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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1988

U.S. NUCLEAR REGULATORY COMMISSION

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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

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration and Resources Management
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301 / 492-8925)

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Lando W. Zech, Jr., Chairman
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers

In the Matter of

Docket No. 50-322-OL-3
(Emergency Planning)

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

July 15, 1988

The Commission denies Intervenors' motion for reconsideration and reversal of CLI-87-5, 27 NRC 884 (1987), in which the Commission had declined to reopen the record on issues concerning the role of the American Red Cross in an emergency and the adequacy of "congregate care" facilities for sheltering evacuees in an emergency. The Commission finds no new information in Intervenors' motion to suggest that the result reached in CLI-87-5 was incorrect.

RULES OF PRACTICE: REOPENING OF RECORD (SATISFACTION OF REQUIREMENTS)

Movants carry a heavy burden in satisfying the requirements for reopening of a record, under standards outlined by the Commission in *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471 (1985), *aff'd, Oystershell Alliance v. NRC*, 800 F.2d 1201 (D.C. Cir. 1986).

RULES OF PRACTICE: REOPENING OF RECORD

Motions to reopen cannot be permitted to be a means for parties to pass off old, unsuccessful contentions as new and relitigate them in hopes of a better result the next time around.

RULES OF PRACTICE: MOTION FOR RECONSIDERATION

The opportunity to file motions for reconsideration should not become a game in which the resources of the Commission and the parties are wasted in endless reiteration of the same arguments. At some point the adjudicatory process must come to an end.

MEMORANDUM AND ORDER

In CLI-87-5 (27 NRC 884), decided June 11, 1987, the Commission granted in part and denied in part a motion, filed by Intervenors New York State, Suffolk County, and the Town of Southampton, to reopen the record of this operating license proceeding. The motion was granted as to issues raised by the withdrawal of a radio station from the Shoreham emergency broadcast system, but denied as to Intervenors' claims regarding the role of the American Red Cross in an emergency and the adequacy of "congregate care" facilities for sheltering evacuees in an emergency. On June 30, 1987, Intervenors filed a motion for reconsideration of those parts of CLI-87-5 which denied their motion to reopen. Finding no new information in that motion for reconsideration to suggest that the result reached in CLI-87-5 was incorrect, the Commission denies the motion for reconsideration, which was, moreover, untimely filed, having been filed 19 days after the issuance of CLI-87-5, rather than the 10 days provided by 10 C.F.R. § 2.771(a), with no showing of good cause for its lateness.

Movants' first argument is that the Commission erred in reasoning that it made little difference whether the American Red Cross provided assistance to the public pursuant to a formal agreement with the utility or simply in accordance with its established policy of coming to the aid of the public when the need arises. On this point, the motion for reconsideration offers no facts and no arguments that were not considered and rejected by the Commission at the time it issued CLI-87-5, and the Commission sees no reason to alter its earlier judgment. Contrary to the movants' claim that "there is no assurance of ARC support in an emergency" (Motion for Reconsideration at 6), the August 21, 1986 letter from the Nassau County Chapter of the American Red Cross stated plainly that it was "mandated" by charter to perform the role outlined in an earlier letter from that organization, dated July 25, 1984. The gist of the August

1986 letter was merely that the July 1984 letter had erroneously been captioned an "agreement."

Movants' second argument is that it was error for the Commission to refuse to reopen the record on the issue of congregate care facilities. The Commission disagrees. To the extent that the motion to reopen was based on the letter from the American Red Cross, the same reasoning outlined above is applicable. Again, that letter by no means constituted, as the Intervenors' motion to reopen boldly declared (at 2), the Red Cross's "refusal to agree, identify, designate, open, or operate such centers in a Shoreham emergency." Movants manifestly failed to carry the heavy burden that the proponent of a motion to reopen faces, under the standards outlined by the Commission in *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471 (1985), *aff'd, Citizens Oystershell Alliance v. NRC*, 800 F.2d 1201 (D.C. Cir. 1986).

The motion to reopen was also based (at 12-13) upon certain letters from facility owners, presented to the Licensing Board on September 26, 1986, by Mr. Howard M. Koenig, Superintendent of Schools of the East Meadow Union-Free School District. Although the September 1986 date cited might suggest at first glance that the information offered was new, having come to light after the Licensing Board's August 1985 decision on congregate care centers, that is not the case. Reference to Mr. Koenig's September 1986 testimony (Tr. 17,003) reveals that his major complaint was that the Atomic Safety and Licensing Board had declined to accept those same letters into evidence when they were presented by a subordinate of his, Mr. Leon Campo, in early 1985.

In fact, Mr. Campo's testimony, with letters attached, was proffered to the Licensing Board by the Intervenors on February 19, 1985. By order of May 6, 1985, the Board rejected it as outside the scope of the proceeding. On May 17, 1985, Intervenors again offered the letters to the Licensing Board as part of a Motion for Reconsideration and in the alternative, Motion to Reopen the Record. On June 10, 1985, the Licensing Board denied that motion. On June 25, 1985, Intervenors moved for the admission of the letters into evidence for a third time. Tr. 15,940. The Licensing Board denied the motion. After the Licensing Board rejected the Intervenors' contention on congregate care centers in LBP-85-31 (22 NRC 410), issued on August 26, 1985, the exclusion of the letters was raised unsuccessfully before both the Appeal Board (as part of the Intervenors' appeal of the August 26, 1985 Concluding Partial Initial Decision on Emergency Planning) and the Commission (as part of the Intervenors' petition for review of the Appeal Board's decision in ALAB-832, 23 NRC 135 (1986)). On the issue of the letters, therefore, the Motion to Reopen and the instant Motion for Reconsideration represent the Intervenors' sixth and seventh bite at the apple, respectively.

Motions to reopen cannot be permitted to be a means for parties to pass off old, unsuccessful contentions as new and relitigate them in hopes of a

better result the next time around. Nor should the opportunity to file motions for reconsideration become a game in which the resources of the Commission and the parties are wasted in endless reiteration of the same arguments. At some point the adjudicatory process must come to an end. The motion for reconsideration is denied.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of July 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers

In the Matter of **Docket No. 55-60755-SP**

ALFRED J. MORABITO
(Senior Operator License for
Beaver Valley Power Station,
Unit 1)

July 15, 1988

The Administrative Judge in this proceeding has determined that Staff incorrectly denied a senior reactor operator license to Mr. Morabito. However, since Mr. Morabito has taken employment outside the nuclear industry and has no present need for a license, he cannot, under Commission rules, hold a license. Since this fact is undisputed by Mr. Morabito, the controversy over the license denial is now moot. The Commission therefore vacates the Administrative Judge's decision, as well as the Staff's license denial.

MEMORANDUM

On April 20, 1988, the Administrative Judge determined after a hearing that the NRC Staff had erred in determining that Mr. Alfred J. Morabito had failed the simulator portion of his senior reactor operator license examination, and that the Staff had therefore incorrectly denied Mr. Morabito a senior reactor operator license. The Judge later modified that decision, by order of May 18, 1988 (LBP-88-16, 27 NRC 583), to make clear that it related only to issues adjudicated in the proceeding, and that the Staff retained the authority to determine whether other requirements for a license had been met.

Also on April 20, 1988, Duquesne Light Company advised the NRC Staff that the candidate had taken employment outside the company's nuclear group, and that the request for his senior reactor operator's license should be considered withdrawn.

Under the Commission's rules, 10 C.F.R. Part 55, possession of an operator's license is conditioned on there being a present need for the license. Although Mr. Morabito has suggested, in a May 10, 1988 letter to the Judge, that the license be issued retroactively and then cancelled as of the date that the company withdrew its certification of need, we believe that this would be an empty exercise. Since Mr. Morabito does not dispute that he cannot now hold a senior reactor operator license, the controversy over the Staff's denial of the license is now moot, and the Administrative Judge's decision and the Staff's underlying denial are therefore vacated.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of July 1988.

Atomic Safety and Licensing Appeal Boards Issuances

ATOMIC SAFETY AND LICENSING APPEAL PANEL

Alan S. Rosenthal, Chairman
Dr. W. Reed Johnson
Thomas S. Moore
Christine N. Kohl
Howard A. Wiber

APPEAL BOARDS

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-1
50-444-OL-1
(Onsite Emergency Planning and Safety Issues)

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

July 5, 1988

On appeal from the Licensing Board's denial of the intervenors' petition pursuant to 10 C.F.R. § 2.758 to waive the electric utility exemption provisions of the Commission's financial qualification regulations, the Appeal Board affirms the denial of the petition. With respect to a separate petition filed by the Attorney General of Massachusetts with the Appeal Board, the Board certifies the petition to the Commission for a determination whether the rule provision should be waived.

RULES OF PRACTICE: CHALLENGE TO COMMISSION REGULATIONS

The Commission's Rules of Practice prohibit direct challenges to any NRC regulations in agency adjudicatory proceedings. 10 C.F.R. § 2.758(a).

RULES OF PRACTICE: WAIVER OF RULES

The Rules of Practice contain a limited exception to the proscription against challenging NRC regulations and provide that a party to a licensing proceeding may petition for a waiver of a regulation if "special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.758(b).

RULES OF PRACTICE: WAIVER OF RULES

The Rules of Practice further require that a waiver petition be accompanied by an affidavit that both sets forth the special circumstances justifying the requested waiver and explains why the regulation would not serve its intended purpose. 10 C.F.R. § 2.758(b).

RULES OF PRACTICE: WAIVER OF RULES

Only the Commission, however, is authorized to grant the petition and waive a rule. A subordinate board may deny a petition but if a board determines that the petition makes a prima facie showing that application of the regulation at issue does not serve the purpose for which it was adopted, the petition must be certified to the Commission for a determination whether the regulation should be waived. 10 C.F.R. § 2758(c) & (d).

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARD

The Commission's substantive financial qualification regulations require that certain applicants for operating licenses, as part of the license application, submit information demonstrating that the applicant possesses, or has a reasonable assurance of obtaining, the funds necessary to cover estimated operation costs for the period of the license, plus the estimated costs of permanently shutting down and maintaining the facility in a safe condition. Similarly, before granting an operating license to an applicant, the regulations obligate the agency to determine whether the applicant is financially qualified to operate the facility. 10 C.F.R. §§ 50.33(f), 50.40(b), 50.57(a)(4).

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARD

The Commission's regulations specifically exempt from the financial qualification reporting requirements applicants that are electric utilities, i.e., entities that generate or distribute electricity and whose rates for service are self-determined

or established by a separate regulatory authority. 10 C.F.R. §§ 50.2, 50.33(f), 50.40(b), 50.57(a)(4).

RULES OF PRACTICE: WAIVER OF RULES

The relatively small number of waiver petitions filed in NRC adjudicatory proceedings and the fact that few, if any, such petitions have been successful evidence the difficulty of meeting the waiver standard. It also underscores the Commission's comment that such a petition "can be granted only in unusual and compelling circumstances." *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972).

FINANCIAL QUALIFICATIONS: CONSIDERATION IN OPERATING LICENSE PROCEEDINGS

The Commission's *purpose* in promulgating the electric utility exemption to the financial qualification regulations was to eliminate case-by-case review by the staff of an individual applicant's financial qualifications as part of the operating license review process and to remove such issue from adjudication in any operating license proceeding. Its rationale for the exemption was straightforward: electric utilities were presumed to be able to finance the safe operation of their facilities through the ratemaking process.

RULES OF PRACTICE: WAIVER OF RULES

A prima facie showing within the meaning of 10 C.F.R. § 2.758(d) is one that is "legally sufficient to establish a fact or case unless disproved." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981).

APPEARANCES

Paul McEachern, Portsmouth, New Hampshire, and **Robert A. Backus,** Manchester, New Hampshire (with whom **Matthew T. Brock,** Portsmouth, New Hampshire, was on the brief) for the intervenors-appellants Town of Hampton, New Hampshire, New England Coalition on Nuclear Pollution and Seacoast Anti-Pollution League.

Stephen A. Jonas and **George B. Dean,** Boston, Massachusetts, for intervenor-petitioner James M. Shannon, Attorney General of Massachusetts.

Thomas G. Dignan, Jr., Boston, Massachusetts (with whom **George H. Lewald** and **Kathryn A. Selleck**, Boston, Massachusetts, were on the brief) for the applicants Public Service Company of New Hampshire, *et al.*

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

We have before us the appeal of the intervenors Town of Hampton, the New England Coalition on Nuclear Pollution, and the Seacoast Anti-Pollution League (hereinafter "appellants") from the Licensing Board's denial of their joint petition to waive the electric utility exemption provisions of the Commission's financial qualification regulations.[1] Those provisions prohibit any examination during an operating license proceeding of an electric utility-applicant's financial ability to operate a commercial nuclear power plant. The appellants seek to have them set aside in this case so that Public Service of New Hampshire (PSNH), the lead applicant and principal owner of the Seabrook facility,[2] could be made to demonstrate, prior to low-power operation, that it is financially qualified to operate the facility safely at low power.

While the appellants' appeal was pending, PSNH filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Hampshire. Recognizing that this new development would likely lead to the filing of additional waiver petitions, we provided the appellants an opportunity to amend their petition or, alternatively, to file a new one. Further, we directed any other party seeking a waiver of the Commission's financial qualification regulations before authorization of low-power operation to file a petition at this time so we could consider all petitions together.[3] In response to our order, the appellants filed a supplemental brief and the intervenor Attorney General of Massachusetts joined the fray and filed a petition to waive the same provisions of the financial qualification regulations.

For the reasons that follow, we affirm the Licensing Board's denial of the appellants' waiver petition and certify to the Commission the petition of the Massachusetts Attorney General for a determination whether the electric utility exemption provisions of the financial qualification regulations should be waived.

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[1] Memorandum and Order (August 20, 1987).

[2] PSNH owns 35.56952% of the Seabrook facility and eleven other public and investor-owned power companies own the remainder.

[3] Memorandum and Order (January 29, 1988) at 2-3.

I.

A. The Commission's Rules of Practice prohibit direct challenges to any NRC regulations in agency adjudicatory proceedings.[4] The same rules, however, contain a limited exception to that proscription and provide that a party to a licensing proceeding may petition for a waiver of a regulation if "special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted."[5] The Rules of Practice further require that a petition be accompanied by an affidavit that both sets forth the special circumstances justifying the requested waiver and explains why the regulation would not serve its intended purpose.[6] Only the Commission, however, is authorized to grant the petition and waive a rule. A subordinate board may deny a petition but if a board determines, on the basis of the petition and any responses (including counteraffidavits), that the petition makes a prima facie showing that the regulation at issue does not serve the purpose for which it was adopted, the petition must be certified to the Commission for a determination whether the regulation should be waived.[7] As part of its consideration, the Rules of Practice provide that the Commission "may direct such further proceedings as it deems appropriate to aid its determination."[8] Here, both the appellants and the Massachusetts Attorney General invoke these procedural provisions in seeking a rule waiver.

B. In turn, the Commission's substantive financial qualification regulations require that certain applicants for operating licenses, as part of the license application, submit information demonstrating that the applicant possesses, or has a reasonable assurance of obtaining, the funds necessary to cover estimated operation costs for the period of the license, plus the estimated costs of permanently shutting down and maintaining the facility in a safe condition.[9] Similarly, before granting an operating license to an applicant, the regulations obligate the agency to determine whether the applicant is financially qualified to operate the facility.[10] But the regulations specifically exempt from these requirements applicants that are electric utilities, i.e., entities that generate

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[4] 10 C.F.R. § 2.758(a).
[5] 10 C.F.R. § 2.758(b).
[6] *Id.*
[7] 10 C.F.R. § 2.758(c) & (d).
[8] 10 C.F.R. § 2.758(d).
[9] 10 C.F.R. § 50.33(f).
[10] 10 C.F.R. §§ 50.40(b), 50.57(a)(4).

The Commission's Rules of Practice, 10 C.F.R. § 2.104(c)(4), also provide that the agency's published hearing notice in an operating license proceeding state that the presiding officer is empowered to consider, *sua sponte*, whether certain applicants are financially qualified to operate the facility.

or distribute electricity and whose rates for service are self-determined or established by a separate regulatory authority.[11]

It is the relatively new electric utility exemption provisions that the appellants and the Massachusetts Attorney General seek to have waived. For a number of years prior to 1982, the Commission's regulations required applicants for construction permits and operating licenses for commercial nuclear power plants to file financial information sufficient to establish, respectively, their qualifications (1) to build and (2) to operate and to decommission the facilities.[12] In 1982, the Commission amended the regulations to eliminate entirely the requirements for financial qualification review and findings for electric utilities applying for construction permits or operating licenses.[13] Upon judicial review, however, the Court of Appeals for the District of Columbia Circuit found that the amendment was not supported by the Commission's stated rationale contained in the accompanying statement of basis and purpose. Accordingly, the court remanded the rules to the agency for further proceedings.[14] Thereafter, the Commission amended the regulations a second time to eliminate only the financial review and findings requirements for electric utility–operating license applicants while retaining such provisions for construction permit applicants.[15] The validity of these amendments was then upheld by the District of Columbia Circuit.[16]

The Commission explained its rationale for exempting electric utilities from the review and findings requirements of the financial qualification regulations in a four-part statement of considerations accompanying the 1984 enactment. Because the purpose underlying the exclusion of electric utilities from the provisions of the agency's financial qualification regulations is central to the resolution of the waiver petitions at hand, a brief rehearsal of the Commission's major points in its statement of considerations is in order.

First, after reciting the litigation history of the regulations, the Commission stated its belief that

> case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover, to a sufficient degree, all or a portion of the costs of construction and sufficient costs of safe operation through the ratemaking process.[17]

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[11] 10 C.F.R. §§ 50.2, 50.33(f), 50.80(b), 50.57(a)(4).
[12] *See* 10 C.F.R. §§ 50.33(f), 50.40(b), 50.57(a)(4) (1982).
[13] 47 Fed. Reg. 13,750 (1982).
[14] *See New England Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127 (D.C. Cir. 1984).
[15] 49 Fed. Reg. 35,747 (1984).
[16] *Coalition for the Environment v. NRC*, 795 F.2d 168 (D.C. Cir. 1986).
[17] 49 Fed. Reg. at 35,748.

According to the Commission, such funding was assured because all public utility commissions are legally obligated to set a utility's rates so that all reasonable costs of serving the public are recovered.[18]

Next, the Commission responded to comments opposing the proposed amendment and challenging the premise that the ratemaking process provides reasonable assurance that nuclear utilities will be able to recover sufficient funds to operate safely. In general, it determined that such comments misapprehend the limited function of the financial disclosure requirements and the NRC's prior practice. In reaching this conclusion, the Commission traced the history of the agency's financial qualification regulations and found that their initial focus had been on the availability of funds rather than on whether the funds were properly spent on safe operation. Likewise, the agency's long-standing practice had been to confine its review of financial submissions to assuring access to a source of funds; the agency had never sought assurance that the monies would be properly spent. Further, the Commission pointed out that a financial disability is not a safety hazard per se because the licensee is required under the Commission's regulations to cease operating if necessary funds for safe operation are not available. Finally, it noted that concern for safe performance is not confined to those utilities with just financial problems and that safe operation is best ensured by other regulatory tools such as the NRC's inspection and enforcement process.[19]

From these considerations, the Commission concluded that the concerns of commenters to the effect that ratemaking bodies do not guarantee funds received by utilities will be applied to safe operation of a facility are irrelevant to the limited assurance the Commission's regulations were intended to provide. Similarly, it found far wide of the mark commenters' assertions to the effect that the ratemaking process does not provide assurance of safe operation because it does not ensure a fixed level of profitability, which, in turn, can only be guaranteed by allowing recovery of all requested rate increases. The Commission observed that its regulations made no assumptions concerning rate of return or level of profits; rather, its premise was that reasonable and prudent costs of safely operating a nuclear plant will be recovered through the ratemaking process. It stated that any profits or return beyond that are of no regulatory concern because "[t]he Commission's concern is with safe operation, not profits."[20]

The Commission based its conclusion that expenses associated with safe plant operation will be recovered through the ratemaking process on a national survey of the National Association of Regulatory Utility Commissioners and the NRC staff's analysis of that survey. According to the Commission, the survey established that, even though rate commissions often deny certain requested cost

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[18] *Id.*
[19] *Id.* at 35,748-49.
[20] *Id.* at 35,749.

items that lead to smaller profit margins, such disallowances are never so great as to preclude the recovery of operating costs. Moreover, the survey showed that all ratemaking authorities have the ability to ensure that utility revenues meet the costs of NRC safety requirements, although the mechanisms vary from state to state.[21] From this survey, the Commission concluded that the rulemaking record

> demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted.[22]

The Commission also pointed out that there was some support in the rulemaking record for the proposition that there is no connection between the agency's financial qualification review and safe operation of a facility but it specifically eschewed footing the electric utility exemption on that basis. Importantly, however, it declared that "if such a link could be identified for any given facility, the Commission would not be precluded from examining the financial qualification of that facility under 10 C.F.R. § 2.758."[23]

In the final portions of the statement of considerations, and after reserving its full authority pursuant to section 182a of the Atomic Energy Act of 1954, as amended,[24] to require additional financial information from an applicant, the Commission noted that

> [a]n exception to or waiver from the rule precluding consideration of financial qualification in an operating license proceeding will be made if, pursuant to 10 C.F.R. § 2.758, special circumstances are shown. For example, such an exception to permit financial qualification review for an operating license applicant might be appropriate where a threshold showing is made that, in a particular case, the local public utility commission will not allow the total cost of operating the facility to be recovered through rates.[25]

It then indicated that in normal circumstances the amendment will reduce the time all participants in the operating license process spend reviewing an electric utility--applicant's financial qualifications because the utility is presumed to be able to finance operation of the nuclear plant and that "[t]he rationale for the

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[21] *Id.*
[22] *Id.* at 35,750.
[23] *Id.* at 35,751 n.5. In subsequently promulgating a rule requiring that a commercial reactor licensee, including an electric utility, notify the agency of the filing of a bankruptcy petition, the Commission seemingly has recognized the possibility of a connection between safety and the financial difficulty of an electric utility. 10 C.F.R. § 50.54(cc)(1). *See* 52 Fed. Reg. 1292 (1987).
[24] 42 U.S.C. § 2232.
[25] 49 Fed. Reg. at 35,751.

rule is in effect a generic determination that regulated or self-regulating public utilities are financially qualified to operate nuclear power plants."[26]

II.

As earlier indicated, the appellants' petition sought a waiver of the regulations exempting the applicants' lead owner, PSNH, from having to demonstrate, prior to low-power authorization, its financial ability to operate at low power and then to decommission the Seabrook facility. In support of their request, the appellants primarily relied upon PSNH's then recent, July 1987, 8-K filing with the Securities and Exchange Commission that, *inter alia*, described the electric utility's severe financial crisis and forecast the likelihood of proceedings under the Bankruptcy Code if a financial plan to improve its dire circumstances could not be developed by the end of 1987. The petition also rested on the New Hampshire anti-CWIP (Construction Work in Progress) statute that precludes any recovery of costs for operating the Seabrook plant unless and until it enters commercial service.[27] According to the petition these factors, combined with the uncertainties of the inevitable bankruptcy proceedings, presented sufficient special circumstances to justify the requested waiver.

In denying the appellants' petition, the Licensing Board looked to the Commission's statement of considerations accompanying the rules and concluded that "[t]he Commission did not implicitly or expressly contemplate or state that an operating license Applicant's financial distress and possible bankruptcy were special circumstances which could result in an exception or waiver under 10 C.F.R. § 2.758."[28] At the urging of the applicants and the staff, the Board determined that a waiver was appropriate solely where there was a showing that a ratesetter will not permit a utility to recover reasonable costs of construction and sufficient costs of safe operation. Hence, the Licensing Board held that the appellants' petition was fatally defective because it failed to demonstrate that, in the event of the issuance of a full-power license, the New Hampshire Public Utilities Commission would not allow recovery of construction and operation costs.[29] Alternatively, the Board determined that the appellants' forecast for PSNH's future in the event the utility filed for protection from its creditors was "wholly speculative" and thus could not form the basis for a prima facie showing that the application of the electric utility provisions of the finan-

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[26] *Id.*
[27] *See* N.H. Rev. Stat. An. 378:30-a.
[28] Memorandum and Order (August 20, 1987) at 7.
[29] *Id.* at 8.

cial qualification regulations does not serve the purpose for which they were adopted.[30]

Although 10 C.F.R. § 2.758 provides a mechanism for setting aside an agency rule in a specific case, its provisions are intended to ensure that duly promulgated regulations are not lightly discarded. Thus, only the Commission can authorize the waiver of a regulation, and in order even to get the waiver question before it, a party first must make a prima facie showing to a subordinate board that special circumstances in the particular case are such that application of the regulation would not serve the purpose for which it was adopted. The relatively small number of waiver petitions filed in NRC adjudicatory proceedings and the fact that few, if any, such petitions have been successful evidence the difficulty of meeting the waiver standard. It also underscores the Commission's comment that such a petition "can be granted only in unusual and compelling circumstances."[31]

On the basis of the factors asserted by the appellants in their petition and in their supplemental brief before us, such compelling circumstances are not present with respect to PSNH's low-power operation of the Seabrook facility. Therefore, the Licensing Board reached the correct result in denying the appellants' petition. The appellants are correct that PSNH's recent bankruptcy filing is the first by a major utility since the Great Depression and that bankruptcy raises a host of uncertainties for PSNH. But, without more, these developments, even when considered with the New Hampshire anti-CWIP laws, do not meet the test of section 2.758 for certifying their waiver petition to the Commission. Because PSNH's bankruptcy filing is so unprecedented, the appellants' arguments have a certain visceral attraction. Such a reaction, however, can never be a proper substitute for the showing required under 10 C.F.R. § 2.758 — the only basis on which we are authorized to act.

Simply stated, the Commission's *purpose* in promulgating the electric utility exemption to the financial qualification regulations was to eliminate case-by-case review by the staff of an individual applicant's financial qualifications as part of the operating license review process and to remove such issue from adjudication in any operating license proceeding. Its rationale for this change

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[30] *Id.* at 10. The Licensing Board also denied the appellants' petition on two procedural grounds: (1) that the Town of Hampton, which filed the joint petition on behalf of all three appellants, lacked standing to file it by virtue of an earlier order assertedly barring it from participating in the proceeding; and (2) that the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution were not properly represented before the Board because no notice of appearance in accordance with 10 C.F.R. § 2.713 had been filed on their behalf by counsel for the Town of Hampton. *Id.* at 2-3. Not surprisingly, the staff does not support the Licensing Board's procedural rulings and the applicants pay only lip service to them. *See* NRC Staff's Response to Intervenors' Appeal (November 5, 1987) at 2 n.2; Brief of Applicants-Appellees (October 26, 1987) at 9-10. In light of our affirmance of the Licensing Board's result denying the appellants' waiver petition, it is unnecessary for us to decide the correctness of these procedural rulings. We note, however, that the standing ruling appears to be based on a highly dubious reading of its earlier order in LBP-86-24, 24 NRC 132, 135-36 (1986). Further, the Board's construction of section 2.713 of the Rules of Practice appears to be hypertechnical and not only elevates form over substance but also disregards the common pleading practice of agency proceedings.

[31] *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972).

was straightforward: electric utilities were presumed to be able to finance the safe operation of their facilities through the ratemaking process. Thus, as we earlier recited in reviewing the statement of considerations accompanying the amendment, the Commission stated that "case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover . . . costs of safe operation through the ratemaking process."[32]

In its statement accompanying the regulatory change, the Commission also elaborated upon the special circumstances that would establish that the purpose of the regulations was not being served and therefore warrant waiving the electric utility exemption to permit litigation of an applicant's financial qualifications. Specifically, it pointed out that a waiver would be appropriate to review an electric utility-applicant's financial qualifications upon a showing that a local public utility commission would not allow recovery of the cost of operating a nuclear facility.[33] Contrary to the determination of the Licensing Board (and the arguments of the applicants and the staff[34]), however, this Commission example was merely illustrative and does not constitute the exclusive method for meeting the standard of 10 C.F.R. § 2.758. Not only is this clear from the context of its statement, but the Commission noted at another point that a waiver to explore the financial qualifications of an electric utility-operating license applicant would be appropriate if a nexus between the safe operation of the facility and the applicant's financial situation were shown.[35] But the appellants have not established any special circumstances of the type noted by the Commission that might warrant adjudicating PSNH's financial qualification to operate Seabrook safely at low power.

Before us, the appellants initially argue that the Commission exempted electric utilities from the financial qualification requirements because such entities are "assured" of funds for safe operation through the ratemaking process. They then claim that, in setting forth this rationale in the statement of considerations accompanying the amendment, the Commission used the word "assure" as it is defined in Black's Law Dictionary, i.e., " '[t]o make certain and put beyond doubt.' "[36] Thus, the argument goes, to meet the regulatory waiver standard the appellants need only show that the New Hampshire Public Utilities

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[32] 49 Fed. Reg. at 35,748. In proposing the change in the financial qualification rules, the Commission noted that "case experience bolsters the Commission's conclusion that as a generic matter electric utilities should be presumed financially qualified to operate the nuclear plants they have constructed and that further case-by-case review on this issue is neither necessary nor productive." 49 Fed. Reg. 13,045 (1984).

[33] 49 Fed. Reg. at 35,751.

[34] Brief of Applicants-Appellees (October 26, 1987) at 5; Applicants' Reply to Brief of Seacoast Anti-Pollution League (March 29, 1988) at 9-11; Tr. 41-45, 49, 55; NRC Staff's Response to Intervenors' Appeal (November 5, 1987) at 13; NRC Staff Responses (March 29, 1988) at 10-15; Tr. 62, 64.

[35] 49 Fed. Reg. at 35,751 n.5.

[36] Intervenors' Brief in Support of Appeal (September 24, 1987) at 5 & n.3.

Commission cannot "assure" that the cost of operating Seabrook at low power will be recovered through rates. In their view, the waiver petition does this because the New Hampshire statute bars PSNH from recovering operating costs for low power if Seabrook never enters commercial service and there can be no "assurance" Seabrook will be licensed for full power by reason of PSNH's dire financial condition.[37]

The appellants' argument is seriously flawed. To begin with, it is erroneously premised on a definition of the word "assure" that finds no support in the language of the Commission's financial qualification regulations or their history. Indeed, those regulations use the term "reasonable assurance" — a term fundamentally at odds with the appellants' asserted meaning.[38] Moreover, the appellants' meaning, if accepted, would effectively nullify the Commission's stated rationale for the amendment. Rather, as the District of Columbia Circuit stated in upholding its validity,

> financial qualification review, even when case-by-case, never required absolute certainty, only a showing that there was "reasonable assurance" of financing the costs of operation. The Commission has determined that the ratemaking process provides that reasonable assurance, and that determination is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent.[39]

Because the appellants' entire argument is built on an erroneous and totally unsupported premise, it must fail.

Furthermore, the appellants' argument cannot be saved by their reliance on the New Hampshire anti-CWIP statute. That law, like similar enactments of many states, precludes only the recovery of operating costs until the facility is put into commercial service. As the appellants concede, it does not bar the applicants from using currently available funds to cover the costs of low-power operation.[40] And the "specific aspect . . . of the subject matter of the proceeding"[41] to which appellants' waiver petition is addressed however is the operation of Seabrook at low power. Thus, absent a showing that the applicants have insufficient funds to cover the costs of low-power operation, this statute does nothing to advance their cause. Nor have the appellants even attempted such a showing.[42] They have

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

[38] *See* 10 C.F.R. § 50.33(f)(1) & (2).

[39] *Coalition for the Environment v. NRC*, 795 F.2d at 175.

[40] Tr. 20.

[41] 10 C.F.R. § 2.758(b).

[42] Ironically, the appellants attached to their brief a document seemingly helping to establish just the opposite. Acting pursuant to section 182a of the Atomic Energy Act of 1954, as amended, the staff, in August 1987, requested financial information from PSNH demonstrating that the applicants at that time could meet the anticipated cost of low-power operation. *See infra* p. 23. The appellants attached PSNH's September 1987 response to that staff request to their brief. Intervenors' Brief in Support of Appeal (September 24, 1987), Exh. E (enclosure to letter from Robert J. Harrison, PSNH, to United States Nuclear Regulatory Commission (September 3, 1987)).

failed, therefore, to make out a prima facie showing of special circumstances that warrant a waiver of the electric utility exemption of the financial qualification regulations. Accordingly, the Licensing Board correctly denied the petition.

In their supplemental brief filed after PSNH sought protection under Chapter 11 of the Bankruptcy Code, the appellants claim simply that the bankruptcy filing, per se, requires a grant of the requested waiver. This is so, they argue, because the assumption underlying the electric utility exemption, i.e., that the ratemaking process will provide the necessary funds to operate Seabrook, is inapplicable in the case of a bankrupt utility where "[j]urisdiction over PSNH as debtor in possession is now vested in the U.S. Bankruptcy Court, which may or may not attempt itself to exercise rate-setting authority."[43] The appellants add, however, that they believe it highly unlikely that the bankruptcy judge would attempt to exercise any rate-setting authority.[44]

The appellants' new position suffers from much the same defect as that portion of their initial argument based on the New Hampshire anti-CWIP statute. The appellants seek to have the regulations in question waived in order to permit an inquiry into PSNH's financial qualifications to operate Seabrook safely at low power. Once again, therefore, the appellants need to establish that PSNH and the other applicants lack sufficient funds to operate Seabrook safely at low power. In other words, if they are to rely on PSNH's filing of a Chapter 11 reorganization petition, they must demonstrate that the bankruptcy proceeding deprives PSNH and the other applicants of the financial resources to operate the facility safely at that power level. The appellants have totally failed to make this required showing.[45]

Rather, the appellants merely aver, without more, that PSNH's reorganization petition may exclude PSNH from the ratemaking process. Similarly, they have not even substantiated their claim that the Bankruptcy Court has either the authority or the inclination to preempt the state ratemaking process. Indeed, they opine that this scenario is unlikely. Such bald assertions, even assuming their relevancy to low-power operation, fall far short of meeting the appellants' burden under 10 C.F.R. § 2.758.[46]

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[43] Seacoast Anti-Pollution League Response to Appeal Board Memorandum and Order (February 23, 1988) at 5 (footnote omitted).

[44] *Id.* at n.3.

[45] As previously noted (*see supra* p. 10), we provided the appellants with an opportunity to amend their waiver petition or to file a new one after PSNH filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Our order specifically "caution[ed] all parties to comply fully with the provisions of 10 C.F.R. § 2.758 and other applicable Rules of Practice." Memorandum and Order (January 29, 1988) at 4 n.2. Rather than amend their waiver petition or file a new one, the appellants filed a supplemental brief with attachments. As the applicants point out in their reply, the appellants' filing neither complies with our order nor the provisions of section 2.758. Although we reject their arguments on the merits, the appellants' failure to comply with our order and the Rules of Practice provides an independent basis for disposing of the appellants' supplemental filing.

[46] The appellants also assert that filing of a reorganization petition by PSNH requires a financial qualification inquiry because bankruptcy raises such major uncertainties that there can be no reasonable assurance that PSNH

(Continued)

III.

We now turn to the petition of the Attorney General of Massachusetts. In response to our instructions, the Attorney General filed his petition to waive the electric utility provisions of the financial qualification regulations directly with us and, like the petition of the appellants, it also is directed at the low-power aspect of the proceeding.[47] The Attorney General's petition is accompanied by several affidavits and numerous other documents arranged in fourteen appendices that total some ninety-five pages. Since submitting his initial petition, the Attorney General has filed two supplements containing some 150 pages of attachments that purportedly contain previously unavailable information.[48]

In a nutshell, the Attorney General's initial petition and supporting documentation purport to show the substantial present and potential future costs associated with low-power operation of Seabrook and the constraints on the availability of funds to PSNH caused by the New Hampshire anti-CWIP statutes and the ongoing bankruptcy proceeding. The petition also seeks to establish the inability or unwillingness of the other joint owners to cover any part of PSNH's share of the current and future low-power costs. According to the petition, these factors demonstrate that PSNH has a shortage of funds for its share of Seabrook costs and hence the applicants have insufficient funds for

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can obtain the funds necessary for safe operation. Seacoast Anti-Pollution League Response to Appeal Board Memorandum and Order (February 23, 1988) at 4, 6-10. Although it is self-evident that bankruptcy creates major uncertainties, this circumstance, without a great deal more, does not satisfy the appellants' burden of establishing that application of the electric utility provisions of the financial qualification regulations will not serve the purposes for which they were adopted. In short, the appellants have pointed to nothing in the proceedings before the Bankruptcy Court that even suggests, much less establishes, that PSNH and the other applicants lack sufficient funds to operate Seabrook safely at low power. Nor have they demonstrated any other link between PSNH's bankruptcy filing and safety at the facility.

[47] *See supra* p. 10. When PSNH filed its reorganization petition and we, in turn, provided the appellants an opportunity to amend their waiver petition or to file a new one, we also directed any other party that intended to file a waiver petition with respect to the low-power aspect of the proceeding to do so immediately in order that we could consider all such petitions together. *See* Memorandum and Order (January 29, 1988) at 3. Pursuant to that instruction, the Massachusetts Attorney General filed his petition.

In their opposition to the Attorney General's petition, the applicants erroneously suggest that the Attorney General has not complied with our order because the petition is not confined to the low-power aspect of the operating license proceeding. Applicants' Response in Opposition to Massachusetts Attorney General's Petition under 10 C.F.R. 2.758 (April 11, 1988) at 3. For support, the applicants primarily point to the first sentence of the Attorney General's petition that requests a waiver of "the public utility exemption from the Commission's requirement that a demonstration of financial qualification be made prior to the issuance of a *commercial nuclear power plant operating license.*" *Id.* (emphasis supplied by the applicants). To arrive at their mistaken conclusion, the applicants apparently equate the Attorney General's use of the word "commercial" with "full-power." No such conclusion is justified from a neutral reading of the first sentence of the petition or a reading of the whole petition. Indeed, the closing sentence of the first paragraph completely dispels the applicants' suggestion. It states that the petition "demonstrate[s] that it is more likely than not that adequate funding for the costs of safe low-power operation . . . will not be available during the pendency of the PSNH bankruptcy." Massachusetts Attorney General James M. Shannon's Petition Under 10 C.F.R. 2.758 (March 7, 1988) at 2 [hereinafter Petition].

[48] Supplement to Massachusetts Attorney General James M. Shannon's Petition Under 10 C.F.R. 2.758 (May 13, 1988) [hereinafter Supplement I]; Second Supplement to Massachusetts Attorney General James M. Shannon's Petition Under 10 C.F.R. 2.758 (June 2, 1988) [hereinafter Supplement II].

the safe low-power operation of Seabrook and any subsequent shutdown and maintenance of the facility should that be necessary. In the second supplement to the petition, the Attorney General asserts that another joint owner holding an 11.59340% interest in Seabrook, Massachusetts Municipal Wholesale Electric Company (MMWEC), has halted its monthly pro rata share payments to the project, thereby creating an additional shortage of the funds needed to operate the facility at low power.

Although the applicants and the staff oppose the petition, they have not filed any counteraffidavits or other exhibits attempting to rebut the Attorney General's documentary filings.[49] Rather, as they did in successfully opposing the appellants' waiver petition before the Licensing Board, the applicants and the staff merely point to the Commission's statement of considerations accompanying the amendment and argue that the sole method for obtaining a waiver is to demonstrate that the electric utility-applicants will be unable to recover the costs of safe operation of the Seabrook facility through the ratemaking process. In their view, the Attorney General must make a prima facie case that the New Hampshire Public Utility Commission will deny the applicants recourse to the ratemaking process once Seabrook is fully licensed and achieves commercial operation. Because the Attorney General has not even attempted such a showing, they claim his waiver petition must be denied.[50]

As previously pointed out (*see supra* p. 17), the Achilles' heel of this argument is that the Commission in its statement of considerations did not limit to this single situation the special circumstances in which a waiver would be appropriate. Rather, the instance of a local public utility commission disallowing any recovery for operating a nuclear power plant was cited by the Commission as an illustration of special circumstances where application of the amendment would not serve the purpose for which it was adopted. Contrary to the apparent belief of the applicants and the staff, the Commission's example was just that, and neither the language used to introduce it ("[f]or example") nor the surrounding context support the notion that no other conditions can present special circumstances warranting a waiver of the electric utility exemption provisions.[51] Moreover, in the same statement, the Commission indicated that a showing of a link between an electric utility operating license applicant's poor

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[49] The applicants filed no responses to the two supplements the Attorney General filed to his waiver petition. The staff, on the other hand, filed brief responses but did not oppose the inclusion of the Attorney General's documentary exhibits in the record. NRC Staff Response (May 18, 1988); NRC Staff Response (June 9, 1988). Even though it did not object to the filing of the Attorney General's petition supplements, the staff states in its first response that such supplemental filings are not permitted by the Rules of Practice. Contrary to the staff's assertion, however, the Commission's Rules do not speak at all to the subject of amendments to waiver petitions. Because nothing prevents a party from filing a second, third or fourth waiver petition, each adding new facts as they develop, sound practice dictates that amendments or supplements to petitions be allowed.

[50] Applicants' Response in Opposition to Massachusetts Attorney General's Petition Under 10 C.F.R. 2.758 (April 11, 1988) at 6-8; NRC Staff Response (March 29, 1988) at 10, 19-20.

[51] 49 Fed. Reg. at 35,751.

financial health and safe operation of its nuclear facility would justify exploring the financial qualification of the troubled utility under 10 C.F.R. § 2.758.[52] Obviously, if the Commission intended its first example to be exclusive, it would not have recited the other. The applicants and the staff have misapprehended the Commission's statement, and the premise of their argument opposing the Attorney General's petition is simply incorrect.

Further, their argument ignores that it is the low-power operation of Seabrook that, in the language of section 2.758(b), is "the subject matter of the particular proceeding" or, more precisely, "the specific aspect . . . of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." The fact that at some indeterminate time in the future, when Seabrook is fully licensed and enters commercial service, PSNH can recover its operating costs does not answer the Attorney General's assertion that PSNH currently lacks sufficient funds to operate Seabrook safely at low power. It is the financial inability or unwillingness of PSNH or some other joint owner to fund its share of the cost to operate Seabrook safely at low power that, if established, provides the special circumstances warranting a rule waiver. And, the factors that have created the deficiency in funds to operate the plant safely at low power comprise the Attorney General's prima facie case that the electric utility exemption in the financial qualification regulations does not serve the purpose for which it was adopted. Yet the applicants and the staff have not even addressed these factors.

We have found that a prima facie showing within the meaning of 10 C.F.R. § 2.758(d) is one that is "legally sufficient to establish a fact or case unless disproved."[53] Here, in order for us to certify the petition to the Commission, the Attorney General must establish that the applicants lack sufficient funds to operate Seabrook safely at low power. In an attempt to do this, the Attorney General first chronicles, with appropriate documentation, the ownership share of each of the twelve joint owners and co-applicants of the Seabrook facility and notes that the Seabrook Joint Ownership Agreement does not obligate any joint owner to assume the obligations of another defaulting owner.[54] The petition

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[52] *Id.* at n.5.

[53] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 14 NRC 55, 72 (1981).

[54] Petition at 4. Although they do not request that it should be dismissed or denied on this ground, the applicants suggest in their response to the Attorney General's petition that the petition fails to comply with the affidavit requirement of 10 C.F.R. § 2.758(b). Applicants' Response in Opposition to Massachusetts Attorney General's Petition Under 10 C.F.R. 2.758 (April 11, 1988) at 5-6. That provision provides that the petition shall be accompanied by an affidavit that identifies the aspect of the subject matter of the proceeding to which application of the relevant regulations would not serve the purpose for which they were adopted. Further, it states that the affidavit should set forth the circumstances justifying the requested waiver. As the applicants are well aware, however, an affidavit is a sworn instrument in which the affiant relates facts within his knowledge. In a case such as this where the pertinent facts are contained in various documents, it is appropriate for the Attorney General to spell out his case in the waiver petition with reference to documentary exhibits.

then shows that none of the joint owners has made any commitment to meet any payment shortfalls that result from PSNH's financial difficulties.[55]

The Attorney General also details the costs of operating Seabrook at low power. Based on the figures PSNH provided the staff in response to a request for financial information several months before PSNH's bankruptcy filing, the petition recites that the cost of low-power operation over the current Seabrook operating budget of $10 million a month is an additional $3,658,000 over a three-month period. Further, the cost of insurance will increase approximately $2,785,000. PSNH's share of these costs as a 35.56952% owner will total $2,291,607.[56] In addition, the petition lists the various salvage values for the facility in its present condition and after it is contaminated by low-power operation and details the costs associated with permanently shutting down and maintaining the facility in a safe condition.[57]

Next, the Attorney General turns to what he terms the consequences of PSNH's bankruptcy filing. Relying upon hornbook bankruptcy principles and the Bankruptcy Code, the Attorney General claims that low-power operation of Seabrook would substantially alter the status quo of the debtor's estate because it entails substantial additional costs and impairs the current salvage value of the plant. He concludes, therefore, that such operation is not in the ordinary course of business and requires approval by the Bankruptcy Court. He then asserts that such approval is extremely unlikely because Seabrook, in turn, is unlikely to receive a full-power license due to the irremediable flaws in its emergency plans.[58] Lastly, the Attorney General points out that the New Hampshire anti-CWIP statute precludes any rate relief for PSNH for low-power operation.[59] Thus, the Attorney General claims that these factors demonstrate a shortfall in PSNH's portion of the funds necessary for low-power operation and the standard for a rule waiver has been met.[60]

In the first supplement to the petition, the Attorney General added information aimed at bolstering his claim that PSNH lacked funds to meet its share of the

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[55] Petition at 5. In this regard, the Attorney General relies upon the answer to a Connecticut Department of Public Utility Control (DPUC) interrogatory by United Illuminating Company, the second largest owner of Seabrook with a 17.5% interest, stating that none of the Seabrook owners has made a commitment to meet any PSNH payment shortfalls. *Id.*, Appendix IV.

The Attorney General's petition also includes specific information on United Illuminating and the joint owners holding the third, fourth and fifth largest interests in the project. That information is designed to show that these owners are either financially unable or currently unwilling to increase their share of Seabrook costs. *Id.* at 5-7. For example, the Attorney General cites the same interrogatory answer by United Illuminating to show that UI cannot increase its share of Seabrook payments without DPUC approval. *Id.*, Appendix IV. In addition, the petition also relates that the joint owner with the third smallest ownership interest, Vermont Electric Cooperative, Inc., with a 0.41259% share, ceased making its monthly Seabrook payments in 1986. *Id.* at 7 & Appendix VIII.

[56] *Id.* at 8-10.

[57] *Id.* at 9-11.

[58] *Id.* at 11-14.

[59] *Id.* at 17.

[60] *Id.* at 16-18.

costs for low-power operation of Seabrook. Specifically, the supplement included documentation that the Bankruptcy Court had authorized PSNH to pay interest on its First and Second Mortgage Bonds and that the trustee for the Third Mortgage Bonds was seeking similar interest payments.[61] It also included PSNH's 1987 Form 10-K filed with the Securities and Exchange Commission stating that PSNH would lack sufficient funds to maintain its monthly Seabrook payments if it was ordered to pay interest on the Third Mortgage Bonds.[62] Further, the supplement provided information on the worsening financial condition of the owners holding the third, fourth, fifth and seventh largest interests in Seabrook.[63]

Finally, in the second supplement to the petition, the Attorney General states that the Board of Directors of MMWEC, the fourth largest owner of Seabrook with an 11.59340% interest, voted on June 1, 1988 not to make its monthly payment, due June 2, 1988, of ongoing Seabrook costs and to get out of the project.[64] According to the Attorney General, the MMWEC Board voted unanimously to endorse the recommendations in two reports of its General Manager that advise drawing down MMWEC's pre-funded construction payments by ceasing future payments beginning with June. The reports note that these payments will meet MMWEC's obligations for two or three months at current levels of expenditures. They also call for MMWEC to prepare a proof of claim for filing with the PSNH bankruptcy proceeding and to prepare to take legal action against the constructors of Seabrook.[65]

The Attorney General's waiver petition clearly establishes the current monthly operating costs for Seabrook and the additional costs associated with low power. It also establishes that in the event PSNH experiences a shortfall in meeting its Seabrook payments none of the other joint owners is obligated to make up the shortage and none of them has made any commitment to do so. Although not critical to his case, the Attorney General's petition goes a long way toward demonstrating that several of the joint owners with the larger interests in Seabrook are fiscally unable to pick up any of PSNH's funding deficiencies.

Notwithstanding these considerations, the initial waiver petition fails to demonstrate the essential fact that PSNH, even though it is in the midst of a bankruptcy reorganization proceeding, cannot meet its share of the low-power operation costs for Seabrook. Rather than establish this point, the Attorney General offers only speculation: first, that Seabrook is unlikely to receive a full-power license and second, that the Bankruptcy Court is unlikely to

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[61] Supplement I at 4 & Appendices II, III.
[62] *Id.* at 5 & Appendix IV.
[63] *Id.* at 6-7 & Appendices VI, VII.
[64] Supplement II at 3-4.
[65] *Id.* at 4 & Attachment 1.

approve any expenditures by PSNH for low-power operation because Seabrook is unlikely to receive a full-power license. This chain of events, however, is just too tenuous to meet the Attorney General's burden under 10 C.F.R. § 2.758(c). Moreover, such prognostication on the ultimate full-power licensing of Seabrook ignores the Commission's prohibition on speculating on the outcome of ongoing proceedings in applying specific regulations — here the waiver provisions.[66] Accordingly, the initial petition does not establish a shortfall in funds by PSNH and, in turn, the applicants' funds to operate Seabrook at low power.

But the gap in the initial petition is filled by the Attorney General's second supplement. It clearly establishes that the joint owner with the fourth largest interest in Seabrook has ceased its monthly payments and is moving to get out of the project. Because MMWEC already had made pre-funded payments to the project, which at current expenditure levels will continue to meet its obligations for two to three months, the impact of MMWEC's action on Seabrook funding will not be felt for sixty to ninety days. In effect, MMWEC's action is the same as if the Board of Directors voted on June 1 to cease payments effective on August 2 or September 2. As matters now stand, the remaining joint owners and applicants will have a substantial 11.59340% deficiency in monthly operating expenses and the additional funds necessary to operate Seabrook safely at low power at the expiration of that period.

It is possible, of course, that other joint owners will step forward to meet the shortfall caused by MMWEC's action, although it is a reasonable inference from the Attorney General's documentation with respect to those owners and the possibility of a shortfall by PSNH that the other joint owners will not do so. It is also possible that MMWEC may return to the fold. Indeed, any number of possibilities can be postulated. But the Attorney General's prima facie case need not foresee and foreclose every such possibility. In the same way that the Attorney General cannot meet his burden by speculating on future

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[66] *Long Island Lighting Co.* (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275, 278-79 (1985). *See* CLI-84-9, 19 NRC 1323, 1327 (1984); CLI-83-17, 17 NRC 1092, 1094 (1983).

Although the emphasis of the Attorney General's petition is on the applicants' shortage of funds for operating Seabrook at low power, the petition also purports to show that PSNH has insufficient funds to decommission Seabrook after low-power operation should that be necessary. Petition at 9-11. *See supra* p. 23. Decommissioning, however, is an action that is normally applicable only after a facility has reached the end of its useful life. This being the case, any consideration at this point of the applicants' purported lack of funds to decommission Seabrook after low-power operation seemingly runs afoul of the Commission's prohibition on speculating about the outcome of the operating license proceeding. This is in contrast to the operation of Seabrook at low power that requires immediate funding for such operation whether or not the facility ever operates at full power.

Moreover, when the amendments to the financial qualification regulations were first promulgated in 1982, the Commission, in the statement of considerations accompanying those amendments, stated that all consideration of decommissioning funding should be eliminated from financial qualification review and instead be considered under the forthcoming decommissioning regulations. 47 Fed. Reg. at 13,751. Although long delayed, the Commission's final decommissioning rule has now been issued. 53 Fed. Reg. 24,018 (June 27, 1988). Even though the 1982 amendment was remanded to the Commission by the District of Columbia Circuit (*see supra* p. 12 & note 14), the Commission's instruction with regard to decommissioning appears to have survived and remains controlling.

events, speculation on future events cannot defeat the Attorney General's present showing that, as matters now stand, the applicants shortly will have more than an eleven percent shortfall in the funds necessary to operate Seabrook safely at low power. Thus, the Attorney General's waiver petition presents a prima facie case that the applicants lack sufficient funds to operate Seabrook safely at low power and, pursuant to 10 C.F.R. § 2.758(c), we must certify the petition to the Commission.[67]

As earlier noted, it will be for the Commission to decide whether to grant the petition and thus to waive the financial qualification regulations in question. Only if the Commission provides that relief will the Attorney General or another party be in a position to file a new contention directed to the applicants' asserted lack of the requisite financial ability to operate the facility safely at low power. (Up to now, any contention along that line would have been subject to summary rejection as constituting an impermissible attack upon the Commission's regulations.) In submitting any such new contention, the Attorney General will be required to address the five factors governing the admission of late-filed contentions that are set forth in 10 C.F.R. § 2.714(a)(1) and demonstrate that, on balance, those factors support its acceptance.

For the foregoing reasons, we *affirm* the Licensing Board's denial of the appellants' waiver petition and *certify* to the Commission the Attorney General's petition.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[67] In its opposition to the Attorney General's petition, the staff closes with a footnote stating that "it should be noted again that the NRC Staff will exercise its authority under section 182a of the Atomic Energy Act to require from Applicants such information as may be necessary for the Commission to determine whether its application for a license should be granted or denied." NRC Staff Response (March 29, 1988) at 21 n.24. Although its comment is not directly relevant to the question before us, the staff appears to be saying that even though in this case the question of the applicants' financial qualifications is pivotal to the licensing decision, it is appropriate to leave the inquiry into the financial status of the applicants to the staff. The staff's approach is difficult to reconcile with the decision in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985). There the court found that one of the Commission's emergency planning rules precluding any hearing on issues of fact material to the licensing decision violated a party's hearing rights under section 189(a) of the Atomic Energy Act.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Howard A. Wilber

In the Matter of **Docket Nos. 50-443-OL-1**
50-444-OL-1
(Offsite Emergency Planning and Safety Issues)

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

July 15, 1988

The Appeal Board denies, as interlocutory, the applicants' appeal from a Licensing Board ruling that a particular contention was not moot; the Board also denies the applicants' alternative request that it undertake discretionary review of the Licensing Board ruling.

RULES OF PRACTICE: APPELLATE REVIEW

The single exception to the general proscription against interlocutory appeals contained in 10 C.F.R. 2.730(f) of the Commission's Rules of Practice is found in section 2.714a. That section permits an appeal, on certain limited and precisely defined questions, from an order on a petition for leave to intervene in a proceeding. In the instance of an order granting such a petition, the authorization extends only to appeals by a party "other than the petitioner . . . the question whether the petition . . . should have been wholly denied." 10 C.F.R. 2.714a(c).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

A request for discretionary review of a Licensing Board ruling is not ordinarily granted unless the challenged ruling either (1) threatens the par- adversely affected by it with immediate and serious irreparable impact whic as a practical matter, could not be alleviated by a later appeal or (2) affe- the basic structure of the p ceeding 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: APPELLATE REVIEW (SCHEDULING DECISIONS)

The Appeal Board has emphasized repeatedly in the past that matters of scheduling rest peculiarly within the licensing board's discretion; the Appeal Board enters that thicket reluctantly, particularly so when it is on an interlocutory basis. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437-38 (1979).

APPEARANCES

Thomas G. Dignan, Jr., and Deborah S. Steenland, Boston, Massachusetts, for the applicants Public Service Company of New Hampshire, *et al.*

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

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Last April, we remanded to the Licensing Board once again the issue of the environmental qualification of the RG58 coaxial cable used, according to the information in the evidentiary record, for data transmission in the Seabrook nuclear power facility's computer system.[1] Subsequently, the applicants filed with the Licensing Board a suggestion of mootness, accompanied by several affidavits. The suggestion was founded on the applicants' assertions, said to

[1] *See* ALAB-891, 27 NRC 341 (1988). As detailed therein, the issue had been returned to that Board on two earlier occasions.

be supported by the affidavits, that (1) only twelve of the 126 installed RG58 cables were routed at least partially through a harsh environment within what the applicants characterized as the "nuclear island" and, as a consequence, required environmental qualification by reason of 10 C.F.R. 50.49, and (2) those twelve cables would be replaced by RG59 coaxial cables with respect to which there is no current environmental qualification issue.[2]

The suggestion of mootness was opposed by both the NRC staff and the intervenor New England Coalition on Nuclear Pollution (Coalition), the sponsor of the contention that had put the environmental qualification of the RG58 cable into question. In the staff's view, the matter was not susceptible of resolution on mootness grounds. Rather, according to the staff, the appropriate course was the reopening of the record to receive, first, the affidavits submitted by the applicants and, thereafter, any "relevant and admissible evidence in support of or opposition to [a]pplicants' position" that either the Coalition or staff might wish to submit.[3] For its part, the Coalition maintained, *inter alia*, that the applicants' filing had "all the characteristics of a summary disposition motion," yet left unresolved "material issues of dispute between the parties."[4]

In a June 23, 1988 transcribed telephone conference call, the Licensing Board rejected the suggestion of mootness, directed the commencement of discovery and invited the institution of summary disposition procedures.[5] As the Board saw it, still open questions stood in the path of a finding that the environmental qualification issue had become moot.[6]

The applicants now seek an immediate appellate examination of this result.[7] To begin with, they claim an entitlement to appeal the Licensing Board's ruling under 10 C.F.R. 2.714a.[8] Alternatively, should we find the ruling not appealable as a matter of right, they ask that we exercise our discretion to review the ruling by way of a grant of directed certification under 10 C.F.R. 2.718(i) and 2.785(b)(1).[9]

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[2] *See* Applicants' Suggestion of Mootness (May 19, 1988) at 2 *et seq.* It appears from the affidavit of Gerald A. Kolkowski (at 2) that, contrary to the impression left by the existing evidentiary record, some of the twelve cables are to be used for purposes not associated with the Seabrook computer system.

[3] NRC Staff Response to Applicants' Suggestion of Mootness (June 2, 1988) at 11-12.

[4] New England Coalition on Nuclear Pollution's Response to Applicants' Suggestion of Mootness Regarding Environmental Qualification of RG-58 Cable (June 9, 1988) at 1, 3-4. In part, the Coalition's filing relied upon an attached affidavit.

[5] *See* Tr. 1177-79, 1181. On June 28, the Board issued a memorandum in which it memorialized those actions and noted that the relevant pages of the transcript were being served on the parties.

[6] *See* Tr. 1178-79.

[7] The Licensing Board declined the applicants' request that it refer this matter to us. *See* Tr. 1178.

[8] *See* Applicants' Appeal and Petition for Directed Certification of an Order of the Atomic Safety and Licensing Board Rejecting Applicants' Suggestion of Mootness With Respect to the Issue of Environmental Qualification of RG-58 Cable (June 28, 1988) [hereinafter, Applicants' Appeal] at 14.

[9] *Id.* at 14-15. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

We agree with the staff and the Coalition that the appeal will not lie and, further, that the well-settled standards for granting discretionary interlocutory review of a Licensing Board order are not met in this instance. Accordingly, we dismiss the appeal and deny directed certification.

1. It scarcely could be more obvious that the provisions of 10 C.F.R. 2.714a have no application in the circumstances of this case. As the single exception to the general proscription against interlocutory appeals contained elsewhere in the Commission's Rules of Practice,[10] section 2.714a permits an appeal, on certain limited and precisely defined questions, from an order on a petition for leave to intervene in a proceeding. In the instance of an order granting such a petition, the authorization extends only to appeals by a party "other than the petitioner on the question whether the petition . . . should have been wholly denied."[11] In other words, to invoke section 2.714a the utility applicant must be in a position to assert that the petitioner for intervention should have been totally excluded from participation in the proceeding. It will not suffice to claim merely that, although properly granting intervention, the Licensing Board should have rejected certain of the contentions advanced by the petitioner.

The Licensing Board ruling here under attack has nothing at all to do with the grant or denial of the Coalition's intervention petition — which was filed and acted upon many years ago. Nor, as it happens, does the ruling bear upon the Coalition's right to participate in this operating license proceeding. Not only is the Coalition taking an active role in the litigation of the issues presented in the offsite emergency planning phase of the proceeding, but also it still has an appeal pending before us on another matter raised in the onsite emergency planning and safety issues phase (i.e., the phase that embraces the environmental qualification issue now at hand).[12] In short, the absolute condition precedent to the resort to section 2.714a is simply not present.[13]

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[10] *See* 10 C.F.R. 2.730(f).

[11] 10 C.F.R. 2.714a(c). The entitlement to appeal from an order denying an intervention petition, of no relevance here, is covered in section 2.714a(b).

[12] *See* ALAB-894, 27 NRC 632 (1988). In noting these facts, we do not mean to imply that, had the challenged order addressed the question of the Coalition's continued entitlement to participate in the proceeding, section 2.714a would have been available to the applicants. For the applicants would still have been confronted with the fact that the order would not have been entered on, and would not have disposed of, an intervention petition and its supplement containing the intervenor's proposed contentions.

[13] Even if factually correct, the applicants' insistence that the Licensing Board "wholly changed" the "contention to be litigated" (Applicants' Appeal at 14) is quite beside the point. As we have seen, section 2.714a does not authorize an interlocutory appeal based upon a claim of that character. It is equally irrelevant that, as the applicants further stress (*ibid.*), were they to prevail on their attempted appeal, "this discrete matter [would be brought] to a close." Whenever, for example, a licensing board denies a motion for summary disposition on a particular issue, a successful interlocutory appeal from that denial similarly would bring a discrete matter to a close. That consideration has never been thought sufficient to justify entertaining, in contravention of 10 C.F.R. 2.730(f), appeals from summary disposition denials. *See, e.g., Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93, 94 (1974).

2. The applicants' alternative request that we undertake review of the Licensing Board ruling in the exercise of our discretion stands on scant better footing. As the applicants acknowledge, such relief is not ordinarily granted unless the challenged ruling either (1) "threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[14] We are satisfied that neither of these standards is met here.

The applicants do not appear to assert that the ruling below will have a serious irreparable impact upon them, and it is clear to us that any such assertion would be unavailing. Insofar as the other prong of the *Marble Hill* test is concerned, we are told by the applicants that, because it purportedly "has resulted in a proceeding, or discrete portion thereof, not being wholly terminated when it should have been," the ruling below "does not merely affect the structure of a proceeding, it creates it."[15] But the same could be said of *any* licensing board determination that declines to end the litigation of a particular issue at a time when one of the parties thinks it should be terminated. Inasmuch as determinations of that stripe are quite commonplace in NRC licensing proceedings,[16] one would have to stretch the reach of the second *Marble Hill* prong a considerable distance in order to bring them within its bounds. Neither have we been given nor do we perceive any good reason to indulge these applicants in that regard. To the contrary, there is absolutely nothing before us to distinguish this case from the myriad others in which, although dissatisfied with a ruling that has the effect of prolonging the litigation of one or more issues, the party must abide the event of further developments before seeking (if still necessary) appellate relief.[17]

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[14] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted).

[15] Applicants' Appeal at 15.

[16] Every time a licensing board admits a contention over objection or denies a motion for summary disposition, it leaves for additional proceedings and possible trial an issue that at least one party believes should not be explored further.

[17] This is so even though the result may be that, once further litigation is conducted, the question whether the issue(s) warranted additional examination "will be moot and of academic interest only." Applicants' Appeal at 15. It is only in highly unusual circumstances where there is the potential of irreparable harm — not present here — that the prospect of mootness will be deemed a relevant consideration on the question whether interlocutory appellate review of a particular licensing board order should be allowed. *See, e.g., Kansas Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408 (1976) (interlocutory review of the denial by the Licensing Board of a protective order with respect to the disclosure of certain pricing terms of a nuclear fuel supply contract).

Appeal *dismissed;* petition for directed certification *denied.*[18]
It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

[18] Although opposing the relief sought by the applicants, the NRC staff asks us to direct the Licensing Board to expedite its determination of the RG58 cable environmental qualification issue. In this connection, the staff maintains that the hearing schedule established by the Board below in the June 23 telephone conference is excessive, particularly in allowing more than six weeks for discovery. *See* Tr. 1181-85. But "[w]e have emphasized repeatedly in the past that matters of scheduling rest peculiarly within the licensing board's discretion; we enter that thicket reluctantly, particularly so when it is on an interlocutory basis." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437-38 (1979), and decisions there cited. In this case, there is insufficient cause to put that reluctance to one side. The staff is free, of course, to seek reconsideration of the schedule by the Licensing Board.

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 No. 50-352-OLA**
(TS Iodine)

PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station, Unit 1)

July 18, 1988

Upon *sua sponte* review, the Appeal Board affirms a Licensing Board order authorizing the issuance of a proposed amendment to the technical specifications for the Limerick nuclear facility.

DECISION

Before us is the Licensing Board's May 5, 1988 memorandum and order, authorizing the issuance of a proposed amendment to the technical specifications for the Limerick nuclear facility.[1] The intervenor Air and Water Pollution Patrol (AWPP) attempted to appeal that order. Because of the failure of AWPP's representative to comply with governing provisions of the Commission's Rules

[1] *See* LBP-88-12, 27 NRC 495.

of Practice, the Appeal Panel Chairman rejected the appeal.[2] No other appeals having been filed, this Board has reviewed the Licensing Board's determination *sua sponte*. That review has disclosed no error requiring corrective action.

Insofar as challenged by the intervenors,[3] the technical specification amendment in question is concerned with certain of the actions to be taken in the event of a temporary increase in the concentration of radioactive iodine in the reactor coolant. This phenomenon, referred to as an "iodine spike," is occasioned by such developments as a change in the power level of the reactor that, because of fuel cladding defects, may cause the transitory release of additional radioactive iodine from the fuel rods. The amendment would remove certain existing reporting requirements in the wake of an iodine spike. In seeking the removal of these requirements, the utility applicant was following the suggestion of the NRC staff. In a generic letter sent several years ago to all nuclear facility licensees and applicants, the staff had expressed the view that the reporting requirements were no longer necessary.[4]

The Licensing Board granted the applicant's motion for summary disposition of the intervenors' consolidated contention to the effect that the pro osed amendment would "downgrade" reporting requirements for iodine spikes to the detriment of the public health and safety.[5] In doing so, the Board concurred in the staff's conclusion that other reporting requirements, not affected by the proposed amendment, would ensure that the Commission is kept appropriately informed of iodine spike events having possible implications for the public health and safety.[6]

We agree with the Licensing Board's disposition of the issue. The short of the matter is that nothing was put before the Board that raised a genuine issue of material fact with regard to the need to continue the specific reporting requirements that the technical specification amendment would eliminate. The affidavits submitted in connection with the applicant's summary disposition motion and the staff's filing in support of that motion demonstrated that

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[2] *See* June 15, 1988 order (unpublished). The June 15 order noted that this failure continued even after AWPP's representative received specific guidance from the Appeal Panel counsel respecting what need be done to perfect the appeal.

[3] In addition to the Air and Water Pollution Patrol, Robert L. Anthony was granted leave to intervene in the proceeding. Mr. Anthony did not endeavor to appeal from the Licensing Board's May 5 order.

[4] *See* Generic Letter No. 85-19 (September 27, 1985), signed by Hugh L. Thompson, then Director of the Division of Licensing in the Office of Nuclear Reactor Regulation. The letter was attached to the Licensee's Answer in Opposition to Request for Hearing and Leave to Intervene by Air and Water Pollution Patrol (May 20, 1987).

[5] LBP-88-12, 27 NRC at 497, 507.

[6] *Id.* at 506-07. As the staff observed in a *Federal Register* notice published on March 12, 1987 (*see* 52 Fed. Reg. 7675, 7692), these other reporting requirements are found in 10 C.F.R. 50.72(b)(1)(i), 50.72(b)(1)(ii), and 50.73(a)(2)(i). In addition, the information regarding iodine spikes that formerly was to be contained in a special 30-day report must, as the result of the technical specification amendment, now be included in the utility's annual report to the NRC.

the retained reporting requirements will suffice. That demonstration was not countered to any extent by the intervenors.

For the foregoing reasons, LBP-88-12, 27 NRC 495, is *affirmed*.
It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Christine N. Kohl
Howard A. Wilber

In the Matter of

Docket Nos. 50-250-OLA-2
50-251-OLA-2
(Spent Fuel Pool Expansion)

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

July 28, 1988

Upon *sua sponte* review, the Appeal Board affirms, with the addition of a condition, the Licensing Board's decision (LBP-88-9A, 27 NRC 387 (1984)) approving amendments to the operating licenses for Turkey Point nuclear facility that allow the applicant to expand the capacity of the spent fuel pools at the facility.

OPERATING LICENSES: TECHNICAL SPECIFICATIONS

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an applicant's safety analysis report (or equivalent) be subject to a technical specification, to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979).

OPERATING LICENSE: TECHNICAL SPECIFICATIONS

The contemplation of both the Atomic Energy Act and the Commission's regulations is that technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. *Ibid.*

OPERATING LICENSE: LICENSE CONDITIONS

Pledges by applicants to the staff or adjudicatory boards to guard against certain specified safety problems need not be turned into technical specifications to become enforceable as a license condition; those pledges can be formally incorporated into a Licensing or Appeal Board order in the proceeding, which is enforceable to the same extent as a Commission decision. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423-24 (1980).

APPEARANCES

Joette Lorion, Miami, Florida, *pro se* and for the intervenor Center for Nuclear Responsibility, Inc.

Steven P. Frantz, Washington, D.C., and Norman A. Coll, Miami, Florida, for the applicant Florida Power & Light Company.

Benjamin H. Vogler for the Nuclear Regulatory Commission staff.

DECISION

1. In March 1984, the Florida Power & Light Company (applicant) submitted an application for amendments to the operating licenses for its two-unit Turkey Point nuclear facility to enable it to expand the capacity of the spent fuel pools at the facility. In July 1984, the Center for Nuclear Responsibility, Inc., and Joette Lorion (intervenors) filed with the Licensing Board a timely request for a hearing and petition for leave to intervene in the proceeding.

While the intervenors' submission was still under Licensing Board advisement, the NRC staff determined that the proposed license amendments "involve[d] no significant hazards consideration" within the meaning of 10 C.F.R. 50.92(c). Accordingly, in November 1984 and under the authority of

10 C.F.R. 50.91(a)(4), the staff issued the amendments subject to the outcome of the pending intervention petition.[1]

In September 1985, the intervenors were admitted to the proceeding, together with seven of their proffered contentions.[2] Subsequently, the applicant obtained summary disposition on five of the contentions and the other two (contentions 5 and 6) went to hearing.

On April 19, 1988, the Licensing Board rendered its initial decision in which it resolved contentions 5 and 6 in the applicant's favor.[3] The Board therefore concluded that the license amendments issued by the staff in 1984 should remain in effect without modification.[4]

The intervenors have not appealed this conclusion and, thus, the initial decision is now before us for review on our own initiative.[5] That review has disclosed no reason to disturb the license amendments. For the reasons set forth below, however, we are constrained to incorporate in our affirmance of the Licensing Board result a direction that the applicant give effect to a representation it made to the staff.

2. The expansion of the capacity of each Turkey Point spent fuel pool has been accomplished by the replacement of the former fuel storage racks with ones that provide less spacing between the individual fuel assemblies. To ensure that the interaction between assemblies remains subcritical by a specified amount, the applicant has placed a neutron-absorbing material, Boraflex, in the new racks.

The applicant supplied the Licensing Board with copies of letters to the staff in which it stated that it would (1) establish surveillance programs to assess the continued effectiveness of the Boraflex;[6] and (2) not store any fuel with an enrichment in U-235 greater than 4.1 weight percent prior to completion of the next surveillance in approximately three years.[7]

In the initial decision, the Licensing Board took both of these representations to be commitments on the applicant's part and, in reaching its result, placed considerable reliance upon them. Given that reliance, we thought it desirable to seek the parties' views on whether the Licensing Board should have converted the representations into license conditions. Although our June 27 order (unpublished) soliciting those views did not so note, in taking that step we were

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[1] *See* 49 Fed. Reg. 46,832 (1984).
[2] *See* LBP-85-36, 22 NRC 590.
[3] *See* LBP-88-9A, 27 NRC 387.
[4] *Id.* at 415.
[5] *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987), and cases cited therein.
[6] *See* letter from Steven P. Frantz to the Licensing Board (July 15, 1987), Attachment (letter from C.O. Woody to the Commission (July 10, 1987), designated L-87-279).
[7] *See* letter from Steven P. Frantz to the Licensing Board (August 31, 1987), Attachment (letter from C.O. Woody to the Commission (August 27, 1987), designated L-87 363). According to applicant witness Russell Gouldy, the surveillance has now been scheduled for December 1989. Tr. 246-47, 312.

also influenced by the seeming internal disagreement within the staff respecting whether, in fact, the applicant had committed itself not to store fuel with more than a particular U-235 enrichment prior to the next surveillance. Staff witness Laurence I. Kopp, a nuclear engineer in the Reactor Systems Branch of the Office of Nuclear Reactor Regulation (NRR), expressed the opinion that no such commitment had been made or, indeed, was warranted.[8] But shortly thereafter, Conrad E. McCracken, the Acting Chief of a different NRR Branch and a member of the same panel of staff witnesses, stated unequivocally that letters from applicants such as the one embracing the representations in question are treated as commitments.[9]

In their response to our order, the intervenors maintain that a license condition embracing the two representations should have been imposed by the Licensing Board and should now be imposed by us.[10] For their part, the applicant and the staff take the opposite position. In this connection, those parties call attention to our decision almost a decade ago in the proceeding involving the proposed expansion of the capacity of the Trojan facility's spent fuel pool. Rejecting the insistence of the intervenor State of Oregon that, *inter alia*, certain operational details set forth in the applicants' "design report" for the expansion be converted into technical specifications to be imposed upon the operating license, we observed:

> there is neither a statutory nor a regulatory requirement that every operational detail set forth in an applicant's safety analysis report (or equivalent) be subject to a technical specification, to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Rather, as best we can discern it, the contemplation of both the [Atomic Energy] Act and the regulations is that technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.[11]

We need not decide here whether that standard is satisfied. For there is an acceptable alternative means of ensuring the observance of the applicant's representations.

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[8] Tr. 358-59. Dr. Kopp was not asked about the representation concerning the surveillance programs.

[9] Tr. 376. Mr. McCracken made this statement after being reminded of Dr. Kopp's earlier contrary testimony.

[10] In exercising our discretion to hear from all of the parties below on the matter of the warrant for a license condition, we saw no need to pass upon whether, by not taking an appeal from the initial decision, the intervenors gave up any further entitlement to participate as of right in the proceeding. We similarly now reserve judgment on that question.

[11] *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979) (footnote omitted). *See* "Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Reactors," 52 Fed. Reg. 3788 (1987).

The year after the *Trojan* decision, we confronted in *Zion* an appeal by the State of Illinois from the Licensing Board's authorization of the expansion of the storage capacity of a spent fuel pool. The State claimed, *inter alia*, that that Board should have raised to the level of a technical specification certain commitments of the applicant respecting such matters as the conduct of a corrosion surveillance program. Although concluding that the *Trojan* standard was not met, we went on to say:

> This does not mean the State's concerns are frivo[illegible] The slow action of corrosion and a gradual loss of neutron-absorbent material can prese[illegible] serious problems if left unchecked. However, Illinois' fears — that the commitments to guard against these possibilities might be withdrawn without prior staff notification or approval and that the means for enforcing them are inadequate — can be allayed without freighting the applicant's license with additional technical specifications. The applicant has pledged to the staff, to the Licensing Board and to this Board not to change or drop those commitments without prior staff approval; it has expressly acknowledged that those promises were made to obtain favorable action on the proposal now before us. . . . We perceive no reason why that pledge should not be formally incorporated in our own order in this case, which is of course enforceable to the same extent as a Commission decision. This disposition settles the permanence and enforceability of the applicant's commitments without trampling on any party's rights . . . .[12]

If anything, there is even greater cause to follow the *Zion* route in this case. As we have seen, the record leaves in doubt whether the staff deems the applicant to have made a commitment not to store, prior to completion of the next surveillance program, fuel with an enrichment in U-235 greater than 4.1 weight percent.[13] In this connection, there is at least some foundation for Dr. Kopp's opinion that no commitment was made. For the evidence indicates that (1) in their present form the license amendments unconditionally authorize the storage of fuel with an enrichment in U-235 of 4.5 weight percent; and (2) the applicant has agreed, at most, merely to notify the staff if it decides to exceed the 4.1 weight percent limit before the next surveillance.[14]

In short, at present there is a lack of full assurance that the applicant will adhere to what the Licensing Board (perhaps mistakenly) took to be a commitment that could be relied upon in arriving at its ultimate determination that the reracking of the spent fuel pools did not pose a significant safety concern.[15] On the basis of the evidence before it, however, the Licensing Board was quite right in attaching importance to the applicant's representations.

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[12] *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423-24 (1980) (footnote omitted).

[13] It is not clear from the staff's submission to us whether it supports Dr. Kopp's position on the question or, instead, that of Mr. McCracken.

[14] Tr. 282-83, 303.

[15] *See* LBP-88-9A, 27 NRC at 413-14.

The testimony of witnesses for both the applicant and the staff cited the Boraflex degradation that had occurred in the spent fuel storage racks at the Quad Cities nuclear facility. That degradation brought about, among other things, gaps (i.e., holes) in the Boraflex sheets incorporated into those racks.[16]

Whether such gaps will be experienced at Turkey Point remains to be seen.[17] Should gaps develop, however, they would have an effect upon the neutron absorption efficacy of the Boraflex sheets. The extent of that effect would hinge upon the size and location of the gaps. The results of a gap sensitivity study performed by the Westinghouse Electric Corporation, taken in conjunction with the Quad Cities experience, suggests that it is unlikely that, so long as the stored fuel does not have an enrichment greater than 4.1 weight percent, the reactivity limit specified for the pools will be exceeded.[18] But, should the enrichment level be 4.5 weight percent, there will be much less room for confidence that any gaps at Turkey Point will not occasion the violation of that limit.[19]

In the circumstances, we might remand this matter to the Board for a reassessment of its determination that no safety concern attends upon the reracking. As we see it, however, the preferable course is to invoke the *Zion* precedent and, by doing so, to bring the proceeding to a close without further delay. More particularly, we direct that, pending the obtaining of satisfactory results from the next surveillance, the applicant shall not store in either of the reracked pools any fuel with an enrichment in U-235 greater than 4.1 weight percent unless it requests approval to do so pursuant to 10 C.F.R. 50.59(a)(1) as if a technical specification were involved.[20]

On the basis of that direction, coupled with our review of the balance of the record, LBP-88-9A, 27 NRC 387, is *affirmed*.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[16] *See* Kilp and Gouldy, fol. Tr. 222, at 27-28; Wing, fol. Tr. 339, at 6-9.

[17] According to staff witness James Wing, the mechanism causing gap formation remains undetermined. *See* Wing, fol. Tr. 339, at 7. Dr. Wing did offer the conjecture that the gaps might be produced by the shrinkage of the sheets as the result of gamma radiation. *Ibid.*

[18] *See* Boyd, fol. Tr. 222, at 3, 7-9 & Figure 3.

[19] *Id.*, Figure 2.

[20] We see no need for a specific incorporation into this order of the applicant's representation respecting the conduct of surveillance programs to assess the continued effectiveness of the Boraflex. The staff's filing with us characterizes that representation as a commitment and we are confident that the staff will enforce it as such. Moreover, our direction with regard to the enrichment limitation provides an additional incentive to carry out the promised surveillance programs.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

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Seymour Wenner
Sheldon J. Wolfe*

**Permanent panel members*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Glenn O. Bright
Dr. James H. Carpenter

In the Matter of **Docket No. 50-271-OLA**
(ASLBP No. 87-547-02-LA)

VERMONT YANKEE NUCLEAR POWER CORPORATION
(Vermont Yankee Nuclear Power Station)

July 12, 1988

In a proceeding involving the proposed expansion in capacity of a spent fuel pool by means of reracking, the Licensing Board denies a request for an emergency, temporary stay of a license amendment that permitted the reracking (although not the requested expansion in capacity). The Board also summarizes the discussions and rulings at the proceeding's second prehearing conference.

RULES OF PRACTICE: STAY OF AGENCY ACTION

The proponent of an emergency, temporary stay of agency action pending review of a motion seeking permanent relief must demonstrate irreparable injury in order to obtain such emergency relief.

TECHNICAL ISSUE DISCUSSED

Consideration of Alternatives.

SECOND PREHEARING CONFERENCE ORDER
(Rulings on Temporary Stay Order and on Schedules)

On June 28, 1988, the Licensing Board conducted a prehearing conference in this proceeding, in which Vermont Yankee Nuclear Power Corp. (Applicant) is seeking authority to expand the capacity of the spent fuel storage pool at the Vermont Yankee Nuclear Power Station.[1] Participating in the conference were the Applicant, the New England Coalition on Nuclear Pollution (NECNP) (Intervenor), and the Commonwealth of Massachusetts and the State of Vermont (both currently participating as "interested States" pursuant to 10 C.F.R. § 2.715(c)).

The conference was initially billed as a "status" conference, in which the Board was to be apprised of the status of various documents being prepared by the Applicant or NRC Staff, to enable the setting of further schedules for the proceeding. On June 13, 1988, however, the Commonwealth of Massachusetts and NECNP filed a Joint Motion to stay the operation of License Amendment 104 to the Vermont Yankee operating license, which had been issued by the NRC Staff on May 20, 1988. That amendment by its terms permitted the Applicant to install new racks in the spent fuel pool, capable of storing up to 2870 fuel elements, but continued the present limitation on the capacity for which the racks could be used to the currently authorized 2000 fuel elements. By Memorandum dated June 20, 1988 (unpublished), the Board posed three questions to the parties concerning certain matters raised by the Joint Motion, to be addressed at the prehearing conference.

Following is a summary of the matters discussed and rulings made by the Board at the conference.

1. The Applicant confirmed that the document setting forth details of its revised fuel pool cooling system, about which the Board had inquired in the Notice of the prehearing conference, had been submitted to the Board and parties on June 7, 1988 (Tr. 230). The Staff indicated that it expected its review of the cooling system to be completed in August and that its safety evaluation (SER) and environmental assessment (EA) would be issued in early September (Tr. 231). Upon inquiry from the Board, however, the Staff indicated that the EA had already been written, although not released (Tr. 250, 322). The Staff held out the possibility that the EA might be issued somewhat earlier, in August. The Board requested the Staff to provide a status report on the issuance of the EA (or other environmental review document, as applicable) as of August 1, 1988 (Tr. 325).

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[1] Notice of this conference, dated May 24, 1988, was published in the *Federal Register* on May 31, 1988 (53 Fed. Reg. 19,836).

2. NECNP (as well as the Commonwealth of Massachusetts and the State of Vermont) requested additional discovery concerning the revised fuel pool cooling system (which is the subject of Contention 1). The Board rejected the Applicant's claim that the contention had become moot as a result of the filing of an FSAR amendment (on June 7, 1988) incorporating a revised fuel pool cooling system, on the basis that the question whether the revised system was capable of performing as specified was still open (Tr. 323).

The Board granted 60 days' additional discovery on Contention 1 between the Applicant and NECNP and the interested States (Tr. 323-24). Further, the Board ruled that discovery between various parties and the Staff on this contention should await the issuance by the Staff of its SER. On Contention 1, discovery against the Staff will extend for 30 days from the date of service of the SER; the 30-day period will encompass second-round interrogatory questions but not responses (Tr. 338-39). (The schedule for the submission of new contentions based on the Staff review documents, and for discovery with respect to new contentions which may be accepted, remains as set forth in our Prehearing Conference Order dated May 26, 1987, LBP-87-17, 25 NRC 838, 852.)

3. With respect to the Joint Motion, in which the State of Vermont indicated that it had joined (Tr. 280),[3] the Commonwealth of Massachusetts moved orally for emergency relief, for a temporary stay of License Amendment 104 pending our decision on the merits of the motion (Tr. 267). The Commonwealth explained that such emergency relief was subsumed within the Joint Motion's request for "such other relief [beyond the injunctive relief primarily sought by the motion] as may be necessary and equitable under the circumstances" (Tr. 271). Vermont and NECNP joined in the request for a temporary stay (Tr. 280, 281).

The Applicant and NRC Staff each opposed our granting of a temporary stay. They raised jurisdictional, as well as procedural and substantive, reasons for our denying the request for emergency relief.

The alleged basis for both the permanent and temporary stay requests is that the Staff, in issuing an amendment that permitted reracking, without preparing and releasing an environmental review of the entire fuel pool capacity expansion, violated the requirements of the National Environmental Policy Act, 42 U.S.C. § 4332, as implemented by NRC in 10 C.F.R. Part 51. The claim is that the Staff, by reviewing only the environmental aspects of reracking (which it found to qualify as a categorical exclusion under 10 C.F.R. § 51.22(c)(9)), has improperly segmented the environmental review of the entire application. The Intervenor and interested States asserted that there is no "independent utility" to the reracking apart from its contribution to the entire project. If that were so, the

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[3] On June 24, 1988, the State of Vermont filed a timely response in support of the Joint Motion, indicating that it joined in the motion seeking a stay of License Amendment 104. At the time of the prehearing conference, the Board had not yet received that response.

Staff's action in approving License Amendment 104 without an environmental review of the entire proposal might well be void. The Board perceives at least a *prima facie* basis for the validity of this claim. But because of the significant procedural and substantive objections asserted by the Applicant and Staff at the prehearing conference, the Board declined to decide any of these questions prior to considering the written responses of the Applicant and Staff to the motion.

The Board denied the request for a temporary stay solely on the basis that the Intervenor and interested States had not demonstrated irreparable injury, as required by 10 C.F.R. § 2.788(e)(2) (Tr. 316). That ruling was without prejudice to a ruling on the permanent injunctive request or even to whether irreparable injury would have to be considered in ruling on the permanent injunction. The only injury asserted was that our eventual consideration of alternatives, as sought by the interested States and NECNP, would be prejudiced if most of the physical work leading to the expansion in capacity had already been performed (Tr. 266, 276). However, it appears that the Applicant has already purchased and paid for the new racks (Tr. 243). Moreover, any review of alternatives which we may be called on to undertake will be carried out on the assumption that no expenditure at all had been made with respect to any of the expansion alternatives — in other words, all expenses for purchase and installation of the new racks are at the risk of the Applicant. This is not to say that the Staff may ignore the mandates of NEPA with impunity; it is only that, for temporary injunctive relief to be granted prior to our decision on the merits, a strong showing of irreparable injury must be — but has not been — made.

For the foregoing reasons, it is, this 12th day of July 1988, ORDERED:

1. The motion of the Commonwealth of Massachusetts, NECNP and the State of Vermont for a temporary stay of License Amendment 104 is hereby *denied*, without prejudice to our ruling on the request for a permanent injunction.

2. Further discovery, as set forth in ¶ 2, *supra*, is hereby *authorized*.

3. The NRC Staff is hereby *requested* to provide us by August 1, 1988, with a status report on its preparation and schedule for release of its EA (or

other environmental review document, as applicable) for the entire spent fuel pool expansion application.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 12th day of July 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. 50-341**

DETROIT EDISON COMPANY
(Enrico Fermi Atomic Power Plant, Unit 2)

July 28, 1988

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Honorable James Caldwell, the Honorable Steven Langdon, the Honorable Herb Gray, and the Honorable Howard McCurdy, members of the Canadian Parliament, concerning their request that the Fermi-2 nuclear reactor not be allowed to operate.

VIOLATIONS AND CIVIL PENALTIES

Discrete violations at a nuclear facility do not give rise to a significant safety concern so long as they have been cured or are being cured, and there has been no overall breakdown in a licensee's programs that would raise legitimate doubt about the safety of the facility. Although it is expected that licensees will pay meticulous attention to, and achieve and maintain a high level of compliance with, NRC requirements, it is recognized that errors may occur. What is most significant is that violations, when identified, are properly assessed in terms of understanding their significance and cause, and that necessary corrective actions are taken to prevent their recurrence.

THE GENERAL ELECTRIC MARK I REACTOR

A petitioner's concerns regarding possible containment failure at a General Electric Mark I reactor are misplaced because the estimated mean frequency of core damage for this reactor is only 1 chance in 100,000 per year, and the

probability of a large accident resulting in one or more early fatalities is only 1 in 1 million to 1 in 1 billion.

EXEMPTIONS FROM INERTING

It was not a safety concern for the NRC to grant an exemption to a boiling water reactor from inerting primary containment during initial startup testing since the potential for an accident was small while the plant was operating at lower power levels. Moreover, it was important not to inert the reactor's containment because of the need for startup testing and the need for personnel to enter the containment during this testing for visual inspections.

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

INTRODUCTION

By Petition to the Director, Office of Nuclear Reactor Regulation, dated February 4, 1988, pursuant to 10 C.F.R. § 2.206, the Honorable James Caldwell, the Honorable Steven Langdon, the Honorable Herb Gray, and the Honorable Howard McCurdy, members of the Canadian Parliament (Petitioners), have appealed the decision to allow Fermi-2 to go into full-power operation. The Petitioners base this request upon information contained in a January 15, 1988 letter to Detroit Edison Company (Licensee) from Mr. A. Bert Davis, Regional Administrator, Region III of the U.S. Nuclear Regulatory Commission (NRC), and an attached Regulatory Assessment, authorizing Fermi-2 to operate at full power. According to the Petitioners, these documents reveal the existence of a number of deficiencies at the plant that should have prevented the NRC from granting this authorization. The Petitioners also base this request on their assertion that Fermi-2 should not be allowed to operate because of certain deficiencies in the plant's design and certain past attempts by the Licensee to withhold information from the NRC.

As specific relief, the Petitioners request: (1) that the January 15, 1988 decision authorizing full-power operation be overturned; (2) that the license to operate Fermi-2 be revoked; and (3) that the Licensee be required to prove, to the satisfaction of both the NRC and the relevant Canadian authorities, that it is absolutely safe to operate the plant and that such operation does not endanger the health and safety of the people of Windsor and Essex County, Canada.

By letter dated March 16, 1988, I 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

A. Background

Before assessing Petitioners' contentions, a review of the background of this matter would be helpful. Detroit Edison Company, the Licensee for Fermi-2, received a full-power operating license for Fermi-2 on July 15, 1985. This license was granted without NRC knowledge of an out-of-sequence rod-pull event that occurred under a lower-power license on July 2, 1985, and resulted in the reactor going critical prematurely. Following disclosure of the event, the NRC issued a Confirmatory Action Letter (CAL), dated July 19, 1985, to the Licensee. This CAL, among other things, confirmed the Licensee's commitment to obtain concurrence from NRC prior to exceeding 5% power.

In addition to the rod-pull event, numerous Technical Specification and procedural violations occurred at Fermi-2 between July 1, 1985, and October 15, 1985. These violations, along with the out-of-sequence rod-pull event, were described in an NRC inspection report for Fermi-2 (50-341/85040(DRP)) dated November 14, 1985. A total of $375,000 in civil penalties was assessed by the NRC for these violations.

Because of the nature and magnitude of the Fermi-2 problems, the Licensee was not allowed to resume operating the unit beyond 5% power. A 10 C.F.R. § 50.54(f) letter was issued on December 24, 1985, identifying the NRC's concern and requesting that the Licensee evaluate and address management weaknesses, develop a comprehensive plan to ensure the readiness of the facility to restart, and identify the actions necessary to improve regulatory and operational performance.

The Licensee responded to the § 50.54(f) letter on January 29, 1986. Actions taken by the Licensee included improving its operations and security plans, changing management personnel and structure, and forming an Independent Overview Committee (IOC). The NRC reviewed and found these corrective actions to be acceptable. Additionally, hold points in the power ascension of Fermi-2 at 20, 50, and 75% of full power were established which could not be exceeded until the NRC had assessed Fermi's operations at each stage and found them acceptable. To accomplish these assessments, an NRC Restart Team was formed, led by a senior NRC manager. The IOC also independently assessed the Licensee's ability to exceed these regulatory hold points. The power ascension and assessments required almost 2 1/2 years to complete. By letter of January 15, 1988, Fermi-2 was released from the final hold point of 75% and allowed to go to full power. This letter is the subject of the Petition.

B. The Petitioners' Concerns with the January 15, 1988 Letter and the Attached Regulatory Assessment

Regional Administrator A. Bert Davis' January 15, 1988 letter authorizing the Licensee to allow Fermi-2 to proceed beyond 75% power is based primarily on the recommendations of a special NRC team of managers and technical experts established to monitor the Licensee's initiatives and plant performance. This team closely monitored the Licensee's performance during Fermi-2's operation up to and through each hold point. As part of its decision of whether to release the plant from the 75% power hold point, the team considered all known areas of weakness. It then analyzed whether sufficient improvement had been made or would be expected in these areas to support full-power operation. Input for the Regional Administrator's decision to release the plant from the 75% power hold point was also provided by the NRC's Office of Nuclear Reactor Regulation and by Region III technical divisions. During this period, the IOC also independently assessed the Licensee's performance.

The Restart Team's conclusions were listed in a detailed written assessment (hereinafter referred to as the NRC Staff Assessment) which was included as an attachment to the January 15, 1988 letter. The Restart Team concluded that identified problems at the facility had either been resolved or sufficient progress had been made in resolving them to allow Fermi-2 to be operated safely at full power. It also noted that some areas still required improvement. The January 15, 1988 letter of Mr. Davis incorporated these same conclusions and also stated that continued work and effort by the Licensee were required.

The Petitioners claim that these words of caution by the Restart Team and Mr. Davis, advising the Licensee that improvement is required, are grounds for their requested relief since they signify that the facility is not ready to be operated. We do not agree, since the statements in question[1] were intended to encourage the Licensee to strive for excellence and to improve its past performance. A challenge to achieve excellence is often given by the NRC to licensees, and it was not intended to imply that the Licensee is not competent

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[1] One of these statements relied upon by the Petitioners is Mr. Davis' advice to the Licensee that "while your almost three months of continuous operation has shown a positive trend toward improved performance, and your overall operation is considered acceptable, significant work and effort on your part is still required to become a good performer." The Petitioners also quoted a statement by Mr. Davis that, "attention to detail, good communications, adherence to procedures and operational performance standards, as well as a slow and cautious approach with strong management oversight and teamwork are requisites to continued successful performance." The Petitioners claim these statements establish that the Licensee lacks important attributes necessary to operate a nuclear facility and that the Licensee is not a "good performer." However, the Petitioners mischaracterize these statements since they were not intended to convey that the Licensee lacks these attributes (i.e., attention to detail, good communications, etc.); rather, the Licensee was being reminded, as might any licensee who is about to begin full-power operation, that these are the types of qualities necessary to safely operate a nuclear facility. Similarly, the encouragement for the Licensee to become a "good performer" was not intended to mean that the Licensee was incapable of operating the facility safely; it was merely a recommendation that the Licensee strive to be better.

to safely operate Fermi-2. If the NRC had believed that Fermi-2 could not be safely operated, then the Licensee would have been ordered to shut down the facility.

The Petitioners also claim that the NRC Staff Assessment reveals that there are a number of problem areas[2] remaining at the facility that should have prevented the NRC from allowing it to be operated. As a basis for this claim, the Petitioners have quoted from those portions of the report where deficiencies were listed. Significantly, however, they have ignored those portions of the report that explained that these deficiencies had either been corrected in whole or at least sufficiently to allow the facility to operate safely at full power. By ignoring the corrective measures that were taken, they have failed to provide any basis to suggest that the facility cannot be safely operated. Under these circumstances, no basis has been provided for the relief the Petitioners seek.

The Petitioners' underlying basis for their request to shut down Fermi-2 appears to be that nuclear plants with identified problems should not be allowed to operate. However, although it is expected that licensees will pay meticulous attention to, and achieve and maintain a high level of compliance with, NRC requirements, it is recognized that errors may occur. What is most significant is that violations, when identified, are properly assessed in terms of understanding their significance and cause, and that necessary corrective actions are taken to prevent their recurrence. Discrete violations at a nuclear facility do not give rise to a significant safety concern so long as they have been cured or are being cured, and there has been no overall breakdown in a licensee's programs that would raise legitimate doubt about the safety of the facility. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 NRC 149, 161 n.7 (1985); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit 2), DD-86-8, 24 NRC 151, 166 (1986). In the case of Fermi-2, after deficiencies and programmatic breakdowns were identified in 1985, the NRC Staff ensured safe operation by requiring the facility to operate at reduced power levels until the problems were sufficiently addressed. A special team was assigned to monitor the Licensee's initiatives to resolve these problems and the plant's performance. Only after this team, the Region, and the Office

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[2] According to the Petitioners, these alleged problem areas, as listed in the NRC Staff Assessment, include: the adequacy of the T-C-3 testing of the feedwater system; the unexpected vibration of the reheater tank emergency drain line; the need for repairs and replacement of parts following the plant scram of December 31, 1987; the concern for main steam line and SJAE head spray piping vibration; the failure to have site-specific loop accuracy calculations to justify the performance of instruments during harsh accident conditions; the failure to have the safety parameter display system fully operational; the higher-than-normal number of events that occurred since the last assessment; an increase in the corrective maintenance backlog; the failure to conduct early review sessions of the Control Room Evaluation Program; several NRC enforcement matters that had not yet been fully resolved; the failure to have a final emergency response plan in place for all of Windsor and Essex Counties; concerns with the Licensee's program to improve Technical Specifications; and a failure of the Licensee's testing program to verify feedwater control.

of Nuclear Reactor Regulation were satisfied that these problems were being properly addressed was Fermi-2 allowed to operate at full power.

In reaching its decision to release Fermi-2 from the 75% power hold point, the NRC considered in detail the items now cited by the Petitioners from the January 15, 1988 letter and attached NRC Staff Assessment. The NRC also carefully weighed many of these same issues in allowing Fermi-2 to proceed past the hold points for power ascension that had been previously set. The Petitioners have not produced any facts to undermine these findings. Under these circumstances, I conclude that the issues cited by the Petitioners with respect to the January 15, 1988 letter and the NRC Staff Assessment do not provide a basis for granting the requested relief.

C. Other Concerns Raised by the Petitioners

In addition to their concerns arising out of the January 15, 1988 letter and the NRC Staff Assessment, the Petitioners have identified the following additional problems concerning Fermi-2.

1. The General Electric Mark I Reactor

The Petitioners claim that certain NRC research establishes that the General Electric Mark I reactor, which is the design for Fermi-2, is an old and inherently risky reactor design whose containment will fail in 90% of severe-accident scenarios.

The Petitioners' concerns are based on information contained in Draft NUREG-1150, "Reactor Risk Reference Document" (February 1987), which is a recent NRC draft analysis of different reactor designs.

The evaluation of severe-accident vulnerability involves three distinct evaluations: first, the probability of an accident involving core damage; second, the likelihood of containment failure; and, third, an assessment of the radiological consequences and public doses resulting from the accident. All three issues must be considered in making a determination on the magnitude of severe-accident risk and what actions should prudently be taken to reduce those risks.

The studies that have been conducted emphasize that the results inherently possess large uncertainties. The draft results of NUREG-1150 present the most recent program, whose intent is to accurately reflect the severe-accident risk at a number of U.S. nuclear power plants, and also to properly reflect the areas of uncertainty. That study included an evaluation for Peach Bottom, a plant quite similar to Fermi in reactor design and containment. The study presented the estimated mean frequency of core damage to be approximately 1 chance in

100,000 per year of operation. Another comprehensive risk study conducted for the Limerick plant estimated a mean core damage probability of 1 in 10,000.

These results are consistent with NRC's belief that core-melt accidents are very unlikely. Draft NUREG-1150 also investigated the probability of early containment failure following a core melt. This study concluded that our ability to accurately predict the response of a Mark I containment was limited for situations where it was subjected to the harsh temperature and pressure conditions following a core-melt accident. As stated earlier, the report indicated that containment failure probability (for these extremely unlikely events) could likely range from 10 to 90%.

These uncertainties are currently the subject of research efforts to better predict the behavior of containments during severe accidents, so that a more complete risk perspective can be assembled for guiding our regulatory activities. However, it is important that these uncertainties be properly characterized. They are not identified deficiencies in the BWR Mark I containments, which have been demonstrated to satisfy their design performance requirements. Rather, these uncertainties are areas that guide our research investigations, whose goals are to provide improved understanding of very unlikely risk situations at nuclear power facilities. Results from these studies (including high containment-failure probabilities) also allow us to calculate public risk estimates assuming that one element of the three that go into a risk assessment (containment failure) is less favorable.

Even allowing the large uncertainties that result in a high upper value for containment failure, the NUREG-1150 study estimated that the probability of a large reactor accident that results in one or more early fatalities ranged from 1 in 1 million to 1 in 1 billion. Given a severe accident, the probabilities of very high radiation exposure and the distances over which they would occur were also estimated to be reasonably small. The risk levels for Fermi would of course depend on its actual core-melt probability, containment behavior, the local demography, and could vary somewhat from the results presented in NUREG-1150. The results of this and related studies do, however, support our overall conclusion of low severe-accident risk at the Fermi plant. One contributing factor is that the massive reactor containment structures may retain considerable radioactive material following a core melt even if its pressure boundary is failed. In this regard, containment failures include cracks or other phenomena that result in loss of pressure integrity that can result in leaks but should not be viewed soley as catastrophic failure of the containment structure. Plateout and deposition of material within containments, even though there may be leakage, also increase the time available to implement effective evacuation activities.

While we believe that severe-accident risks are low at operating nuclear plants, our goal is to pursue additional activities to achieve even lower levels of public risk. To assure that our risk conclusions are applicable to all oper-

ating units, a number of programs are going forward to assess severe-accident likelihood and consequences. These programs include plant-specific studies to determine any severe-accident vulnerabilities, both from the perspective of accident frequencies and from containment performance following a core melt. Any problems will be dealt with if identified. This program is known as the individual plant examination (IPE) program which is expected to commence later this year. These and related programs will be conducted to provide further assessments of severe accidents on a plant-specific basis, so that appropriately low risk levels can be maintained.

2. *The Exemption from Inerting*

The Petitioners also contend that Fermi-2 is unsafe because of the exemption it has received from the general rule requiring the inerting of the primary containment system with nitrogen. According to the Petitioners, this exemption endangers the surrounding area by increasing the risk for an accident at the reactor.

At the outset, it should be noted that the inerting exemption is no longer operative and the facility is now required to be inerted in accordance with its technical specifications. Nevertheless, in addressing this contention, a brief technical explanation of this subject is helpful. The purpose of inerting is to limit the possibility of post-accident hydrogen explosions inside the primary containment. To prevent such explosions, the containments of boiling water reactors (BWRs) are normally inerted during operation. However, there is an exception to this general rule, which has been granted to Fermi-2 and almost all other recently licensed BWRs, that allows reactor licensees limited exemptions from inerting during initial operation so that they can perform startup testing. These exemptions are limited to the end of startup testing or 120 effective full-power days, whichever occurs first. Startup tests are important since they ensure that the nuclear facility's systems function as designed and that problems identified during the testing are corrected. It is best that the reactor's containment not be inerted during certain tests so that personnel can enter it for visual inspections. The potential for an accident and subsequent hydrogen explosion during startup testing is small because the plant generally operates at lower power levels and experiences several startups and shutdowns during this period which decrease the potential buildup of fission products.

Because of the need for startup testing and the small degree of risk of explosion during this testing, the decision to allow Fermi-2 and other BWRs limited exemptions from inerting was fully justified. Upon expiration of this exemption, Fermi-2 was inerted in accordance with the requirements of the technical specifications governing the operation of the facility.

3. *The Alleged Inadequate Infrastructures*

The Petitioners claim that there have been "continual discoveries of inadequate infrastructure included in the construction of the reactor" that have resulted in continuing accidents and problems at the plant.

Although it is not entirely clear what the Petitioners mean by their use of the word "infrastructure," I disagree with this characterization if they are implying that the design of Fermi-2 is deficient. The NRC has found that the design of this unit meets our regulations. Nevertheless, I acknowledge that there have been deficiencies in the implementation of this design into the as-built features of the plant and the plant's technical specifications and operating procedures. Many of the Fermi-2 operational problems were caused by these deficiencies. However, as discussed above, these deficiencies, and the Licensee's resolution of them, were taken into account during the NRC's detailed regulatory assessment following its Confirmatory Action Letter of July 19, 1985. Based upon this assessment, the NRC Staff determined that these deficiencies had been adequately resolved or were in the process of being resolved in a time frame and manner acceptable to support NRC's release from each hold point.

For these reasons, to the extent that Fermi-2 may have had an "infrastructure" problem, the Petitioners' concern is not valid since remedial action has already been taken.

4. *The Large Number of Violations at Fermi-2 and the Withholding of Information from the NRC*

The Petitioners also claim that Fermi-2 has one of the highest levels of "fines" for breaches of NRC regulations of any nuclear reactor in the United States, and that one of these violations, which involved the Licensee withholding information about the facility reaching criticality just before it was issued an operating license in 1985, is grounds for now revoking this license.

Although Fermi-2 has experienced a large number of violations compared to other reactors, the NRC has devoted considerable regulatory oversight to Fermi-2 to assure that the problems causing these violations have been adequately addressed. Regulatory actions taken by this Agency have included issuance of the July 19, 1985 Confirmatory Action Letter and the December 24, 1985, § 50.54(f) letter, discussed above. In addition, civil penalties have been levied to emphasize the seriousness of the violations and the need for the Licensee to improve its operations. The Licensee's initiatives, designed to rectify these problems, have included significant management and organizational changes, and numerous improvement programs focused on improving personnel and hardware performance.

These improvements and regulatory actions have provided reasonable assurance to the NRC that the problems causing these violations are being properly addressed and that the present operation of Fermi-2 at full power is justified. The NRC will continue to closely monitor the operation of Fermi-2 in the future. The information-withholding incident in 1985, which the Petitioners claim constitutes a basis for withdrawing the facility's operating license, was acted upon by the NRC in 1985 by the imposition of substantial civil monetary penalties on the Licensee and not allowing the facility to operate beyond 5% power. (*See* Discussion, § A, *supra*.) There is no new information that would provide a reasonable basis for now reopening the question of whether additional penalties should be assessed for this past violation.

5. The Licensee's SAFETEAM Program

The Petitioners further claim that the Licensee's SAFETEAM program "holds back information from the NRC." However, they have offered no facts to substantiate their claim, and there have been no problems or occurrences at the facility to indicate that the SAFETEAM program has inhibited or restricted employee communication with the NRC.

SAFETEAM is a voluntary program not required by the NRC, established by the Licensee in 1983, to assist plant managers in the early identification of errors or omissions during the construction and operation of the plant. The program provides an opportunity for site workers, in confidence, to express to a select group of Licensee's representatives concerns that may not be recognized or effectively responded to through normal channels of communication within the Licensee organization. Past NRC inspections and investigations have indicated that issues brought into the SAFETEAM program have been addressed. Although the NRC identified certain programmatic weaknesses, safety-related concerns were found to have been properly addressed by the Licensee.[3]

The Licensee's SAFETEAM program does not interfere with its employees' rights to report safety-related matters to the NRC. Employees at the facility are still encouraged to report safety-related problems directly to the NRC by notices that the Licensee has visibly posted on site. In these notices, employees are alerted of their right to contact the NRC and advised that their confidentiality will be maintained in the event such contacts are made.

Under these circumstances, I conclude that Petitioners' contention regarding SAFETEAM lacks merit.

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[3] The results of these NRC inspection findings are documented in NRC Inspection Report Nos. 50-341/85029 and 50-341/85037, dated July 26, 1985, and October 25, 1985, respectively.

CONCLUSION

The deficiencies at Fermi-2 identified by the Petitioners as issues in their Petition were all well known to the NRC and were previously considered in our regulatory decisions. Civil penalties were imposed and a Confirmatory Action letter and a § 50.54(f) letter were issued to ensure that these deficiencies were adequately addressed. To ensure the safe operation of Fermi-2, this facility was not allowed to operate at full power for over a 2-year period until adequate assurances had been received that these deficiencies were adequately addressed. The NRC's January 15, 1988 letter allowing full-power operation was thus fully justified.

For these and the other reasons discussed above, I find no basis for taking the actions requested by the Petitioners. Accordingly, the Petitioners' requests pursuant to 10 C.F.R. § 2.206 are denied.

As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 28th day of July 1988.

Denials of Petitions for Rulemaking

DENIALS OF PETITIONS FOR RULEMAKING

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

Victor J. Stello, Jr., Executive Director for Operations

In the Matter of Docket No. PRM 50-47

QUALITY TECHNOLOGY COMPANY July 11, 1988

The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-50-47) filed by Mr. Owen L. Thero, President of Quality Technology Company. The petition is being denied because (1) the existing regulations provide adequate assurance that safety-related concerns are being reported; (2) the proposed additional regulation would not substantially increase the overall protection of the public health and safety; and (3) the need for the proposed rule is not otherwise demonstrated by the information provided.

The Petitioner requested that NRC require all utilities involved in a nuclear program to (1) report *all* identified concerns relating to wrongdoing activities to the Office of Investigation and (2) maintain a nationwide employee concern program. Wrongdoing activities are not specifically defined by the Petitioner but are assumed to be criminal-type activities. Examples might include use of drugs or alcohol on the job and the falsification of documents or records. The NRC has carefully considered the issues raised in the petition and has taken them into account in reaching a decision on the areas that fall within its jurisdiction.

NRC: RULEMAKING AUTHORITY

In contemplating the addition of new regulations, NRC must ask if the new regulations are required to provide adequate protection of the public health and safety. The next level of questioning is: Will the proposed rule result in enhanced health and safety or an improved plant operation? Finally, what is the cost of the new regulation versus the benefits to be derived? This applies to the licensee as well as NRC. Before considering the implementation of a

mandatory program on all nuclear power plants in the United States, a definitive basis should be established to show that such a requirement is in fact needed.

PERSONNEL: NUCLEAR POWER PLANT (FITNESS FOR DUTY)

The objective of the proposed fitness-for-duty rule is to provide for the public health and safety by eliminating access to protected areas at nuclear power plants by personnel who are judged to be unfit for duty. Personnel considered unfit for duty are those who are under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause that in any way affects their ability to safely and competently perform their duties. Employee assistance programs would be available for rehabilitation.

SAFETY-RELATED MATTERS: REPORTING REQUIREMENTS

Although there are no regulations currently in effect regarding specific reporting of identified concerns related to wrongdoing activities (assumed to be criminal activities such as use of drugs or alcohol on the job and fabrication of documents or records) there are several regulations in effect concerning the reporting of safety-related matters. These regulations are found in: 10 C.F.R. Part 21 (reporting of defects and noncompliance); 10 C.F.R. § 50.55(e); 10 C.F.R. § 50.7; 10 C.F.R. § 50.72; 10 C.F.R. § 50.73; Appendix B to 10 C.F.R. Part 50, criteria 15 and 16; 10 C.F.R. § 70.52; and 10 C.F.R. § 73.71.

SAFETY-RELATED MATTERS: REPORTING REQUIREMENTS

The regulations concerning the reporting of safety-related matters have been promulgated by NRC with the intention of identifying deficiencies and noncompliances that either reduce or have the potential to reduce the degree of protection afforded to public health and safety or the environment. It is not NRC's intention to receive all employee nonsafety-related concerns. The management of the utilities has certain responsibilities relative to employee concerns and as long as the concerns do not affect safety, they should remain the responsibility of utility management. If the utility management is not responsive or if there is concern with retaliation, there are adequate alternative means to bring matters of health and safety concern to the NRC for resolution.

SAFETY-RELATED MATTERS: REPORTING REQUIREMENTS

The present regulations set up a rather extensive system of reporting requirements that licensees are required to follow. The regulatory system is designed

to provide a framework to ensure that events that are significant to the safe operation of nuclear power plants are reported to NRC so that the appropriate corrective action can be taken. In cases where employee concerns have not been resolved to the employee's satisfaction, there are means available for discussing their concerns with NRC. To date, nonsafety-related concerns have essentially been the responsibility of licensee management. If licensee management demonstrates that it is unwilling or unable to handle such concerns, and NRC determines that these concerns are a problem at more than a few isolated plants, then NRC can consider taking a more direct action. Until then, licensee management should be given the opportunity to address the matter.

LICENSEE EMPLOYEES: INVESTIGATION AND CORRECTION OF CONCERNS

Good management practices by the utilities and the existing regulatory structure together provide reasonable assurance that valid problems identified by employees will be investigated and corrected.

LICENSEE EMPLOYEES: IDENTIFICATION AND RESOLUTION OF CONCERNS

Employees who wish to provide information or who have concerns have two options available to them. They may discuss the particular concern with their supervisor or plant management. If they cannot obtain satisfactory resolution or if they do not desire to use this avenue, they can take the concern directly to the NRC. NRC has maintained a policy that allows licensee employees to bring concerns to its attention. This can be done either verbally or in writing and can be done through the resident inspector, regional personnel, or NRC Headquarters personnel. This option may afford the individual confidentiality.

LICENSEE EMPLOYEES: IDENTIFICATION AND RESOLUTION OF CONCERNS

The main purpose of an employee concern program is to provide a forum in which to resolve employee concerns about the safety of a nuclear plant. Several utilities have established such programs, on a voluntary basis, some at a considerable expenditure of resources to assure that all employee concerns are investigated and resolved. Many of these programs have continued into the operation phases of a plant's existence. There is no question that these programs can and will identify employee concerns. Such concerns might surface through

some other mechanism such as a good quality assurance program, the normal employer-employee working relationship, or by reporting to the NRC.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated October 27, 1986, Mr. Owen L. Thero, President of Quality Technology Company (QTC) filed with the NRC a petition for rulemaking. The Petitioner requested that NRC expand the scope of its regulations so that all utilities involved in a nuclear program (1) report *all* identified concerns relating to wrongdoing activities to the Office of Investigation, much along the same lines as is required to report nuclear-safety-related issues, and (2) maintain a nationwide employee concern program incorporating the applicable facets of the Employee Response Team recently conducted at the Tennessee Valley Authority Watts Bar facility.

II. BASIS FOR REQUEST

The Petitioner (QTC) bases the petition on its experience gained from involvement in employee concern programs at several utilities, most recently the TVA Watts Bar facility. This involvement included the collection, collation, and investigation of safety concerns. As a result of this experience, the Petitioner states that it had been in the unique position to observe the program's effectiveness from both the perspective of management and the perspective of the employee. The Petitioner contends that because of this unique vantage point and experience, it has observed that employees engaged in the construction or operation of a nuclear facility have the most accurate and insightful information about safety-related issues. The Petitioner claims that several thousand nuclear-safety-related concerns and several hundred wrongdoing activities have been identified through the efforts of the employee concern programs conducted by QTC at Watts Bar and other facilities, which otherwise would not have surfaced.

QTC believes that without resolution of employee-identified safety-related concerns, the potential exists for costly hardware failures or potential danger to the employees of nuclear facilities or the general public.

The Petitioner further believes that the disposition of wrongdoing activities by the licensee is not clear, and in its experience the licensee has not allowed QTC to investigate reported wrongdoing issues nor has the licensee willingly reported such activities to the NRC or to the Department of Justice. QTC also claims

that licensees have no effective corrective action mechanism to investigate or resolve wrongdoing issues; therefore, a corrective action mechanism is needed.

The Petitioner concludes that the sheer number of identified concerns along with the very high rate of substantiation (greater than 50%) more than justifies the need for a nationwide employee concern program to be authorized and defined by law.

III. PUBLIC COMMENTS ON THE PETITION

A notice of filing of the petition for rulemaking was published in the *Federal Register* on January 12, 1987 (52 Fed. Reg. 1200) and included the full text of the proposal. Interested persons were invited to submit written comments. The comment period was subsequently extended 60 days to provide sufficient time for public comments. In response to the invitation in the *Federal Register* soliciting comments on the petition for rulemaking, a total of thirty-four letters was received. These letters came from individuals, law firms, public interest groups, utilities, and other companies that manage nuclear plants. Five comments favored the petition and twenty-six comments were opposed to the petition. One comment requested an extension of the comment period to allow more time to respond. One comment favored the thrust of the proposal, but recommended that it be held in abeyance pending congressional action on some proposed Inspector General bills. The remaining comment by a Congressman favored the first part of the petition (i.e., report all identified concerns related to wrongdoing activities) but could not support the second part (establish an employee concern program) if there were not attendant requirements as to how the program would be operated in order to guarantee its integrity. For the purpose of summarizing, this split comment was considered as a favorable response. Hence, there were seven comments (21%) favoring the petition and twenty-six comments (79%) opposed. The seven comments favoring the petition came from two sources. Three comments were from individual citizens, three from public interest groups, and one from a Congressman. A summary of the significant comments in favor of the proposal are highlighted below.

A rule promulgated in response to the petition would:

- Provide a safe, confidential means for information to be volunteered by employees with no fear of reprisal.
- Be conducive to the identification of personnel who are using drugs or alcohol.
- Define wrongdoing activities to include nonnuclear and nonutility business, e.g., drug sales and bookmaking.

— Require licensees and holders of construction permits to report allegations of management wrongdoing or evidence bearing on the character and/or suitability of management.

The twenty-six comments opposed to the petition included twenty-four from utilities or companies that run utilities, one from a company (SYNDECO) that is a subsidiary of Detroit Edison Company, and the remaining comment was from the Atomic Industrial Forum. A summary of the significant comments opposing the petition are highlighted below:

— The petition may be motivated by self-interest on the part of the Petitioner (not considered).
— Current regulations are adequate to ensure that safety problems are reported.
— Utilities' experience with employee concern programs does not support the Petitioner's claim that the rate of substantiation is greater than 50%.
— No evidence was presented to show that public safety would be significantly enhanced as a result of the proposed rule.
— Various utilities indicated that they were not aware of any industry problems regarding licensee treatment of employee concerns.
— Several employee concern programs voluntarily set up by utilities currently exist.
— No factual need was provided for the proposed rule.
— Mandatory employee concern programs could reduce the effectiveness of industry's voluntary programs by reducing management flexibility, and safety-related matters could go unreported.
— Current utility experience does not justify the imposition of additional regulatory reporting requirements.

One of the public comments raised an issue that was not raised by the Petitioner. The issue is: Provide a safe, confidential means for information to be provided by employees with no fear of reprisal. Employees who wish to provide information or who have concerns have two options available to them. They may discuss the particular concern with their supervisor or plant management. If they cannot obtain satisfactory resolution or if they do not desire to use this avenue, they can take the concern directly to the NRC. NRC has maintained a policy that allows licensee employees to bring concerns to its attention. This can be done either verbally or in writing and can be done through the resident inspector, regional personnel, or NRC Headquarters personnel. This option may afford the individual confidentiality.

IV. STAFF ACTION ON THE PETITION

The proposed petition was published in the *Federal Register* in January 1987. The comment period was extended (thru mid-May) in order to provide sufficient time for public comments. The resumption of action on the petition was delayed for approximately 6 months because of the NRC reorganization and the subsequent realignment of duties and responsibilities, and the prioritization of ongoing work. Action on the petition resumed in mid-November of 1987.

V. REASONS FOR DENIAL

The NRC has considered the petition, the public comments received, and the current regulatory structure. After consideration of the above, NRC has concluded that the Petitioner's request should be denied. The discussion that follows addresses the various allegations contained in the petition and the NRC response to each of these allegations.

1. Allegation

Several thousand nuclear-safety-related concerns and several hundred wrongdoing activities have been identified through the efforts of the employee concern programs that QTC has either conducted or been associated with at several nuclear facilities, which otherwise would not have surfaced.

Response

The main purpose of an employee concern program is to provide a forum in which to resolve employee concerns about the safety of a nuclear plant. Several utilities have established such programs, on a voluntary basis, some at a considerable expenditure of resources to ensure that all employee concerns are investigated and resolved. Many of these programs have continued into the operational phases of a plant's existence. There is no question that these programs can and will identify employee concerns. But no evidence was presented that these concerns would not have surfaced through some mechanism such as a good quality assurance program, the normal employee-employee working relationship, or by reporting to the NRC. Although a large number of specific concern files from Watts Bar are in the possession of NRC, the information contained in these files is very cryptic and generally does not contain specific technical detail to support the assertions by the Petitioner. Additionally, no specific documentation concerning the rate of substantiation

at Watts Bar or other units has been provided by the Petitioner to support the assertions.

2. Allegation

Unresolved nuclear-safety-related concerns could have surfaced through a series of costly hardware failures and/or potential endangerment of the employees and the general public if allowed to go into operation unconnected.

Response

In response to this assertion, one of the commenters (an engineering firm) felt strongly that there are very few engineering decisions made that are totally conclusive. Instead, considerable expertise and judgment go into the determination of most requirements of this type. The commenter stated that management makes decisions based on analysis and opinions. Experience has shown that very few, if any, employee concerns actually require hardware changes and very few of the hardware changes materially improve safety. No documented evidence of any type has been provided by the Petitioner to support this assertion.

3. Allegation

The disposition of wrongdoing activities by licensee is not clear. In our experience, the licensee has not allowed us to investigate wrongdoing issues reported. Neither has it been willing to report these activities to the NRC or to the Department of Justice. It has no effective corrective action mechanism to investigate or resolve wrongdoing issues. These issues fall into a "black hole."

Response

In contemplating the addition of new regulations, NRC must ask if the new regulations are required to provide adequate protection of the public health and safety. The next level of questioning is: Will the proposed rule result in enhanced health and safety or an improved plant operation? Finally, what is the cost of the new regulation versus the benefits to be derived? This applies to the licensee as well as NRC. The present regulations set up a rather extensive system of reporting requirements that licensees are required to follow. The regulatory system is designed to provide a framework to ensure that events that are significant to the safe operation of nuclear power plants are reported to NRC so that the appropriate corrective action can be taken. In cases where employee

concerns have not been resolved to the employees' satisfaction, there are means available for discussing their concerns with NRC. To date, nonsafety-related concerns have essentially been the responsibility of licensee management. If licensee management demonstrates that it is unwilling or unable to handle such concerns, and NRC determines that these concerns are a problem at more than a few isolated plants, then NRC can consider taking a more direct action. Until then, licensee management should be given the opportunity to address the matter. The Petitioner has not provided any factual evidence to show that a problem exists at any plant as alleged in the proposal.

4. Allegation

The sheer numbers of concerns identified along with the very high rate of substantiation (greater than 50%) more than justifies the need for a nationwide employee concern program to be authorized and defined by law.

Response

The Petitioner's assertion appears to be based on experience gained primarily at TVA's Watts Bar facility. Before considering the implementation of a mandatory program on all nuclear power plants in the United States, a definitive basis should be established to show that such a requirement is in fact needed. As noted in reason #1 on page 9, the Petitioner has provided no evidence or specific documentation other than its stated experience at one facility to support its assertion. With respect to experience with substantiation rates, three of the commenters stated that their experience does not support a substantiation rate in excess of 50%. In fact, their experience reflects a substantiation rate that is significantly less than 50%. The information provided is not sufficient to establish that a problem exists in the "industry" and that a rulemaking is needed to solve the problem.

In addition to reviewing the assertions of the Petitioner and the comments from the public, the petition was also examined in light of the existing regulatory structure. Although there are no regulations currently in effect regarding specific reporting of identified concerns related to wrongdoing activities as raised by the Petitioner, there are several regulations in effect concerning the reporting of safety-related matters. These regulations are briefly listed below.

- Part 21 of 10 C.F.R. requires reporting of defects and noncompliance.
- Section 50.55(e) requires holders of construction permits to notify NRC regarding deficiencies in design or construction, which could adversely affect safety.

— Section 50.7 prohibits licensees from discriminating against employees engaging in certain protected activities including providing information to the Commission regarding violations.
— Section 50.72 requires the notification of NRC regarding various classes of emergency and nonemergency events.
— Section 50.73 requires the notification of NRC of specific events reportable via the Licensee Event Report program.
— Appendix B to 10 C.F.R. Part 50, criteria 15 and 16, requires the licensees to document defects and take the appropriate corrective action including defects brought to the attention of the licensee by employees.
— Section 70.52 require the licensees to report on accidental criticality or loss or theft of special nuclear material.
— Section 73.71 require the licensees to report on unaccounted-for shipments, suspected thefts, unlawful diversion, radiological sabotage, or other events that significantly threaten safeguards.

In addition to the above regulations, the NRC is presently preparing a proposed rule concerning fitness for duty at nuclear power plants which is expected to be published for public comment in June or July 1988. The objective of the fitness-for-duty rule is to provide for the public health and safety by eliminating access to protected areas at nuclear power plants by personnel who are judged to be unfit for duty. Personnel considered unfit for duty are those who are under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause that in any way affects their ability to safely and competently perform their duties. Employee assistance programs would be available for rehabilitation.

The regulations cited above have been promulgated by NRC with the intention of identifying deficiencies and noncompliances that either reduce or have the potential to reduce the degree of protection afforded to public health and safety or the environment. It is not NRC's intention to receive all employee nonsafety-related concerns. The management of the utilities has certain responsibilities relative to employee concerns, and as long as the concerns do not affect safety, they should remain the responsibility of utility management. If the utility management is not responsive or if there is concern with retaliation, there are adequate alternative means to bring matters of health and safety concern to the NRC for resolution, as discussed in this notice.

It appears that good management practices by the utilities and the existing regulatory structure together provide a reasonable assurance that valid problems identified by employees will be investigated and corrected. In light of the above, no additional action is required at this time.

Because each of the issues raised in the petition has been substantially addressed and resolved, the NRC has denied the petition.

For the Nuclear Regulatory Commission

Victor Stello, Jr.
Executive Director for Operations

Dated at Rockville, Maryland,
this 11th day of July 1988.

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