a restricted power level (there 5%, here 25%) so reduced such factors as fission product inventory, residual heat, urgency to respond to off-normal conditions, and the possible consequences of an accident that the deficiencies of the emergency plans were not significant for the plant in question. 14 NRC at 123-39; 15 NRC at 191-97. After hearing argument the boards in those cases found that, for the proposed operations, the deficiencies in the plans were indeed not significant. 14 NRC at 139; 15 NRC at 197.

Both of these decisions were undisturbed on review. Indeed, when the Commission issued the rule change that created § 50.47(d), permitting operation up to 5% without full compliance with the emergency planning regulations, it noted these decisions favorably, saying:

> The level of risk associated with low-power operation has been estimated by the staff in several recent operating license cases: Diablo Canyon . . . San Onofre . . . and LaSalle . . . . In each case the Safety Evaluation Report concluded that low-power risk is several orders of magnitude less than full-power risk. These findings support the general conclusion in the text that a number of factors associated with low-power operation imply greatly reduced risk compare[d] with full power.

47 Fed. Reg. 30,232, 30,233 n.1.

We see a compelling analogy between the situation obtaining before the rule change with respect to *all* low-power operation and that obtaining at present with

respect to operation above 5%. Where only emergency planning contentions remain to be adjudicated, if an applicant submits a request under § 50.57(c) for operation in excess of 5% power, and asserts that the unresolved contentions can be resolved for that power level by virtue of the "not significant for the plant in question" provision of § 50.47(c)(1), we must at least give the request serious consideration. It is at least possible that the applicant may be able to comply with the regulations and obtain a low-power license through this route. Thus we conclude that LILCO'S motion is properly filed and that no exemption from the regulations is needed as urged by the Governments.

We caution, however, that the road may be a difficult one. In particular, we note that the Commission sanctioned 5% operation in part because Staff analyses had indicated that the risks involved were "several orders of magnitude less than full power risk." It may well be that the risk at 25% is not so greatly diminished. We note also that the Statement of Considerations that the Commission offered at the time of the rule change specifically noted that while the rule change exempted the applicant from NRC and FEMA review of many of the requirements of § 50.47(b), the NRC would nonetheless be expected to review for compliance with subsections 50.47(b)(3), (5), (6), (8), (9), (12), and (15). 47 Fed. Reg. at 30,233. The exact significance of the Commission's establishing this requirement we have not evaluated in the light of § 50.47(c)(1)'s stated relief from *all* the requirements of § 50.47(b).

Furthermore, we agree with the Staff that the plain wording of § 50.57(c) requires that we "(1) consider whether pending contentions in the proceeding are relevant to the request . . . ; (2) allow any party with contentions the opportunity to show that those contentions are so relevant; and (3) make findings on the application of the § 50.57(a) criteria to the activity sought to be licensed" with respect to the matters in controversy.

The interaction between §§ 50.57(c) and 50.47(c)(1) is, in the case at bar, also complex. It would appear to the Board, for example, that the "relevance" test for contentions expressed in § 50.57(c) is much less rigorous than the "not significant" test of § 50.47(c)(1). Further, LILCO's claim that 25% of power operation lowers the risk sufficiently so that any emergency planning deficiencies are insignificant or compensated (LILCO's Reply at 10) is a claim that inherently compares two incommensurables. How far some given risk must drop and in what way it must drop in order that some particular precaution may become unnecessary is not a matter instantly perceived.

Thus our answer to question 1 is: The applicant is entitled to pursue this course, but the circumstances of a particular case may well require a hearing, and we are bound to consider at the outset whether due process requires such a hearing and upon which of the unresolved contentions it should be based.

ANALYSIS OF QUESTION 2

Here the controversy is simple, direct, and, in the Board's view, of little consequence. The Governments believe that the motion under § 50.57(c) must consider subsections 50.57(a)(2), (3), and (6). Governments' Reply at 5-6. LILCO believes it need only satisfy the requirements for § 50.57(a)(3). LILCO's Reply at 3-5. Staff apparently takes no position.

The three subsections involved in the dispute set forth findings that would be required in order to issue a license (whether for full power or for limited power under § 50.57(c)). They read as follows:

> § 50.57(a) Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51, upon finding that:
>
> • • •
>
> (2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
>
> (3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and
>
> • • •
>
> (6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

LILCO's position, while not succinctly expressed, is apparently that, since only subsection (a)(3) requires "reasonable assurance" and that "reasonable assurance" finding was made with respect to the extant 5% power license, all other § 50.57(a) findings, for whatever power level, have already been resolved favorably to LILCO. LILCO's Reply at 6. We find the logic difficult to follow, but we see no need to grapple with it.

In the Board's view, for this case, where common defense and security are not at issue nor is the plant's conformity with the application, a positive finding under § 50.57(a)(3) would, in fact, be tantamount to a positive finding for all three of the subsections at issue. Certainly a negative finding would be dispositive. We shall proceed on the assumption that a license can issue only if its issuance, the operation of the facility, and the activities authorized will all give reasonable assurance of the protection of health and safety and compliance with the regulations.

ANALYSIS OF QUESTION 3

The question of which contentions currently in litigation are relevant in a substantive way to the activity to be authorized is a question that stands at the core of any litigation concerning the request for 25% power. Furthermore, it is

a question of great complexity, involving as it does the interplay of emergency preparedness with the variable scope of potential accidents when that scope is considered as a function of power level. There are no quick or obvious answers, and, in our view, the answer to this question may itself be achieved only through the analytic crucible of litigation.

The matter of the validity of the technical analysis supporting LILCO'S motion is a narrow one and constitutes only a small part of the total litigation. Its complexity together with the existing burdens on this Board, however, calls, we believe, for the attention that could only be given by separating out that portion of the case for separate consideration. Four possibilities present themselves: We can request the appointment of a separate board, the appointment of a Special Master, the appointment of an Alternate Board Member, or a Technical Interrogator. In any case the new forum would consider the discrete question of whether any of the contentions currently before this Board, including both the so-called legal authority contentions and the contentions before us on remand, are substantively relevant to the proposed operation at 25% of full power. These bodies would be empowered to examine the relevance of such contentions based on LILCO'S technical risk assessment and on any evidence produced by other parties.[2] The chief difference in their powers would be that a Board so appointed could decide, upon finding that none of the contentions had substantive relevance to 25% operation, that an initial decision could be issued and the request could be granted. If the contentions were evaluated in opposition to a favorable finding under § 50.57(3), the request would be denied. In either case, the decision of the separate board would be appealable. The authority of the Special Master, Alternate Board Member, or Technical Interrogator would be limited to the advisory and assistant role established by 10 C.F.R. § 2.722. The matter of dealing with those contentions at 25% of power would be left to the present Board. We defer deciding what further procedures may be required at that point. It appears certain to us now that the examination of this question cannot be accomplished without some opportunity for the Governments to review both LILCO's original request and the Staff's analysis thereof. In the interest of expedition we therefore direct that the Staff resume its review of the proposal. Further, in order to focus the inquiry, we believe that the Governments must be given further opportunity to state with basis and specificity the ways in which any of their present contentions are relevant to the proposed operation. These statements, of course, would necessarily await the

[2] Our understanding of LILCO's intent is that it would attempt to prevail on a showing of immateriality of the unresolved contentions under § 50.47(c)(1) based on its technical risk assessment and the uncontested elements of emergency planning now in place. Therefore, the inquiry of the separate forum would focus on the risk assessment and not on final resolution of the remaining contentions in the case. If LILCO establishes that the plant is sufficiently safe when restricted to a maximum of 25% power so that the remaining contentions are immaterial to public health and safety, the contentions would be substantively irrelevant for the purposes of § 50.57(c).

publication of the Staff Safety Evaluation and a reasonable period for review by the Governments' experts. The precise schedule for review, submission of statements, and comment by the parties on such statements would be set by the proposed new Board, Special Master, Alternate Board Member or Technical Interrogator with due regard to the equities involved.

We therefore seek the parties' comments on the relative advantages and disadvantages of requesting that the Chief Administrative Judge appoint an auxiliary board, or in consultation with him, a Special Master with the parties' consent, or an Alternate Board Member, or Technical Interrogator without it. 10 C.F.R. § 2.722(a)(2)(3). The parties have of course given us their views on this matter previously, but this was before we decided that LILCO's motion is properly filed and that it is entitled to timely consideration of its motion under existing regulations without first seeking an exemption. With today's decision it is no longer open to the parties to argue that LILCO is not entitled to proceed on the course it has chosen, that no consideration at all be given its request, or that its request be deferred indefinitely. We can and do additionally consider LILCO's economic concerns in deciding that as a procedural matter LILCO is entitled to explore all possibilities afforded by NRC regulations for obtaining an operating license for Shoreham within a meaningful time frame. Therefore, it is no longer open to the parties to argue that no proceeding be undertaken or that it be long deferred on grounds of excessive burden or lack of resources. Further proceedings by one of the above alternatives, unless LILCO withdraws its request, are inevitable. Parties' views on the best alternatives for going forward may be changed by these developments, and their recommendation on the narrow issue we pose is warranted.

ANALYSIS OF QUESTION 4

As is clear from the discussion above, in the cases that we regard as precedential concerning the matter of operation at powers less than full power, § 50.47(c)(1) was deemed to operate through its "not significant for the plant in question" provision both by the boards that decided the issue and by the Commission. We believe that it should so function here.

We have given consideration to LILCO's position that the other provisions of § 50.47(c)(1) may also afford the requested relief. The position of both Staff and Governments is that the notion of "adequate interim compensating action" was meant to cover the situation where provisions in the emergency plans of one organization compensated for deficiencies in the preparedness of other organizations but was not meant to apply to whatever safety benefits that might result from operation of the reactor at restricted power levels. We are persuaded by the briefings of the parties and our own review of the regulations that

emergency planning regulations are promulgated as a matter of policy and that relief from the requirements of these regulations cannot generally be obtained based on probabilistic risk assessments that show low risk to public health and safety from restricted reactor operations. The Commission has of course devoted considerable effort to ensuring that reactor operations even at 100% power have low risk to the public but still it requires emergency preparedness.

The Commission has not spoken directly on this matter and there appears to be no precedential case law controlling. Additionally, LILCO argues that restricted power levels are but one element among several that together would permit its motion to be granted under the adequate interim compensating action provision § 50.47(c)(1). This route therefore remains at least potentially open to obtain the relief sought if LILCO wants to pursue it although the burden may be a difficult one.

We also considered whether "other compelling reasons" could include impending power shortages on Long Island as a basis for relief as espoused by LILCO. Power shortages may cost money; they may inconvenience people or threaten jobs or loss of industrial capacity. LILCO has not alleged and we find no reason for believing that there are reasons, for granting the request under this provision, related to the public health and safety, at least at any level of significance likely to result from the near-term unavailability of Shoreham. Thus, LILCO's reliance on this provision of § 50.47(c)(1) appears to be based principally on an economic argument. It is well established that relief from the Commission's safety regulations cannot be founded upon economic considerations. The Commission has clearly designated emergency planning as a matter required for protection of public health. Thus, we do not believe that it would be fruitful to pursue a restricted power license for Shoreham based on the possibility of power shortages on Long Island, because even if true beyond question, relief could not be granted for that reason alone. If safety-related reasons exist for granting a license to operate at 25% power, they will have to succeed on their own merit under the regulations without assistance from economic considerations.

CONCLUSION

LILCO has the right to pursue operation at 25% of full power by invoking § 50.57(c) and using § 50.47(c)(1) in the latter's "not significant for the plant in question" provision to satisfy the requirements of § 50.57(a)(3) as required under § 50.57(c). The Governments, however, have the right to be heard to the extent that their contentions are relevant to such operation.

In order to ensure all parties' rights in this proceeding, we direct that the Staff resume its review of LILCO's proposal, and we direct that all parties comment

upon the relative desirability of appointing a Special Master, another board, an Alternate Board Member, or Technical Interrogator to direct the inquiry into whether there are extant contentions in this case that are substantively relevant to the proposed operation at 25% of power. If a Special Master is appointed, such Special Master would be empowered only to recommend to this Board whether there is such relevance to the contentions presently before us. If a board is appointed, such board would be empowered to grant LILCO's request upon a finding that no such contentions existed or, if relevance is found, to deny LILCO's motion. If the motion is denied, this Board will seek the views of the parties as to whether it would be preferable to proceed with resolution of emergency planning contentions for 25% power or for 100% power in the posture of the case as it then exists. If an Alternate Board Member is appointed, that alternate will submit a report to the Board, which will be advisory only, and if a Technical Interrogator, that person will assist the Board in evaluating evidence and preparing a suitable and complete record. This Board will retain jurisdiction over resolution of existing emergency planning contentions at all times.

ORDERED:

1. LILCO is entitled to proceed with its request for 25% power operation under 10 C.F.R. § 50.57(c).

2. Intervenors are entitled to be heard on the relevance of their contentions to LILCO's request.

3. The Staff is directed to proceed with a review of LILCO's 25% power request.

4. The parties are directed to recommend to the Board by January 22, 1988, on the appointment of a separate board, a Special Master, an Alternate Board Member, or a Technical Interrogator to consider LILCO's 25% power request.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 7th day of January 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Robert M. Lazo, Chairman
Glenn O. Bright
Richard F. Cole

In the Matter of

Docket No. 30-13435
(ASLBP No. 88-559-01-SC)

FINLAY TESTING LABORATORIES, INC.

January 27, 1988

In this Memorandum and Order, the Licensing Board denies an NRC Staff motion to stay this show-cause proceeding pending completion of a Department of Justice investigation of Licensee's activities, and establishes a schedule for further proceedings.

ENFORCEMENT ACTION: STAY OF PROCEEDINGS

Where a stay of the type requested would devastate Licensee's business and deny Licensee its due process rights, the Staff bears a heavy burden to demonstrate a clear case of hardship or inequity in being required to proceed promptly with its action.

ENFORCEMENT ACTION: STAY OF PROCEEDINGS

Analysis of the facts of this case, using the four-pronged balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972), mandates the conclusion that a stay is unwarranted where (1) no time limit for the stay is even suggested; (2) no privilege is asserted by the Staff to support its contention that discovery requested

by the Licensee in this case would hinder the parallel criminal investigation; (3) the Licensee has persistently asserted its rights to a prompt hearing; and (4) the Licensee would suffer extreme prejudice from the delay both in its business operations and in its ability to effectively prepare a defense to the enforcement action.

MEMORANDUM AND ORDER ON PREHEARING CONFERENCE OF JANUARY 13, 1988

The Licensing Board conducted a prehearing conference pursuant to notice[1] in Honolulu, Hawaii, on January 13, 1988. The parties, Finlay Testing Laboratories, Inc. (Licensee), and the Staff of the Nuclear Regulatory Commission (NRC Staff), both attended and participated.

Matters considered included (1) Licensee's multiple motions dated December 14, 1987, relating to the scheduling of hearings and discovery; (2) NRC Staff Motion for Stay of Proceeding, dated December 17, 1987; (3) identification of the key issues in the proceeding; and (4) establishment of a schedule for further actions in this proceeding.

I. STAFF MOTION FOR STAY OF PROCEEDING

On September 21, 1987, the Deputy Executive Director for Regional Operations issued against Licensee an Order Suspending Licensing (Effective Immediately) (published at 52 Fed. Reg. 36,479 (Sept. 29, 1987)). The order recited that on August 31, 1987, the NRC Staff commenced an investigation into the Licensee's activities, based upon allegations received by the Staff. Relying upon the results of an initial investigation by the NRC's Office of Investigations ("OI"), the Staff determined that on the two occasions that were the subject of the allegations the Licensee had transported licensed material in violation of U.S. Department of Transportation ("DOT") and NRC regulations. The order also noted the failure on both of these occasions to use required shipping papers and labels. *See* 10 C.F.R. § 71.5. While noting that the OI investigation was continuing, the Staff concluded on the basis of information from the initial investigation that the violations appeared to be deliberate, raising significant doubts as to whether the Licensee is able or willing to comply with the Commission's requirements to protect the public health and safety. Therefore, the Deputy Executive Director for Regional Operations, pursuant to 10 C.F.R. §§ 2.201(c) and

[1] 53 Fed. Reg. 89 (1988).

2.202(f), suspended on an immediately effective basis all activities authorized under the license.

The order further noted that, pursuant to 10 C.F.R. § 2.202(b), the Licensee might file an answer showing cause why the license should not have been suspended and might also request a hearing on the order. If a hearing were requested by the Licensee (or any other person adversely affected[2]), the Commission would issue an order designating the time and place for any hearing. The issue to be considered at any such hearing would be whether the suspension order should be sustained.[3]

On October 5, 1987, the Licensee filed an "Answer; Request for Rescission or Relaxation of Order; Request for Hearing." Therein, the Licensee admitted that the improper shipments to and from the island of Hawaii in February 1987 occurred, as recited in the order. Answer at 17. The Licensee also admitted that the DOT's labeling requirements were not met with respect to the August 18, 1987 shipment to Johnston Island, as recited in the order, but denied that it violated DOT regulations by shipping the radiographic device on a military flight that also carried passengers. *Id.* at 17-18. The Licensee denied that Gordon Finlay, president and owner of the Licensee, had any knowledge of (1) the repackaging of the radiographic device involved in the Johnston Island shipment and the failure to have properly labeled the resulting package (Answer at 10) and (2) the improper shipment of a radiographic device to the island of Hawaii. *Id.* at 13.

As noted in the order (at 3), the OI investigation was continuing at the date of the order's issuance. That investigation is still continuing, but as of early December 1987, had progressed to the point where the Staff and OI considered referral of the matter to the Department of Justice (Department) to be appropriate. Discussions by OI and the Staff were undertaken with the Department, resulting in the Department commencing on December 8, 1987, a criminal investigation of the activities of the Licensee. In a conference call on the following day (December 9, 1987), the Staff advised Judge Lazo and counsel for the Licensee that the Department had commenced a criminal investigation of the Licensee's activities and that the Department was requesting the Staff to seek a stay of this proceeding in order to avoid irreparable harm to the criminal investigation. It was agreed during that conference call that the Staff would file by December 16, 1987, a motion for a stay of this proceeding.

Although the Staff intends to seek a stay for a period sufficient to permit the Department to complete its criminal investigation, since the Department has only recently begun its investigation it is not now in a position to estimate the

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[2] No other person requested a hearing on the order.

[3] The order further stated that an answer or request for hearing would not stay the immediate effectiveness of the order. Order at 5.

length of time needed to complete the investigation. However, the Department believes that it will be in a position to make such an estimate by about the middle of January 1988. Accordingly, the Staff is currently requesting a stay of this proceeding until mid-February 1988 to permit the Staff to file a motion for an extension of the stay (which the Staff would file by January 29, 1988), to provide the Licensee an opportunity to respond to that motion, and to allow time for the Licensing Board to rule on that motion.

On December 28, 1987, Licensee filed its opposition to NRC Staff Motion for a Stay of Proceeding. In its opposition, Licensee requests not only that the Staff's motion be denied, but also that the Order Suspending License (Effective Immediately), entered September 21, 1987, be immediately vacated due to Staff's dilatory and bad-faith conduct.

Licensee argues that Staff must make out a clear case of hardship or inequity in being required to go forward with this matter if there is even a fair possibility that the stay will damage Licensee. A stay of the type requested would devastate Licensee's business and deny Licensee its due process rights. *See Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936).

Staff acknowledges the heavy burden placed upon it, yet asserts an entitlement to the stay based principally upon the slip opinion attached to its motion, *Advanced Medical Systems, Inc.*, ALJ-87-4, 25 NRC 865 (1987) (*AMS*).

The facts of this matter could not be more dramatically different that those in *AMS*. And, in *AMS*, only a 3-month stay was granted by the Presiding Officer. *AMS*, 25 NRC 872-73. While the balancing test applied in that case is generally applicable before courts deciding this issue, it is clearly evident that each balancing factor weighs in favor of Licensee, and against granting the Staff's motion.

Despite the explanation by the Staff, it is clear that the request is for an open-ended stay of all matters in this proceeding. A status report in mid-February 1988 can hardly be considered the end of the stay request. Staff "intends to seek a stay for a period sufficient to permit the Department [of Justice] to complete its criminal investigation . . . [and Justice] is not now in a position to estimate the length of time needed to complete the investigation." Staff Motion at 4. Such an open-ended stay request was denied in *AMS* under enormously less egregious circumstances for the Licensee.

In *AMS*, "[b]efore the proceeding progressed very far, the NRC Staff administratively relaxed the terms of the order." *AMS*, 25 NRC at 865. AMS was authorized to, and did, resume the suspended activities under certain conditions imposed by the Staff.

This one fact in *AMS*, above all else, militated against the Presiding Officer's outright denial of the stay request made by the Staff there. As the Staff argued in *AMS* (at 866):

> The Staff believes that *since AMS may now perform its normal business* under the conditions of the relaxed suspension order, a stay would not be unduly burdensome on AMS [emphasis added].

On the contrary, in this proceeding Licensee is unable to conduct anything like its normal business. The suspension order has neither been relaxed nor rescinded, wholly or partly, despite detailed settlement proposals by Licensee to the Staff urging relaxation or rescission of the order.

Staff admits that Licensee has consistently requested a hearing and expeditious processing of this matter. The combined motions filed by Licensee with the Presiding Officer, dated December 14, 1987, detail the efforts to which Licensee has gone in seeking some forward movement in this matter. It is not without moment that Licensee requested a hearing, a motions hearing, discovery, and a prehearing conference before learning of the December 8 Staff referral to the Department. There is no indication that Licensee intends to abuse the discovery process.

Analysis of the facts in this matter, under the four-prong balancing test established in *Barker v. Wingo*, 407 U.S. 514 (1972), also mandates the conclusion that a stay is unwarranted.

(1) Length of Delay

Staff seeks an open-ended stay. No one can avoid that unmistakable conclusion, and no one has predicted when, or if, the Department of Justice investigation will be concluded. No time limit for the stay is even suggested. As is well known, it is not unusual for criminal investigations to take months, even years.

(2) Reasons for Delay

The Staff's justification for the delay is principally that discovery of witness statements upon which the suspension order was based would reveal to potential targets of the criminal investigation significant information relevant to the criminal investigations. Staff's Motion at 8. The statements were obtained by NRC Office of Investigations, not the Department; and were ostensibly obtained for this, not a criminal, proceeding.

However, no protection has been requested under 10 C.F.R. § 2.790(a)(7), even though the Staff is clearly aware of that protective provision. Staff's Motion at 4 n.7. More importantly, except for telling us that criminal discovery procedures are more restricted than civil discovery procedures, the Staff offers no justification for withholding the discovery requested by Licensee. Significantly, no privilege of any type is asserted by the Staff on the discovery issue.

This same basic argument was raised by the IRS in *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). However, *Campbell* was also drastically different in circumstance from this matter.

In *Campbell*, the plaintiff filed a civil action for a tax refund knowing that he was about to be indicted for tax fraud (307 F.2d at 481-89). In that case, not only the timing, but the tactics of the action's filing itself, and subsequent requests for discovery, led the Fifth Circuit to find that Campbell's motion under Rule 34 for discovery, if not the suit itself, was purely for the purpose of obtaining the otherwise unobtainable criminal investigative reports. *Id.* at 490.

This matter is nothing like *Campbell*. Investigative reports of the Department have not been requested. The Department admits that it is conducting its own investigation into essentially the same factual allegations. Olingy Affidavit, ¶¶ 3-6. It will prepare its own reports. Additionally, Licensee did not commence this matter; the Staff did. And, Licensee did not request discovery with knowledge that a criminal referral had been or would be made. *Cf. Campbell, supra*, 307 F.2d at 481-82. Even in *Campbell*, the Fifth Circuit indicated that the discovery Licensee seeks should have been available under the circumstances (*see id.* at 489).

> The reports prepared as part of a criminal investigation would necessarily contain information of importance to the criminal prosecution that could have no necessary relation to the refund claim but could not be physically separated in the files. *Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents* [emphasis added].

In *Campbell*, a very broad request for "any and all" confidential criminal investigative reports was made by Campbell. No such request has been made here. In essence, the Fifth Circuit agreed that production of all of the items of discovery Licensee is requesting in this matter was proper, even though Campbell was acting in bad faith there.

The Staff seeks to bolster its reasons for delay by offering *in camera, ex parte* proof, by hearsay affidavit, to bolster the Department trial attorney's conclusory affidavit. However, such an *ex parte* presentation is in contravention of the NRC's own policy statement and a clear violation of the Licensee's constitutional rights of due process and confrontation of witnesses. Any order entered based upon such *ex parte* proceedings would be constitutionally and procedurally void.

Licensee argues that the now obvious underlying reason for delay is the Staff's deliberate and consistent pattern of dilatory tactics since early September to avoid having this matter determined. This is the very strongest case for

denial of the Staff's motion. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1375 (D.C. Cir. 1980).

(3) Licensee's Assertion of Its Rights

There is no issue here. The Staff admits that "the Licensee has persistently asserted its right to a prompt hearing." Staff Motion at 9. Presumably, the Staff will also admit that Licensee has persistently requested action on its settlement proposals, its requests for settlement conferences, its requests for prehearing conference, and its requests for documents and other discovery, all of which are described in Licensee's December 14, 1987 motions and attachments.

Licensee states that it is losing over $36,000.00 in average monthly revenues, and has lost through cancellation of contracts and continuing related expenses over $400,000 in revenues to date. Additionally, the very nature of this proceeding, and Staff's national press release about it, has harmed the business and reputation of Licensee. Most importantly, Licensee is being prevented from any opportunity to vindicate itself through proper procedural channels in this matter. Finlay Affidavit.

(4) Prejudice to the Licensee

The Licensing Board has already heard much about the financial and personal pressures under which the Licensee is operating. The affidavit of Gordon Finlay attests to the financial and personal devastations that the unresolved suspension order has caused.

Perhaps more importantly, the open-ended delay attendant to the stay request will hamper if not effectively destroy the Licensee's opportunity to present a defense to the suspension order. Witnesses are already dispersed throughout the Continental United States and much of the South Pacific Ocean, and other important evidence such as Military Airlift Command (MAC) documents and witnesses will in due course be moved, stored, transferred, reassigned, discharged, lost, or destroyed. Most of the Staff's witnesses no longer work with the Licensee. Some of them left on bad terms. The identities of these witnesses are and have been largely known to the Licensee, having been disclosed by the OI and others during the investigation.

Unless the Licensee is allowed to examine, and to cross-examine, these and other Staff witnesses on the statements they have given, the statements already obtained by the Staff may be the only recallable versions of the facts when and if a hearing occurs.

The Staff has already conducted an extensive investigation of Licensee, including its books and records, and obtained sworn statements from numerous witnesses. Essentially, the Staff already has the evidence it needs to proceed in this matter. On the other hand, Licensee is at a serious disadvantage because the Staff has refused to disclose any of the investigative information, or the nature of the documentation, upon which it intends to rely. This is not a situation where the Staff may, by this delay, be impaired in its ability to sustain the suspension order. It is, however, a matter with dangerous potential of fatally impairing Licensee's ability to mount its defense.

In this matter, dramatically unlike the *AMS* matter, Licensee is not allowed to conduct any activities under its NRC license.

II. STAFF OFFER TO MAKE AN *IN CAMERA, EX PARTE* PRESENTATION

In its Motion for Stay of Proceedings the Staff noted that the attached Department of Justice declaration does not contain all of the details that might be offered in support of the motion. In this regard, Counsel for the Staff stated that the Staff, OI, and the Department are not willing to state on the public record or to the Licensee, even under protective order, additional matters that the Licensing Board may consider necessary to rule upon the motion. However, it was stated that the Staff, OI, and the Department were prepared to make an *in camera, ex parte* presentation to the Licensing Board under the provisions of the Commission's Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings. 49 Fed. Reg. 36,032 (Sept. 13, 1984) if the Licensing Board believed that additional details are necessary in order to rule on the Staff's motion for stay.

After considering the NRC Staff Motion for Stay of Proceeding, the Licensee's opposition to NRC Staff Motion for Stay of Proceedings, their attachments and the accompanying affidavits of Judith E. Olingy, Esq. (Department of Justice Attorney), and Gordon Finlay, the Board determined that the Staff had failed to establish that the proceeding should be stayed so as to permit the Department of Justice to complete a parallel criminal investigation. In denying the motion, the Board declined to hear an *in camera, ex parte* presentation as offered by the Staff.

In its ruling, the Licensing Board noted that an *ex parte* communication, such as offered by the Staff, would serve no useful purpose at this time. It could not be part of the adjudicatory record upon which we could base a decision to grant or deny Staff's motion for a stay of the proceeding. Nor, in our view, would the additional details hinted at by the Staff tilt the balancing of the equities which

weighs so heavily in favor of Licensee and against granting the Staff's motion to prevent this proceeding from going to hearing without further delay.

III. STAFF POSITION REGARDING SETTLEMENT

Staff delayed holding settlement discussions from September 21 until November 9. When settlement discussions were finally held at Licensee's insistence, Licensee expected that a meaningful settlement proposal would be promptly and positively considered. Licensee has stated that it spent substantial time and money in preparing its proposal dated November 18, 1987. Staff then delayed responding to the settlement proposal and ultimately refused to discuss settlement at all.[4] Staff dallied in responding to the Presiding Officer's requests regarding discovery and hearing timing. When finally faced with a requirement to provide justification for its order, Staff referred this matter to the Department of Justice on the same issues, and the same basic information, that it had in August, over a month before the order was entered.

Such conduct not only prejudices the Licensee but demonstrates the very reason that the regulations mandate a prompt hearing when *ex parte* suspension orders are issued. 10 C.F.R. § 2.202(c).

IV. SCHEDULE

During a prehearing conference by telephone conducted on January 20, 1988, Counsel for Licensee and NRC Staff proposed to the Licensing Board a schedule that they had agreed upon for discovery and hearing in this proceeding. That schedule that has been approved by the Licensing Board is set forth below.

January 13, 1988	Discovery period begins.
January 22, 1988	Last day for filing discovery requests by NRC Staff.
January 29, 1988	Last day for filing Staff's responses or objections to Licensee's discovery requests.
February 5, 1988	Last day for filing Licensee's responses or objections to Staff's discovery requests.
February 26, 1988	Last day for filing prefiled written direct testimony by both parties — in hands of Board.
March 9, 1988	Hearing begins.

[4] *See* Letter dated December 15, 1987, from Lawrence J. Chandler to Barry D. Edwards, and Tr. 35 and 56.

V. LICENSEE'S MULTIPLE MOTIONS DATED DECEMBER 14, 1987

On December 14, 1987, Licensee filed a (1) Motion for Order Setting Hearing; (2) Motion for Prehearing Conference; (3) Motion for Settlement Conference; and (4) Motion for Order Shortening Time for Response to Requests for Production of Documents and Other Discovery.

Licensee's motion for order setting hearing is granted by the actions of the Licensing Board taken in this Order and the Notice of Hearing entered this day. The prehearing conference requested by Licensee was held on January 13, 1988. Licensee's motion for settlement conference is denied. Licensee's motion for order shortening time for response to discovery requests is granted to the extent ordered by the Licensing Board in this Order.

V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 27th day of January 1988, ORDERED:

1. That NRC Staff Motion for Stay of Proceeding, dated December 17, 1987, is *denied;* and
2. Licensee's Motion for Order setting hearing is *granted.*

THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Glenn O. Bright
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 27th day of January 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Peter B. Bloch, Presiding Officer

In the Matter of

Docket No. 55-60402
(ASLBP No. 87-552-03-SP)

DAVID W. HELD
(Senior Operator License for
Beaver Valley Nuclear Power
Station, Unit 1)

January 11, 1988

This case, involving an application for the issuance of a senior reactor operator's license, was dismissed as moot after it became apparent that the Applicant, who is already licensed to operate Beaver Valley Nuclear Power Station, Unit 2, would not use a license for Unit 1 even if it were issued to him.

RULES OF PRACTICE: MOOTNESS

A proceeding to determine whether or not a senior reactor operator's license should be issued, is moot if the license in question would not be used. Although the Applicant sought a determination concerning whether or not he had passed a test, it is not the business of the hearing officer to determine issues subsidiary to the ultimate issue of whether or not to issue a license. Even though private decisions might affect Applicant's career because he has not been issued a license, this impact on private decisions does not prevent the proceeding from being moot.

RULES OF PRACTICE: CONTINUING JURISDICTION

The hearing officer, although dismissing the case as moot, considered the possibility that events could transpire that would cause the case to have an impact on future federal licensing decisions, and it retained jurisdiction to entertain a motion to reactivate the case if that contingent event did transpire.

DECISION

This case involves an appeal by David W. Held from the denial of a senior reactor operator's (SRO) license for Unit 1 of the Beaver Valley Nuclear Power Station. I have determined that the case is moot, in that Mr. Held is licensed as an SRO for Beaver Valley Unit 2 and cannot utilize more than one license at the present time. Tr. 16-18, 22-23. The truth of the inability to use more than one license is corroborated by the letter of Duquesne Power and Light Company withdrawing its previous certification that it required Mr. Held's services for operating Unit 1. Letter from J.D. Sieber, Duquesne Light Co., to U.S. Nuclear Regulatory Commission, November 12, 1987.

The reason the case is moot is that this is a proceeding contesting the denial of a license and I am authorized to consider an appeal from a denial of a license. My jurisdiction is to determine whether or not a license should be issued, not to decide whether or not a particular examination has been passed.[1]

We note that Mr. Held applied for his SRO license for Unit 1 in 1986. He demonstrated his physical health, passed the written examinations for Unit 1, and presented a statement from Duquesne Light Company, the operator of the unit, that he was needed as an operator of that unit. Were it not for the determination of the Staff of the Nuclear Regulatory Commission that Mr. Held had not passed the simulator portion of his examination, he would have been issued a license.[2] 10 C.F.R. § 55.11 (prior to May 26, 1987).

Mr. Held's principal remaining concern, and the reason he has continued to press his appeal, is that the issuance of a license to operate Unit 1 could be useful to him in his career to demonstrate that he has filled the requirements for jobs that require a knowledge of both Beaver Valley units. Tr. 14-15. In

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[1] I have considered whether it would be appropriate to hold a hearing to determine whether a license should have been issued at the time Mr. Held was first graded on his simulator examination. Although I consider this to be a possible interpretation of the regulations, I have decided that it is not necessary to incur the expense of a hearing under circumstances where there is very little likelihood that the contested license would ever be used.

[2] Mr. Held also claims that he would have been paid $4000 additional during the past 16 months had he been licensed. Filing of January 4, 1988, at 2. However, it is my job to decide whether or not to license Mr. Held, not to administer the personnel system of Duquesne Light, which is free to determine for itself, in the absence of any final NRC determination, whether Mr. Held had completed the necessary work to be considered as qualified as other operators of Unit 1.

this instance, that possibility is troubling because Mr. Held's alleged difficulties on the simulator examination do not appear to be specific to Unit 1 and are, therefore, the kind of alleged deficiencies that an employer could consider to have been resolved through Mr. Held passing the SRO examination for Unit 2 and gaining operating experience with that unit.

A consequence of the decision I am now issuing is that there is no final decision by the Nuclear Regulatory Commission concerning whether Mr. Held passed his simulator examination or should have been issued a license at the time he took that examination. Hence, Mr. Held is in a special kind of limbo in which the outcome of his license application has never been fully determined. Duquesne Light Company could, therefore, consider itself free to determine whether he has demonstrated the kind of knowledge of Unit 1 that would fit him for Beaver Valley duties for which the utility wishes him to be knowledgeable of Unit 1 (but for which there is no legal requirement that he be licensed to operate Unit 1).

In reaching this decision, based on mootness, I am aware that there is a possible circumstance in which the mootness of this case would be self-reversing. That is, it is possible that at some future time, Duquesne Light could obtain an agreement to dual-license personnel for both of its units and it might not feel free to include Mr. Held within the dual-licensed group.[3] Should this event occur within the next 2 years, then Mr. Held should immediately notify me and the case will be automatically reactivated because it would then be ripe for adjudication.

In closing, I would like to express my appreciation both to Mr. Held and to the Staff of the Commission for the excellence of their presentations. In particular, as a nonlawyer, Mr. Held has distinguished himself for clarity of writing and verbal expression, diligence, and cooperativeness.

ORDER

Upon consideration of the filings of the parties and the entire record in this matter, it is, this 11th day of January 1988, ORDERED:

That the case is dismissed as moot, subject to the condition that Mr. Held may move to reopen the case within 2 years should a circumstance arise in which the issuance of senior operator license for Beaver Valley Nuclear Power Station, Unit 1, is necessary for Mr. Held to obtain a dual license for Units 1 and 2.

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[3] Letter of Duquesne Light to U.S. Nuclear Regulatory Commission, November 28, 1987, attached to Mr. Held's filing of January 4, 1988.

This Decision shall become final agency action in 30 days unless a petition for reconsideration is filed in a timely fashion. If such a motion is filed, this decision (as amended) shall become final agency action 30 days after issuance of the decision on the motion for reconsideration.

Peter B. Bloch
ADMINISTRATIVE JUDGE

Bethesda, Maryland

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Hugh L. Thompson, Jr., Director

In the Matter of Docket No. 70-135

BABCOCK & WILCOX
(Apollo Facility) January 7, 1988

The Director of the Office of Nuclear Material Safety and Safeguards denies a petition filed by the Cindee Virostek requesting action with regard to the Babcock & Wilcox Apollo facility. The Petitioner requested that the license for the facility be "suspended until corrective actions have been fully implemented," after which the license be "terminated and revoked, and the facilities and grounds be released for unrestricted use." The Petitioner asserted that the Licensee had not fulfilled a license condition requiring decontamination at the end of the plant life, that the facility has had a significant adverse affect upon Apollo Township and the surrounding environment, and that material is missing and unaccounted for.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where a petitioner has not provided the factual basis for her request with the specificity required by 10 C.F.R. § 2.206, action need not be taken on her request.

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

INTRODUCTION

On February 24, 1987, Cindee Virostek (Petitioner) filed petitions pursuant to 10 C.F.R. § 2.206 requesting that the Director of the Office of Nuclear Reactor

Regulation, the Director of the Office of Inspection and Enforcement, and the Director of the Office of Nuclear Material Safety and Safeguards take action with regard to the Babcock & Wilcox (B&W) Apollo facility. The Petitioner requested that the license for the facility be "suspended until corrective actions have been fully implemented," after which the license be "terminated and revoked, and the facilities and grounds be released for unrestricted use."

The Petitioner asserts as a basis for this request that the Licensee has not fulfilled License Condition No. 37 of License No. SNM-145, which provides that at the end of plant life, the Licensee shall decontaminate the facility and grounds so that they can be released for unrestricted use. The Petitioner also asserts as bases for the request that the Apollo facility has had a significant adverse affect upon Apollo Township and the surrounding environment, and that material is missing and unaccounted for. By letter dated April 10, 1987, the Licensee was asked if it wished to submit information concerning the issues raised in the Petitions. The Licensee provided such information on May 20, 1987.

The Petitions have been appropriately referred to me for a decision. For the reasons given below, I have concluded that the Petitioner's request should be denied.

DISCUSSION

Background

The Apollo facility was established as a commercial venture by Nuclear Materials and Equipment Corporation in 1957 to develop and manufacture nuclear fuel containing uranium and to provide decontamination laundry services. In 1967, the license authorizing these activities was transferred to a subsidiary of Atlantic Richfield Company, which continued these activities until 1971, when the subsidiary was purchased and the license was acquired by Babcock & Wilcox.[1]

In 1980, Babcock & Wilcox (B&W) decided to discontinue uranium fuel processing at the Apollo facility and embarked on a program to remove process equipment and to decontaminate the buildings in which uranium fuel processing had been conducted. Uranium processing equipment was removed and shipped for disposal, thus removing the major fraction of the uranium contamination associated with fuel processing operations. B&W's license was amended on April 18, 1984, to delete authority to conduct fuel processing operations and to delete the expiration date.

[1] The commercial laundry business was discontinued by Babcock & Wilcox in 1981.

The license was subsequently modified by the NRC and set to expire on March 31, 1987, and on February 25, 1987, B&W submitted an application for license renewal. Because the application was submitted more than 30 days prior to expiration of the existing license, the existing license will not expire until final action has been taken on the application for renewal.[2] In its renewal application, B&W proposes to use the Apollo facility to supplement and duplicate some of the nuclear service operations that are presently conducted at its nearby Parks Township facility.

The Petitioner raises several issues as a basis for her request for relief. For the most part, however, the Petitioner has not provided the factual basis for her request with the specificity required by § 2.206 and, for this reason, action need not be taken on the request. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 NRC 149, 154 (1985). Nonetheless, the issues raised in the petitions have been evaluated to the extent possible. As discussed below, I have determined that there is no basis to take the action requested.

Unfulfilled License Condition

The Petitioner asserts that since the Licensee has terminated fuel processing operations, this corresponds to the end of plant life as defined in 10 C.F.R. Part 70, and the plant, therefore, should be decontaminated so that the facility and grounds can be released for unrestricted use in accordance with License Condition No. 37.

Sections 30.36 and 70.38 of 10 C.F.R. provide that each licensee shall request termination of its license when it decides to terminate all activities involving materials authorized under the license, shall terminate use of such material, and shall remove radioactive contamination to the extent practicable. License Condition No. 37 provides that B&W shall decontaminate the Apollo facility at the end of plant life so that the facility and grounds can be released for unrestricted use. The intent of these regulations and license condition is to prevent abandonment of the facility without decontamination prior to license termination.

As described above, in February 1987, B&W requested authority to conduct nuclear service operations at the Apollo facility. Thus, it is clear that B&W has decided not to terminate all licensed activities at the facility.[3] The term "end of

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[2] Section 70.33(b) of 10 C.F.R. provides that in any case in which a licensee, not less than 30 days prior to expiration of its existing license, has filed an application for renewal of a license, its existing license shall not expire until the application for renewal has been determined by the Commission.

[3] The Petitioner asserts that the Licensee was notified in writing by the NRC Staff to submit a schedule for decontaminating the Apollo plant by January 1, 1984, but failed to submit such a schedule. Although this assertion is true, the request was made under the assumption by the Staff that, because the Licensee had ceased

(Continued)

plant life," as used in License Condition No. 37, is meant to refer to the cessation of all licensed activities. Consequently, there is no merit to the Petitioner's assertion that the Licensee should be required to complete decontamination of the facility at this time.

Significant Adverse Effect

The Petitioner asserts that the Apollo facility has had a significant adverse effect upon Apollo Township and the surrounding environment and that the facility is an immediate and serious threat to the health and safety of the Licensee's employees and the public, to the environment, and to the common defense and security. The Petitioner further asserts that all Licensees at this facility have had a history of chronic noncompliance, that there have been cases involving a deliberate failure to comply with regulatory requirements, cases when noncompliance caused a serious accident and incident, and cases where the nature and number of noncompliances demonstrated that management has not conducted its activities with adequate concern for public health and safety.

A review of the compliance history at the Apollo facility shows that, while compliance problems were incurred by former licensees prior to B&W's acquisition of the license, and by B&W early in its history, B&W's record of compliance has since improved. Since the beginning of 1982, the NRC has identified only five instances of noncompliance, none of which had the potential to affect public health and safety or resulted in escalated enforcement action.[4] Moreover, the Petitioner has provided no information on any particular conditions or events that allegedly now pose a threat to the public health and safety, to the environment, or to the common defense and security such as would warrant the requested action. *See Limerick, supra*, 22 NRC at 154.

Material Unaccounted For

The Petitioner raises numerous issues regarding material that she alleges is missing and unaccounted for. The Petitioner first alleges that there is the possibility that a diversion has occurred because material that was found to be missing and unaccounted for in the 1950s, 1960s, and 1970s was never properly investigated. During this time period, prior to the time when the license was

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fuel processing at the facility, no future activities were to be conducted at the plant. B&W informed the Staff by letter, dated December 12, 1983, that this assumption was erroneous, and thus it did not need to submit a schedule for plant decontamination.

[4] The most significant situation of noncompliance since B&W assumed operations at Apollo involved material control and accounting problems identified from 1974 to 1977. These problems were resolved through improvements in B&W's measurements program.

acquired by B&W, the Atomic Energy Commission (AEC) determined during an inspection that there had been material unaccounted for (inventory difference). The AEC attempted to reconcile the excessive inventory difference, and then a request was made to the Federal Bureau of Investigation for investigation into the possibility of a diversion. The results of the investigation were inconclusive. On April 25, 1977, the NRC issued an unclassified digest of a classified NRC Task Force Report on "Accumulated Material Unaccounted For (MUF) — High Enriched Uranium — Babcock & Wilcox Company — Nuclear Materials Division — Pennsylvania Facilities" covering the period of April 1, 1974, to August 8, 1976. The Task Force concluded that B&W had upgraded its physical security system and had taken actions toward substantive program improvements in material control and accounting. In accordance with applicable requirements, since 1977, while B&W was in the production mode, the frequency of physical inventories was every 2 months for high-enriched uranium and every 6 months for low-enriched uranium. There have since been no inventory differences or any deficiencies relating to the control and accountability of nuclear materials that have not been resolved to the satisfaction of the NRC.

The Petitioner next asserts that B&W's Apollo facility was classified as a "mixed facility," and, as such, received special nuclear material both under a license and under license-exempt contract conditions. As such, the Petitioner asserts that there is a need to verify and validate the "contractor's explanation of inventory differences." The NRC is not aware that there was any special nuclear material at the Apollo facility that was not licensed, including material that was received under AEC contract. To the Staff's knowledge, all special nuclear material, regardless of ownership or contractual relationship, was inventoried and resulting inventory differences were investigated. Therefore, the investigations conducted of the inventory differences did address all special nuclear material. As indicated above, since 1977, there have been no inventory differences or deficiencies relating to the control and accountability of nuclear materials that have not been resolved to the satisfaction of the NRC.[5]

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[5] The Petitioner also asserts that there is a need for verification of the Energy Research and Development Administration's (ERDA's) contractual responsibilities under ERDA Contract Agreement Number IA-1009. Agreement IA-1009 was a 1975 draft agreement between the NRC and ERDA which was never executed. Instead, the agencies exchanged correspondence in 1976 stating their agreement that they would independently exercise their safeguards and security responsibilities at mixed facilities. The ERDA field offices responsible for contracts audited the contract books and security of classified material. The Petitioner provides no basis for her assertion that ERDA's (now, the Department of Energy (DOE)) contractual responsibilities should be verified. The Petitioner also asserts that there is a need for verification of the inventory difference control limits established by plant design and if they were adjusted due to upgrading of plant design. The Petitioner asserts that this need is due to the fact that a "5-fold error" was found in 1977. The Staff has been unable to determine to what error Petitioner is referring. With regard to the Petitioner's concern that inventory difference control limits were adjusted, the Staff notes that in August 1976 the inventory difference control limits were reconfigured to provide tighter regulatory restraints on inventory differences. It is not clear if that is the action referred to by the Petitioner. As the Petitioner has provided no specific information with regard to these concerns, further action is not warranted. *See Limerick*, *supra*, 22 NRC at 154.

The Petitioner claims that it is in the public's best interest to have inventory differences that were separately identified and accounted for as being in process tanks, walls, floors, or work areas, and burials, verified. At the end of the phase of high-enriched uranium processing at the Apollo facility, the Licensee nondestructively assessed the quantities of material identified as inventory remaining in the building structure and assigned values for material holdup and shipments to licensed disposal sites. The NRC independently verified those quantities. Final assignment of values for material holdup in the building structure has not been completed; however, since the material is in a form not readily extractable, and the results of plant effluent and environmental measurements are within NRC standards, the material poses no significant threat to public health and safety. Samples of material being sent for disposal at licensed burial sites were also independently measured at that time. The material sent to burial included process equipment, tanks, and cleanup residues. Thus, the Petitioner's request to have such inventory differences verified has been satisfied, and no further relief need be granted.

The Petitioner claims that since much of the material was government-owned and handled under government contracts, the Commission should require all government-owned material to be returned to the government. It should be noted that there are no longer any government contracts in effect for work at the Apollo facility, that all such contracts have been closed out, that there are no outstanding shipper/receiver differences, and that there are no active certificates of possession under any such government contracts.

Finally, the Petitioner states that the Commission should require verification of undeclared losses of material contained in waste material that went to onsite controlled burial. The Staff is unaware of any onsite burial of waste material at the Apollo facility; therefore, there are no known "undeclared losses of material" buried on site at the Apollo facility to be verified.

In sum, none of the Petitioner's allegations concerning B&W's control and accounting of nuclear materials at the Apollo facility since B&W took control of the facility provide any basis for the action that the Petitioner requests. Further, since 1977 there have been no inventory differences or deficiencies relating to the control and accountability of nuclear materials which have not been resolved to the satisfaction of the NRC.[6]

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[6] The Petitioner claims that it would be in the best interest of the government and the public to decommission and deactivate in accordance with the "provisions of the interagency agreements" for past projects which Petitioner states were to be performed by DOE. In this connection, the Petitioner alludes to a Memorandum of Understanding between ERDA and the Commission which she alleges was to be reviewed and modified as necessary to comply with a February 24, 1978 Memorandum of Understanding. The Staff is unaware of any such interagency agreements, of any February 24, 1978 Memorandum of Understanding, or of any other Memorandum of Understanding between ERDA and the Commission.

CONCLUSION

For the reasons stated in this Decision, the Petitioner's request that I institute a proceeding to suspend and subsequently revoke the license for B&W's Apollo facility and that the facility and grounds be released for unrestricted use is denied.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

Hugh L. Thompson, Jr., Director
Office of Nuclear Material Safety
and Safeguards

Dated at Silver Spring, Maryland,
this 5th day of January 1988.

•U.S. G.P.O. 1988-202-186:60019