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NUCLEAR REGULATORY COMMISSION ISSUANCES

March 1988

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NUCLEAR REGULATORY COMMISSION ISSUANCES

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

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

U.S. NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson

In the Matter of **Docket No. 50-322-OL-6**
(Emergency Planning)

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

March 4, 1988

The Appeal Board denies the intervening governments' motion for interlocutory review (i.e., directed certification) of the Licensing Board's decision permitting applicant to pursue its request to operate the Shoreham nuclear power facility at a 25 percent power level.

RULES OF PRACTICE: INTERLOCUTORY APPEALS

The Commission's Rules of Practice prohibit "interlocutory appeals." 10 C.F.R. § 2.730(f). The proper vehicle for seeking interlocutory review of a licensing board decision is a motion or petition for "directed certification" pursuant to 10 C.F.R. §§ 2.718(i), 2.785(b)(1).

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

The Appeal Board grants requests for interlocutory review infrequently, and then only upon a showing that the challenged ruling either threatens to cause immediate and irreparable harm, or "'affects the basic structure of the proceeding in a pervasive or unusual manner.'" *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370 (1981) (citing *Public Service Electric and Gas Co.* (Salem Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980)).

REGULATIONS: EXEMPTIONS

Under 10 C.F.R. § 50.12(a), the Commission may grant exemptions from regulations in 10 C.F.R. Part 50 upon a showing of at least one of six identified "special circumstances." The exemption should also be "[a]uthorized by law, [should] not present an undue risk to the public health and safety, and [should be] consistent with the common defense and security."

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

10 C.F.R. § 2.758(b) provides a mechanism for a party to an adjudication to petition the Commission for the waiver of any specified Commission rule or regulation. It requires a showing that "special circumstances . . . are such that application of the rule or regulation . . . would not serve the purpose for which the rule or regulation was adopted."

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

The mere expansion of issues rarely, if ever, affects the basic structure of a proceeding in a pervasive or unusual way so as to warrant appeal board interlocutory review. *See, e.g.*, ALAB-861, 25 NRC 129, 135 (1987); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982); *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981).

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

A board's use of parallel hearings to consider additional issues does not provide a basis for a grant of directed certification. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987).

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

A licensing board order that neither decides the merits of an issue nor denies the parties' right to be heard thereon does not have a pervasive or unusual effect on a proceeding so as to warrant interlocutory review. *South Texas*, 13 NRC at 372.

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

Unique or even erroneous licensing board interpretations and applications of Commission regulations generally cannot be said to "alter[] the very shape of the ongoing adjudication" so fundamentally as to require appeal board intercession before judgment on the merits. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982). *See also id.*, ALAB-706, 16 NRC at 1756-58.

RULES OF PRACTICE: INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION)

Only where a board's interpretation of a regulation is "of patent, immediate, and large significance to the administration of not merely that specific proceeding but, as well, the numerous other operating license proceedings then under way or at the threshold of commencement" has an appeal board conducted interlocutory review. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376-77 (1983). *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982), *rev'd in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). *See also Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474-75 (1985).

APPEARANCES

Thomas Boyle, Hauppauge, New York, and **Herbert H. Brown, Lawrence Coe Lanpher**, and **Karla J. Letsche**, Washington, D.C., for intervenor Suffolk County; **Fabian G. Palomino** and **Richard J. Zahnleuter**, Albany, New York, for intervenor State of New York; and **Stephen Latham**, Riverhead, New York, for intervenor Town of Southampton

Donald P. Irwin, Lee B. Zeugin, and **David S. Harlow**, Richmond, Virginia, for applicant Long Island Lighting Company.

Edwin J. Reis for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Intervenors Suffolk County, the State of New York, and the Town of Southampton (hereinafter, "the Governments") jointly move for leave to file an interlocutory appeal[1] from the Licensing Board's January 7, 1988, memorandum and order in the "OL-6" phase of this operating license proceeding. *See* LBP-88-1, 27 NRC 7. In that decision, the Board gave permission to applicant Long Island Lighting Company (LILCO) to pursue its request to operate the Shoreham nuclear power facility at a 25 percent power level under NRC regulations codified at 10 C.F.R. §§ 50.57(c) and 50.47(c)(1). The Governments claim that the Board's order not only is erroneous, but also so fundamentally affects the structure of this proceeding that interlocutory review is necessary. LILCO and the NRC staff oppose the motion. As explained below, the Governments' arguments are not persuasive, and we therefore deny their motion.

A. Construction at Shoreham is complete, but numerous contested issues concerning offsite emergency planning for the facility remain unresolved. Despite these outstanding issues, Shoreham holds a low-power license pursuant to 10 C.F.R. § 50.47(d), authorizing operation up to five percent of rated power. In April 1987, LILCO asked the Commission to increase its authorized power level to 25 percent. The Commission denied the motion but permitted LILCO to "refile its request under [10 C.F.R.] § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby." CLI-87-4, 25

[1] The Commission's Rules of Practice prohibit "interlocutory appeals." 10 C.F.R. § 2.730(f). As the Governments should be aware by now (*see, e.g.*, ALAB-780, 20 NRC 378 (1984)), the proper vehicle for seeking interlocutory review of a licensing board decision is a motion or petition for "directed certification" pursuant to 10 C.F.R. §§ 2.718(i), 2.785(b)(1). Notwithstanding the incorrect characterization of their motion, however, the Governments address the proper legal criteria for a petition for directed certification. *See infra* pp. 261-62.

NRC 882, 883 (1987). LILCO refiled its request last July, and the Licensing Board subsequently called for fuller briefing by all the parties of the various issues raised by that motion. *See* Memorandum of October 6, 1987 (unpublished).

After consideration of the numerous pleadings before it (including the Governments' opposition), the Licensing Board decided that LILCO's motion was properly filed under 10 C.F.R. § 50.57(c). LBP-88-1, 27 NRC at 12, 16. That regulation permits applicants to move for an operating license authorizing low-power testing (one percent of full power) and "further operations short of full power operation," while the hearing on full-power licensing is still pending. Section 50.57(c) also gives other parties with contentions "relevant to the activity to be authorized" the right to be heard, and directs the Board to make certain findings required by section 50.57(a) — e.g., reasonable assurance that the activities authorized can be conducted in compliance with the agency's regulations and without endangering the public health and safety — prior to ruling on the motion.

The Licensing Board further agreed with LILCO that another regulation, 10 C.F.R. § 50.47(c)(1), embodies the appropriate standard against which LILCO's 25 percent power request should be measured. LBP-88-1, 27 NRC at 12, 15, 16. That provision states that, when an applicant fails to meet the NRC's emergency planning standards set out in 10 C.F.R. § 50.47(b), it

> will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

10 C.F.R. § 50.47(c)(1) (1987).[2] In so ruling, the Licensing Board also concluded that "no exemption from the [emergency planning] regulations is needed as urged by the Governments." LBP-88-1, 27 NRC at 12. The Board thus determined that it would entertain LILCO's motion for operation at 25 percent power. It noted, however, the opposing parties' right to be heard and the difficult task that lies ahead for LILCO if it is to succeed ultimately with its motion. *Id.* at 12, 16. The Board also solicited the parties' further views on whether a separate licensing board, special master, alternate board member, or technical interrogator should be used for the consideration of LILCO's motion. *Id.* at 14-15, 16-17, 18.

B. As the Governments' motion acknowledges, we grant requests for interlocutory review infrequently, and then only upon a showing that the challenged ruling either threatens to cause immediate and irreparable harm, or "'affects the basic structure of the proceeding in a pervasive or unusual manner.'" *Hous-*

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[2] The Commission recently amended this section of the emergency planning regulations, but the particular language at issue here was not changed. *See* 52 Fed. Reg. 42,078, 42,085-86 (1987).

ton Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370 (1981) (citing *Public Service Electric and Gas Co.* (Salem Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980)). The Governments rely on the latter criterion and suggest essentially two reasons why the Licensing Board's order has a pervasive or unusual effect on the basic structure of this proceeding. First, in their view, because LILCO's 25 percent power request is effectively a challenge to the Commission's emergency planning regulations and the generic assumptions underlying them, the Board cannot entertain the motion in the absence of either an "exemption" request under 10 C.F.R. § 50.12(a) or a "waiver" request under 10 C.F.R. § 2.758(b).[3] In other words, the Governments' complaint is that the Board does not intend to evaluate LILCO's motion in accordance with all the regulatory standards that the Governments believe pertain here. Second, the Governments contend that the Board's ruling dramatically changes the issues in this proceeding, by permitting LILCO to attack the underlying assumptions of the emergency planning regulations.[4]

As a separate argument, the Governments claim that we should intercede and review the Board's ruling now because it has important generic implications for many other cases. In this connection, they cite our decision in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982), *rev'd in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983), where we reviewed a ruling referred to us by a licensing board that concerned an interpretation of the Commission's Rules of Practice.

As both LILCO and the staff contend, the Governments misunderstand and overstate the significance of the Licensing Board's order.[5] The Licensing Board's order simply authorizes the filing of LILCO's motion to operate at 25 percent power — an action clearly permitted under 10 C.F.R. § 50.57(c). As such, it adds new issues to the proceeding, not unlike a board's admission of new contentions. We have long held, however, that the mere expansion of issues rarely, if ever, affects the basic structure of a proceeding in a pervasive or unusual way so as to warrant our interlocutory review. *See, e.g.*, ALAB-861, 25 NRC 129, 135 (1987); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power

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[3] Under 10 C.F.R. § 50.12(a), the Commission may grant exemptions from regulations in 10 C.F.R. Part 50 upon a showing of at least one of six identified "special circumstances." The exemptions should also be "[a]uthorized by law, [should] not present an undue risk to the public health and safety, and [should be] consistent with the common defense and security." 10 C.F.R. § 2.758(b) provides a mechanism for a party to an adjudication to petition the Commission for the waiver of any specified Commission rule or regulation. It requires a showing that "special circumstances . . . are such that application of the rule or regulation . . . would not serve the purpose for which the rule or regulation was adopted."

[4] LILCO apparently hopes to prove that the risks from operation at 25 percent power are substantially less than at full-power operation, and that therefore any deficiencies in the emergency plan for Shoreham are not significant for operation at that reduced power level. *See* LBP-88-1, 27 NRC at 12.

[5] Although it is certainly not evidence of record upon which we would or could rely, we note that even one of the counsel for Suffolk County has stated (if quoted accurately) that the Board's decision " 'shouldn't have much significance read into it.' " *Inside N.R.C.*, January 18, 1988, at 12.

Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982); *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981). The Governments do not convincingly explain why the addition of the 25 percent power issues here is distinguishable from these past cases.[6] We have also found that a board's use of parallel hearings to consider such additional issues does not provide a basis for a grant of directed certification (*see supra* note 1 & pp. 261-62). *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987).

Further, the Board's order does not decide the merits of the motion, and it preserves the Governments' right to be heard thereon. *See South Texas*, 13 NRC at 372 (no pervasive or unusual effect on proceeding where board's specification of issues for hearing is not a final ruling and parties remain free to litigate their issues). To be sure, the Board did determine that 10 C.F.R. § 50.47(c)(1) provides the appropriate standard against which LILCO's motion will be measured — thus rejecting the Governments' argument that LILCO must seek an exemption under 10 C.F.R. § 50.12(a) as well. But again, as we have repeatedly stressed, unique or even erroneous licensing board interpretations and applications of Commission regulations generally cannot be said to "alter[] the very shape of the ongoing adjudication" so fundamentally as to require our intercession before judgment on the merits. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982). *See also id.*, ALAB-706, 16 NRC at 1756-58.[7] This is particularly true in this case, where the Licensing Board has expressed reservations about LILCO's ultimate chance of success on the merits of its 25 percent power motion. *See* LBP-88-1, 27 NRC at 12, 16.

Only where a board's interpretation of a regulation is "of patent, immediate, and large significance to the administration of not merely that specific proceeding

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[6] The staff correctly points out that the Board's determination to entertain LILCO's 25 percent power motion does not end or affect those other parts of this proceeding concerned with whether LILCO's emergency plan conforms to the NRC's regulations for full-power operation. NRC Staff Response (February 8, 1988) at 7-8.

[7] We do not reach the merits of the Governments' objection to the Licensing Board's ruling. But the following excerpt from the Statement of Consideration for the Commission's 1985 amendment to 10 C.F.R. § 50.12(a) — not cited by the Licensing Board or any of the parties — casts considerable doubt on the Governments' position that LILCO must seek an exemption under section 50.12(a) as well as satisfy the standards of section 50.47(c)(1):

> On a related point, the relationship between the general exemption criteria in § 50.12(a) and other provisions in Part 50 that contain specific exemption criteria or alternative methods of compliance, the Commission would emphasize that § 50.12(a) is the exemption provision that applies *generally* to the provisions of 10 CFR Part 50. If another regulation in Part 50 provides for specific exemption relief, or for alternative methods of compliance, the criteria of the specific regulation are the appropriate considerations. If the exemption criteria in the specific regulation are met, the rule has been complied with, and no exemption under § 50.12(a) is necessary. It is only in those cases where the specific exemption or alternative compliance criteria cannot be satisfied, that the application of the general criteria in § 50.12(a) will be appropriate. If the specific exemption criteria, or the alternative methods of compliance, can be satisfied, there is no need to also satisfy the criteria of § 50.12(a).

50 Fed. Reg. 50,764, 50,775 (1985) (emphasis in original).

but, as well, the numerous other operating license proceedings then under way or at the threshold of commencement" have we conducted interlocutory review. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376-77 (1983). *See Catawba*, 16 NRC at 464-65. *See also Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474-75 (1985). The Governments, however, totally fail to support their claim that the Licensing Board's ruling at issue here has "significant generic implications" for "many other cases." Governments' Motion (January 21, 1988) at 11.[8]

The Governments have therefore failed to show that the Licensing Board's ruling in LBP-88-1, 27 NRC 7, authorizing the filing of LILCO's motion for 25 percent power operation, has a pervasive or unusual effect on this adjudication, so as to warrant interlocutory review. Accordingly, the Governments' Motion for Leave to File Interlocutory Appeal is *denied*.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

[8] Indeed, we are aware of only one other proceeding (*Seabrook*) where the relationship of sections 50.57(c), 50.47(c)(1), and 50.12(a) could arise. But even there, applicants do not yet have a low-power (five percent) license; thus, any request for a higher power level is purely a matter of speculation at this point. (The only other pending operating license proceeding involves the Comanche Peak facility, but emergency planning is not a contested issue there.)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL
50-444-OL
(Offsite Emergency Planning)

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

March 18, 1988

The Appeal Board denies a joint request by the Town of Amesbury, the Town of Hampton, the Seacoast Anti-Pollution League, and the New England Coalition on Nuclear Pollution for interlocutory review of a Licensing Board scheduling order.

RULES OF PRACTICE: DIRECTED CERTIFICATION

It is well-established that the Appeal Board will exercise its discretionary authority pursuant to 10 C.F.R. § 2.718(i) to direct certification of an interlocutory order of a licensing board "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

RULES OF PRACTICE: DIRECTED CERTIFICATION

Where a licensing board scheduling order is involved, agency case law makes clear that, under either standard for interlocutory review, a showing that the schedule deprives a party of its right to procedural due process is required. *See* ALAB-864, 25 NRC 417, 420-21 (1987).

APPEARANCES

Matthew T. Brock, Portsmouth, New Hampshire, for the intervenors, Town of Amesbury, Massachusetts; Town of Hampton, New Hampshire; Seacoast Anti-Pollution League; and New England Coalition on Nuclear Pollution.

Frank W. Ostrander, Boston, Massachusetts, for the intervenor, James M. Shannon, Attorney General of Massachusetts.

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

Sherwin E. Turk for the Nuclear Regulatory Commission staff.

MEMORANDUM

On February 25, 1988, the Town of Amesbury, the Town of Hampton, the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (hereinafter "intervenors") jointly filed a motion for directed certification of a February 17, 1988 scheduling order of the Licensing Board.[1] The Board's order established a schedule designed to bring to a conclusion the litigation of the offsite emergency planning issues in this operating license proceeding.[2] To borrow its language, the issues before that Board are proceeding on three separate "tracks": the first, or "Main Track," consists of all issues involving the New Hampshire Radiological Emergency Response Plan (NHRERP), except sheltering; the second, or "Sheltering Track," includes the sheltering issues

[1] Because of the time constraints facing the intervenors under the Licensing Board's scheduling order, we directed that all responses to the intervenors' motion be filed expeditiously and, on March 9, we issued an order denying the motion for directed certification. This memorandum sets forth our reasons for denying the motion.

[2] At present, the proceeding is divided between two Licensing Boards. The other Board is presiding over onsite emergency planning and safety issues.

involving the NHRERP; and, the third, or "SPMC Track," embraces the issues arising from the applicants' Seabrook Plan for the Massachusetts communities.

In an earlier order issued on February 3, the Licensing Board had fixed a number of filing dates and proposed others for all three tracks. Then, in its February 17 order, the Board changed certain of the dates it had previously set and proposed. For the Main Track, the Board advanced the date established for the applicants' proposed findings of fact from March 9 to March 2 and, in the SPMC Track, it advanced the previously proposed filing date for the intervenors' contentions from May 6 to April 1. It is this latter change that is the focus of the intervenors' motion. The Board also delayed both the proposed hearing starting date for the Sheltering Track from April 18 to May 2 and the previously set date for filing testimony from March 28 to April 18.

A. The intervenors seek interlocutory review of the Licensing Board's scheduling order, claiming that the Board's three-track schedule, combined with the intervenors' Seabrook-related responsibilities before other boards and in other forums, is so compressed that, absent relief, they will be denied their due process right to a fundamentally fair hearing secured by 10 C.F.R. § 2.718 and the Constitution. They argue that the offsite Board's advancement from May 6 to April 1 for the filing of their contentions on the Massachusetts portion of the Seabrook Plan is the straw that broke the camel's back, with the consequence that they are being deprived of the opportunity to raise significant issues in the SPMC Track of the proceeding. The Attorney General of Massachusetts supports the intervenors' motion, pointing out that even though he has far more resources available for the proceeding than the intervenors, the Board's schedule is such that his office "has been hard pressed to meet its obligations."[3]

In particular, the intervenors argue that even though they were served with a version of the plan for the Massachusetts communities on September 22, 1987, they were engaged in thirty-four days of hearings on the New Hampshire portion of the plan, scattered throughout the period beginning October 5, 1987, and concluding February 10, 1988. And, since the end of the hearings, the intervenors claim they have been preparing proposed findings of fact and conclusions of law on those issues that, under the Board's schedule for the Main Track, are due April 6. Additionally, as the Attorney General points out, the Commission did not determine that the applicants' plan for the Massachusetts communities was a bona fide one until November 25, 1987, so any earlier review would have been senseless. According to the intervenors, the applicants also withheld from the Massachusetts portion of the plan information on the identities of those providing emergency services and they only received this material on February 24, 1988, following the Licensing Board's entry of an interim protective order on February

[3] Response of Commonwealth of Massachusetts in Support of Joint Intervenor Appeal by Motion for Directed Certification (March 8, 1988) at 2.

17. In this regard, the intervenors argue that the Licensing Board's filing deadline for contentions does not give them sufficient time to investigate and to survey a reasonable sample of the hundreds of alleged service providers in order to ensure that they can file contentions with adequate bases and specificity. Further, they assert that since the entry of the scheduling order the applicants, on February 18, 22 and 23, have served "three substantial modifications or additions to the SPMC, totalling hundreds of pages of plans and materials" that they have not even had an opportunity to assess.[4]

In addition to the issues being litigated before the offsite Board, the intervenors note that they have other Seabrook-related demands on their time and resources that the Board seemingly ignored in setting the schedule for offsite issues. These other obligations, when combined with the Board's three-track schedule for offsite issues, are so burdensome that they effectively preclude the intervenors from developing and filing by April 1 many important contentions on the Massachusetts portion of the plan. First, the intervenors assert that, at our invitation, they had to supplement their petition to waive the Commission's financial qualification rule, which supplement was filed February 23. They also have been preparing briefs for submission to the United States Court of Appeals for the First Circuit in the challenge to the Commission's amendment of 10 C.F.R. § 50.47(c)(1) that provides new criteria for evaluating utility-prepared emergency plans in situations where state and local governments decline to participate in emergency planning. Similarly, they have prepared comments on the Federal Emergency Management Agency's guidance criteria for implementing the Commission's amendment of section 50.47(c)(1). Finally, they assert that intervenor New England Coalition on Nuclear Pollution is occupied litigating other issues before the onsite Seabrook Board and that the other intervenors have an opportunity to participate before that Board on the reopened issue of the applicants' amended notification plan.

The applicants and the NRC staff oppose the intervenors' directed certification motion, arguing that the intervenors have made no showing that the Licensing Board's scheduling order deprives them of due process and hence the standard for interlocutory review has not been met. In short, they claim that the intervenors overstate and misstate their litigation burdens before the offsite Board and, in the words of the applicants, "[i]f they squander their time, the fault lies not in the Board's order, but in the Intervenors' election of tactics."[5]

Specifically, the applicants and the staff assert that the principal part of the Massachusetts portion of the plan has been available since September 1987 so the intervenors have had many months to draft contentions. Next, they note that the hearings on the New Hampshire portion of the Seabrook Emergency Plan

[4] Joint Intervenor Appeal by Motion for Directed Certification (February 25, 1988) at 9.
[5] Applicants' Response to Joint Intervenor Appeal by Motion for Directed Certification (March 3, 1988) at 9.

were held on an intermittent basis from October 1987 to February 1988 and that the intervenors utilized a "lead intervenor" approach on the issues, so that the hearings did not require each intervenor's undivided attention throughout that period. The applicants and the staff also claim that in late December 1987 the applicants offered the intervenors, subject to a protective order, the information the applicants originally deleted from the Massachusetts portion of the plan concerning service providers. The intervenors, however, refused to sign the protective order, so they should not now be heard to complain about needing more time to file contentions.

B. It is well established that we will exercise our discretionary authority pursuant to 10 C.F.R. § 2.718(i) to direct certification of an interlocutory order of a licensing board "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[6] Where, as here, a scheduling order is involved, our cases make clear that, under either of these alternative standards, a showing that the schedule deprives a party of its right to procedural due process is required.[7] Further, as we recently noted in directing certification and reversing a scheduling order in this same proceeding, "fundamental fairness is at the root of procedural due process" and, although "[t]here is . . . no litmus paper test for determining whether, in a particular case, the fundamental fairness standard is satisfied[,] . . . that assessment must be made on the basis of the totality of relevant circumstances disclosed by the record."[8]

Unlike the situation presented in ALAB-864 where the Licensing Board, without explanation, established a schedule that provided the intervenors only eleven days to conduct discovery on twenty-one contentions and only ten days to prepare prefiled testimony, the Board's scheduling order here, although once again without explanation, is not so draconian as to raise an issue of constitutional dimensions. In their motion papers, the intervenors acknowledge that before the Licensing Board they acceded to the schedule set forth in the Board's February 3 order. But the only change from that original schedule that moved up any of the intervenors' filing deadlines was the advancement of the intervenors' filing date for contentions. Thus, having made that concession, the intervenors' argument before us is necessarily limited to one that the April

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[6] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnotes omitted). *Accord Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); ALAB-864, 25 NRC 417, 420 (1987); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987).

[7] *See* ALAB-864, 25 NRC at 420-21; ALAB-858, 25 NRC 17, 21 (1987); *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981).

[8] ALAB-864, 25 NRC at 421 (footnotes omitted).

1 deadline for contentions on the Massachusetts portion of the plan is so short, when considered with their other litigation obligations, that they will be deprived of the opportunity to raise important issues about the plan. Our review of the relevant circumstances, however, does not support the intervenors' claim. Accordingly, the intervenors have not shown that the Licensing Board's scheduling order meets the standard for interlocutory review.

The intervenors' joint motion paints with a very broad brush in depicting their litigation burdens but they have failed to present us with any quantitative figures of the actual resources available to each intervenor, as well as estimates of the actual and proposed use of such resources, in meeting their respective Seabrook obligations. Indeed, in enumerating these obligations, the intervenors' motion does not even tell us whether the various filings are joint filings like this motion or separate filings by each intervenor. Absent at least some indication of the number of attorneys, paralegals and technical experts each intervenor is using and how their time is allocated to meet their respective obligations it is difficult to conclude that the intervenors are overburdened by a schedule that on its face is not patently unreasonable.

For example, the intervenors concede that the majority of the Massachusetts portion of the Seabrook Plan has been available since last September 22. Even if we disregard this date and start the clock with the Commission's determination on November 25, 1987 that the plan was a bona fide one,[9] the intervenors still have had almost three months prior to the Board's scheduling order to study and evaluate the plan. Although the hearing on the New Hampshire portion of the plan also was spread over much of this same period (from October 5 to February 10), the hearing consumed only 34 out of a total of 129 days with only 6 days of hearings in all of January and February. Further, each intervenor's participation in the hearing was not so all-consuming that the intervenors now reasonably can claim they had no time during this period to devote to other tasks, such as evaluating the Massachusetts portion of the plan or preparing proposed findings of fact on individual issues in the hearing as the testimony on those issues was completed. Moreover, the Licensing Board's scheduling order gives the intervenors a period of over six additional weeks (until April 1) to prepare contentions for the SPMC Track and eight weeks (until April 6) from the date of the close of the hearing to file proposed factual findings on the New Hampshire portion of the Seabrook Plan. This latter period for filing proposed factual findings is significantly longer than the usual, and presumptively reasonable, period of forty days prescribed for such findings in the Commission's Rules of Practice.[10] In these circumstances, we cannot find that the Licensing Board's April 1 filing deadline for contentions on the Massachusetts portion of the

[9] *See* CLI-87-13, 26 NRC 400 (1987).
[10] *See* 10 C.F.R. § 2.754.

Seabrook Plan is unreasonable. Obviously, therefore, the schedule is not so harsh as to deprive the intervenors of their right to a fair hearing.

The intervenors also argue that two additional circumstances make the Board's schedule so burdensome that they cannot meet the April 1 deadline for filing contentions. They assert that on February 18, 22 and 23 the applicants issued substantial modifications to the Massachusetts portion of the plan. Besides the fact that under the current schedule the intervenors still will have over five weeks to analyze the amendments before contentions are due, we cannot ordinarily base a decision on whether to grant directed certification of a scheduling order upon subsequent events that were not before the Board when it established the challenged schedule. Rather, an appropriate request for relief must be presented in the first instance to the Licensing Board. In any event, we note that even though the applicants' recently filed amendments are voluminous due to the nature of the amendment process, many of the changes appear to be relatively minor and nonsubstantive.

Finally, the intervenors argue that they did not receive from the applicants the portions of the plan containing service-provider information until February 24 after they signed the Licensing Board's interim protective order. According to the intervenors, the April 1 deadline for contentions simply does not give them sufficient time to investigate and to survey a reasonable portion of the applicants' hundreds of service providers in order to ensure their contentions are adequately framed. Once again, we cannot base our decision on the appropriateness of granting directed certification of the Board's scheduling order on events occurring after that order.[11] Because the number of service providers utilized by the applicants and the magnitude of the intervenors' investigative task regarding those providers were not directly before the Licensing Board when it established the contention deadline, an appropriate request for relief must be presented in the first instance to the Board.[12]

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[11] We cannot accept the argument of the applicants and the staff that the intervenors have only themselves to blame for the delay in their receiving the service-provider information because the applicants offered the intervenors that material last December but the intervenors refused to sign the applicants' protective order. The record does not contain any correspondence among the parties setting forth the exact terms of that offer and the transcript of the argument on this point before the Licensing Board raises serious questions as to the substance of the applicants' offer. *See, e.g.*, Tr. 9726-27.

[12] We note that in the event the Licensing Board denies the intervenors relief, the Commission's Rules of Practice, 10 C.F.R. § 2.714, permit late-filed contentions. Therefore, assuming the intervenors act with all possible resources and with due diligence in carrying out their investigation, any contentions they are unable to file because of insufficient time to investigate might still be pursued by establishing, *inter alia*, good cause for not filing the contentions on time.

For the foregoing reasons, the intervenors' motion for directed certification is denied.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

Cite as 27 NRC 273 (1988) ALAB-890

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

In the Matter of

Docket Nos. 50-456-OL
50-457-OL
(Safety Issues)

COMMONWEALTH EDISON COMPANY
(Braidwood Nuclear Power Station, Units 1 and 2)

March 25, 1988

The Appeal Board affirms a Licensing Board decision rejecting intervenors' claim that incidents of harassment and intimidation of QC inspectors during the construction of the Braidwood facility precluded the requisite reasonable assurance finding that the plant has been properly constructed and can be operated without endangering the public health and safety.

OPERATING LICENSE PROCEEDINGS: ISSUES FOR CONSIDERATION

An operating license proceeding is not concerned with whether a sanction should be imposed against a utility because of asserted noncompliance with a Commission regulation; rather, it is concerned with whether the plant was properly constructed and can be operated without endangering the public health and safety.

OPERATING LICENSE PROCEEDINGS: *SUA SPONTE* ISSUES

As a general matter, in an operating license proceeding, the Licensing Board must confine itself to matters put into controversy by the parties. 10 C.F.R. 2.760a. While the Board has the power to raise *sua sponte* "a serious safety, environmental, or common defense and security matter" (*ibid.*), it may not exercise that power without the issuance of a separate order which makes the requisite findings and briefly states the Board's reasons for raising the new issue. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981).

APPEARANCES

Robert Guild, Chicago, Illinois (with whom **Douglass W. Cassel, Jr.,** and **Robert L. Jones, Jr.,** Chicago, Illinois, were on the brief) for the intervenors Bridget Little Rorem, *et al.*

Joseph Gallo, Washington, D.C., and **Philip P. Steptoe,** Chicago, Illinois (with whom **Peter Thornton,** Chicago, Illinois, was on the brief) for the applicant Commonwealth Edison Company.

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

DECISION

Before us on the appeal of intervenors Bridget Little Rorem, *et al.*, is the concluding partial initial decision of the Licensing Board in this proceeding involving the application of the Commonwealth Edison Company (applicant) for an operating license for each of the two units at its Braidwood nuclear power facility in Illinois.[1] The decision addresses a contention put forth by those intervenors concerning alleged harassment and intimidation of quality control (QC) inspectors in the employ of an applicant contractor performing electrical work at the facility.[2]

As admitted by the Licensing Board, the intervenors' contention alleged:

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[1] *See* LBP-87-14, 25 NRC 461 (1987). In an earlier partial initial decision, the Licensing Board resolved in the applicant's favor the emergency planning issues raised by the intervenors. *See* LBP-87-13, 25 NRC 449 (1987). On *sua sponte* review in the absence of an appeal, we affirmed that decision in ALAB-871, 26 NRC 78 (1987).

[2] Although the intervenors' original contention in the quality assurance area was considerably broader, it was reduced in scope by reason of a Commission order. *See* CLI-86-8, 23 NRC 241 (1986), and Licensing Board Memorandum and Order (May 2, 1986, unpublished).

> Contrary to Criterion I . . . of 10 C.F.R. Part 50, Appendix B, and 10 C.F.R. Section 50.7, Commonwealth Edison Company and its electrical contractor, L.K. Comstock Engineering Company [Comstock] have failed to provide sufficient authority and organizational freedom and independence from cost and schedule as opposed to safety considerations to permit the effective identification of and correction of quality and safety significant deficiencies. Systematic and widespread harassment, intimidation, retaliation and other discrimination [have] been directed against Comstock QC inspectors and other employees who express safety and quality concerns by Comstock management. Such misconduct discourages the identification and correction of deficiencies in safety related components and systems at the Braidwood Station.[3]

After this preamble, the contention described what the intervenors characterized as instances of harassment and intimidation. According to the contention, more than twenty-five Comstock QC inspectors had complained to the NRC at various times since August 1984 about harassment carried out by certain Comstock quality assurance supervisory personnel. This harassment was said to include widespread pressure to approve deficient work, to sacrifice quality for production and cost considerations, and to violate knowingly established quality procedures. Any inspector expressing quality or safety concerns, the contention asserted, was subjected to threats of violence, verbal abuse, termination of employment, transfer to an undesirable job, or other adverse treatment. Further, the contention maintained that, despite the termination of the employment of a Comstock QC supervisor for his mistreatment of a QC inspector, the effects of his harassment remained and systematic harassment continued to occur.

During the course of almost 100 days of evidentiary hearings on the contention, the Licensing Board received the testimony of over sixty witnesses, including several of the Comstock QC management personnel and inspectors involved in the alleged harassment and intimidation. In addition, the applicant presented testimony on data from two reinspection programs as rebuttal to the intervenors' charge that the effectiveness of the QC inspections was impaired by actual or perceived harassment and intimidation. Unrelated to any claim embraced by their contention but as part of a general attack upon one of the Comstock QC managers, the intervenors were also allowed to introduce evidence concerning a method of inspection (referred to as the grid system) performed by Comstock prior to the period of the asserted harassment and intimidation.

Over a lengthy dissent, the majority of the Licensing Board found there to be reasonable assurance that the plant was properly constructed.[4] At the outset,

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[3] LBP-87-14, 25 NRC at 464 (quoting intervenors' contention).

[4] Although cast in such broad terms, that finding must be read much more narrowly. Obviously, given the limited scope of the matter being litigated, the most that the majority could appropriately find was that reasonable assurance existed that the Comstock electrical work had been properly performed. In the circumstances, it was for the NRC staff to resolve, outside of the adjudication, any outstanding questions regarding the quality of the remainder of the construction work. The staff (subject to possible Commission review) also had the responsibility of making the ultimate findings required by 10 C.F.R. 50.57(a) as a precondition to the actual issuance of the operating license

(Continued)

the majority determined that the structure of Comstock's quality assurance organization met the requirements of Criterion I of 10 C.F.R. Part 50, Appendix B, regarding the freedom of quality assurance personnel from cost and schedule considerations.[5] It then discussed the most significant alleged instances of harassment and intimidation of QC inspectors.[6] Although the Board majority considered some of the actions against the QC inspectors to have "crossed the line of acceptable behavior," it found no evidence that any of the demonstrated instances of harassment or production pressure was intended to have an effect on the quality of the inspections.[7] Further, the Board majority considered credible the testimony of the QC inspectors that, despite the actual or perceived harassment, they had continued to perform their inspections properly.[8]

As part of its examination of the question whether the QC inspectors had succumbed to any harassment or schedule pressure, the Board majority reviewed the evidence relating to the applicant's two reinspection programs at the facility.[9] Those programs consisted of a second inspection of a sample of completed work by qualified individuals who had not been involved in the initial inspection. Although the programs were not instituted for litigation purposes, the applicant presented an analysis of the data from the reinspections to demonstrate the consistent level of performance by the Comstock QC inspectors before, during, and after the period of alleged harassment. The Board majority agreed that the results did so demonstrate.[10] It also observed that no significant construction shortcomings had been identified in the one reinspection program during the course of which the safety significance of found deficiencies was assessed.[11] Finally, the Board majority reviewed the adequacy of Comstock's grid system inspection method and found no cause for concern.[12]

Based on the testimony of the QC inspectors and the results of the reinspection programs, the Licensing Board majority concluded that, despite management harassment and schedule pressure, the QC inspectors had continued to perform their inspection duties in a professional manner.[13] Consequently, to

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that the Licensing Board had authorized. Among other things, the staff had to find that the facility had been constructed in conformity with all regulatory requirements and that reasonable assurance exists that its operation will not endanger the public health and safety.

[5] *See* LBP-87-14, 25 NRC at 468-71.

[6] *Id.* at 471-92.

[7] *Id.* at 502.

[8] *Id.* at 502-03. In this regard, the majority expressed its agreement with the belief of applicant consultant Robert V. Laney, that the QC inspectors would scrupulously protect their personal integrity. *Ibid. See* Laney, fol. Tr. 17,245, at 24-25.

[9] *See* LBP-87-14, 25 NRC at 492-99.

[10] *Id.* at 503.

[11] *Id.* at 499. The other reinspection program did not evaluate the safety significance of its results. *See* DelGeorge, fol. Tr. 16,740, at 14.

[12] *See* LBP-87-14, 25 NRC at 499-500.

[13] *Id.* at 502.

repeat, the majority found the requisite reasonable assurance that the Braidwood facility has been properly constructed and can be operated without endangering the public health and safety.[14] On the strength of that finding, the Board authorized the issuance of licenses to operate both units of the Braidwood Station, provided that conditions stated in its earlier emergency planning decision (*see supra* note 1) are fulfilled.[15]

The Licensing Board Chairman filed a minority opinion in which he disagreed with many of the subsidiary findings of the majority. Among other things, the Chairman concluded that the harassment and production pressure were intended to affect the quality of the QC effort.[16] In this connection, differing with the view of his colleagues, the Chairman found that the employment termination of a high-level inspector had been prompted by the fact that he had raised quality concerns.[17] In addition, the Chairman considered the applicant's reinspection programs to have been inadequate to support the efficacy of the quality assurance program or the soundness of the electrical system installation.[18]

Notwithstanding his belief that improper production pressure was present and that instances of harassment, intimidation and retaliation had occurred, the Board Chairman found that the QC inspectors had properly performed their inspections for the period in question and that there is reasonable assurance that the electrical system was properly installed by Comstock. Thus, contrary to the intervenors' claim, the Board Chairman concluded that the quality of the construction of the Braidwood facility was not adversely affected by harassment or intimidation of QC inspectors. Based on his concern regarding the efficacy of Comstock's by then abandoned grid system method of weld inspection, however, the Board Chairman could not find reasonable assurance of the safety of the facility.[19]

On their appeal, the intervenors maintain that (1) Criterion I of 10 C.F.R. Part 50, Appendix B, was not met because of harassment and intimidation of QC inspectors; (2) there is no evidence that the QC inspectors performed their tasks satisfactorily; (3) deficiencies in grid system weld inspections compel reversal of the decision; and (4) the Licensing Board improperly placed the burden of proof on the intervenors. The applicant and NRC staff oppose the appeal. For the reasons that follow, we affirm the Licensing Board's decision.

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[14] *Id.* at 503. As previously observed, *supra* note 4, that finding requires qualification.
[15] *Id.* at 504.
[16] *Id.* at 538.
[17] *Ibid.*
[18] *Id.* at 538, 555-59, 669.
[19] *Id.* at 538, 668-69. In another break with the majority, the Board Chairman recommended the imposition of civil penalties against the applicant and Comstock for specific matters related to harassment and intimidation of QC personnel. *Id.* at 538.

I. CRITERION I OF 10 C.F.R. Part 50, APPENDIX B

Appendix B to 10 C.F.R. Part 50 sets forth the quality assurance criteria for the design, construction, and operation of structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public.[20] Criterion I provides in relevant part:

> The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality assurance functions shall report to a management level such that this required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. . . . Irrespective of the organizational structure, the individual(s) assigned the responsibility for assuring effective execution of any portion of the quality assurance program at any location where activities subject to this appendix are being performed shall have direct access to such levels of management as may be necessary to perform this function.

As earlier noted, the Licensing Board rejected the intervenors' claim that these requirements were not met in the case of the QC inspection of Comstock work. Renewing that claim before us, the intervenors go on to maintain that, *a fortiori*, the facility should be denied an operating license.[21]

Utilities engaged in the construction of nuclear power facilities are, of course, expected to comply with all of the requirements imposed by Criterion I and the other portions of Appendix B. And, beyond doubt, the failure to observe those requirements — just as the violation of other Commission regulations — may subject the utility to enforcement action on the part of the NRC staff. But this is not an enforcement proceeding and the issue at hand is thus not whether a sanction should be imposed against the utility because of its asserted noncompliance with a Commission regulation. Rather, we are concerned in this licensing proceeding with whether the Licensing Board correctly authorized the issuance of operating licenses for the Braidwood facility and, more specifically, whether there is adequate record support for the Board's ultimate finding of reasonable assurance that the Comstock electrical work was properly performed. On that score, a failure to observe some Criterion I requirements may or may not call for the conclusion that the requisite assurance is lacking. That will depend upon such factors as the nature of the violation and what measures, if any, were taken to compensate for the perceived QC organizational deficiency.

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[20] *See* 10 C.F.R. Part 50, Appendix B, Introduction.

[21] *See* Opening Brief of Intervenors-Appellants Bridget Little Rorem, *et al.* (July 1, 1987) at 6-7; App. Tr. 6-11.

We need not, however, pursue that matter further. For we are in agreement with the Licensing Board that, contrary to the intervenors' insistence, Criterion I was not violated here.

The intervenors' Criterion I claim is essentially rooted in the undisputed fact that the applicant wished to eliminate the QC inspection backlog pertaining to the Comstock work. In this respect, the record discloses that a backlog of approximately 14,000 inspections existed in mid-1983.[22] In November 1983, the NRC staff expressed concern regarding Comstock's ability to eliminate that backlog while carrying out its ongoing inspection responsibilities.[23] In a written response to that concern, the applicant indicated that Comstock's inspection force had been expanded.[24]

In early 1984, the applicant selected Daniel Shamblin as its new Project Construction Superintendent at Braidwood.[25] Shamblin found the continuing inspection backlog unacceptable.[26] In recognition of that fact, Comstock QC Manager Irving DeWald prepared a plan for the elimination of the backlog.[27] After considering the plan, Shamblin announced that the elimination of the backlog must be the first priority of Comstock.[28] He also was prepared to suspend any further Comstock craft work if necessary to accomplish that objective.[29] In addition, Shamblin required Comstock management to report to him every Monday on the backlog elimination effort.[30]

As part of that effort, Comstock established a daily inspection status report for use in determining the progress being made in reducing the backlog.[31] In addition, DeWald met with the Comstock QC inspectors every Friday to discuss inspection activities.[32] At these meetings, it was reported that DeWald frequently would exhort the inspectors to perform their tasks expeditiously.[33] Comstock also continued to hire additional QC inspectors.[34] As a result of the efforts of the applicant and Comstock, the inspection backlog was eliminated in September 1984.[35]

We find nothing in these undisputed facts that might be taken as supporting the intervenors' belief that the QC inspectors lacked "sufficient independence"

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[22] *See* DeWald, fol. Tr. 1700, at 7.
[23] *See* Intervenor Exhibit 3 at 7-8, 27-29.
[24] *See* Intervenor Exhibit 7, Enclosure 2 at 3.
[25] *See* Shamblin, fol. Tr. 16,274, at 1.
[26] *Id.* at 8-10.
[27] *See* Intervenor Exhibit 12.
[28] *See* Intervenor Exhibit 8 at 1.
[29] *See* Shamblin, fol. Tr. 16,274, at 10-14.
[30] *See* Intervenor Exhibit 8 at 2.
[31] *See* DeWald, fol. Tr. 1700, at 20-21; Seese, fol. Tr. 2330, at 7-9.
[32] *See* Tr. 1786 (DeWald).
[33] *See* Tr. 4240-41 (Snyder); Tr. 5796-98 (Gorman); Tr. 7566-68 (Seeders).
[34] *See* DeWald, fol. Tr. 1700, at 7-10.
[35] *See* Shamblin, fol. Tr. 16,274, at 16-17.

within the meaning of Criterion I. The applicant's desire to reduce the inspection backlog was not only quite understandable but also might well have had, at least in part, safety underpinnings.[36] Moreover, the steps taken to achieve that end appear to us to have been perfectly reasonable. Of particular significance, the record is devoid of anything to suggest that the applicant's management (through Shamblin) was calling upon the inspectors either to conduct the inspections at a pace that would not enable a proper review of the items under scrutiny or to overlook discovered deficiencies. Among other things, there is no probative evidence that inspection quotas (let alone unreasonable ones) were imposed, or that any action was taken against a QC inspector because of the failure to complete a certain number of inspections in a given period.[37] Additionally, it is clear from the testimony of the inspectors that they were free to raise quality concerns and did so when appropriate.[38]

In the circumstances, the intervenors' argument comes down to the proposition that Criterion I contains an absolute prohibition against any endeavor by the utility to obtain the more timely performance of inspection activities on its construction project. We reject such an expansive reading of the Criterion.[39] As we see it, so long as there is no indication that it encompassed an explicit or implicit direction to perform substandard inspections, there is nothing improper about an effort to shorten the gap between the completion of a segment of the construction work and the ascertainment of the quality of that segment.

II. HARASSMENT AND INTIMIDATION

We turn now to the question whether, notwithstanding the absence of a violation of Criterion I, the record supports the intervenors' claim that

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[36] *Id.* at 8-9. *See also* Intervenor Exhibit 3 at 7-9. As construction work progresses, it may become more difficult to conduct certain types of QC inspections (e.g., of items that are no longer readily accessible to the inspector).

[37] *See, e.g.*, Tr. 4248-56 (Snyder); Tr. 4857-66, 4883-84 (Rolan); Tr. 4995-98, 5050-54 (Musereau); Tr. 5107-28, 5207-09, 5242-43 (Holley); Tr. 5782-83 (Gorman); Tr. 5918-23 (Peterson); Tr. 6857-73 (Bowman); Tr. 8655-57 (Hunter); Tr. 9238-41 (Martin); Tr. 9665-70 (Perryman); Tr. 9884-85 (Bossong). In support of their argument, the intervenors refer to a meeting between 24 Comstock QC inspectors and the NRC resident inspectors, where the QC inspectors are said to have agreed in response to a question that Comstock emphasized quantity over quality. *See* Tr. 17,534-35 (McGregor). But the testimony of the QC inspectors at trial indicated that, although stressing the importance of expedition, the Comstock management took no concrete action intended to exalt quantity over quality. *See, e.g.*, Tr. 4267-69, 4469, 4526-27 (Snyder); Tr. 4744-47, 4882-84 (Rolan); Tr. 5115, 5122-23 (Holley); Tr. 5924-29 (Peterson); Tr. 6857-58 (Bowman); Tr. 16,647-49 (Hill).

[38] *See, e.g.*, Tr. 4182, 4185-87 (Snyder); Tr. 6795-815 (Bowman); Tr. 9648-50, 9673-81, 9689 (Perryman). This is not to say that all supervisors of the QC inspectors were pleased by the independence shown by the inspectors. Nevertheless, the inspectors indicated that, while their management may have responded slowly in some instances, problems were resolved in due course. *See, e.g.*, Tr. 4193, 4520-27 (Snyder); Tr. 4837-42 (Rolan); Tr. 6818, 6956-57, 6968-69 (Bowman); Tr. 9677, 9751-52 (Perryman); Tr. 12,373-82 (Archambeault).

[39] Because the pertinent portion of Criterion I relates to the freedom of quality assurance personnel to raise quality concerns, we agree, however, that a violation of that criterion could occur regardless of the presence or absence of harassment or intimidation of those personnel.

intimidation and harassment of Comstock QC inspectors stood in the path of the result reached below. In addressing this question, we first summarize the testimony bearing upon the nature of the asserted intimidation and harassment and then consider the evidence directed to their effect upon the acceptability of the inspectors' performance.

A. Over a dozen Comstock QC inspectors were called to testify. These individuals were not of one mind with regard to what constituted harassment or intimidation in a construction site setting.[40] Not surprisingly, then, equally diverse opinions were expressed with regard to whether harassment or attempts at intimidation had taken place. Some of the inspectors believed that they had been harassed and/or subjected to intimidation by Comstock QC management at various times during the 1983-85 period.[41] The cited examples included abusive language by supervisors and the refusal by Comstock management to allow an inspector to change his work shift.[42] Other inspectors, however, disclaimed any belief that they had been significantly harassed.[43]

But while there was disagreement among the inspectors concerning their subjection to harassing and intimidating conduct on the part of superiors, no significant divergence of opinion was present in the testimony about the effect of that conduct upon inspector performance. With a single limited exception, each inspector to whom the question was posed stated unequivocally that, notwithstanding any perception of harassment or intimidation directed against him or fellow workers, he had carried out his responsibilities in a professional manner.[44] These statements were supported by concrete illustrative examples. Inspector Richard Snyder testified that, over the vehement objection of a supervisor, he filed a report on the calibration of a welding machine.[45] Inspector John Seeders testified that he performed a record review in a careful manner despite his conviction that he was being pressed to complete the review quickly.[46] And inspector Robert Hunter stated that, when a supervisor came to

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[40] *See, e.g.*, Tr. 4975 (Mustered); Tr. 7051-53 (Wicks); Tr. 6788, 6819 (Bowman); Tr. 7435-36, 7875 (Seeders); Tr. 9422-25 (Martin); Tr. 12,482 (Archambeault).

[41] *See, e.g.*, Tr. 4196-98, 4224-28 (Snyder); Tr. 4660-65 (Rolan); Tr. 5098-99 (Holley); Tr. 5728, 5741-44, 5754-56 (Gorman); Tr. 7418, 7425, 7853-55 (Seeders); Tr. 8635-37, 8669-70 (Hunter); Tr. 9214-15, 9219-20, 9416, 9420-26 (Martin); Tr. 9948 (Bossong); Tr. 12,369-70 (Archambeault).

[42] *See, e.g.*, Tr. 4196-98 (Snyder); Tr. 12,369-70 (Archambeault). The most serious incidents of harassment and intimidation involved confrontations with Comstock QC Supervisor Richard Saklak. Because of one such confrontation, Saklak's employment was terminated by Comstock. *See* DeWald, fol. Tr. 1700, at 26-33.

[43] *See, e.g.*, Tr. 4972-79 (Mustered); Tr. 6780-91, 6796-800, 6810-12, 6818-21, 6910-11 (Bowman); Tr. 7039-40, 7050-58 (Wicks). *See also* Tr. 6255 (Puckett).

[44] *See, e.g.*, Tr. 4256 (Snyder); Tr. 4739, 4743-44, 4880-81 (Rolan); Tr. 4974, 4991-94 (Mustered); Tr. 5111-16, 5153-54 (Holley); Tr. 5916-18 (Peterson); Tr. 6911 (Bowman); Tr. 7052 (Wicks); Tr. 7756-57 (Seeders); Tr. 8668-71, 8702-03 (Hunter); Tr. 9544-51 (Martin); Tr. 12,491-92, 12,642-48 (Archambeault).

[45] *See* Tr. 4181-87, 4196-97 (Snyder).

[46] *See* Tr. 7423-30 (Seeders).

him and requested that an inspection report be closed out, before complying with the request he would ensure that this action was appropriate.[47]

The exception to this line of testimony was the observation of inspector Terry Gorman that he might have unintentionally discharged his duties in a less careful manner because of strong pressure exerted on him to complete high priority assignments.[48] At the time in question, however, Gorman was not engaged in the field inspection of construction work but, instead, was assigned to the processing of documents in the document vault.[49] From all that appears in the record, the processing errors that were discovered by file clerks (and led to Gorman's concession of a possible adverse reaction to pressure) were of no safety significance.

B. The intervenors acknowledge the testimony of the inspectors on their job performance. At least by implication, they also concede the absence of any affirmative evidence to suggest that that testimony was false. Nonetheless, we are told that, because the testimony was self-serving, we should not merely discount it entirely but, as well, assume the converse: that the perceived harassment and attempted intimidation had a decided effect upon the quality of the inspection of completed construction work.[50]

The intervenors do not explain why we should accept the portion of the testimony of the inspectors that assists their position while, at the same time, reject as being not worthy of belief the portion that cuts against their attack upon the result below. We need not, however, pursue that seeming inconsistency any further in this instance. That is because there is credible evidence of record that bears out the inspectors' insistence that they carried out their field inspections properly, despite the perceived harassment and attempted intimidation. That evidence consists of the results of two reinspection programs that, in combination, produced a second opinion by different inspectors regarding the construction work examined by the QC inspectors in question, both before and during the period that those inspectors allegedly were subjected to harassment and intimidating tactics.

1. The first of the two programs was the Construction Sample Reinspection (CSR), which addressed all construction work completed before June 30, 1984.[51] Its objectives were to provide assurance that the plant construction met "applicable design requirements" and "to confirm that the overall quality pro-

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[47] *See* Tr. 8873-77 (Hunter).

[48] *See* Tr. 5752-62 (Gorman).

[49] *See* Tr. 5746-47 (Gorman).

[50] In this connection, the intervenors maintain that the Licensing Board majority gave excessive weight to the testimony of applicant consultant Robert Laney that the QC inspectors would resist pressure to compromise their integrity. Although the majority did note its general agreement with this witness's views on the subject (*see supra* note 8), we do not read that agreement as crucial to the Board's ultimate conclusion on the matter.

[51] *See* Kaushal, fol. Tr. 13,068, at 3.

gram was functioning as expected."[52] The CSR was made up of three elements.[53] The first was a random selection of the items to be reinspected from the total number of safety-related items available for reinspection, with the consequence that each item had an equal opportunity to be included in the sample.[54] According to the uncontroverted testimony of a statistician, the selected sample was large enough to support a conclusion with 95 percent confidence that, if no design-significant defects were found in the inspected items, 95 percent of the total population would be free of such defects.[55] The remaining two elements involved the non-random selection for reinspection of items that either were a part of essential plant systems or, for some other reason, were deemed to warrant special scrutiny.[56]

The second reinspection program was conducted by Pittsburgh Testing Laboratory (PTL) with an objective of ascertaining how well the QC inspectors had performed their duties. This program was initiated during the early phases of construction in 1977 and continued through the construction period. The portion of the PTL data analyzed for this proceeding related to work that had been reinspected between July 1982 and June 1986.[57]

For the purposes of this proceeding, the applicant assembled the data obtained from these two reinspection programs in such fashion as to enable a comparison of the relationship between the results of the inspections and reinspections for both (1) the inspections taking place before the period of asserted harassment and attempted intimidation; and (2) the inspections occurring during that period. Specifically, the objective was to ascertain whether there was significantly greater agreement between the inspectors and reinspectors regarding items accepted by the former *prior* to the commencement of the purported undue pressure. If so, there might be room for an inference that the inspectors had succumbed to such pressure. On the other hand, so the applicant's reasoning continued, if there turned out to be no significant difference between the rates

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[52] *Id.* at 4-5.

[53] *Id.* at 11-16.

[54] *Id.* at 14.

[55] *See* Frankel, fol. Tr. 17,082, at 10. Discrepancies identified during the CSR program were evaluated for design significance by Sargent & Lundy, the architect-engineer for Braidwood. *See* Kaushal, fol. Tr. 13,068, at 25-26. None of the discrepancies was found to be design significant. *See* Thorsell, fol. Tr. 14,270, at 17; Kostal, fol. Tr. 14,270, at 21. We need add only that the record belies the Licensing Board Chairman's endeavor to put the objectivity of Sargent & Lundy into question. *See* LBP-87-14, 25 NRC at 662-65. For example, to support his belief that Sargent & Lundy might have been concerned about being held accountable for any determined design-significant defects, the Licensing Board Chairman pointed to a cable that assertedly had been excessively bent as the result of a cable junction box that was too small. *Id.* at 663. But the evidence discloses that the box was of adequate size and the cable manufacturer had allowed use of the cable as installed in it notwithstanding the degree of bending. *See* Tr. 14,488-89, 14,590-91, 15,490 (Thorsell). The remaining claims by the Licensing Board Chairman regarding the objectivity of Sargent & Lundy in its analysis of identified discrepancies are equally without merit.

[56] *See* Kaushal, fol. Tr. 13,068, at 14-16.

[57] *See* Rebuttal Testimony of George F. Marcus (August 1986) at 7-12, admitted at Tr. 15,568.

of agreement throughout the entire period, the appropriate inference would be that there was no pressure-related change in the performance of the inspectors.[58]

2. As is undisputed, the data support the thesis that the agreement rate between the inspections and reinspections did not vary to a material extent insofar as the inspections conducted before and after 1983 are concerned.[59] In common with the applicant and the Licensing Board majority, we conclude that probative weight can be attached to this fact.[60] In this connection, we have considered and rejected the intervenors' objections to any reliance being placed upon the reinspection data — objections based entirely upon the views expressed by the Licensing Board Chairman in his dissenting opinion.

To begin with, crucial significance does not attach to the fact that the CSR program covered only inspections conducted before June 30, 1984. In stressing that consideration,[61] the Licensing Board Chairman overlooked the additional fact that the PTL reinspection program extended to inspections throughout the period of construction work. The data acquired from that program that were put into evidence below related to the initial inspections performed during the entire period of alleged harassment and attempted intimidation. In this connection, both programs reinspected work that had been initially inspected between July 1982 and June 1984. The data derived from those reinspections indicated that the two programs provided similar results vis-a-vis the agreement rate between the initial inspections and the reinspections.[62] Thus, there is little reason why the PTL data should be deemed insufficient for the period not embraced by the CSR program.

The insistence of the Licensing Board Chairman that the PTL data should be discarded as not derived from a statistically random sample entirely ignores the testimony of applicant witnesses Martin R. Frankel and Louis O. DelGeorge.[63] Dr. Frankel, an acknowledged expert in the analysis of statistical data, indicated that, although the PTL sample was not statistically random, it nonetheless might suffice to support an inference that the initial inspectors had not succumbed to undue pressure.[64] This, he added, could be determined only by means of an engineering evaluation.[65] Mr. DelGeorge, an engineer and official of the appli-

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[58] *See* DelGeorge, fol. Tr. 16,740, at 5-6, 9-13.

[59] *Id.* at 13. *See also* Frankel, fol. Tr. 17,082, at 20-27. No exact dates were established during the proceeding for the commencement and cessation of the alleged harassment and intimidation. *See* LBP-87-14, 25 NRC at 539-40. Nevertheless, it appears that the period generally ranged from mid-1983 to late 1985. In any event, collectively, the reinspection programs covered inspection work performed both before and during the alleged harassment and intimidation.

[60] *See* LBP-87-14, 25 NRC at 493-99, 503.

[61] *Id.* at 654-55.

[62] *See* DelGeorge, fol. Tr. 16,740, at 37-38; Tr. 16,801-02 (DelGeorge).

[63] *See* LBP-87-14, 25 NRC at 559, 665-66.

[64] *See* Frankel, fol. Tr. 17,082, at 25.

[65] *See* Tr. 17,147-48 (Frankel).

cant with broad experience in the execution of reinspection programs, provided just such an evaluation.[66] He concluded that, given its size and distribution over time, the PTL sample was sufficient despite not being statistically random.[67] Significantly, neither the Licensing Board Chairman nor the intervenors even refer to this conclusion or the analysis offered in support of it, let alone explain why we should decline to accept it.[68]

No greater merit attaches to the Licensing Board Chairman's complaint, echoed by the intervenors, that the supplied reinspection data did not include the items that had been rejected by the initial inspectors.[69] As a practical matter, reinspections normally are not directed to the determination whether a particular item had been rejected by the initial inspector: for good reason, the focus of reinspections is on work that has been accepted (either initially or after correction of determined deficiencies). Moreover, to repeat, the issue here is whether there was a significant change in the quality of the initial inspectors' performance as the result of harassment and intimidation. As seen, the data from the reinspection programs countered the existence of any such change.

In sum, we have been provided with insufficient cause not to take the reinspection results as corroborating the testimony of the inspector witnesses that they had performed their field inspections without regard to any harassment or attempted intimidation. On this score, it is important to bear in mind that there was not one scintilla of evidence that tended to establish that harassment or attempted intimidation had influenced the field inspections.[70]

III. GRID SYSTEM

Prior to November 1982 Comstock employed an inspection method known as the grid system. There was no claim below that harassment or intimidation endeavors influenced the results of inspections using that system. This being so, it is doubtful that those inspections were within the ambit of the single contention admitted for litigation. Despite his recognition of this consideration,[71] as previously noted the Licensing Board Chairman relied exclusively upon his

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[66] *See* DelGeorge, fol. Tr. 16,740, at 43-44.

[67] *Id.* at 45-47.

[68] The Licensing Board Chairman also criticized the PTL program based upon his refusal to accept the testimony of applicant witnesses that only a small percentage of welds had been reinspected through paint. *See* LBP-87-14, 25 NRC at 665-66. The intervenors do not press this point on appeal and we find nothing in the record to cast doubt upon the credibility of the witnesses.

[69] *Id.* at 557-59, 660-62.

[70] In the absence of such evidence, the intervenors' reliance upon *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983) is entirely misplaced. Stated otherwise, the record at hand does not indicate, in the words of *Callaway*, "a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components." *Id.* at 346.

[71] *See* LBP-87-14, 25 NRC at 553-54.

belief that the grid system was flawed to support his conclusion that there was not reasonable assurance that the facility was properly constructed.[72] Because the intervenors endorse the attack upon the grid system, we are constrained to address the matter notwithstanding our conviction that it was beyond the scope of the proceeding.[73] We find the Licensing Board Chairman's criticism of the grid system insubstantial.

The grid system method called for the selection of a certain percentage of classes of items for inspection. In the case of welds and equipment, 100 percent were inspected. For all other classes, 35 percent received scrutiny (subject to an expansion of the sample if an unacceptable number of deficiencies were discovered in the items initially selected for inspection).[74]

At the end of October 1982, the applicant decided that it was not satisfactory to inspect only some items. Accordingly, it directed Comstock to commence forthwith an inspection of all items, including those that had previously eluded inspection under the 35-percent standard.[75]

One vestige of the grid system remained, however, for almost another year. In conducting the 100-percent inspection of the welds, some inspectors had followed the practice (permitted by Comstock) of documenting the inspection results in personal notebooks and then later transferring the information to official checklists.[76] In October 1983, at the applicant's insistence, the practice was discontinued.[77] Thereafter, the inspectors were required to use the checklists during the inspections.[78]

Given that ultimately 100 percent of all items were inspected, it is not significant that only 35 percent of certain items were examined at the outset.[79] This leaves the Licensing Board Chairman's dissatisfaction with the pre-October 1983 practice of recording weld inspection results *ab initio* in personal notebooks. Although that practice may well have been undesirable, there is nothing

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[72] *See supra* p. 277.

[73] As a general matter, in an operating license proceeding, the Licensing Board must confine itself to "matters put into controversy by the parties." 10 C.F.R. 2.760a. While the Board has the power to raise *sua sponte* "a serious safety, environmental, or common defense and security matter" (*ibid.*), it may not exercise that power without the issuance of "a separate order which makes the requisite findings and briefly states the [board's] reasons for raising the [new] issue." *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). No such order surfaced with regard to the issue of the adequacy of grid system inspections.

[74] *See* LBP-87-14, 25 NRC at 499-500; DeWald, fol. Tr. 1700, at 7; Intervenor Exhibits 160 and 200.

[75] *See* LBP-87-14, 25 NRC at 564; DeWald, fol. Tr. 1700, at 7; Intervenor Exhibit 205, Attachment III. *See also* App. Tr. 55.

[76] *See* DeWald, fol. Tr. 1700, at 24.

[77] *See* Tr. 9570-78 (Martin).

[78] *Ibid.*

[79] Apparently relying on an erroneous proposed finding submitted by the staff, the entire Licensing Board incorrectly thought that just 35 percent of the welds were inspected. *See* LBP-87-14, 25 NRC at 499-500, 564. *See also* NRC Staff's Findings of Fact and Conclusions of Law on Rorem, *et al.* Contention 2.C (February 13, 1987) at 7-8.

in the record to suggest that it resulted in the failure to document discerned weld deficiencies.[80] In this regard, it is noteworthy that the CSR program did not identify any design-significant weld defects, i.e., deficient welds that might raise safety concerns.[81]

For the foregoing reasons, the Licensing Board's concluding partial initial decision, LBP-87-14, 25 NRC 461, is *affirmed*.[82]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[80] Under the grid system, upon finding a defective weld the QC inspector would bring it to the attention of the craft personnel with instructions to take necessary corrective action. As a general matter, the weld would not be incorporated into an official checklist until after the defect had been corrected and, thus, the weld could be listed as acceptable. Depending upon the amount of time required to correct the defect, several days (or perhaps a week or more) might elapse before a particular weld would turn up on a later checklist. *See* Tr. 8290-91, 8348-56 (Martin).

In light of the foregoing practice, acknowledged by the Licensing Board Chairman (*see* LBP-87-14, 25 NRC at 554, 650), it is scarcely surprising that the checklists make reference only to accepted welds. Nonetheless, the Chairman takes that fact to suggest that the inspections did not turn up all weld defects. Proceeding on the assumption that a proper inspection would have determined that roughly 30 percent of the welds were defective, he reasons that it would not have been possible to correct all of them before the preparation of the checklist showing that they were acceptable. *Id.* at 554-55, 651.

There are several flaws in this line of reasoning. For one thing, there is no record basis for the Licensing Board Chairman's assumption respecting the percentage of welds that should have been found defective on an initial inspection. Second, the record evidence refutes his tacit assumption that all welds initially found defective made their way into the same checklist as acceptable. *See* Tr. 8352-53 (Martin). Third, the evidence also contradicts the yet further tacit assumption that a large number of weld defects could not be corrected within the several day period elapsing between the inspections and the preparation of the checklists. *See* Tr. 8357-63 (Martin).

[81] The intervenors assert that the CSR program did not measure the effectiveness of QC inspector performance under the grid system. This is true but irrelevant. For our purposes, it is enough that the absence of any detected design-significant weld defects meant that there is 95 percent confidence that 95 percent of the total weld population is free of such defects. *See supra* p. 283.

[82] We have considered all of the intervenors' other claims on appeal and find them equally without merit. Among those claims is the insistence that the Licensing Board improperly allocated the burden of proof. It may well be that, once the intervenors had established that QC inspectors believed that they had been subjected to harassment and attempts at intimidation, the applicant had the burden of going forward on the safety significance of that belief. If so, the applicant sustained that burden through the vehicle of the inspectors' testimony and the evidence relating to the reinspection programs, which reflected that any harassment or attempted intimidation that might have occurred did not materially influence the outcome of field QC inspections. Although given ample opportunity to do so, the intervenors did not succeed in rebutting the applicant's showing. Thus, the applicant must be deemed to have also satisfied its ultimate burden of proof on the question whether the Comstock electrical work was properly performed.

Atomic Safety and Licensing Boards Issuances

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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman
Dr. Oscar H. Paris
Frederick J. Shon

In the Matter of

Docket No. 50-322-OL-5
(ASLBP No. 86-534-01-OL)
(EP Exercise)

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

March 9, 1988

Licensing Board concludes that it lacks authority to retain jurisdiction for purposes of determining whether a subsequent exercise demonstrates that certain fundamental flaws, which it found were revealed by the February 13, 1986 Exercise of the offsite emergency response plan for the Shoreham Station, have been corrected.

LICENSING BOARDS: DELEGATED AUTHORITY

Where the Commission delegated authority to the licensing board to conduct an expedited hearing and issue a decision on the question of whether fundamental flaws were demonstrated by the exercise of an emergency plan, but did not delegate authority to make a reasonable assurance finding, that board's jurisdiction ends on issuance of its initial decision. It may not retain jurisdiction to determine whether a subsequent exercise demonstrates that any such flaws have been corrected.

MEMORANDUM AND ORDER
(Concerning Retention of Jurisdiction)

In our Initial Decision,[1] we noted that Staff, in its proposed findings, had suggested that we should retain jurisdiction in this proceeding to determine whether, following another FEMA-graded exercise, LILCO had adequately corrected the flaws found in its emergency plan in the February 13, 1986 Exercise. Because Staff did not elaborate on this suggestion and no other party addressed it, we called for the views of all parties.[2]

Those views have now been received.[3] Staff no longer suggests that we retain jurisdiction. After reconsideration, Staff points out that were we to retain jurisdiction, we would have to do so on the basis that certain issues pending before us were unresolved. Staff now takes the view that we have carried out the Commission's directive in CLI-86-11, 23 NRC 577, 579 (1986), "to consider evidence which intervenors might wish to offer to show that there is a fundamental flaw in the LILCO emergency plan," so that there are no such issues. Thus in Staff's view, our jurisdiction terminated on issuance of our Initial Decision, LBP-88-2, 27 NRC 85 (1988).[4]

LILCO believes that we should retain jurisdiction. In support of this view, LILCO points out that its motion upon which the Commission acted in deciding CLI-86-11 viewed the February 13 Exercise as the full-participation exercise that would support licensing of the Shoreham plant. Thus, in LILCO's view, we should retain jurisdiction to determine, following an exercise, whether the flaws that we found have been remedied so as to permit a reasonable assurance finding. In this regard, LILCO appears to view our mandate as similar to that of a board with jurisdiction over an operating license proceeding where such a course is clearly appropriate. *See Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1168-70 (1984); *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549 (1982), *modified and aff'd*, ALAB-727, 17 NRC 760 (1983).

Intervenors appear to take the position that, while we probably lack the authority to retain jurisdiction, it might be a good idea for us to do so. Initially,

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[1] LBP-88-2, 27 NRC 85 (1988).

[2] *Id.* at 214.

[3] *See* LILCO's Views on Continuing Board Jurisdiction, dated February 17, 1988; NRC Staff Response to Board Request, dated February 19, 1988; and Intervenors' Views on Whether the Licensing Board Should Retain Jurisdiction, dated February 23, 1988.

[4] Staff also points out that LBP-88-2 in effect reverses several of the OL-3 Board's findings on the adequacy of the LILCO plan. Thus, a practical problem would be presented by our retention of jurisdiction over the exercise results on the "fixes" to these inadequacies because the OL-3 board continues to have jurisdiction over any necessary changes to the LILCO plan. In Staff's view, this ad[illegible]sion and complication to an already complex case.

they point out that our Partial Initial Decision[5] holding that the February 13 Exercise was not a full-participation exercise, the flaws found in LBP-88-2, and the expiration of the 2-year period in which the February 13 Exercise might have been used to support licensing combine to make it unlikely that there could be any corrective measures with respect to the February 13 Exercise results over which we might preside. Intervenors believe that while this situation could be interpreted in such a way as to present issues raised by the February 13 Exercise, such an interpretation involves a strained reading of CLI-86-11. While noting that there is no guarantee that the members of this Board would be available to preside over the litigation of the results of a future exercise,[6] Intervenors believe that the stronger argument for our retention of jurisdiction lies in considerations of "judicial" economy. They correctly point out that, having found flaws revealed by the February 13 Exercise, it makes sense for us to review the efforts to correct those flaws.

Licensing boards "are delegates of the Commission and, as such, . . . may exercise authority over only those matters that the Commission commits to them."[7] We agree with Staff that, with the issuance of LBP-88-2, we have discharged the responsibilities delegated to us by the Commission. The Commission has not indicated that our authority extends beyond "expedit[ing] the hearing to the maximum extent consistent with fairness to the parties, and . . . issu[ing] [our] decision upon the completion of the proceeding";[8] consequently we have no authority to review any corrective measures that might be taken.

We note that, in its delegation to us, the Commission has not included the authority to make a finding of reasonable assurance, but rather has limited us to considering evidence that fundamental flaws exist.[9] We presume that this omission was intentional, and that the Commission intended to leave the authority to make such a finding exclusively with the board having jurisdiction over the operating license application in general. Had the Commission given us such authority, LILCO's position would be well taken.

Moreover, we also agree with Staff that for us to retain jurisdiction in this procedural situation would only add confusion and complication to an already excessively complex proceeding. Intervenors have alluded to the possibility that it may not be possible to further consider the February 13 Exercise as a basis for licensing. Whether it is possible or not, it may not be desirable. As things now stand, another exercise must be held. That being the case, it may be more expeditious to design that exercise as a full-participation exercise that

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[5] LBP-87-32, 26 NRC 479 (1987).
[6] LILCO also noted this problem in its response.
[7] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).
[8] CLI-86-11, 23 NRC at 582.
[9] *Id.* at 579.

will support licensing in and of itself. At a minimum, such a course would seem to provide the opportunity to cut off further litigation over the results of the February 13 Exercise except to the extent that the Commission may wish to review those results in order to provide guidance. In this situation, we believe the Commission may wish to provide direction. Our retention of jurisdiction to determine whether the fundamental flaws that we have found have been shown by a subsequent exercise to have been corrected only serves to further complicate this situation without providing any corresponding benefit. If, after reviewing this situation, the Commission wishes to delegate further authority to this Board it can, of course, do so.

In light of the foregoing, we have concluded that we lack the authority to retain jurisdiction to determine whether the fundamental flaws revealed by the February 13, 1986 Exercise have been corrected.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Frederick J. Shon
ADMINISTRATIVE JUDGE

Oscar H. Paris
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 9, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

In the Matter of

Docket Nos. 50-443-OL
50-444-OL
(ASLBP No. 82-471-02-OL)
(Offsite Emergency Planning)

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

March 23, 1988

MEMORANDUM AND ORDER
(Protecting Information from Public Disclosure)

I. BACKGROUND

On September 18, 1987, Applicants filed in this proceeding their Seabrook Plan for Massachusetts Communities (SPMC). Asserting personal privacy considerations, Applicants deleted or "redacted" certain information concerning the identity of individuals and organizations needed to implement the plan.

In its memorandum and order lifting the stay of low-power operations, the Commission required that the Applicants must provide to the NRC Staff and to FEMA any of the redacted information that the Staff and FEMA deem necessary

for their review of the plan. The Commission directed further that, prior to low-power operation, Applicants must indicate their willingness to provide "the detailed information [deemed necessary by the Staff and FEMA] to the other parties to the proceeding, if necessary under appropriate protective orders from the Licensing Board." The Commission expected that the Licensing Board would fashion orders that would "allow full litigation of contested issues without unnecessarily violating personal privacy." CLI-87-13, 26 NRC 400, 405 (1987).

On December 30, 1987, Applicants provided to the Staff information requested by the Staff and requested that the information be withheld from public disclosure pursuant to 10 C.F.R. § 2.790 on the grounds that it contained commercial proprietary information. The Staff granted the request on February 5, 1988. During the evidentiary hearings the Massachusetts Attorney General (Mass AG) requested the information. The Applicants agreed to provide it, but only under a protective order withholding the information from the general public. The Attorney General objected to a protective order as a matter of policy. Tr. 8398-425, 8987-9004. The matter stood at an impasse until February 10, when the Massachusetts Attorney General, who is the lead intervenor on this issue, agreed to a temporary protective order until the matter could be resolved on the merits. Tr. 9724-29. On February 17 the Licensing Board issued a temporary protective order. Active parties have executed affidavits of nondisclosure where required and we understand that most of the information has been provided in accordance with the terms of the temporary protective order.

In the meantime, Rockingham County Newspapers requested the information under the Freedom of Information Act (FOIA) (5 U.S.C. § 552), which request was denied by the Staff on February 25 on the grounds that the information was proprietary, apparently under FOIA Exemption 4 as restated under Part 9 of the NRC regulations. 10 C.F.R. § 9.5(4).

The Massachusetts Attorney General filed his motion and memorandum opposing the entry of a permanent protective order on February 19, to which Applicants replied on February 25, with the Staff responding on March 3.

II. DISCUSSION

A. Introduction

The Massachusetts Attorney General opposes a continuation of the protective order on the general grounds that one is not needed, that the Massachusetts public has a right to know who will be the responders in an emergency, and that a protective order will foreclose a full litigation of the plan by current and potential intervenors.

In response, Applicants argue that an extended protective order is needed to protect the privacy of the suppliers of services and facilities in the plan

for Massachusetts communities, and that Applicants would be harmed in their commercial interests in the plan if the suppliers were publicly identified and subject to intimidation by persons not under the control of the Licensing Board.

For its part, the NRC Staff emphasizes the Applicants' commercial right to have the information withheld from public disclosure, and would have the Board recognize the privacy rights of the suppliers.

In our rulings below, we extend the protective order through discovery to the beginning of the hearing on the plan for the Massachusetts communities. We will then reassess the need for protection. We agree with the Applicants and Staff that there is a significant probability that the suppliers' rights to privacy might be invaded absent a protective order. The Applicants have made at least a threshold showing that they have a protectible commercial or proprietary interest in the withheld information. Their initial request to the Staff for confidential treatment should not be mooted by compulsory discovery in this proceeding. Our major focus, however, is on preserving the integrity of this proceeding. Unrestricted disclosure of the identity of the suppliers prior to the evidentiary hearing will have the dangerous probability of allowing potential witnesses to be intimidated. In fact, the very factual foundation of the litigation could be distorted if uncontrolled disclosure of the relevant information is authorized.

B. Authority to Issue Protective Order

The Commission itself recognized that a protective order might be required to avoid violating personal privacy. CLI-87-13, *supra*, 26 NRC at 405. The Commission's general discovery rule authorizes its presiding officers to make orders required to protect "a party or person from annoyance, embarrassment, oppression . . . ." 10 C.F.R. § 2.740(c). The exemptions to the FOIA have been incorporated into the NRC discovery rules. Thus trade secrets and commercial financial information may be withheld from disclosure after balancing the interest of the public in disclosure and the interests of the persons urging nondisclosure. 10 C.F.R. §§ 2.790(a)(4), 2.740(c).

Judicial officers have the inherent authority and responsibility to ensure a fair hearing to the parties before it. Toward this end the NRC rules and the Administrative Procedure Act empower presiding officers to regulate the course of those hearings. 5 U.S.C. § 556(c)(5); 10 C.F.R. § 2.718(e).

Further, the Commission's licensing boards must predicate their decisions upon a record supported by reliable, probative, and substantial evidence. 10 C.F.R. § 2.760(2)(c). *See also* 5 U.S.C. § 556(d). Our authority to regulate the course of the proceeding therefore necessarily authorizes us to protect the foundation of the evidentiary record from deliberate distortion through

annoyance, intimidation, or embarrassment of potential witnesses or persons involved in the subject matter of the proceeding, as we explain below.

No party seriously disputes our general authority to impose orders restricting the disclosure of information. The dispute centers on whether the Intervenors' litigative needs will be compromised, whether a protective order is needed in this case, and whether any such need outweighs the strong public interest in conducting the proceeding "as open as possible to full public scrutiny." *Kansas Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 417 (1976).

A corollary to our finding that the Board is authorized to restrict the public dissemination of the protected information, in face of the strong public policy favoring disclosure, is that the restriction should be no greater than needed to protect the interests entitled to protection. *Id.* at 418. *Seattle Times Co. v. Rinehart*, 467 U.S. 20, 32; 81 L. Ed. 2d 17, 26 (1984), *citing Procunier v. Martinez*, 416 U.S. 396, 413; 40 L. Ed. 2d 224 (1974) and other cases. We have followed this principle in considering the need for and the terms for extending the protective order.

C. Need for Protective Order

As the Massachusetts Attorney General recognizes, "[t]his is to be sure an unusual situation." Memorandum at 5. The emergency planning aspects of the Seabrook application have captured the public's attention as much as any proceeding. Even the candidates for the office of President of the United States found it appropriate to address the issue during the recent campaign in New Hampshire. The Commission itself commented that the Seabrook plant is surrounded by an "emotionally charged atmosphere" — a fact to which the Board can attest from its own experiences during the hearings.

The Board has had an opportunity over many weeks to hear from and observe many who live near the Seabrook Station, including many who live in the Emergency Planning Zone. Most of those we have heard strongly oppose the licensing of Seabrook, yet are civil and decorous. The Seabrook opponents by and large are as dedicated to civil order and to a disciplined society as any people anywhere.

There is, however, a proportionally small but aggressive minority of Seabrook opponents, including some members of the Clamshell Alliance, who have demonstrated by civil disobedience their willingness to frustrate the licensing process by extra-legal means. They are not parties to the proceeding and are, therefore, beyond the control of the Licensing Board. If, as we fear, this group would seek to influence the licensing process by interfering with the agreements and expectations between Applicants and the suppliers in the plan

for Massachusetts, there is little the Board can do except to deny them the opportunity.

There is another aspect of the emergency planning phase of the proceeding that sets it off from other administrative proceedings. In this case the Board is required to make *predictive* findings, i.e., there is, or there is not, reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Seabrook. 10 C.F.R. § 50.47. This fact gives rise to a rare opportunity to influence the outcome of the adjudication by changing the facts upon which the prediction must be made. Our concern therefore is that some undisciplined opponents to the Seabrook Station will improperly interfere with the arrangements between Applicants and the suppliers for the *purpose of influencing the hearing*. This finding is unprecedented, required by the novel circumstances of this proceeding. Our reasoning should be well understood.

Stated another way, if the arrangements between the Applicants and the suppliers were made solely for the purpose of providing emergency services and facilities in the Massachusetts communities, without regard to the licensing process, we would have no concern that the arrangements would be tampered with — nor any authority over the matter. It is only because the arrangements have a separate and special use in support of the license application that our cognizance over them and the need for protection arise.

The Intervenors argue the matter from a slightly different direction. They state that, if in fact the community influences suppliers to abrogate their arrangements with Applicants, that is simply a fact of life that must be accounted for when considering whether adequate protective measures can and will be taken. And, in any event, the argument goes, sooner or later the information must be produced. The Board, however, does not accept this concept of a self-fulfilling, circular chain of events. No one seriously suggests that a rational community would oppress the potential suppliers of emergency services solely because they would serve in an actual radiological emergency. The only reason for pressuring the potential suppliers would be to prevent their arrangements with the Applicants from being used in the licensing proceeding. If the Board can interrupt the cycle by an appropriate protective order, it is our responsibility to do so.

D. Personal Privacy Considerations

The Massachusetts Attorney General points to the decision in *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979), for the proposition that privacy protection to be afforded the suppliers in this proceeding was not granted in the similar *Allens Creek* case. There, the National Lawyers Guild sought to protect the identity of its intervening members to spare them harassment because of their

asserted antinuclear views. The Appeal Board, drawing a distinction between the emotional climate surrounding the civil rights movement (where privacy needed protection) and the controversy attendant to issues of nuclear power, held that the identity of the Guild members had not been shown to require protection solely because of their views. *Id.* at 399, 400. The case before us is quite different. As noted above, the Board through its own observations has determined that there are those who might harass the suppliers if it would suit their purposes, and that they might perceive a rational incentive for such harassment.

As argued by the Mass AG, there may be some doubt whether the privacy rights to which the suppliers might be entitled have a foundation in the exemptions to the Freedom of Information Act. The respective provision of the NRC rules, § 2.790(a)(6), pertains to medical, personnel, and similar files relating to the individual personal life. But, as noted above, our discovery rules do not end with § 2.790. The general NRC discovery rule on protective orders, § 2.740(c), and Federal Rule of Civil Procedure 26(c), upon which the NRC rule was modeled, clearly permit protection from annoyance and oppression independently of FOIA exemptions.

The Attorney General asserts his right to communicate the protected information to the general public. Both the Attorney General and Applicants have directed the Board's attention to *Seattle Times Co., supra*, which is, indeed, instructive on that point. There the Court upheld a Rule 26(c) privacy-type state protective order designed to prevent harassment of members of a controversial religious organization. The Court found that pretrial discovery limitations on the dissemination of such information does not offend the First Amendment. Thus the Attorney General, gathering the information about the suppliers solely through the discovery authority given for this proceeding, is reasonably restrained from disseminating that information. He would not have the information but for the needs of this litigation and he has no First Amendment rights to information gathered only through that means. *Id.* at 32.

It should be noted that the protective order does not restrain the dissemination of identical information obtained through independent means. *Id.* at 34.

The Board therefore concludes that the suppliers of services and facilities in the plan for Massachusetts communities have an independent right to have their arrangements with the Applicants held private. This right of privacy is a separate and adequate basis in itself to extend the protective order. We also hold that the Applicants have sufficient privity with the suppliers to assert their privacy rights for them. As a practical matter the suppliers cannot raise privacy claims on their own. Only Applicants can do this effectively. *United States v. Lasco Industries*, 531 F. Supp. 256, 263 (N.D. Tex. 1981). (Employer may assert right of employee to privacy in medical records against federal subpoena.)

E. Applicants' Commercial Interests

It is obvious that the Applicants have a substantial commercial interest in the arrangements with the suppliers. Not only has money been expended in developing the arrangements, as the Staff points out, but the secondary damages attendant to any disruption of the arrangements through tortious interference would be very great in terms of delay, extra litigative costs, or perhaps the outright denial of a commercially valuable license to which Applicants might be entitled.

The Commission's rules authorize the nondisclosure of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." 10 C.F.R. § 2.790(a)(4). This protection, as we have noted, has its genesis in the Freedom of Information Act, Exemption 4. 5 U.S.C. § 552(b)(4). Traditionally the type of information protected by Exemption 4 has been confidential commercial or financial information the disclosure of which would "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 769-70 (D.C. Cir. 1974) ("*National Parks I*"). Although the Applicants do not allege a specific competitive injury from the disclosure of the identity of the suppliers, and there is no *direct* competitive significance to the information, any serious economic damage would weaken a utility's competitive position *vis-a-vis* other fuels. Furthermore, the economic trend is for increased competition among central-station electricity generators. The Board believes that Applicants have a real competitive interest in the commercial information. In addition, as the NRC Staff argues, substantial economic harm to the information's owner may be protected under Exemption 4 even where no competitive position is at risk. Staff Response at 7, *citing generally, 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983). Finally, Exemption 4 is not by its terms limited to considerations of competitive harm.

F. Intervenors' Due Process Rights

The Attorney General argues that he will be denied a "full litigation" of the plan for Massachusetts communities under a protective order because he would be denied access to hundreds of third-party sources of information about the suppliers. Memorandum at 14-15. There is no need to dwell on this point. We are simply not moved by the argument and can find no need for any party to consult in the community at large in its discovery efforts.

The protective order is very narrow. It permits access to the information by the attorneys, secretaries, and investigators of the office of Attorney General. It is similarly flexible with respect to other intervenors. The Intervenors are permitted

to conduct normal discovery-type interviews with the suppliers. In the case of business firms, they are permitted to contact the cognizant employees. If any intervenor, in a *particular situation* comes to a dead end because it may not contact, say, a former employee without violating the protective order, it can first seek an exception from the Applicants, then from the Licensing Board.

The Attorney General also makes a due-process argument on behalf of unnamed potential intervenors. This argument is even less convincing than the argument on the AG's own behalf, even assuming that he has standing to raise the matter. Potential intervenors have no discovery rights. Discovery is available only to parties to a proceeding. 10 C.F.R. § 2.740(a), (b). Memorandum at 12-13.

G. Other Withheld Information

Also redacted from the plan for the Massachusetts communities was a category of information in Appendix H, said to be the names and phone numbers of hundreds of members of the New Hampshire Yankee offsite response organization. The Staff did not request this information. Therefore the Applicants have not provided it to the Intervenors under the temporary protective order. The Attorney General demands the Appendix H information. He argues that the Commission, in CLI-87-13, intended for the Intervenors to have the entire plan for the Massachusetts communities. Applicants, looking at the plain language of CLI-87-13, note that under that order they need only indicate their willingness to give to the other parties the detailed information requested by the Staff and FEMA. *Id.*, 26 NRC at 405.

Neither the Applicants nor the Massachusetts Attorney General has interpreted the Commission's order correctly. The Attorney General has no basis for his opinion that the Commission intended that the entire plan be provided to the Intervenors. The language is clear enough on that point. *Id.*

On the other hand, Applicants misread CLI-87-13 as stating that they are obliged to provide the Intervenors with only the information requested by the Staff. That construction would imply that Intervenors' discovery rights are controlled by the requests of the Staff or perhaps FEMA.

The Commission was simply explaining to the Applicants that, at a minimum and without undue delay, the Intervenors should have whatever information the Staff and FEMA use to perform their evaluations. The Commission had no intention of restructuring the discovery rules in that respect. The standard for discovery remains as always: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . ." 10 C.F.R. § 2.740(b)(1). The information contained in Appendix H is relevant to the proceeding. The question to be decided is whether the information is privileged or should otherwise be protected in accordance with

general discovery principles. This matter was discussed during the telephone conference call of March 21. Tr. 9831-40. The foregoing interpretation of CLI-87-13 was explained to the parties. While counsel for Applicants points out that none of the Appendix H information would be discoverable until the contentions are filed, to move the matter along, Applicants are willing to produce the information forthwith under suitable protection. *E.g.*, Tr. 9838 (Dignan).

Accordingly, the Board directs that the Appendix H information be provided under the protective order extended today. However, we authorize the Applicants to redact home phone numbers because they are irrelevant to the issues, private, and would serve no discovery purpose. We also authorize the Applicants to redact the emergency phone numbers because there is no apparent discovery purpose for them and because the potential damage in the inadvertent release of the emergency numbers would outweigh any benefit from producing them.

II. ORDER

The protective order approved on February 17, 1987, is extended until the beginning of the evidentiary hearing on the Seabrook Plan for the Massachusetts Communities, or until further order of the Board. Prior to the beginning of the evidentiary hearing, Applicants may petition for further relief. Prefiled testimony containing protected information shall be withheld from public disclosure in accordance with the terms of the order. To the extent possible, protected information shall be separated from other portions of prefiled testimony.

THE ATOMIC SAFETY AND
LICENSING BOARD

Gustave A Linenberger, Jr.
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
March 23, 1988

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-528

ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station, Unit 1) March 14, 1988

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Myron L. Scott, on behalf of the Coalition for Responsible Energy Education, and Jack Kaufman, on behalf of the Valley of the Sun Gray Panthers (Petitioners), requesting that the Arizona Public Service Company, *et al.* (APS) be assessed a civil penalty of not less than $100,000 for disabling an engineered safety system at the Palo Verde Nuclear Generating Station, Unit 1, on January 20, 1987.

TECHNICAL SPECIFICATION INTERPRETATION

Although a disabling incident was caused by Licensees inappropriately applying Technical Specification 3.0.3 for purposes of operational convenience, no enforcement action was warranted by the NRC based on the minimal safety significance of the incident and a lack of clear NRC guidance. The Licensees' future entry into Technical Specification 3.0.3, however, must be better controlled.

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

INTRODUCTION

By Petition dated April 27, 1987, Mr. Myron L. Scott, on behalf of the Coalition for Responsible Energy Education, and Mr. Jack Kauffman, on behalf of the Valley of the Sun Gray Panthers (Petitioners), filed a request pursuant to 10 C.F.R. § 2.206 addressed to the Director, Office of Inspection and Enforcement of the Nuclear Regulatory Commission (NRC). The Petitioners asked the NRC to provide relief by issuing an Order to Show Cause why a Notice of Violation (Severity Level III or higher) should not be issued and a civil penalty of not less than $100,000 ($50,000 escalated for the repetitive nature of the concerns) be assessed against the Arizona Public Service Co., *et al.* (Licensees) based on a January 20, 1987 event at the Palo Verde Nuclear Generating Station, Unit 1.

The Petition was subsequently referred to the Office of Nuclear Reactor Regulation for response. By letter dated June 22, 1987, the Director, Office of Nuclear Reactor Regulation, advised the Petitioners that the issues raised in the Petition were under consideration, and that the NRC would respond within a reasonable time. For the reasons set forth below, I have determined that the Petition should be denied.

DISCUSSION

This Petition concerns an event that occurred on January 20, 1987, at the Licensees' Palo Verde Nuclear Generating Station, Unit 1. During the event, a Control Room Shift Supervisor intentionally overrode an automatic trip function (which is to actuate on low steam-line pressure) of the main steam isolation system (MSIS). The MSIS is an engineered safety system.

The Petitioners allege that disabling of this engineered safety system was unauthorized, and that plant management's response to the event was representative of the failure of Palo Verde personnel and management to fully appreciate the significance of safety-related events and to adopt a thorough, diagnostic approach to such events to prevent their recurrence.[1] They also point to several past violations (included as Appendices 2 and 3 to the Petition) as additional examples of management's failure in these areas. According to the Petitioners, a high number of Licensee Event Report incidents at Palo Verde Units 1 and 2 and the fact that the Arizona Nuclear Power Project is still in the early years of

[1] The Petitioners base these allegations on a letter dated March 13, 1987, from the NRC to the Licensees (included as Appendix 1 to the Petition), which raised specific issues associated with the event and concerns with the Licensee management's response to the event.

attitude formation have increased the importance of instilling a thorough and diagnostic approach to event assessment and operator behavior through regulatory disciplinary action.

The January 20, 1987 disabling event was reported by the Licensees to the NRC in Licensee Event Report 87-007, dated February 18, 1987. As documented in that report, the reactor operating personnel did intentionally disable the Palo Verde Unit 1 MSIS automatic function when steam-line pressure was about 25 psia. At the time, the reactor was subcritical and was being cooled from Mode 4 to Mode 5 with the No. 2 steam generator because of a tube leak in the No. 1 steam generator.

The NRC Staff examined the circumstances surrounding the event, and reviewed the applicable plant procedures and regulatory requirements, to ascertain whether a violation of a regulatory requirement had occurred during the event. The results of the Staff's review, as reported in NRC Inspection Report No. 50-528/87-17,[2] can be summarized as follows:

(1) The operating crew intentionally disabled the MSIS feature to keep the main steam isolation valves (MSIVs) open to minimize plant radiological contamination and to avoid potential MSIV damage. Before disabling the MSIS feature, the operating crew determined that this action was allowed by plant procedures and Technical Specifications, as discussed below.

(2) The MSIS feature was disabled in accordance with plant Procedure 36MT-9SB03, "PPS Bistable Input Simulation." This procedure allows the crew to simulate inputs to the plant protection system (PPS) bistables. Paragraph 5.3 of the procedure requires the Shift Technical Advisor (STA) to verify that action taken under the procedure is allowed by the Technical Specifications.

(3) The STA verified that the unit would be in compliance with the Limiting Condition for Operation (LCO) in Technical Specification 3.0.3. This LCO required the unit to be placed in a cold shutdown condition (Mode 5) from a hot shutdown condition (Mode 4) within 24 hours when a system-specific LCO and the LCO's associated action statement are not met. After the crew disabled the MSIS feature, they put the unit in a cold shutdown condition in approximately 1 hour and 18 minutes.

(4) The implementation of Procedure 36MT-9SB03 was controlled in accordance with a plant work control procedure under Work Order 00203545.

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[2] Inspection Report No. 50-528/87-17, July 24, 1987, ¶13.

On the basis of its review, the Staff concluded that the operating crew complied with the Licensees' procedures. However, the procedures were based on a misinterpretation of the NRC's intent concerning the use of Technical Specification 3.0.3. The misinterpretation of this particular Technical Specification may in part be the result of a lack of specific NRC guidance with respect to the use of Technical Specification 3.0.3 for the specific situation at Palo Verde. Therefore, we concluded that the Licensees' procedures inappropriately applied Technical Specification 3.0.3 for the purpose of operational convenience. Based on the minimal safety significance of this incident[3] and the lack of clear NRC guidance, we conclude that enforcement action is unwarranted.

The Licensees' future entry into Technical Specification 3.0.3, however, must be better controlled. In order to have better control, the Licensees have improved their plant administrative procedures to utilize Technical Specification 3.0.3 appropriately.[4]

In addition, as part of a technical specifications improvement program for all licensees, the Staff has issued Generic Letter 87-09, dated June 4, 1987, which provides guidance on short-term improvements and includes clarifications in some areas. This Generic Letter specifically clarifies the intent of LCO 3.0.3 by stating that it is "not intended to be used as an operational convenience which permits (routine) voluntary removal of redundant systems or components from service in lieu of other alternatives that would not result in redundant systems or components being inoperable." Rather, as indicated by this generic letter, the intended purpose of LCO 3.0.3 is to provide time limits for an orderly shutdown when the individual Limiting Conditions for Operation and/or Action Statements in other specifications cannot be complied with. Now that this clarification has been issued, future similar occurrences may be subject to citation in accordance with the Commission's enforcement policy.

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[3] The Staff evaluated the safety implications of the actions taken by the Licensees during this specific event. Based on that review, the Staff has concluded that the facility had not been placed in an unsafe condition during this event for the following reasons:

(1) The Technical Specifications (Table 2.2-1) allow the MSIS trip setpoint to be set 200 psi below the actual steam-line pressure whenever the plant is in Mode 3 or 4. Therefore, with an actual steam-line pressure of 25 psia, the trip setpoint could have been set at 0 psia, which would have effectively removed the trip function of the MSIS.

(2) At the time of the event, the reactor was shut down in Mode 4 with all control rods inserted and the reactor coolant system borated to cold shutdown conditions.

(3) The automatic MSIS feature on low steam-line pressure is provided primarily to terminate or mitigate a main steam-line break and the resulting cooldown of the primary system. At the time of the event, the No. 1 steam generator was already isolated and the No. 2 steam generator pressure was approximately 25 psia. Because the main steam-line design operating pressure is approximately 1000 psig, the probability of a steam-line break at 25 psia was extremely remote.

(4) With the reactor coolant system borated to a cold shutdown condition, the reactivity addition resulting from an uncontrolled cooldown could not have resulted in a return to criticality.

(5) Water injection capability was available to allow rapid recovery from any reactor coolant system contraction resulting from a cooldown.

[4] Inspection Report No. 50-528/87-10, May 21, 1987, at 15.

The Petitioners also expressed concern that Licensees' management has generally failed to appreciate safety-significant events, has not adopted a thorough, root-cause, diagnostic approach to plant events, and has allowed an excessive number of personnel errors to be committed at the facility. As examples of these concerns, the Petitioners have included as Appendices to their Petition three NRC letters concerning instances where management inadequacies may have existed. In response to these concerns, the Staff has reviewed the Licensees' cumulative activities and has found that the Licensees' overall management performance is acceptable. This finding is reflected in the NRC's most recent Systematic Assessment of Licensee Performance report on Palo Verde, dated January 15, 1987, which has found the Licensees' overall performance to be satisfactory. Also, as documented in other recent NRC reports on Palo Verde, the Staff has found that the Licensees are implementing a root-cause determination program and have recently made improvements in this program.[5] The Staff will continue to closely review the Licensees' performance and will identify areas of the Licensees' performance where improvements may be warranted.

CONCLUSION

On the basis of the foregoing discussion, the information contained in the referenced documents, and in consultation with the Office of Enforcement, I have concluded that enforcement action is unwarranted.

Accordingly, the Petitioners' request for a civil penalty against the Licensees is denied. A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 14th day of March 1988.

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[5] Inspection Report No. 50-528/86-38, January 13, 1987, at 3; Inspection Report No. 50-528/86-37, January 26, 1987, ¶ 14; Inspection Report No. 50-528/87-19, June 12, 1987, at 2; and Inspection Report No. 50-528/87-17, July 24, 1987, ¶ 14.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-498

HOUSTON LIGHTING AND
POWER COMPANY, *et al.*
(South Texas Project, Unit 1) March 18, 1988

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Government Accountability Project (GAP) requesting a delay in the Commission's meeting to consider full-power licensing for South Texas Project (STP) Unit 1 because of alleged deficiencies in the NRC's review of allegations received through GAP. GAP requested that the Commission meeting be delayed until there had been a complete investigation of all allegations regarding STP and a report disposing of each allegation was released to the public.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

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

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

INTRODUCTION

On January 26, 1988, the Government Accountability Project (GAP) filed a petition (Petition) pursuant to 10 C.F.R. § 2.206 requesting a delay in the Commission's meeting to consider full-power licensing for South Texas Project (STP) Unit 1 because of alleged deficiencies in the NRC's review of allegations

received through GAP. GAP requested that the Commission meeting be delayed until there had been a complete investigation of all allegations regarding STP and a report disposing of each allegation was released to the public. The Petition was referred to the Staff on January 28, 1988. On February 12, 1988, GAP submitted a letter supplementing the initial petition and requesting an explanation as to the conduct of the review. This Decision provides a consolidated response to the above-mentioned submittals.

The deficiencies alleged by GAP in the Petition are related to the efforts of the NRC Safety Significance Assessment Team (SSAT) that was constituted in November 1987 to determine the licensing impact of all allegations that GAP made available to the NRC on the South Texas Project. In the January 26 submittal, GAP asserts the following as bases for its Petition:

(1) The results of the NRC's limited investigation into allegations were predetermined in that the NRC had prepared a draft of the findings before the SSAT had returned from its site inspection.

(2) One of the allegers was not permitted to show the NRC team any of his allegations relating to Unit 1.

(3) The NRC review was subjected to overwhelming scheduling pressures, resulting in disposition of most of the allegations without interviewing the allegers and in a failure to thoroughly address the sixty selected allegations that were the focus of the team's review.

(4) None of the allegations of wrongdoing have been investigated by the NRC.

In the February 12 submittal, GAP asserts the following additional deficiencies as bases for its Petition:

(5) The SSAT did not investigate all the allegations, and therefore rendered false a statement by the NRC Chairman Lando Zech that 100% of allegations are investigated.

(6) There was no basis for the NRC's assessment on January 12, 1988, that the allegations were not of immediate safety significance.

(7) Houston Lighting and Power Company improperly interacted with the SSAT regarding the inspection.

In addition to the above, the Petition requests an explanation of whether NRC will conduct further investigation of the allegations.

Receipt of the GAP Petition was acknowledged on February 29, 1988. A notice that the Petition was under consideration was published in the *Federal Register* on March 8, 1988 (53 Fed. Reg. 7449).

In considering a request under 10 C.F.R. § 2.206 or, for that matter, any allegation of substandard workmanship or improper practices involving a nuclear power reactor, the NRC Staff is mindful of the Commission's overriding regulatory responsibilities to ensure adequate protection of the public health and safety in the use of radioactive material and the operation of nuclear power

facilities. *See Power Reactor Development Co. v. Int'l Union of Electrical, Radio, and Machine Workers*, 367 U.S. 396, 406 (1961). Consistent with these responsibilities, a reactor operating license will only be issued by the Commission if it can be found that there is reasonable assurance that power operation presents no undue risk to the health and safety of the public. *See* 10 C.F.R. § 50.57. When assessing the significance of allegations, the Staff makes an initial determination whether an allegation, if true, is relevant to safe operation of the facility. Allegations deemed not relevant to safe operation of the facility and allegations determined to be frivolous, or too vague or general in nature to provide sufficient information for the Staff to investigate, may not receive further consideration. Nevertheless, in this case, the SSAT, in fact, did review many allegations that would normally have been considered too vague or general, in order to confirm that the types of deficiencies alleged either did not exist or would not undermine safety.

The results of the SSAT's examination of the allegations received through GAP are contained in NUREG-1306, "NRC Safety Significance Assessment Team Report on Allegations Related to the South Texas Project, Units 1 and 2," March 1988. On the bases of this review, the results of previous inspections, and evaluations that have been documented previously in safety evaluation reports, the Staff has determined that the STP Unit 1 was built in conformance with applicable regulatory requirements and that the systems in the facility would, if called upon, perform their intended safety function. Thus, for the reasons in this Decision, we find no basis to support GAP's request and do not recommend a delay in the Commission's meeting to consider full-power licensing for STP Unit 1. Accordingly, the Petition is denied.

DISCUSSION

GAP informed the Staff in January 1987 that it had commenced an investigation into allegations concerning the safety of the STP. According to GAP, it had received safety allegations from approximately thirty-five current and former employees of the STP.

The Staff has attempted to work with GAP to obtain the substance of these allegations since January 1987. Correspondence ensued between the Staff and GAP, with repeated requests by NRC for the allegations-related information. Eventually the Staff issued a subpoena to GAP to produce those documents. In October 1987, the U.S. District Court denied enforcement of the subpoena and urged the parties to work toward getting the safety issues to the Staff. Subsequently, an agreement was reached between the Executive Director for Operations and CAP on the main elements of a process that would provide the NRC

Staff limited access to information that might be of relevance in the forthcoming licensing decisions regarding STP.

The SSAT was formed in November 1987. Each allegation was reviewed by the SSAT and a determination made as to whether further examination of the allegation was appropriate or necessary or whether no further action was required because of the duplication of allegation, lack of requisite specificity, or lack of safety significance. Those allegations that the SSAT determined to involve harassment/intimidation or wrongdoing were later referred to the NRC Office of Investigations (OI). After several weeks of preparatory efforts, including direct telephone contact with allegers, a site inspection was conducted during the week of January 18, 1988. On the basis of the information from the inspection, the SSAT evaluated all allegations that appeared to be technically oriented and that were considered to have potential safety significance. A copy of the report documenting the results of the review, NUREG-1306, is enclosed herewith (not published). Since the SSAT's conclusions with respect to its review are fully explained in NUREG-1306, a detailed examination of each allegation is not warranted here. The following discussion summarizes some of the issues addressed in NUREG-1306 and provides a response to the matters raised in the Petition.

(1) Allegation That the Result Was Predetermined

The Petition asserts that the results of the NRC's allegedly "limited" investigation into allegations were predetermined, because the NRC inspection team or other NRC Staff had prepared a draft of the findings before the SSAT had returned from its site inspection.

As explained in NUREG-1306, the SSAT inspection efforts were fully consistent with the technical information provided by GAP and the allegers. The only limitations on the review came from the lack of specificity from GAP regarding the allegations. The SSAT made strenuous efforts to overcome this difficulty by preparing for the onsite inspection (*see* Appendix B, NUREG-1306) in such a way that the allegations were viewed in a wide perspective. Each allegation was examined and analyzed for both the main concern and to ascertain any ancillary issues raised by the allegation, the potential root causes that might be involved, and wider implications if the allegations were substantiated. As a result, the onsite inspection effort was focused on physical inspection of components and specific areas of the plant, as well as related documentation.

By the end of the inspection, a large body of information had been accumulated; the review of the information was still incomplete. Under these circumstances, it was not possible to make findings in many areas before leaving the site. Therefore, no draft report could have been prepared at that time as alleged by GAP.

The SSAT did not see any alleged draft reports prepared by nonmembers. Although individual team members may have drafted handwritten contributions to actions of the report during the site inspection, typewritten material was not produced during the site inspection indicating results of the inspection. Such handwritten drafts can only be considered preliminary documents of individual participants and not necessarily reflective of the team's ultimate conclusions.

(2) Allegation Concerning Lack of Access to Unit 1

GAP asserts that one of the allegers was not permitted to show the NRC team any of his allegations relating to Unit 1.

The alleger referred to in this assertion was interviewed by members of the SSAT by telephone on January 16, 1988. The SSAT reviewed the information provided by the alleger in light of the allegations selected by the SSAT for onsite inspection and of allegations previously inspected at STP. On the basis of this review, the SSAT concluded that all but one of the alleger's concerns were bounded by other issues selected for inspection by the SSAT, or by previous reviews conducted on site of other allegations. The single exception was the alleger's concern relating to fasteners in electrical switchgear provided by Westinghouse. The alleger claimed that fasteners from sources other than Westinghouse were being used to fasten parts in Westinghouse switchgear. As a result of the onsite inspection, the SSAT found that non-Westinghouse fasteners had been used but that there was no safety basis or regulatory requirement to use Westinghouse fasteners, nor was a safety problem caused by use of non-Westinghouse fasteners.

A decision was made to allow the alleger access to Unit 2 instead of to Unit 1 because (1) the two units at STP are practically identical and any safety concerns raised regarding Unit 1 switchgear could be illustrated by reference to Unit 2 switchgear, and (2) for security reasons, public access to Unit 1 is more difficult to obtain than to Unit 2, at the current stage of construction. The alleger came to the STP site on January 18, 1988, and toured the Unit 2 13.8-kV switchgear in the company of two SSAT members (*see* Appendix C, NUREG-1306). No safety-related concerns were identified as a result of the tour with this alleger.

(3) Allegation That SSAT Review Is Incomplete Due to Scheduling Pressure

GAP alleges that the NRC review was subjected to overwhelming scheduling pressures, resulting in disposition of most of the allegations without interviewing the allegers and in a failure to thoroughly address the sixty selected allegations that were the focus of the team's review. GAP also alleges that the SSAT

did not investigate all the allegations and, therefore, rendered false a statement attributed to NRC Chairman Lando Zech that 100% of allegations relating to plant equipment are investigated.

The efforts of the SSAT to review all allegations for appropriate disposition are detailed at length in NUREG-1306. For approximately 2 months preceding the actual onsite inspection, the SSAT had access to the files that contained the concerns conveyed to GAP by the allegers.

The SSAT review of GAP's files identified approximately 700 allegations provided by approximately thirty-five individuals. Each allegation was reviewed and evaluated for appropriate disposition. The SSAT determined that 120 of the 700 allegations were repetitious, 240 were considered as either harassment/intimidation or as wrongdoing, and 140 more were not safety-related. The allegations of harassment/intimidation, wrongdoing, or those that were non-safety-related were found by the SSAT to have no licensing significance. Of the original 700 allegations, a total of 213 allegations remained as possible candidates for onsite inspection at STP. Examples of these allegations are: Pipe joints not properly installed; steam generator out of plumb; 20% of valves installed backwards; heating, ventilation, and air-conditioning (HVAC) ductwork and supports not installed per specifications; fasteners from questionable U.S. and foreign sources used in plant; Raychem cable splices do not meet safety standards; faulty weld rod used throughout the plant; coatings on orbital bridge flaking and chipping; crack in basemat of fuel-handling building; and as-built items do not agree with as-designed configurations.

The SSAT reviewed all 213 allegations in detail and subsequently placed allegations in categories on the basis of the discipline, equipment, and shared characteristics, (e.g., mechanical/valves/installation; electrical/splices/Raychem). From these categories of allegations, the SSAT identified for onsite inspection those allegations that were representative of the technical concerns conveyed by the allegers and enveloped the 213 allegations either specifically or on a generic basis. Ten such allegations were identified and designated as primary allegations. In addition, sixty-one secondary allegations were selected that conveyed concerns similar to those of the primary allegation.

At a very early date the SSAT found that the allegations were deficient in terms of specific details. On this basis, the SSAT developed a program for inspecting the allegations; that program included provisions to compensate for the general (as opposed to specific) nature of the allegations. An essential part of the SSAT program was the development of detailed inspection plans. These plans (described in NUREG-1306) included all the steps necessary to thoroughly inspect the installed condition at STP and establish a bounding condition for the generalized concerns conveyed by the allegations. These plans were developed well ahead of the actual onsite inspection.

The SSAT interviewed all the allegers who were made available by GAP relative to the seventy-one allegations selected for onsite inspection by the SSAT. These interviews were conducted before and during the actual onsite inspection. With only a few exceptions, the allegers did not provide specific details. The few details that were provided did not require the previously developed inspection plans to be changed. While on site, the SSAT made optimal use of available time. This was accomplished by emphasizing physical inspections on site and making provisions to collect supporting data for subsequent review and evaluation off site.

The SSAT was at the STP site from January 18 through January 22, 1988, or 4.5 calendar days. In actuality, the SSAT worked extremely long hours, and put in the equivalent of 8 work days on site. After performing the onsite inspection, the SSAT spent significantly more time reviewing and evaluating inspection results and supporting data. The overall effort of the SSAT is estimated to have consumed 2910 person-hours. On this basis, I find that the totality of effort expended to review the allegations was sufficient to thoroughly address the concerns represented by the allegations. Moreover, the conduct of the SSAT review was fully consistent with the statement attributed to the NRC Chairman by the newspaper report included in the Petition in that each and every allegation was reviewed and evaluated, and appropriate disposition was made of each allegation.

In response to the question raised in the Petition regarding further reviews, there is no intention to conduct any further reviews on the allegations unless the results of the review of the wrongdoing allegations point to possible safety problems not previously made known to the NRC.

(4) Wrongdoing Allegations

GAP charges that none of the allegations of wrongdoing have been investigated by the NRC.

The SSAT was aware of the wrongdoing aspects associated with the allegations, and made a deliberate effort to separate the safety significance aspects out of them. The safety significance aspects have been included within the allegations assessed for licensing impact. OI encountered difficulty in its initial attempts to gain access to the allegers' information in the possession of GAP. However, the wrongdoing aspects are currently being evaluated by OI. OI has requested that GAP make available for interview the individuals making allegations of wrongdoing regarding STP. GAP has indicated to OI that it is having difficulty in locating the allegers involved in the allegations under review by OI. For this reason, OI has been unable to proceed with its investigations.

(5) Mr. Rehm's Statement Regarding Immediate Safety Significance

GAP alleges that there was no basis for NRC's assessment on January 12, 1988, that the allegations are not of immediate safety significance.

In his January 12, 1988 letter, Mr. T.A. Rehm stated to Ms. Garde that, based on the SSAT's initial review of GAP's files, "the data reviewed indicates that the allegations are general in nature and not of immediate safety significance." As indicated in § 2 of NUREG-1306, during November and December 1987, the SSAT had completed a review of all the information made available by GAP in its Washington, D.C. office. However, in the context of the continuing efforts of the SSAT, Mr. Rehm's statements were of a preliminary nature, awaiting completion of the SSAT's review. As shown in NUREG-1306, the completed review showed Mr. Rehm to be correct in his assessment.

(6) The SSAT Review Was Influenced by the Licensee

GAP also alleges that Houston Lighting and Power Company improperly interacted with the SSAT regarding the SSAT's review. GAP speculates that the Licensees limited the SSAT's investigation, and points to a memorandum issued by the Licensees at the conclusion of the site visit, stating that "no safety concerns requiring additional attention were noted by the inspectors" as evidence of improper influence by Licensees.

Section 2.206(a) of 10 C.F.R. requires petitioners to "set forth the facts that constitute the basis for the request." Absent such a showing, the Director need take no action on the Petition. *See Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 979 (1984); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-17, 10 NRC 613, 614-15 (1979); *Duke Power Co.* (Oconee Nuclear Station, Units 1, 2, and 3), DD-79-6, 9 NRC 661, 661-62 (1979); *see also Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 443 (1980). In view of the lack of any specific information or facts to support GAP's speculations, I find that GAP has failed to present any substantive information calling into question the independent nature of the SSAT review. In the absence of an adequate factual basis, no action need be taken regarding GAP's allegation of influence by the Licensees.

CONCLUSION

On the basis of the review by the SSAT, the results of which are contained in NUREG-1306, and as described in this Decision, I find no basis to support GAP's request and do not recommend a delay in a Commission meeting

to consider full-power licensing of STP Unit 1. Accordingly, GAP's request is denied. A copy of this Decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 18th day of March 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of **Docket No. 50-312**

SACRAMENTO MUNICIPAL UTILITY DISTRICT
(Rancho Seco Nuclear Generating Station)

March 18, 1988

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Ms. Barbara Moller that requested the Nuclear Regulatory Commission (NRC) to take action concerning the Rancho Seco Nuclear Generating Station (Rancho Seco). Petitioner requested the NRC Staff to order the Rancho Seco Licensee to show cause why the NRC should not prevent the Licensee from restarting Rancho Seco, or, in the alternative, to order the Licensee to shut down the plant completely. Petitioner based these requests on an alleged official investigation of allegedly falsified cable tray data and on Rancho Seco's assertedly problem-laden history.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where a petitioner requests the NRC to require complete or 100% inspection or sampling in order to satisfy petitioner's concerns, and where the NRC requires partial inspection or sampling to obtain data that give the NRC reasonable assurance that petitioner's concern raises no significant public health and safety issue, the NRC need not take any further action.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where a petitioner raises a concern, the licensee takes action to address that concern, and the NRC Staff publishes its evaluation of the licensee's actions in a

public document and concludes that the licensee's actions resolve the petitioner's concern, so that the NRC has reasonable assurance that the licensee can operate the plant without undue risk to public health and safety, the NRC need not take any further action.

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

INTRODUCTION

On February 25, 1987, Ms. Barbara Moller submitted a Petition in accordance with 10 C.F.R. § 2.206. The Petition was referred to the Director, Office of Nuclear Reactor Regulation (NRR), for consideration.

The Petition asked the U.S. Nuclear Regulatory Commission (NRC) to order the Licensee of the Rancho Seco Nuclear Power Plant to show cause why the plant should not be prevented from restarting until a complete check of all cables was undertaken or, in the alternative, why the plant should not be completely shut down. Ms. Moller gave as the bases for the Petition (1) the "official investigation" concerning falsification of cable tray data and (2) the "problem-laden" history of the Rancho Seco facility. In the Petition, Ms. Moller asserted that three forged signatures had been found at each level in the quality control hierarchy on at least seven cable installation cards and that this indicated that proper cross-checking had not been done. Ms. Moller further asserted that in light of the falsification of cable data, sampling was not an effective method for checking cable work. Ms. Moller further asserted that 2000 cables had been added to the plant since 1974, and she expressed concern regarding information that had indicated to her that a sample of only 215 cables was going to be checked.

On April 1, 1987, the Commission's Office of Governmental and Public Affairs received a letter from U.S. Senator Alan Cranston requesting that the Commission Staff respond to the concerns raised in Ms. Moller's Petition. The Staff responded in a letter from Mr. Victor Stello, Jr., Executive Director for Operations, dated April 24, 1987. The letter stated that a response to Ms. Moller would be made following the completion of evaluations being performed by the Licensee and the Staff and that the NRC would not authorize restart of Rancho Seco until the cable-routing discrepancies were resolved.

On April 27, 1987, Dr. Thomas E. Murley, Director, NRC Office of Nuclear Reactor Regulation (NRR), acknowledged receipt of the Petition. He informed Ms. Moller that the Petition would be treated under 10 C.F.R. § 2.206 of the Commission's regulations and that appropriate action would be taken in

a reasonable time. Notice of receipt of the Petition was published in the *Federal Register* on May 6, 1987 (52 Fed. Reg. 16,967).

In a letter dated September 13, 1987, Dr. Murley advised Ms. Moller that the Licensee was currently working to resolve the cable problems and that the NRC Staff was monitoring this effort and would provide an independent assessment of the extent of the problems and the adequacy of proposed resolutions. He also reiterated the NRC Staff's position that Rancho Seco would not be permitted to restart until the safety concerns associated with the plant cables were resolved.

BACKGROUND

The Rancho Seco Nuclear Generating Station, operated by the Sacramento Municipal Utility District (SMUD, the Licensee), is a 916-MWe Babcock & Wilcox (B&W)-designed pressurized-water reactor located in Clay, California, about 25 miles southeast of Sacramento. The plant received an NRC operating license in 1974.

In the years 1983 through 1985, the Licensee undertook and completed a significant design/construction effort regarding electrical cable at Rancho Seco. These efforts involved rerouting of existing cable, and installation of new cable. This work was done in support of an expanded electrical distribution system, implementation of requirements imposed on licensees after the accident at Three Mile Island, implementation of modifications for fire protection (delineated in Appendix R to Part 50 of Title 10 of the *Code of Federal Regulations*), and efforts to environmentally qualify safety-related electrical equipment. In this period, approximately 7800 cables were either installed or rerouted, including 2034 that served safety-related equipment.

Concerns regarding cables began to surface in 1984 when it was alleged that records documenting electrical cable installation were not properly controlled, that some records were missing, and that data entered into the computerized cable raceway and tracking system (CRTS) might be inaccurate. Subsequent investigation by the Licensee and review by the NRC Staff have shown these allegations were true. The NRC Staff's evaluation is documented in NUREG-1286, Supplement 1.

Following the discovery and investigation of the cable-routing discrepancies, the Licensee developed a plan for cable inspection. In January 1987 the Licensee integrated this inspection activity and reviews of other cable-related problems into a single program under a single program manager.

The NRC Staff has monitored and evaluated the Licensee's program for identifying and correcting safety-related cable problems. This evaluation is documented in § 4.8 of the NRC Staff's "Safety Evaluation Report Related to the Restart of Rancho Seco Nuclear Generating Station, Unit 1 Following the Event

of December 26, 1985," and Supplement 1 to that report (NUREG-1286 and NUREG-1286, Supplement 1). The issues raised by Ms. Moller in her Petition were addressed by the Staff in §§4.8 and 2.3.2 of NUREG 1286 as discussed below.

DISCUSSION

A. Falsification of Cable Pull Cards

Investigations of cable discrepancies, including inspections, have been performed by the Licensee. The results showed that in two separate instances safety-related electrical cables had not been rerouted even though the cognizant field engineers and quality control inspectors had signed off on the cable installation records (cable pull cards) indicating the cables had been rerouted. Also, in both cases the signature of the cable installer was not on the pull card as it should have been, according to established plant procedures. In the first case, which involved fourteen cables serving equipment for remote plant shutdown, the cable installer's name was printed on the cards. In the second case, which involved the intermixing of eleven power and control cables with instrumentation cables in instrumentation cable trays, the field engineer's signature was in the signature block reserved for the signature of the cable installer. The safety implications of these cable discrepancies are discussed below.

To understand the safety implications associated with the cable discrepancies and to determine the appropriate corrective actions, it was necessary for the Licensee to understand the nature of the deficiencies in field engineering and quality control. The licensee has determined the nature and extent of the cable discrepancies with formal programs for investigation of identified cable discrepancies and inspection of installed cable. The NRC Staff has review the Licensee's programs for investigation and inspection and found them acceptable.

The Fourteen Remote-Shutdown Cables

The first instance mentioned above involved fourteen remote-shutdown cables that were to have been rerouted to satisfy separation criteria for fire protection specified in 10 C.F.R. Part 50, Appendix R. In this instance, the field work necessary to reroute the cables was simply not done and the cables remained in an unacceptable configuration. The Licensee's investigation indicates that the work order (i.e., the cable pull cards) for rerouting the cables was never transmitted to the installer from the field engineer. Consequently, the cables were not pulled back and repulled into their new locations. A principal cause of this failure appears to be that instead of using the established procedure

for controlling cable pull cards, the field engineer and the Card Control Group (CCG) clerk were using an informal procedure developed by an engineering aide in the CCG. It also appears that when the card control discrepancy was detected, proper followup action was not taken. The NRC Office of Investigations is currently investigating whether or not wrongdoing was involved in this matter.

The failure of the quality control (QC) inspector to detect the work control error during his inspection is thought to be the result of the practice of some electrical QC inspectors to attempt to inspect cable routing after the work was completed. This practice is unacceptable because it usually allows inspection only in the vicinity of the cable terminations, and hence a failure to reroute a portion of the cables located away from the terminations would not be detected. As discussed in Appendix A of NRC Inspection Report 50-312/87-21, inspections of this type did not satisfy the existing procedural requirement to verify that the installed cable route was in agreement with the approved design drawings. In a letter from the NRC, dated July 30, 1987, the Licensee was notified that the improper QC practice was a Severity Level IV violation of 10 C.F.R. Part 50, Appendix B, Criterion X, which governs inspection of activities involving quality. The Licensee's corrective actions in response to this violation, are discussed later in this document.

The Eleven Intermixed Cables

The second instance involved eleven power and control cables that were to have been removed from some of their original trays and rerouted so that the trays could be redesignated and used to house new instrumentation cable. This work was to have been done as part of a major modification in 1983 that involved the relocation and installation of a large amount of cable over a relatively short time period. As in the first instance, the cable pull cards had been signed off, indicating the work necessary to complete the rerouting of the eleven cables was done; but the work had not been done. Thus, when the new instrumentation cables were pulled into the redesignated cable trays, intermixing of safety-related power/control and instrumentation cables occurred, which constituted a violation of design criteria.

The Licensee's investigation also identified procedural violations on the part of the field engineers and QC inspectors. The procedural violations included the signing of cable pull cards by the field engineer instead of by the craft foreman responsible for actually performing the work and the failure of QC inspectors to properly verify that the installed cable route was in accordance with specifications. As discussed above, the Licensee was cited with a Severity Level IV violation of 10 C.F.R. Part 50, Appendix B, Criterion X, for failing to conduct proper inspection of cable routing. The Licensee's corrective actions in response to this violation are discussed below.

Safety Implications and Corrective Actions

Following the completion of the investigation of the fourteen remote-shutdown cable discrepancies and the discovery of the eleven intermixed cables, it became apparent to both the Licensee and the NRC Staff that the faulty practices, procedures, and controls that had allowed cable-routing problems to occur and go undetected and could very well have affected other safety-related cables. In a July 2, 1987 letter from G.C. Andognini, SMUD, to Frank J. Miraglia, NRC, the Licensee committed to expanding the ongoing inspection of safety-related and safe shutdown cable to include all such cables in the population that had been rerouted since the beginning of commercial operation at the plant. The NRC Staff agreed that this expansion was necessary because multiple errors in rerouting had occurred and such errors could not be detected if route certifications were not properly performed by QC inspectors. Those inspections have since been completed and no other work control errors were identified. The results of the inspections are discussed below under § C.

In response to the cable installation deficiencies described above, the Licensee has developed new procedures and controls and has made improvements to existing ones. The changes have been based on the results and recommendations derived from the Licensee's investigations of cable discrepancies. The changes that specifically address control of cable work are as follows:

1. A new procedure has been developed that establishes instructions for the processing of cable installation cards. It details the interfaces between the CCG, CRTS Administrator, and Field Engineering. One important feature of the procedure is that it requires installation cards to be returned to the CRTS Coordinator after the work has been completed and held until the Engineering Change Notice is closed. The procedure currently exists as an attachment to the Nuclear Engineering Administrative Procedure (NEAP) 4127, Rev. 0, and is being formalized for use as the Card Control Electrical Engineering Instruction. Formal training on use of the procedure will be given to personnel who are either in the CCG or who handle cable installation cards in interfacing groups.

2. Existing cable installation procedures (MP/IS 307) have been revised so that cable route inspection is specified as a "hold point" in the procedure. QC inspectors are now required to witness cable pulls so that routing can be properly verified. Electrical QC inspectors have been trained regarding this procedural clarification. Use of this procedure will ensure that installed cable routes are properly verified.

3. Cable route revisions and repulls are to be specified on the cable drawings and forms input to the CRTS. Changes to these documents resulting from route revisions will be treated as Drawing Change Notices (DCN). New installation documents will not be generated for repulls. The intent of this change is to ensure that field instructions for implementing route revisions are clear.

In addition to the specified changes described above, the Licensee has made broad changes in the Rancho Seco quality assurance (QA) program. These

changes were presented to the NRC Staff in a meeting held September 23, 1987. The more significant changes include: reorganization of the QA department with the new Director of Nuclear Quality reporting directly to the Chief Executive Officer; increased staffing with people who have multidisciplinary backgrounds; organizational independence from production organization; and increases in the scope and frequency of audit activities.

The NRC Staff considers both the specific and broad changes in procedures and quality control to be acceptable. However, in the course of the normal inspection program the Staff will continue to closely monitor performance in quality activities to ensure that the changes are effective.

B. Inspection of Cable Routes

The Licensee's corrective action regarding inspection of cable routes has been (1) a complete (100%) inspection of all safety-related and safe shutdown cables that have involved route revisions between the start of commercial operation and the initiation of the inspection program on December 22, 1986 (475 cables), and (2) a random-sample inspection of cables installed between the start of commercial operation and the initiation of the inspection program that have never undergone route revisions (142 of 1559 cables). The 14,000 cables installed during the original construction of the plant, which have never involved route revisions, were excluded from the inspection program by the Licensee because

1. There has been no indication of any significant installation error or technical problem through startup or subsequent operation or surveillance testing.
2. The original architect engineer (Bechtel) had in place and used a rigorous quality control program for the design, installation, and inspection of the original cable population and followed a uniformly consistent set of rules and procedures.

The NRC technical staff has reviewed the Licensee's documentation for the procedures and controls for cable design and installation in place during original construction. The Staff's review is documented in § 4.8.2.2 of Supplement 1 to NUREG-1286. On the basis of this review, the Staff has concluded that (1) the Bechtel quality control program and Bechtel's circuit and raceway scheduling program were sufficient to adequately control the original design and installation of the original cable population, and (2) reinspection of this cable population is not necessary.

The Licensee completed the inspections on December 9, 1987. The results were documented in the Wire and Cable Program report transmitted to the NRC by letter dated January 22, 1988. The NRC Staff's review of the report is documented in § 4.8 of Supplement 1 to NUREG-1286. According to the report, the Licensee found no significant routing errors in the sample inspection

of the newly installed cables that had never been rerouted. A total of nineteen significant cable discrepancies were identified in the 100% inspection of rerouted cables, excluding the original seven cable discrepancies that had prompted the inspection program. All twenty-six identified cable-routing discrepancies have been corrected in the plant by properly rerouting the cables.

C. Sampling

In the Staff's view, the objective of a sample inspection of construction work is to determine with reasonable assurance that the number and significance of deficiencies in construction and quality assurance have not degraded safety margins to an unacceptable level. In the case of misrouted electrical cables at Rancho Seco, the following criteria were used:

1. There is 95% assurance that at least 95% of the cables are correctly routed (95/95).
2. The defects have no significant potential for a loss of redundancy as a result of a single failure during a design-basis accident.

An NRC Staff statistician has reviewed the sample sizes included in the revised sampling plan submitted with the Licensee's letter of July 2, 1987, and has concluded in §4.8 of NUREG-1286 that when sampling has been done according to the License 's plan, the 95/95 acceptance criterion stated above has been met. Sample inspections were completed according to the Licensee's plan on December 9, 1987. Based on the results of these inspections, the NRC Staff has concluded in §4.8 of Supplement 1 to NUREG-1286 that the 95/95 acceptance criterion stated above has been met.

On the basis of the knowledge of the causes of the routing defects identified at Rancho Seco, the types of defects identified and the results of inspections, which ensure that the 95/95 acceptance criterion has been met, the Staff has concluded that (1) the likelihood of installed safety-related and safe shutdown cables being in a configuration that violates physical separation criteria is acceptable low; and (2) the potential for a redundant safety system failure as a result of a possible major cable defect (violation of physical separation criteria) also is acceptable low.

D. "Problem-Laden History" of the Facility

Following issuance of the NRC Staff's Incident Investigation Team's (IIT) report on the December 26, 1985 overcooling event at Rancho Seco, it became apparent to both the Staff and the Licensee that the design and programmatic deficiencies identified during the Staff's investigation were symptomatic of more

serious problems than those associated with the overcooling event and would require a corrective action program that embodied more than the narrow focus of the overcooling event. Accordingly, in the spring of 1986, the Licensee embarked on a comprehensive Plant Performance and Management Improvement Program (PP&MIP) that responded to a broader range of issues.

The program was designed by the Licensee to comprehensively identify all known problems that had occurred, or that could be anticipated to occur in the future, based on experience at similar facilities. Problems were identified from several sources: a precursor review of historical documents and recommendations; interviews with a cross-section of the plant staff (180 interviews); a deterministic failure analysis for the effect of loss of electrical power, instrument air, and control power on plant operations; incorporation of relevant B&W Owners Group Safety and Performance Improvement Program (SPIP) recommendations; NUREG-1195, the Incident Investigation Team (IIT) report of the December 26th event; and other miscellaneous information. The resolution of each problem was prioritized by the Licensee as a restart, near-term, or long-term item.

The problems identified were organized by type or system, reviewed by two Licensee boards to eliminate redundancy, and assigned priorities for implementation. At the same time, the recommendations were combined with the functional and test requirements of each plant system to produce a reference document for each system.

The NRC Staff has reviewed the PP&MIP as part of the Rancho Seco restart safety evaluation and found it to be acceptable. The Staff's evaluation of the program is documented in § 2.3.2 of the NRC Staff's "Safety Evaluation Report Related to the Restart of Rancho Seco Nuclear Generating Station, Unit 1 Following the Event of December 26, 1985," and Supplement 1 to that report (NUREG-1286 and NUREG-1286, Supplement 1).

E. Design Control Deficiencies

The Petitioner also referenced "significant design control deficiencies" in safety-related pipe supplies. Problems that reflect deficiencies in design control were identified by the NRC Staff during its Augmented System Review and Test Program (ASRTP) inspection conducted at Rancho Seco in early 1987. These problems are discussed in Inspection Report 50-312/86-41 and summarized in § 3.7.2.2 of NUREG-1286.

To address deficiencies in design control, the Licensee has developed and implemented its Engineering Action Plan (EAP). The purposes of this plan are to improve the quality of work involving design reviews and design changes and to document, in detail, the design bases for key safety systems. The NRC Staff evaluated the plan and implementation of the plan during a followup ASRTP

inspection conducted between September 28 and October 9, 1987. As discussed in its inspection report (50-312/87-29), the Staff has concluded that, overall, the quality of design work at Rancho Seco has improved and that remaining weak spots would be corrected when new supervisors and engineering personnel were fully trained in the various aspects of the EAP.

CONCLUSION

The Petitioner seeks the institution of a show-cause proceeding pursuant to 10 C.F.R. § 2.202 to modify or revoke the operating license for the Rancho Seco facility. The institution of proceedings pursuant to § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to the concerns raised by the Petitioner in this Decision to determine whether enforcement action is warranted.

For the reasons discussed above, I conclude that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's request for action pursuant to § 2.206 is denied. As provided in 10 C.F.R. 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for its review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 18th day of March 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket No. 50-312

SACRAMENTO MUNICIPAL
UTILITY DISTRICT
(Rancho Seco Nuclear Generating
Station)

March 22, 1988

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Honorable Tom Bradley, Mayor of Los Angeles, which requested the Nuclear Regulatory Commission to shut down the Rancho Seco Nuclear Generating Station (Rancho Seco) permanently. The Petitioner asserted that Rancho Seco should be shut down permanently because of (1) its asserted similarity to the Three Mile Island Unit 2 reactor; (2) its alleged 100 unplanned outages; (3) its alleged poor management, inadequate training, and sloppy maintenance; and (4) the overcooling event that Rancho Seco experienced in December 1985.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where the NRC Staff has published public documents that contain safety evaluations of the concerns that a petitioner raises as the basis for a request, and where those public documents state that those concerns do not constitute substantial public health and safety issues, the NRC need not act on petitioner's request.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where the NRC Staff has conducted a safety evaluation of a petitioner's particular concerns involving a particular plant, has concluded that those con-

cerns fail to provide a basis for any significant public health and safety issue, has concluded that there is reasonable assurance that the licensee can operate the plant without undue risk to the public health and safety, and has published the evaluation and conclusions in a public document, the NRC need not act on petitioner's request.

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

INTRODUCTION

On August 26, 1986, the Honorable Tom Bradley, Mayor of Los Angeles, submitted a Petition requesting that the Nuclear Regulatory Commission (NRC or Commission) conduct public hearings and permanently close the Rancho Seco Nuclear Generating Station (Rancho Seco). In a letter dated September 26, 1986, the NRC Director of Inspection and Enforcement, James M. Taylor, responded to Mayor Bradley and informed him that his Petition would be treated under 10 C.F.R. § 2.206 of the Commission's regulations. By letter dated December 15, 1986, Mr. Taylor provided additional information to Mayor Bradley on the status of his Petition. Mr. Taylor also stated that a full response to the Petition would be made after the NRC Staff completed its evaluation of corrective actions taken by the plant's operator, the Sacramento Municipal Utility District (SMUD), to improve the performance of Rancho Seco. Mr. Taylor's letter further advised that the NRC evaluation of the corrective actions would be completed before the Commission made any decision on restart.

Mayor Bradley's request for a hearing and subsequent permanent closure of the Rancho Seco Nuclear Generating Station is based on allegations that: (1) Rancho Seco is a twin of the Three Mile Island reactor; (2) the plant has had a troubled operating record; (3) the plant has suffered nearly 100 unplannned outages including the worst overcooling incident in industry history in 1978 and two severe overcooling incidents in 1985; and (4) the plant is plagued by poor management, inadequate training, and sloppy maintenance.

In accordance with the following discussion, I find that the permanent shutdown of Rancho Seco is not justified. I have decided, therefore, to deny your request. I do note, however, that the NRC has not permitted SMUD to operate Rancho Seco for more than 2 years following an overcooling transient that occurred in December 1985. During that time, a comprehensive evaluation to identify deficiencies at Rancho Seco was completed and a corrective action plan to correct the identified deficiencies was initiated. These actions resulted in significant improvements in plant management, maintenance, training, and in the overall mechanical condition of Rancho Seco.

BACKGROUND

On December 26, 1985, Rancho Seco experienced a loss of dc power within the integrated control system (ICS) while the plant was operating at 76% power. Following the loss of ICS dc power, the reactor tripped on high reactor coolant system (RCS) pressure. The reactor trip was followed by an overcooling transient that actuated safety features and resulted in excessive RCS cooldown. The overcooling transient continued until ICS dc power was restored 26 minutes later. With restoration of ICS dc power, the excessive RCS cooldown was stopped and the plant was stabilized.

The effects of the December 1985 transient were not, in themselves, significant in terms of decreasing the capacity of the plant to operate safely. However, the transient was the last in a series of undesirable events that raised the NRC's level of concern over the ability of SMUD to operate a nuclear power plant safely. The difficulties experienced by the Rancho Seco operators in recovering from the transient focused attention on the poor material condition of the plant and SMUD's failures to initiate plant improvements that had previously been required by the NRC.

In compliance with a Confirmatory Action Letter issued by the NRC Region V Administrator, the Rancho Seco Nuclear Generating Station has remained shut down since December 26, 1985. Because of the concerns that the December 1985 events raised, the Confirmatory Action Letter confirmed that, before returning Rancho Seco to power operations, SMUD would (1) provide a root-cause evaluation of the reactor trip and overcooling event and (2) justify Rancho Seco's readiness to resume power operations. SMUD has been responding to the Confirmatory Action Letter in stages, with step-by-step review and comment by the NRC Staff.

An Incident Investigation Team (IIT) was dispatched to the site to investigate the December 1985 transient and related issues. The NRC Staff has completed its investigation of the December 26, 1985 reactor trip and overcooling event and has published the results in NUREG-1195. This publication includes a description of the event and its significance, and discusses the precursors that led to the reactor trip and overcooling. The NRC Staff evaluation of the ongoing restart effort has been published in NUREG-1286 and Supplement 1 to NUREG-1286 (Supp. 1). NUREG-1286 and Supplement 1 comprehensively evaluate SMUD actions to improve overall performance at Rancho Seco and to correct the deficiencies identified in NUREG-1195.

In response to the IIT Report, SMUD developed the "Action Plan for Performance Improvement," which addressed the problems identified in the IIT Report and outlined a broad spectrum of issues to be addressed to improve the overall operational performance at Rancho Seco. The NRC Staff rejected the initial version of the SMUD Action Plan because it failed to address all

the problems that needed attention. Additionally, the NRC Staff independently initiated a review of the Rancho Seco performance history to identify areas of marginal performance. This effort included a review of weaknesses identified during a series of post-shutdown inspections and evaluations. The Staff indicated it would not accept the SMUD Action Plan until all problem areas identified by the Staff were included in the performance improvement program.

Failure to make progress on these issues led to essentially a 100% turnover of plant management and a complete management reorganization at Rancho Seco. As part of the Action Plan, the new SMUD management eventually compiled a comprehensive list of the problems which included Staff-identified deficiencies.

The SMUD Action Plan also included diagnostic programs to evaluate all areas of plant operations that are essential to successful overall plant performance. The Action Plan required SMUD to incorporate any additional problems identified by diagnostic programs into the list of previously identified deficiencies. The NRC Staff reviewed the completeness of the cumulative problem list. A corrective action program was established by SMUD to resolve all problems included on the cumulative problem list.

SMUD is now resolving the identified problems. The status of SMUD's corrective action program, a description of the problems, and a description of the problem identification process are included in the NRC Staff restart evaluation, NUREG-1286 and Supplement 1. The Commission will address the restart of Rancho Seco following the completion of (1) the SMUD performance improvement program and (2) the NRC Staff evaluation of the readiness of Rancho Seco to operate.

DISCUSSION

The specific issues enumerated in Mayor Bradley's petition regarding plant design, alleged troubled operating record, unplanned outages, overcoolings, and alleged inadequate management, training, and maintenance are thoroughly addressed by NUREG-1286. Resolution of these issues in a manner satisfactory to the NRC Staff was necessary before the Staff would make a positive restart recommendation to the Commission. Completion of the proposed corrective actions in plant hardware, Technical Specifications, procedures, management, and organization will result in significant performance improvement at Rancho Seco, which should preclude the types of concerns referenced by the Petition, including unplanned outages, overcooling, poor management, inadequate training, sloppy maintenance, operating mistakes, equipment failures, and procedural and inspection violations. The NRC Staff evaluation of the effectiveness of these improvements which supports restart is documented in NUREG-1286.

Design Similarity to the TMI Reactor

The Petition expressed concern that the Rancho Seco reactor is a twin of the Three Mile Island (TMI) reactor.

Even though the 1979 TMI accident was the most serious in the U.S. commercial nuclear power program, the plant's protective features successfully isolated the effects of the accident from the environment, and offsite radiological consequences were minimal (NUREG-0558, "Population Dose and Health Impact of the Accident at the Three Mile Island Nuclear Station"). Nonetheless, as a result of the accident a major safety reassessment of the commercial power program in the United States was initiated (e.g., NUREG-0578, "TMI-2 Lessons Learned Task Force: Status Report and Short-Term Recommendations"; NUREG-0737, "Clarification of TMI Action Plan Requirements"). This reassessment led to a wide range of required modifications throughout the nuclear industry, targeted at reducing the likelihood of a TMI-type accident (NUREG-0737, *supra*). The modifications included features that would improve the performance of the plant as well as the ability of the plant staff, the local community, and the nation to respond to nuclear accidents (*id.*). The "lessons learned" from the TMI accident were incorporated into the nation's nuclear power program and into Rancho Seco as appropriate. Thus, the TMI accident served as a stimulus to enhance the safety of existing nuclear power stations.

The specific plant hardware improvements that were developed following the review of the accident-related events at TMI were most applicable to reactors built by the Babcock & Wilcox Company (B&W), the manufacturers of the TMI reactor. As implied in the Petition, the Rancho Seco reactor was manufactured by B&W and benefitted substantially from the TMI accident experience. Rancho Seco also benefitted from the operating experiences of other B&W reactors. Following an incident that involved the loss of auxiliary feedwater at a B&W plant (Davis-Besse) on June 9, 1985, and the overcooling incident at Rancho Seco on December 26, 1985, the NRC requested that the B&W Owners Group reevaluate the design of the B&W reactor systems to look for inherent weaknesses that could make the reactors more susceptible to transients and accidents. The Owners Group evaluations are documented in a report entitled "Safety and Performance Improvement Program" (BAW-1919). The NRC Staff assessment of this program is available as a Safety Evaluation Report, NUREG-1231. As explained in NUREG-1231, the Owners Group did not identify any major design flaws; however, it made more than 200 recommendations for improving operations at B&W plants, and recommendations applicable to Rancho Seco have been incorporated by SMUD. The NRC Staff evaluation of BAW-1919, moreover, found no safety concerns that would preclude continued safe commercial operation of these facilities.

There are a total of eight B&W power reactors licensed to operate in the United States. Except for Rancho Seco, all the licensed B&W reactors, including TMI Unit 1, are operating. The operating records of these reactors are not significantly different from those of other types of reactors in the United States. As concluded in NUREG-1231, the B&W-designed reactors can operate without undue risk to the public health and safety. Accordingly, Rancho Seco's design similarity to TMI-2 provides no basis to close Rancho Seco permanently.

Management

The Petition describes the Rancho Seco operating history as "troubled" and characterized by a series of unplanned outages and reactor overcoolings. These occurrences have been evaluated by both SMUD and the NRC Staff. The root causes of the problems invariably include management and the onsite plant staff.

A key issue in the Rancho Seco performance improvement program has been management competence. Since December 1985, the senior plant management has undergone a 100% turnover, and more than twenty new managers have joined the SMUD staff. SMUD conducted a nationwide search for managers and was able to recruit experienced nuclear plant managers to direct future operations. The NRC Staff reviewed the resumes of these new managers and interviewed them. On this basis, and subsequent observations of plant recovery operations, the NRC Staff concluded (NUREG-1286, § 3.8) that the Rancho Seco management team appears well-qualified to prepare the plant to resume commercial operation, train the operating staff, and successfully operate the Rancho Seco Nuclear Power Station.

Maintenance and Training

The Petition included concerns related to inadequate training and sloppy maintenance. The management changes instituted at Rancho Seco included changes in management of the maintenance and training departments.

In both these areas, the new Rancho Seco managers have initiated programs to correct identified deficiencies. The NRC Staff considers improvements in these areas vital to successful plant operations and, as a result, has very closely evaluated the effectiveness of these improvement programs. The Staff's conclusions are based on detailed program reviews conducted on site (NUREG-1286, and Supp. 1, § 3.4.1). In the case of training, the Staff evaluation included observation of operators' performance at the B&W simulator in Lynchburg, Virginia (NUREG-1286, § 3.4.1.2). The Staff will continue close monitoring of these programs following plant restart. On the basis of its evaluation (NUREG-1286, §§ 3.3 and 3.4), the Staff has concluded that Rancho Seco has developed

effective maintenance and training programs that should be capable of supporting successful plant operations.

Equipment Reliability

In addition to management issues, the performance improvement program comprehensively addresses plant hardware problems. Known equipment deficiencies were integrated into the performance improvement program as items to be resolved before restart. SMUD added new systems to the plant to optimize future operations and improve the plant response to abnormal conditions. One of the new systems, the emergency feedwater instrumentation and control system, is a major hardware addition that provides redundant, safety-grade control of auxiliary feedwater (NUREG-1286, § 3.1.3). Had this system been in place on December 26, 1985, it probably would have prevented the overcooling transient from exceeding the Technical Specification limit of 100°F in 1 hour (NUREG-1195, § 7.2.3). SMUD has also established a preventive maintenance program to provide assurance that equipment will remain in good operating order (NUREG-1286, § 3.3.1.5).

A comprehensive equipment testing program is a major part of the performance improvement plan (NUREG-1286, § 3.7). SMUD is testing individual components, systems, and integrated systems to ensure that original plant equipment and the newly installed systems operate as designed. The system test program extends through the projected plant restart. SMUD has proposed that following restart (criticality), it would continue testing systems under hot, low-power conditions during a 6-month power ascension program (Supp. 1, § 3.4.1.7). The extended power ascension program will give the utility the opportunity to thoroughly evaluate operators during various startup conditions and will give the NRC Staff an additional opportunity to monitor system performance and SMUD operating competence. This program should decrease the likelihood of future operational mistakes and unplanned outages.

Overcooling Events and Unplanned Shutdowns

The Performance Improvement Program was designed to decrease the likelihood of overcooling events and to decrease the frequency of unplanned shutdowns. Specifically, SMUD: (1) installed a safety-grade emergency feedwater initiation and control system (Supp. 1, § 3.1.3); (2) added diesel generators to the onsite emergency grid (NUREG-1286, § 4.7); (3) refurbished the ICS/NNI (NUREG-1286, § 3.1); and (4) refurbished plant valves (NUREG-1286, § 3.3.2). These improvements in Rancho Seco's hardware systems should improve the plant's operating reliability and thereby decrease the number of

unplanned shutdowns. Furthermore, improved operator training, maintenance procedures, and plant management, as described above, should reduce the number of human errors that cause unplanned shutdowns. In short, significant improvements have taken place at Rancho Seco since the 1985 shutdown. The improvements should preclude the type of problems referenced in the petition.

CONCLUSION

The Petition requested the NRC to hold public hearings and shut down Rancho Seco permanently. The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to the concerns raised by the Petitioner in this Decision to determine whether enforcement action is warranted.

For the reasons discussed above, I conclude that no substantial health and safety issues have been raised by the Petitioner which warrant the initiation of a proceeding to consider the permanent shutdown of Rancho Seco. Accordingly, the Petitioner's request for action pursuant to § 2.206 is denied. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for its review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 22d day of March 1988.

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