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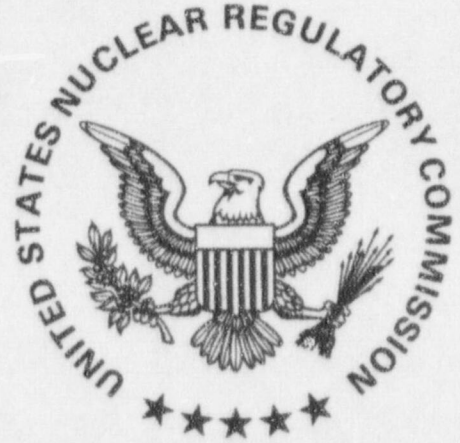
NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1998



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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1998

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

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

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Office of the Chief Information Officer
U.S. Nuclear Regulatory Commission
Washington, DC 20555–0001
(301–415–6844)

COMMISSIONERS

Shirley A. Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

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

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Commission Issuances

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of **Docket No. 40-8905-MLA**

QUIVIRA MINING COMPANY
(Ambrosia Lake Facility,
Grants, New Mexico) **July 17, 1998**

The Commission reviews an Atomic Safety and Licensing Board decision that denied a request for hearing and leave to intervene to challenge a materials license amendment. The Commission affirms the Board's finding that the Petitioner lacks standing to intervene. The Petitioner's economic interests, which were unrelated to any radiological harm, did not fall within the zone of interests of the Atomic Energy Act, the Commission found.

RULES OF PRACTICE: STANDING TO INTERVENE

To demonstrate standing in Commission licensing proceedings under AEA § 189a, a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.

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

Increased competition represents a cognizable Article III injury.

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTERESTS)

Under our case law, to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also must show that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (NEPA)

NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions. A petitioner who suffers only economic injury has no standing to bring a challenge under NEPA.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (NEPA)

The fact that economic interest or motivation is involved will not preclude standing, but the petitioner must also be threatened by environmental harm.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Merely because one is injured by a particular agency action does not necessarily mean one is within the zone of interests protected by the applicable statute. The zone of interests test would prove meaningless if it encompassed any party affected by an agency's decision.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

The petitioner must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. The two-pronged test set forth by the Supreme Court thus asks: (1) what are the interests "arguably . . . to be protected" by the relevant statutory provisions; and (2) are the petitioner's interests that are affected by the challenged agency action among them? *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927, 935 (1998).

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

The Atomic Energy Act contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose. Unlike the statutes under which the courts have found competitors within a statutory "zone

of interests," the AEA includes no express provision effectively cordoning off a portion of the market from competition. The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. These provisions by themselves do not necessarily turn all competitor licensees into suitable challengers of agency action.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Permitting routine adjudicatory challenges to agency decisions solely because one company sues to complain of a competitive advantage would be more likely to frustrate than to further statutory objectives.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Section 84 of the AEA, 42 U.S.C. § 2014, was intended by Congress merely to ensure that licensees did not have to bear unnecessary costs. Section 84 has nothing to do with competitors' interests.

MEMORANDUM AND ORDER

I. INTRODUCTION

In this Decision we review the Atomic Safety and Licensing Board's Memorandum and Order, LBP-97-20, 46 NRC 257 (1997). The Board's order denied Envirocare of Utah, Inc.'s request for a hearing and leave to intervene to challenge a materials license amendment granted to the Quivira Mining Company (Quivira or QMC). The Board found that Envirocare lacked standing to challenge the license amendment and accordingly terminated this proceeding. Pursuant to 10 C.F.R. § 2.1205, Envirocare has appealed to the Commission, requesting us to reverse LBP-97-20. Quivira and the NRC Staff support the Board's Decision. We affirm the Decision.

II. BACKGROUND

This proceeding stems from the Quivira Mining Company's request for a materials license amendment. The amendment, approved by the NRC Staff on May 16, 1997, permits Quivira to accept and dispose of specified amounts of

11e(2) byproduct material[1] at its Ambrosia Lake facility, located near Grants, New Mexico. Prior to the amendment, Quivira was already authorized to possess byproduct material generated by its own operations at the Ambrosia Lake uranium mill, and also to receive limited amounts of byproduct material from *in situ* leach uranium mining facilities. The license amendment at issue in this proceeding authorizes Quivira to receive 11e(2) material from unspecified outside generators.

Envirocare, which itself operates a commercial disposal facility for 11e(2) material, filed a request for a hearing on: (1) the Quivira license amendment and (2) the Finding of No Significant Impact (FONSI) issued by the NRC for that license amendment. Envirocare's core complaint is that the license amendment permits Quivira to become a general commercial disposal facility like Envirocare, but that the NRC did not require Quivira to meet the same regulatory standards the agency imposed upon Envirocare when Envirocare sought *its* license to become a commercial disposal facility for 11e(2) material.

Envirocare, for example, states that to obtain its disposal facility license, it bore the expense of a full environmental review, which included an environmental impact statement (EIS), while in contrast the NRC did not require and has never required an EIS for the Quivira facility. In Envirocare's view, the NRC improperly relied upon outdated and incomplete information when it determined that there was no need for an EIS. Envirocare further claims that Quivira apparently did not or does not have to comply with various strict regulatory standards, found under 10 C.F.R. Part 40, Appendix A, which Envirocare states it must meet at great financial cost. Instead, argues Envirocare, Quivira's "summary application" for its license amendment simply failed to show that Quivira has met or will meet these Appendix A requirements for groundwater protection, radon barriers, detection monitoring, inspections, siting and design, and other matters. Envirocare's Request for Hearing (May 28, 1997) at 16. Envirocare states that "it is not clear that the NRC has required QMC to meet these standards," and "[t]o the extent that the NRC has not required QMC to meet the strict standards applied to Envirocare, NRC approval of QMC's License Amendment discriminates against Envirocare." Envirocare's Supplement to Its Request for Hearing (July 3, 1997) at 16.

In short, Envirocare's petition for a hearing argued that it is "unfair and inconsistent for the NRC to apply different, less stringent standards for the commercial disposal of 11e.(2) wastes at a former mill site, than the NRC applies for the commercial disposal of 11e.(2) at a disposal facility." Envirocare's Request for Hearing (May 28, 1997) at 12-13. If Quivira does not have to meet the same regulatory standards, Envirocare argues, it will suffer a "severe

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[1] Such material is defined as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." AEA § 11.e(2), 42 U.S.C. § 2014(e)(2).

competitive disadvantage," for Quivira's "lower costs will allow it to attract customers away from Envirocare." *Id.* at 12. Envirocare, therefore, claims an "economic interest in ensuring that all licensees that propose to accept 11e(2) byproduct material from other persons for disposal comply with applicable NRC standards." *Id.* at 11. Envirocare submits that the NRC's approval of Quivira's license amendment violated the Atomic Energy Act (AEA), the National Environmental Policy Act (NEPA), and the Due Process Clause of the United States Constitution.

Quivira and the NRC Staff opposed Envirocare's petition for hearing. Both argued that Envirocare, which operates its disposal facility some 500 miles away from Quivira's Ambrosia Lake facility, has no standing to request a hearing on Quivira's license amendment. Both stressed that the AEA focuses upon the protection of public health and safety — protection from radiological harm and not the alleged economic "competitive injury" alleged by Envirocare. Neither the AEA nor the NRC's regulations permit "market competitors to use the administrative process to oppose new applications," submits Quivira. Answer of Quivira Mining Co. in Opposition to the Request for Hearing of Envirocare of Utah, Inc., at 10 (June 12, 1997). Nor does Envirocare's alleged economic injury fall within the interests of NEPA, argues Quivira and the NRC Staff, stressing that although NEPA encompasses economic interests, it also requires there to be some concrete environmental risk to the petitioner, not simply economic risk untied to any environmental injury. Because Envirocare is located nowhere near the Ambrosia Lake facility and thus faces no risk of radiological harm to health or property, Envirocare cannot simply rely upon its status as a market "competitor" to challenge this license amendment, concludes Quivira and the Staff.

The Licensing Board in LBP-97-20 denied Envirocare's petition, finding no standing to intervene. Because there "clearly is a real possibility . . . that competition from the Ambrosia Lake facility will cause economic harm to Envirocare," the Board found that Envirocare had demonstrated sufficient "injury in fact" for standing. 46 NRC at 265. The Board, however, went on to conclude that the alleged "competitor" injury did not fall within the "zone of interests" of either the AEA or of NEPA, the two statutes upon which Envirocare had based its standing.

III. ANALYSIS

Under section 189a of the Atomic Energy Act, the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). In evaluating whether a petitioner's "interest" provides an appropriate basis for intervention, the Commission has

long looked for guidance to current judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *see, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).[2] To demonstrate standing in Commission licensing proceedings under section 189a, a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). Injury must be "actual or imminent." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Consistent with an additional, so-called "prudential" requirement of standing, the Commission also has required the petitioner's interest to fall, arguably, within the "zone of interests" protected or regulated by the governing statute(s) — here, the AEA and NEPA. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *see also Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1998); Reytblatt v. NRC, 105 F.3d 715, 721 (D.C. Cir. 1997). The actual "breadth" of the applicable zone of interests will vary according to the particular statutory provisions at issue. Bennett v. Spear, 117 S. Ct. at 1161. At bottom, the standing analysis seeks to determine "whether Congress intended for a particular class of plaintiffs to be relied upon to challenge an agency's disregard of the law." *Clarke v. Securities Industry Association*, 479 U.S. 388, 389 (1987).

Here, we hold that Envirocare meets the actual injury test but fails the zone of interests requirement. Because the question of "competitor standing" is essentially a matter of first impression for the Commission, we lay out our reasoning at some length.

A. Injury in Fact Traceable to Challenged Action

The Licensing Board found that Envirocare adequately had demonstrated injury in fact for standing. Noting the "realities of market competition," the Board concluded that there is more than a speculative possibility that Envirocare may suffer economic injury from competition with the Ambrosia Lake facility, and that such injury need not be great to satisfy standing requirements. 46 NRC at 264-65. In their appeal briefs, Quivira and the NRC Staff continue to challenge Envirocare's showing of injury. Specifically, the Staff maintains that

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[2] Although the Commission customarily follows judicial concepts of standing, we are not bound to do so given that we are not an Article III court. Our principal concern is to ensure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA. *See* 42 U.S.C. § 2239.

Envirocare's alleged "competitor" injuries are too speculative. Staff Appeal Brief (Dec. 23, 1997) at 5 n.5. Both Quivira and the Staff also assert that Envirocare's alleged injury lacks any causal connection to the agency action complained of, and therefore would not be redressable by a favorable decision. *Id.* at 11-12. As the Staff's argument goes, any alleged economic harm to Envirocare would not be caused by Quivira's licensing but by Envirocare's licensing. *Id.* at 12.

We reject these claims and agree with the Licensing Board that Envirocare has shown sufficient injury in fact for standing. Envirocare and Quivira are competitors providing a similar service. Envirocare's argument is not simply that it faces added competition from the Ambrosia Lake facility, but that through an alleged inappropriately lax licensing of the Quivira facility, Quivira will have an unfair competitive edge over Envirocare, which faced more stringent — and more expensive — licensing.

There is no question that "increased competition represents a cognizable Article III injury." *MD Pharmaceutical Inc. v. Drug Enforcement Administration*, 133 F.3d 8, 11 (D.C. Cir. 1998) (citing *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697 (D.C. Cir. 1994)). Here, as the Licensing Board found, the alleged competitive injury "would not occur absent the licensing" at issue. Envirocare does not claim that *its* licensing violated statutory requirements, but that the licensing of the Ambrosia Lake facility did. 46 NRC at 265. And if, as Envirocare argues, Quivira obtained improper licensing advantages in violation of the AEA, it is certainly conceivable that these allegedly insufficient license requirements could be remedied through the imposition of additional license conditions or through invalidating the Quivira license pending further safey or environmental reviews. Such actions by the NRC could remedy the "unfair" competition of which Envirocare complains.

We disagree with the Staff's claim that the alleged competitor injury is too speculative. For standing purposes, it suffices that an alleged improper licensing of the Ambrosia Lake facility has the "clear and immediate" potential to compete with Envirocare's own services. *See Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990); *see also Fisons Corp. v. Shalala*, 860 F. Supp. 859, 862 (D.D.C. 1994) (alleged injury not too speculative because of the potential for "an improper FDA approval of a generic drug to hurt" competitor). Petitioners need not wait until actual increased competition occurs. *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); *UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621, 626 (3d Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996).

B. Zone of Interests

Under our case law, to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue. *See, e.g., River Bend,* 40 NRC at 47; *Reytblatt v. NRC,* 105 F.3d at 721. The zone-of-interests test derives from *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152-53 (1970), and has been followed by the courts ever since. *See, e.g., Liquid Carbonic Indus. v. FERC,* 29 F.3d at 704. Envirocare argues that its economic injury as a competitor falls within the zone of interests of both the National Environmental Policy Act and the Atomic Energy Act. The Licensing Board rejected both these claims and so do we.

1. NEPA

Envirocare first argues that its economic injury is encompassed by NEPA. Envirocare claims, in effect, that a purely economic injury suffices for standing, so long as the challenged agency action — here the licensing of the Ambrosia Lake facility — will have environmental effects *somewhere,* even if those effects will occur hundreds of miles away and could not possibly impact Envirocare. In sum, Envirocare argues it need not suffer any environmental injury to bring an action under NEPA, as long as the facility has a "primary effect on the natural environment," regardless of where that effect may be. *See* Envirocare's Substitute Appeal Brief (Dec. 2, 1997) at 3.

We find Envirocare's position inconsistent with a long line of judicial cases. NEPA's purpose is to protect the environment, "not the economic interests of those adversely affected by agency decisions." *Nevada Land Action Association v. United States Forest Service,* 8 F.3d 713, 716 (9th Cir. 1993) (citing *Portland Audubon Society v. Hodel,* 866 F.2d 302, 309 (9th Cir.), *cert. denied,* 479 U.S. 911 (1989)). A petitioner who suffers only economic injury has no standing to bring a challenge under NEPA. *Id.* Indeed, parties whose motivation is solely "economic self-interest and welfare are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest." *Churchill Truck Lines, Inc. v. United States,* 533 F.2d 411, 416 (8th Cir. 1976). An interest in "economic well-being vis-a-vis [] competitors is clearly not within the zone of interests" of NEPA, which was "not designed to prevent the loss of profits." *Id. See also Mountain States Legal Foundation v. Glickman,* 92 F.3d 1228, 1236 (D.C. Cir. 1996) (NEPA's "rather sweeping list of interests . . . do not include purely monetary interests, such as the competitive effect that a . . . project might have on plaintiff's commercial enterprise").

It has long been established that the risk that environmental harm "will be overlooked — is itself sufficient 'injury in fact' to support standing, provided

this injury is alleged by a plaintiff having a *sufficient geographical nexus* to the site of the challenged project [such that they can] expect [] to suffer whatever environmental consequences the project may have." *Sabine River Authority v. United States Department of Interior*, 951 F.2d 669, 674 (5th Cir.) (citation omitted, emphasis added), *cert. denied*, 506 U.S. 823 (1992). Parties affected solely by economic harm should not be able to use NEPA "as a device" to "thwart governmental activity under the guise of environmental interest" simply by "invoking the magic word 'environment,' when their injury has factually nothing to do with the environment." *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 487-88 (D. Kan. 1978) (citations omitted), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). *See also* David J. Hayes and James A. Hourihan, "NEPA Requirements for Private Projects," 13 B.C. Envtl. Aff. L. Rev. 61, 75 (1985) ("Courts should vigorously apply standing principles to ensure that the judicial system is not clogged with economic dog-fights hidden behind 'environmental' disguises").

The fact that economic interest or motivation is involved will not preclude standing, but the petitioner must also be threatened by environmental harm. *See, e.g., City of Los Angeles v. United States Department of Agriculture*, 950 F. Supp. 1005, 1011-12 (C.D. Cal. 1996). Otherwise, to permit a competitor "under the banner of environmental champion" to raise "legal challenges to a project approved by federal and state agencies would be so marginally related to and inconsistent with the purposes implicit in NEPA that it cannot be assumed that Congress intended to permit" the lawsuit. *Id.* at 1013 (citations omitted). *See also Florida Audubon Society v. Bentsen*, 94 F.3d 658, 665-66 (D.C. Cir. 1996) (environmental harm must threaten petitioner's interest).

Envirocare's argument for NEPA standing relies heavily upon *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979). Envirocare cites this case in support of its claim that economic injury is sufficient for standing under NEPA, as long as the project at issue also has environmental effects, no matter where these might occur. But like the Licensing Board, we do not read *Port of Astoria* to stand for so broad a proposition.

In *Port of Astoria*, a broadcasting company had standing to challenge a power plant whose power lines would interfere with the station's broadcasts. Although the injury was economic, it was nevertheless "the immediate and direct result" of the power plant, located in the broadcasting company's area. *Id.* at 476. In other words, the injury directly resulted from the project's environmental impacts. The same decision rejected standing for a party threatened only by monetary losses "not coupled with environmental considerations." *Id.* at 474-75. Indeed, the court's reasoning in *Port of Astoria* is similar to that of several of our own agency decisions which hold that economic injury may be protected under NEPA, but only when the economic harm is directly caused by environmental effects.

As the Commission summarized in *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992):

> It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage. For example, if the licensing action in question destroyed a woodland area, those persons who would be deprived of their livelihood in a local timber industry could assert a protected interest under NEPA. *See, e.g., Jersey Central Power and Light Co.* (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business, resulting from the operation of a nuclear power plant); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water that may affect his catch).

Here, unlike *Port of Astoria* and the cases cited in *Rancho Seco,* no direct environmental effects would lead Envirocare to lose any profits. Envirocare's competitor injury is therefore not protected under NEPA.

2. AEA

We turn now to a more difficult question, and one of first impression: whether Envirocare's alleged "competitor" injuries fall within the zone of interests of the Atomic Energy Act. As the Licensing Board and the Staff have noted, this agency historically has rejected bare economic injury — unlinked to any radiological harm — as a basis for standing. *See, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). Envirocare did raise a "competitor" injury claim a few years ago when it sought to intervene in a different proceeding. *See UMETCO Minerals Corp.*, LBP-94-7, 39 NRC 112 (1994). But by rejecting Envirocare's petition as untimely, the Licensing Board in that earlier proceeding did not need to resolve the question of Envirocare's standing. We now hold that a petitioner's mere claim of "competitor" injury, unlinked to a claim of radiological injury, is not among those interests arguably protected or regulated under the Atomic Energy Act.

We begin our analysis by looking at what the Supreme Court has stated about "zone of interests." The Court has said that the zone of interests test is "not meant to be especially demanding." *Clarke,* 479 U.S. at 399-400. There need not be, for instance, any showing of a specific congressional intent to protect or otherwise benefit the particular petitioner or his class. *Id.* Nevertheless, the Court consistently has looked for "some indication" that the petitioner's interest is arguably among those interests protected by the relevant statute. *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927, 936 n.7 (1998).

Merely because one may be injured by a particular agency action, then, "does not necessarily mean one is within the zone of *interests to be protected by a given statute*." *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 524 (1991) (emphasis added). The zone-of-interests test would prove "meaningless" if it encompassed any party affected by an agency's decision. *Liquid Carbonic Indus. v. FERC*, 29 F.3d at 704. Indeed, the test is "meant to narrow the field of potential challengers." *Id.*

In short, the petitioner "must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Air Courier*, 498 U.S. at 523-24 (rejecting standing for postal workers because employment issues were not among the interests postal statutes sought to advance). The two-pronged test set forth in the latest Supreme Court decision on competitor standing thus asks: (1) what are the interests "arguably . . . to be protected" by the relevant statutory provisions; and (2) are the petitioner's interests that are affected by the challenged agency action among them? *National Credit Union*, 118 S. Ct. at 935. Here, we find no indication in the AEA of an intent to protect the competitor interest Envirocare asserts — a purely economic interest entirely unrelated to any radiological harm to Envirocare. Envirocare therefore lacks standing. A review of "zone of interests" decisions, particularly at the Supreme Court level, supports our view.

In support of standing, Envirocare cites the various Supreme Court cases that have found standing for "competitors" adversely affected by administrative rulings. But while it is true that these cases involved statutes not specifically designed to protect the competitor plaintiffs bringing suit, it was simply not sufficient for standing that these competitors might suffer competitive injury. In every Supreme Court decision to date involving "zone of interests" and competitor standing, the Court has found some form of statutory interest in or provision for restricting competition — typically a restriction on market activities or a limitation on the available customer base. Because these cases in some form or other have all involved a statutory intent to limit competition, the interests of competitors seeking to challenge allegedly illegal competition properly fell within these statutes' zone of interests.

For example, in the most recent of these cases, the Court found that banks fall within the zone of interests of the Federal Credit Union Act, a statute enacted without any intent to protect banks, but instead to promote the financial soundness of credit unions and to help make credit more readily available to those who otherwise might not be able to obtain loans. *National Credit Union*, 118 S. Ct. at 935-36 n.6. To promote these dual goals, the statute contains a provision restricting credit union membership to those who share a "common bond." As competitors of the credit unions, the banks had an interest in upholding this restriction on the credit unions' customer base. *Id.* at 936.

Because the National Credit Union Administration had interpreted the "common bond" restriction in an expansive fashion that would permit credit unions to greatly enlarge their membership, banks, who might suffer competitively by losing current or future members to credit unions, had standing to challenge the agency's interpretation. The banks had more than "merely . . . an interest in enforcing the statute in question." *Id.* at 937 n.7. Their particular interest as competitors was directly related to the statute's "interest in limiting the markets that federal credit unions can serve." *Id.* at 935-36 n.6; *see also id.* at 936 n.7. As the Court wrote, this statutory interest "is *precisely* the interest of respondents. . . . As competitors of federal credit unions, respondents certainly have an interest in *limiting the markets* that federal credit unions can serve, and the NCUA interpretation has affected that interest by allowing federal credit unions to increase their customer base." *Id.* at 936 (emphasis added). There was, then, an "unmistakable link" between the competitor interest of the banks and an express statutory provision that effectively limited the credit unions' market. *Id.* at 936 n.7.

In similar fashion, all other Supreme Court "competitor" zone-of-interests cases have been rooted in some applicable statutory provision whose clear intent or effect is to restrict competition, thereby drawing "competitors" within the statutes' zone of interests. *See, e.g., Clarke*, 479 U.S. 388 (1987); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). Following this reasoning, the Court has permitted securities dealers, data processors, and investment companies to challenge rulings made by the Comptroller of Currency under various banking-related statutes. But again, by these statutes, "Congress had arguably *legislated against the competition that the petitioners sought to challenge*, and from which flowed their injury." *Investment Co. Inst.*, 401 U.S. at 620 (emphasis added); *see also Clarke*, 479 U.S. at 403. Congress thus had "provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against." *Association of Data Processing*, 397 U.S. at 155; *see also Clarke*, 479 U.S. at 403. Standing in these cases was predicated, therefore, upon the fact that "Congress, for its own reasons, primarily its concern for the soundness of the banking system, *had forbidden banks to compete with plaintiffs*" by "limit[ing] the activities [available to] national banks." *Clarke*, 479 U.S. at 398 (emphasis added).

Cognizant of the potential for litigants to frivolously delay or otherwise frustrate administrative action, the Supreme Court indeed has stressed that "where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

Applying these various Supreme Court principles, the District of Columbia Circuit rejected standing for an association representing competitor waste disposal firms seeking to challenge an EPA rule. Under existing regulations, these firms incurred high disposal costs for ash generated from their incineration facilities. They objected to an EPA interpretation that would, among other effects, permit some other kinds of utilities and smelters to generate ash "without incurring comparable costs," and thus to potentially "undersell them." *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 281 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Although the association vigorously asserted that their members' interests — albeit financial — would promote the environmental aims of the relevant statute, the Resource Conservation and Recovery Act (RCRA), the court refused to find the firms' financial interests any more than "marginally related" to RCRA's environmental goals. *Hazardous Waste*, 861 F.2d at 283. That the firms "may suffer competitive loss because EPA ha[d] not forced on their competitors as demanding (and expensive) techniques as they themselves employ" did not by itself prove a sufficient ground for standing. *Id.* at 280.

Moreover, the Court went on to emphasize the following:

> Petitioner wants to increase the regulatory burden on others. Its interest lies in the competitive advantage that its membership might secure if the government imposed higher costs on other firms. As noted above, that interest carries a considerable potential for judicial intervention that would distort the regulatory process. . . . [W]e see no special reason to suppose that Congress might have thought them suitable advocates of the environmental interests underlying the statute.

Id. at 285.

"A firm has no common law interest, much less a constitutional one, in having . . . government force competitors' services to be of the same quality (and cost) as its own." *Id.* Thus, the firms' status as competitors of facilities "allegedly advantaged by [the EPA's] failure to adequately perform a statutory duty" did not bring their purely economic concerns within the zone of interests of RCRA. *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1047 (D.C. Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). The "interest in stricter regulation of their competitors" simply "fell outside the zone of interests Congress intended to protect in enacting RCRA." *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 435 (D.C. Cir.), *cert. denied*, 490 U.S. 1106 (1989). RCRA's intent was to promote the safe disposal and recycling of hazardous wastes — health and safety interests that provided no reason to view competitor firms as "suitable challengers" of EPA violations. *See id.* at 435-36. *See also Calumet Industries, Inc. v. Brock*, 807 F.2d 225, 229 n.3 (D.C. Cir. 1986) (competitor would not have standing to "contest [agency's] failure to similarly burden others").

As Envirocare points out, there have been a number of court of appeals and district court decisions basing standing upon competitive injury. The bulk of these cases, however, can be analogized to the Supreme Court cases, for they similarly involve statutory provisions whose intent or effect is to bar or limit competition in some fashion. By setting forth restrictions on specific market activities or customer base, these statutes effectively cordoned off a segment of the relevant market from competition. "When the core purpose of a statute is to *barricade an area from competitive entry,* the interests of firms that operate in the reserved area are presumptively congruent with the statutory goal. It is thus appropriate to treat them as 'arguably within the protected zone.'" *National Coal Association v. Hodel,* 825 F.2d 523, 533 (D.C. Cir. 1987) (concurrence) (emphasis added).

Acknowledging that these zone-of-interest "competitor" cases can be "devilishly complex," the D.C. Circuit has nevertheless attempted to parse these cases and explain what makes one competitor meet the standing requirements while another does not, even where their "economic motivations could be thought analogous." *First National Bank & Trust Co. v. National Credit Union Administration,* 988 F.2d 1272, 1278-79 (D.C. Cir. 1993).[3] Competitors are more likely to further congressional purposes, the court reasoned, when the applicable statutory restriction "itself reflects a congressional judgment that . . . *constraint on competition is the means to secure the statutory end.*" *Id.* (emphasis added). Even where the intent of restrictions has nothing to do with any party's "competitive" or economic interests, competitors satisfy standing requirements where the statute involves a "restraint on competition" and this restraint is "the means to assure the statutory end." *Id.* at 1279 (concurrence); *see also Liquid Carbonic Indus.,* 29 F.3d at 705. This reasoning follows that of the Supreme Court competitor cases.

Here, although Envirocare has a general interest in limiting the competition for its services, the AEA contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose. See *Cities of Statesville v. AEC,* 441 F.2d 962, 975 (D.C. Cir. 1969). Unlike the statutes under which the courts have found competitors within a statutory "zone of interests," the AEA includes no express provision effectively cordoning off a portion of the market from competition. The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. These provisions by themselves do not necessarily turn all competitor licensees into suitable challengers of agency action. The only express statutory direction regarding competition concerns

[3] The standing portion of this decision was affirmed by the Supreme Court in *National Credit Union Administration v. First National Bank & Trust Co.,* 118 S. Ct. 927 (1998).

antitrust reviews for commercial nuclear power reactors and production facilities, which are not involved here. *See* AEA §§ 103, 105, 42 U.S.C. §§ 2133, 2135.

Permitting routine adjudicatory challenges to agency decisions solely because one company "sues to complain of [a] competitive advantage" would be "more likely to frustrate than to further statutory objectives." *See National Coal Association v. Hodel*, 825 F.2d 523, 530 n.9 (D.C. Cir. 1987); *see also Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 927 (D.C. Cir. 1989) (waste disposal firms have business interests that may prove "fundamentally inconsistent" with the environmental interests of RCRA and thus a disposal firm might be a "peculiarly unsuitable proxy for those whom Congress intended to protect"). The AEA's focus upon health and safety interests is more akin to the environmental and safety interests of RCRA, under which competitors were not permitted to challenge EPA action, than to the drug, banking, and other cases that rest explicitly upon statutory provisions intended to prohibit or limit competition, either for the protection of a particular class, or to further some other statutory goal.[4]

Although a few judicial decisions seemingly have accorded standing to a competitor without expressly tying the competitor's interest to an interest of the applicable statute,[5] such a generalized approach seems at odds with the principles the Supreme Court has until now consistently followed. There would be no reason at all to examine and discern the congressional intent and "interests protected" under a given statute if all competitors could be readily deemed to have standing. Indeed, courts have cautioned against permitting competitors to obtain standing "through a facile assertion that they are enforcing entry-restricting legislation." *First National Bank & Trust Co.*, 988 F.2d at 1277 n.4. Moreover, there is a growing concern about competitors improperly seeking litigation before regulatory agencies simply to "trigger . . . litigation costs

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[4] *See, e.g., Schering Corp. v. FDA*, 51 F.3d 390, 395-96 (3d Cir.) (where Drug Competition and Patent Restoration Act's market entry provisions were designed as a "statutory compromise of the competing concerns" of "pioneer" and generic drug manufacturers), *cert. denied*, 516 U.S. 907 (1995); *UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621, 630-31 (3d Cir. 1995) (UPS within zone of interests of postal rate statutes, which relate to postal monopoly and reflect congressional concern with balancing interests of the government, various categories of mailers, and competitors), *cert. denied*, 516 U.S. 1171 (1996); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 367-68 n.5 (D.C. Cir. 1998) (petitioner's "both concerns, predation and competition, come within the zone of interests of the Federal Power Act"); *MD Pharmaceutical, Inc. v. Drug Enforcement Administration*, 133 F.3d 8, 12 (D.C. Cir. 1998) (where statute established quotas for registered drugs, and therefore already registered manufacturers, "[e]ven more so than traditional licensees," would have an interest in keeping out each new market entrant who would produce a percentage of the total allowable quota); *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration*, 822 F.2d 1105, 1107-09 (D.C. Cir. 1987) (where a primary factor to be considered under National Gas Act was "competitiveness" of import); *Associated Gas Distributors v. FERC*, 899 F.2d 1250 (D.C. Cir. 1990) (action brought under Natural Gas Act which has express concerns about monopoly power and various effects on competition); *MOVA Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (pioneer drug company's interest in limiting additional competition was " 'by its very nature' linked with the statute's goal of limiting competition") (citing and following *National Credit Union*, 118 S. Ct. at 935 n.6).

[5] *See, e.g., Old Town Trolley Tours, Inc. v. Washington Metropolitan Area Transit Commission*, 129 F.3d 201, 203 (D.C. Cir. 1997). *See also Michigan Gas Co. v. FERC*, 115 F.3d 1266, 1272 (6th Cir. 1997).

and other administrative burdens" and thereby impose expenses upon their competitors. *See* Lars Noah, "Sham Petitioning as a Threat to the Integrity of the Regulatory Process," 74 N.C. L. Rev. 1, 7 (1995).

Envirocare claims that it does not propose here an "open-ended" inquiry because it merely seeks to ensure that Quivira has complied with the detailed regulatory standards for mill tailings disposal. Envirocare Substitute Appeal Brief at 18. These standards, however, contained in Appendix A to Part 40, address an extensive list of different matters, and Envirocare appears poised to raise any number of them, in addition to raising challenges under a number of other sections, spanning record-keeping, waste manifest, worker safety, and other regulations. *See, e.g.*, Envirocare's Request for Hearing at 4. The risk of Envirocare — which has no radiological interest of its own — inordinately burdening the administrative process is not insignificant.

Envirocare further suggests that its economic injury falls specifically within the interests protected by section 84 of the AEA, 42 U.S.C. § 2014. As amended in 1983, this section directs the Commission, in managing 11e(2) byproduct material, to take into account not only public health, safety, and environmental risks, but also "economic costs." Yet as the Licensing Board found, Congress added this section merely to ensure that licensees did not have to bear unnecessary costs.[6] Section 84 has nothing to do with competitors' interests.

Envirocare does not seek to challenge its own regulatory burdens, but essentially to urge that identical burdens be imposed upon another licensee. Envirocare seeks, as the Licensing Board stated, to make its own "precise licensing requirements the floor (rather than the ceiling)." 46 NRC at 267. Moreover, "any competitor of QMC anywhere in the country" would also be able to have a hearing on QMC's licensing requirements. This outcome would, as the Board noted, go against the flexibility Congress intended the Staff to have in considering the particular site-specific factors of each facility, particularly those of preexisting mill sites.[7]

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[6] *See, e.g.*, 128 Cong. Rec. S2976 (daily ed. Mar. 30, 1982) (statement of Sen. Wallop) (amendment intended to protect health and safety without imposing unnecessary costs on already economically depressed industry); 128 Cong. Rec. S2977 (daily ed. Mar. 30, 1982) (statement of Sen. Schmitt) (vital that nuclear industry "not be saddled with unreasonably stringent restrictions in a misguided effort to eliminate remote and hypothetical risks without regard to the enormous costs involved"); 128 Cong. Rec. S13056 (daily ed. Oct. 1, 1982) (statement of Sen. Simpson) (regulatory approach should be "reasonably related to the risks in terms of costs"); 128 Cong. Rec. S15313 (daily ed. Dec. 16, 1982) (statement of Sen. Schmitt) ("it is contrary to the public interest . . . to impose requirements which are totally unnecessary or which are out of line with the risks involved"); 128 Cong. Rec. H8816 (daily ed. Dec. 2, 1982) (statement of Rep. Lujan) ("costly regulatory burdens should not be imposed upon the uranium industry to address insubstantial risks").

[7] *See, e.g.*, H.R. Conf. Rep. No. 97-884, at 44 (1982) (NRC should consider the site-specific conditions of existing mills); 128 Cong. Rec. S2973 (daily ed. Mar. 30, 1982) (statement of Sen. Simpson) (section 84 amendment intended to allow NRC "flexibility in applying . . . requirements at existing sites where large quantities of mill tailings already exist"); 128 Cong. Rec. S2975 (daily ed. Mar. 30, 1982) (statement of Sen. Simpson) (amendment

(Continued)

When Envirocare applied for and received its own NRC license, it had ample opportunity to contest and where appropriate to request an exemption from any of the regulatory burdens imposed by the NRC Staff. Envirocare now remains free to request a relaxation of any current license requirement it deems unwarranted or no longer necessary. But Envirocare's purely competitive interests, unrelated to any radiological harm to itself, do not bring it within the zone of interests of the AEA for the purpose of policing the license requirements of a competitor. Indeed, it would be disruptive of our statutory scheme if all competitors could easily obtain hearings to second-guess the Staff's actions toward other licensees.[8]

To say that Envirocare lacks standing to bring this action is not to say that Envirocare has no meritorious arguments about Quivira's environmental conditions and current license requirements. Standing requirements determine only who may bring an action, not whether the claims made are valid. Those claims are not before us now. It is for the purpose of considering safety and environmental claims outside of adjudication that the NRC has the 10 C.F.R. § 2.206 petition process, by which Envirocare may bring its concerns to the attention of the Director.

IV. CONCLUSION AND ORDER

For the reasons stated in this decision, the Commission hereby *affirms* the Atomic Safety and Licensing Board order LBP-97-20.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of July 1998.

"provides, as under existing law, that NRC has greater flexibility in developing and applying requirements to uranium mills in existence prior to November 1, 1981, taking into account" particular additional factors that would not be applicable to new NRC licensees); 128 Cong. Rec. S2968 (daily ed. Mar. 30, 1982) (statement of Sen. Domenici) (amendment "specifically authorizes NRC to take into account various site-specific factors in applying requirements to existing facilities").

[8] Envirocare also claims standing on the ground that the NRC's inconsistent application of its licensing requirements violates constitutional guarantees of due process and equal protection. Agencies like the NRC, however, have wide discretion to perform regulatory functions on a case-by-case basis. Nothing in Envirocare's generalized and unsupported argument provides a basis for a claim of constitutional injury. Moreover, as the Licensing Board suggests, there are inherent, obvious differences between Envirocare and Quivira. *See* 46 NRC at 271-72. "Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause." *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) (citation omitted).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

July 28, 1998

I. INTRODUCTION

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings, within the framework of its existing Rules of Practice in 10 C.F.R. Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. *Statement of Policy*

on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); 46 Fed. Reg. 28,533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment of and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 C.F.R. Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. SPECIFIC GUIDANCE

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, prefiled testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 C.F.R. Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 C.F.R. § 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under section 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied "as otherwise ordered by the presiding officer." Boards should exercise their authority under these options and 10 C.F.R. § 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such a motion will likely substantially reduce the

number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the Staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, e.g., by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the Staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307 (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. *Parties' Obligations*

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 C.F.R. § 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in section 2.714(b)(2). *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The Commission reemphasizes that licensing boards should continue to require adherence to section 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 C.F.R. Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1427, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants." *See* 10 C.F.R. §§ 55.71(d) and 51.95(c).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 C.F.R. § 2.760a. Such authority

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[1] "[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." *Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule*, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). The board may not proceed further with *sua sponte* issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise *sua sponte*.

Currently, 10 C.F.R. § 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 C.F.R. Part 54 may arise as the Staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 C.F.R. § 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 C.F.R. § 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pretrial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the Staff. *See, e.g.*, 10 C.F.R. §§ 2.720(h), 2.744. Under the existing practice, however, the Staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall

provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the Staff, such orders shall provide only that the Staff identify the witnesses whose testimony the Staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the Staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 C.F.R. § 2.1231. Accordingly, the Staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the Staff until the Staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the Staff before the Staff's review documents are issued will expedite the hearing, discovery against the Staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the Staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, e.g., by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular, the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. CONCLUSION

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to

monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

For the Commission

ANNETTE VIETTI-COOK
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 28th day of July 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of **Docket No. 72-22-ISFSI**

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

July 29, 1998

The Commission considers two appeals of an Atomic Safety and Licensing Board decision, LBP-98-7, 47 NRC 142 (1998), which made various rulings on intervention. The Commission affirms the Board's grant of intervention to the Confederated Tribes of the Goshute Reservation. The Commission also affirms the Board's decision to deny the intervention request of the Scientists for Secure Waste Storage.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission must grant intervention to any person whose "interest may be affected by the proceeding." Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). To determine whether a petitioner's interest provides a sufficient basis for intervention, the Commission has long looked for guidance to current judicial concepts of standing.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

Where an organization asserts a right to represent the interests of members, judicial concepts of standing require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim

asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Longstanding agency practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

An organization must allege that one of its members will suffer a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING

The Commission historically has accorded substantial deference to board determinations for or against standing, except when the board has clearly misapplied the facts or law.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

The interest that the organization seeks to represent in a proceeding must be germane to the organization's overall purposes. The "germaneness" test requires that an "organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." The purpose of the test is to ensure "a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing." (Citations omitted.)

INTERVENTION: DISCRETIONARY

The Commission considers appeals of licensing board rulings on discretionary intervention under an "abuse of discretion" standard.

INTERVENTION: DISCRETIONARY

Generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute.

ENVIRONMENTAL JUSTICE

Whether there was "discrimination in the site selection process" is not a cognizable claim in our adjudicatory proceedings. President Clinton's executive order on environmental justice, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), expressly stated that it creates no new legal rights or remedies; accordingly, it imposed no legal requirements upon the Commission. Its purpose was merely to underscore certain provisions of existing law. The only "existing law" applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

ENVIRONMENTAL JUSTICE

Disparate impact analysis is the Commission's principal tool for advancing environmental justice under NEPA. Questions of motivation and social equity lie outside of NEPA's purview. The NRC's goal with respect to analyzing disparate impacts is to identify and adequately weigh, or mitigate, effects of the proposed action on low-income and minority communities.

FINANCIAL QUALIFICATIONS

Part 50 financial qualifications provisions are not applicable *in toto* to Part 72 ISFSI applicants, but should merely be used as guidance. Financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context. Our financial qualifications standards and other licensing regulations do not require the board to undertake a full-blown inquiry into an applicant's likely business success. To the maximum extent possible, both the NRC Staff and the licensing board should avoid second-guessing private business judgments.

MEMORANDUM AND ORDER

The Commission is considering together two appeals that arise from the application of Private Fuel Storage, L.L.C. (PFS), for a license to store spent nuclear fuel at an Independent Spent Fuel Storage Installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. Both appeals challenge the Atomic Safety and Licensing Board's rulings on intervention in LBP-98-7, 47 NRC 142 (1998).

The first appeal, taken by PFS, seeks reversal of the Board's grant of intervention to the Confederated Tribes of the Goshute Reservation. The

Confederated Tribes represents the interests of one of its members, Chrissandra Reed. The NRC Staff and an Intervenor, Skull Valley Band of Goshute Indians (hereinafter Skull Valley Band), support PFS's appeal, while another Intervenor, the State of Utah, opposes it. The second appeal, taken by Scientists for Secure Waste Storage (SSWS), seeks reversal of the Board ruling that denied it intervention. PFS and the Skull Valley Band support SSWS's appeal; the NRC Staff and the State of Utah oppose it. We affirm both of the challenged Board rulings. We also take this opportunity to comment briefly on several other aspects of this adjudication.

BACKGROUND

The agency published a notice and opportunity for hearing on PFS's license application in July 1997. The notice set September 15, 1997, as the deadline for filing petitions for intervention. *See* 62 Fed. Reg. 41,099 (July 31, 1997). The Confederated Tribes, a federally recognized Native American tribe of 450 members, filed a timely response to this notice, as did numerous other potential intervenors. On January 20, 1998, more than 4 months after the intervention filing deadline, SSWS filed its initial intervention petition. SSWS explained that it was a group of renowned scientists, engineers, and educators interested in presenting sound technical and scientific information to the Commission in connection with this proceeding.

The Board received the SSWS petition just prior to the January 27, 1998 prehearing conference, at which the Board heard oral arguments from various petitioners on their standing and on the admissibility of their contentions. Subsequent to the prehearing conference, at the Board's direction, SSWS filed two amendments to its original intervention petition, dated February 2 and 27, 1998.

On April 22, the Board resolved all petitions for intervention. Among other rulings, the Board granted intervention to the Confederated Tribes and denied intervention to SSWS. LBP-98-7, 47 NRC at 170-71, 172-78. The Board granted the Confederated Tribes standing only as an authorized representative of the interests of one of its members, Chrissandra Reed, although the Confederated Tribes had also sought standing in its own capacity. Ms. Reed had provided an affidavit stating that she visits the Skull Valley reservation regularly and is legal guardian of her granddaughter, who also makes frequent visits. *Id.* at 170-71. Ms. Reed's affidavit expressed concern about the health, safety, and environmental impacts of the proposed PFS ISFSI on her and on her granddaughter. The Board acknowledged that the record contained conflicting information about the frequency of Skull Valley visits by Ms. Reed and her granddaughter, but found that the Reeds' contacts with the Skull Valley

reservation are not "so attenuated as to provide an insufficient basis for standing." *Id.* at 171.

On appeal, PFS argues that the Confederated Tribes lacks standing to represent the health, safety, or environmental interests of Ms. Reed and her granddaughter because these interests are not "germane" to the purposes for which the Confederated Tribes was established. PFS also argues that Ms. Reed's contacts with the Skull Valley reservation are not frequent enough to establish that she would have standing on her own to challenge the PFS license application. The NRC Staff, which had conceded the Confederated Tribes' standing before the Board, now urges the Commission to remand the issue to the Board to resolve the uncertainty in the record over the frequency of the Reeds' visits.

As for SSWS, the Board denied intervention as a matter of right because of SSWS's failure to point to an interest of its own directly affected by the proceeding. LBP-98-7, 47 NRC at 176-77. The Board also found that SSWS had failed to demonstrate good cause for petitioning late and had failed to show that it met the other factors recognized by the NRC as weighing in favor of late intervention. *Id.* at 172-75. Finally, the Board denied discretionary intervention to SSWS, ruling that SSWS's potential contributions to the proceeding, which it saw as overlapping to some extent the NRC Staff's safety and environmental reviews, did not outweigh the risk of delay that could result from SSWS's "academic interest" rather than "particular concern." *Id.* at 173-74, 177-78. On appeal, SSWS argues that the Board abused its discretion in denying discretionary intervention; it does not appeal the rulings on intervention as of right or on the untimeliness of its filing.

CONFEDERATED TRIBES' STANDING

By statute, the Commission must grant intervention to any person "whose interest may be affected by the proceeding." Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). To determine whether a petitioner's interest provides a sufficient basis for intervention, "the Commission has long looked for guidance to current judicial concepts of standing." *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *see, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

Where, as with the Confederated Tribes in the current case, an organization asserts a right to represent the interests of members, "judicial concepts of standing" require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are

germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. *See Georgia Tech*, 42 NRC at 115.

At issue in this proceeding is whether the Confederated Tribes meets the first and second prongs of the *Hunt* test.

1. Injury to Ms. Reed

To meet the first *Hunt* requirement — that a member of the organization would have standing on her own to intervene as of right in an NRC proceeding — an organization must allege that one of its members will suffer "a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." *Georgia Tech*, 42 NRC at 115. *Accord International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). For the reasons discussed below, we agree with the Board that the Confederated Tribes meets this test.

Before the Board, the Confederated Tribes relied on two affidavits filed by Ms. Reed. The affidavits authorize the Confederated Tribes to represent Ms. Reed's interests and state that she is concerned with the impacts of the proposed ISFSI on her own health and safety and on that of her 3-year-old granddaughter, also a member of the Confederated Tribes. Ms. Reed states that she is the legal guardian of her granddaughter and that, approximately every other week, her granddaughter visits cousins who live on the Skull Valley reservation for visits that last from one night to two weeks. Ms. Reed further asserts that she herself visits the reservation eight to ten times a year. *See* LBP-98-7, 47 NRC at 170-71.

Ms. Reed's averments are sufficient to establish standing. To begin with, no one challenges the Board's finding that the visits to Skull Valley by Ms. Reed and her granddaughter "bring one or both of them within distances of the facility" that have been deemed "sufficient to provide standing for other participants" in this case. LBP-98-7, 47 NRC at 171. And, while the record contains some conflicting evidence about the exact frequency of the Reeds' visits, nothing in the record contradicts the Confederated Tribes' claim that Ms. Reed and her granddaughter have relatives on the Skull Valley reservation whom they visit regularly. Indeed, the declaration provided by PFS itself (in opposition to standing) concedes that Ms. Reed visits the reservation at least once a year and that her granddaughter visits the reservation three to four times a year "or more

whenever Chrissandra needs a place for Michaela [Ms. Reed's granddaughter] to stay." *See* PFS Answer to the Confederated Tribes Supplemental Memorandum, exh. 1 (Wash Declaration), at 1-2 (Dec. 12, 1997). Thus, PFS's own declaration establishes that the Reeds' familial ties are close (so close that the granddaughter is left alone with her Skull Valley relatives whenever necessary) and that their visits to Skull Valley, while not on a rigid schedule, are commonplace.[1]

The NRC Staff, while not opposing the Confederated Tribes' standing outright (the Staff had conceded the Tribes' standing before the Board), suggests that the Commission remand the standing question to the Board with a directive to determine, presumably through a hearing or a further exchange of affidavits, the frequency of the Reeds' visits to Skull Valley. We think a remand unnecessary and likely to result in unproductive collateral litigation. The Confederated Tribes' standing does not depend on the precise number of the Reeds' visits. It is the visits' length (up to 2 weeks) and nature — for necessary child care and visiting relatives — that establish a bond between the Reeds and Skull Valley and the likelihood of an ongoing connection and presence sufficient for standing. *Compare, e.g., Dubois v. Department of Agriculture*, 102 F.3d 1273, 1282-83 (1st Cir. 1996) (a son's "return 'regularly,' at least annually, to his parents' home" sufficient to establish standing to challenge expansion of nearby ski facility), *cert. denied*, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1977). *Cf. also Georgia Tech*, 42 NRC at 117 ("driving by" a reactor daily sufficient for standing); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 (1979) ("recreational" canoeing near reactor sufficient for standing).

We historically have accorded "substantial deference" to Board determinations for or against standing, except when the Board has clearly misapplied the facts or law. *See International Uranium (USA) Corp.*, 47 NRC at 118; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996); *Georgia Tech*, 42 NRC at 116; *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). The Board did not misapply the facts or law here. It reviewed the entire record and reached the reasonable conclusion that Ms. Reed's contacts with the Skull Valley reservation are enough for standing under prevailing judicial and Commission precedent.

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[1] At the prehearing conference, counsel for the Confederated Tribes stated that the Skull Valley Band had "cut off" the granddaughter's visits. Transcript at 20. Counsel for the Skull Valley Band stated that this was "blatantly not true." Transcript at 24. The Confederated Tribes' statement seems peculiar in that it is against its own interest. Nevertheless, a colorful exchange by counsel at an oral argument is not evidentiary and does not suffice to undermine Ms. Reed's sworn claims that she will continue to visit her relatives and rely on them for child care. However, if any party develops new evidence that conclusively shows that Ms. Reed and her granddaughter will no longer be visiting the Skull Valley reservation, they are free to submit it to the Board on summary disposition, if appropriate, or at a hearing and ask the Board to revisit its threshold standing decision.

2. Germaneness

The second prong of the *Hunt* test is whether the interest that the organization seeks to represent in a proceeding is germane to the organization's overall purposes. As a general matter, it may seem self-evident that organizations will rarely wish to go to the trouble and expense of litigation to contest matters that are unrelated to their interests. *Cf. Consolidated Edison Co. of New York* (Indian Point, Units 2 and 3), CLI-82-15, 16 NRC 27, 32 (1982). Nevertheless, PFS argues here that the Confederated Tribes fails the germaneness test. It appears to take the position that the Confederated Tribes has no legitimate interest in the health and safety concerns of its members except when they are on the reservation. The NRC Staff does not support PFS's germaneness argument. The Board itself did not discuss it.

In the leading judicial case on the issue, *Humane Society of the United States v. Hodel*, 840 F.2d 45, 58-59 (D.C. Cir. 1988), the court of appeals articulated what it deemed to be a "modest but sensible" test for organizational germaneness. The test requires that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." *Id.* at 56 (footnote omitted). The purpose of the test, according to the court in *Humane Society*, is to ensure "a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing." *Id.* at 58.

The Confederated Tribes is not the equivalent of a "law firm with standing"; it can hardly be seen as one of the "litigious organizations" that the germaneness test was meant to exclude. *See id.* at 57-58. To the contrary, the record shows that part of the Tribes' mission is to provide health, safety, social, educational and commercial services for its members. *See* Affidavit of David Pete at 17, 19 (Aug. 28, 1997), attached to Petition for Leave to Intervene Submitted by the Confederated Tribes (Aug. 28, 1997). As a sovereign body, it maintains a strong interest in its members' welfare as is exemplified by its efforts to provide these various services. With respect to health care, it takes responsibility for its members under any circumstance, even when a member's need for care stems from an illness or injury occurring off the reservation. *See* Brief of the Confederated Tribes of the Goshute Reservation in Response to the Appeal of Applicant Regarding Standing at 10 (May 8, 1998). The Confederated Tribes is well situated to represent a broad range of health and safety interests of its members on a daily basis and not just for purposes of litigating this case. The Confederated Tribes further cites its health care policy and the United States child welfare laws that permit it to intervene in any state child custody proceeding involving one of its members as support for its proposition that its responsibility for its members does not stop at the border of its reservation. *See id.* at 10-11, *citing* the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

Beyond bare assertions to the contrary, PFS has not countered with evidence that undermines the Confederated Tribes' claim.[2] For these reasons, we find that Confederated Tribes' interest in the health and welfare of its members, whether on or off the reservation, is sufficiently "germane" to the Tribes' organizational purpose.[3]

STANDING OF SSWS

SSWS appeals the Licensing Board's finding that it failed to meet the Commission's test for intervention as a matter of discretion under the standards enunciated in *Pebble Springs*, CLI-76-27, 4 NRC at 616. The Board weighed the various *Pebble Springs* factors and determined that:

> [G]iven SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the proceeding (factor six), we find discretionary intervention is not appropriate in this instance.

47 NRC at 177-78 (footnote omitted).

The Commission considers appeals of licensing board rulings on discretionary intervention under an "abuse of discretion" standard. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, *aff'd*, CLI-91-13, 34 NRC 185 (1991). In the present case, we see no such abuse of discretion. As the Board itself noted, "at first blush" it may seem anomalous to find that admission of SSWS, whose membership includes scientists of unquestioned accomplishment and renown, would be unlikely to add significantly to the development of a sound record. But as the Board explained, the intervention petition was deficient with regard to the specifics of the subject

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[2] The Skull Valley Band argues that permitting the Confederated Tribes to intervene here would interfere with the Skull Valley Band's sovereign interests in running its own affairs. Taking this argument to its extreme, no party would be permitted to intervene in this proceeding because all intervenors, at least those contesting the facility, would risk interference with the sovereign rights of the Band. This conclusion would of course turn our statutory mandate to permit intervention in our agency proceedings on its head.

[3] The Applicant argues that the Confederated Tribes' posture here is no different from that of the organizations that unsuccessfully sought standing in *McKinney v. Department of the Treasury*, 799 F.2d 1544 (Fed. Cir. 1986), and *Medical Association of Alabama v. Schweiker*, 554 F. Supp. 955 (M.D. Ala.), *aff'd*, 714 F.2d 107 (11th Cir. 1983) (*per curiam*). We disagree. In *McKinney*, the court held that an organization that did nothing more than "aver[ ] that it is a 'nonprofit public interest law firm'" failed to demonstrate a nexus between its organizational purpose and the economic interests of producers and workers in barring the import of goods. 799 F.2d at 1553. In *Medical Association of Alabama*, the court rejected a medical association's claim that its physician members' taxpayer interests were related to its organizational purpose even though no physician had joined the association for tax purposes. 554 F. Supp. at 964-65. Here, by contrast, the Confederated Tribes has established that part and parcel of its mission is to represent health and safety interests of its members in numerous capacities beyond the scope of the proceeding.

matter of the proceeding, i.e., the PFS application. We agree with the Board that generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute.[4]

In declining to disturb the Board's ruling, we wish to point out, as did the Board, that there are other means by which SSWS can contribute to the proceeding and make its expertise available: as witnesses for other parties, by an *amicus* filing, or with an appearance under 10 C.F.R. § 2.715(a).

MISCELLANEOUS MATTERS

No additional issues remain before the Commission on appeal. The Commission is monitoring this proceeding, however, as it does all proceedings. We believe that two admitted contentions, on environmental justice and on financial qualifications, warrant brief comment even at this early stage of the case. We also offer a general observation on the proceeding's anticipated schedule.

1. Environmental Justice

The Board appropriately denied an environmental justice contention submitted by the State of Utah that proposed to litigate the issue of "discrimination in the site selection process." LBP-98-7, 47 NRC at 203. As the Board recognized, we recently decided in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998), that such claims are not cognizable in our adjudicatory proceedings.

The Board did admit an environmental justice contention offered by another intervenor, Ohngo Gaudadeh Devia (OGD), that appears to focus more on disparate impacts, a legitimate issue for litigation under our *Claiborne* decision (47 NRC at 106-09), than on discriminatory siting. *See* LBP-98-7, 47 NRC at 233. As framed, however, OGD's contention suggests that PFS's application does not satisfy President Clinton's executive order on environmental justice, Exec. Order No. 12,898, 3 C.F.R. 859 (1995). *See id.* We remind the Board and the parties of our ruling in *Claiborne* that President Clinton's executive order stated expressly that it created no new legal rights or remedies; accordingly, it

[4] On appeal, SSWS complains that "the Licensing Board excessively 'front loaded' the requirements for intervention by explicitly expecting intervenors to come to the proceeding with detailed knowledge of specific elements of the application . . . ." Brief of SSWS in Support of Appeal from Denial of Petition to Intervene at 6 (May 1, 1998). SSWS's position reflects a basic misunderstanding of what is expected of an intervenor before this agency, particularly an intervenor coming to a proceeding late and seeking discretionary intervention. A petitioner seeking discretionary intervention must "identify with particularity the issues on which it is willing to participate." *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). "[B]road, generalized averments will not suffice." *Id.* It was therefore reasonable for the Board to conclude that despite the scientific expertise of SSWS's members, their failure to display sufficient special knowledge of *this* application weighs heavily against granting discretionary intervention.

imposed no legal requirements upon the Commission. *See* CLI-98-3, 47 NRC at 102. "Its purpose was merely to 'underscore certain provision[s] of *existing* law.' " *See id.* The only "existing law" applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

Our *Claiborne* decision held that "'[d]isparate impact' analysis is our principal tool for advancing environmental justice under NEPA." *Id.* at 100. The Board admitted OGD's environmental justice contention with the useful caveat that litigation on the contention was "limited to the disparate impact matters" raised in its admitted bases. LBP-98-7, 47 NRC at 233. OGD's contention (with its supporting bases), however, not only alleges "disparate impacts," but also claims that the siting process was not "just and fair." *Id.* This formulation arguably seeks a broad NRC inquiry into questions of motivation and social equity in siting. As we held in *Claiborne,* and as the Board held with regard to the State of Utah's environmental justice contention, such questions lay outside NEPA's purview. *See* CLI-98-3, 47 NRC at 101-06; LBP-98-7, 47 NRC at 203. "The NRC's goal [with respect to analyzing disparate impacts] is to identify and adequately weigh, or mitigate, effects [of the proposed action] on low-income and minority communities that become apparent only by considering factors peculiar to those communities." CLI-98-3, 47 NRC at 100. *See also* Council on Environmental Quality "Final Environmental Justice Guidance Under the National Environmental Policy Act" at 8-9 (Dec. 10, 1997). That should be the focus of the Board's environmental justice inquiry.

2. *Financial Qualifications*

The Board agreed with the NRC Staff that the Part 50 financial qualifications provisions are not applicable *in toto* to Part 72 ISFSI applicants, but should be used as guidance in reviewing the financial qualifications of PFS. LBP-98-7, 47 NRC at 187. This is consistent with our holding last year in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997), that financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context. In *Claiborne* the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. *Id.* at 308-09. The conditions had the effect of assuring financial qualifications and obviating further litigation of these issues. The parties and the Board may wish to consider the feasibility of license conditions in this proceeding, and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success. *See id.* at 308. To the maximum extent practicable, both

the NRC Staff, in its safety and environmental reviews, and the Board, in its adjudicatory role, should avoid second-guessing private business judgments.

3. Schedule

Recently, in CLI-98-7 (June 5, 1998), we remarked that the Board in this proceeding had handled the early phases of this adjudication "with admirable dispatch" (47 NRC at 312). The Board also seems ready to manage the remaining phases of the adjudication with a similar eye on efficiency and speed. *See* Memorandum and Order (General Schedule for Proceeding and Associated Guidance), dated June 29, 1998 (unpublished). We see no purpose at this point in attempting to fine-tune the Board's proposed schedule. We urge the Board and the parties, however, to heed the guidance set out in our recently issued *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

Like the Board (*see* Memorandum and Order, June 29, 1998, at 4), we are concerned that the NRC Staff's ongoing safety and environmental reviews of the proposed PFS facility not be compromised or delayed by the demands of the adjudicatory process. In its supervisory capacity, the Commission is pressing the NRC Staff (which to some extent is relying on outside contractors) to complete its reviews as promptly as possible. If at any point the NRC Staff submits to the Board a sworn affidavit or declaration indicating that hearing, discovery, or other adjudicatory requirements are significantly disrupting or delaying the Staff reviews, we would expect the Board to consider staying proceedings or otherwise modifying adjudicatory deadlines or schedules to accommodate the need for a prompt and thorough NRC Staff review. Our goal is to see the entire licensing process, including both the NRC Staff's review and the adjudication, completed as expeditiously and efficiently as possible.

CONCLUSION

For the foregoing reasons, the Board decision in LBP-98-7 to admit Confederated Tribes as a party and to refuse admission to SSWS is *affirmed.*

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of July 1998.