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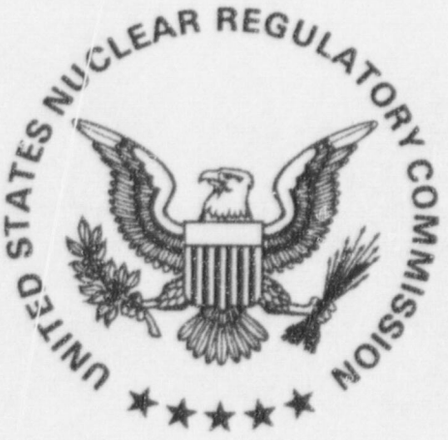
NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1998



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NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1998

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

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

U.S. NUCLEAR REGULATORY COMMISSION

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

COMMISSIONERS

Shirley A. Jackson, Chairman
Greta J. Dicus*
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield**

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

*Ms. Dicus began serving a second term as Commissioner on October 27, 1998.
**Mr. Merrifield began serving as Commissioner on October 23, 1998.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 50-423-LA-2**

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 3)

October 23, 1998

The Commission affirms the Board's conclusions that the Petitioner lacks standing because it failed to demonstrate that the requested amendment either has "obvious potential for offsite consequences" or would otherwise pose a plausible risk of "injury in fact" to itself or its representative member.

MEMORANDUM AND ORDER

This proceeding involves an application by Northeast Nuclear Energy Company ("Northeast") to amend the operating license for Unit 3 of its Millstone Nuclear Power Station. The amendment would permit Northeast to amend its Updated Final Safety Analysis Report to reflect the addition of a new sump pump subsystem. The Citizens Regulatory Commission ("CRC") opposes the amendment and has filed a petition to intervene in this proceeding. On September 2, 1998, the Atomic Safety and Licensing Board issued LBP-98-22, 48 NRC 149, finding that CRC lacked standing, denying the intervention petition, and terminating the proceeding.

On September 11th, CRC filed an interlocutory appeal as of right pursuant to 10 C.F.R. § 2.714a. The NRC Staff and Northeast oppose the appeal. We see no basis here for departing from our usual practice of deferring to the Board's

judgments on threshold standing questions. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998) (collecting cases). We concur fully with the Board's conclusions that CRC lacks standing because it failed to demonstrate that the requested amendment either has "obvious potential for offsite consequences" or would otherwise pose a plausible risk of "injury in fact" to CRC or its representative member, Mr. Joseph H. Besade. LBP-98-22, 48 NRC at 155-56. On appeal, CRC raises no arguments not already addressed fully and correctly by the Board. We therefore affirm LBP-98-22 based on the Board's own reasoning.[1]

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of October 1998.

[1] We note that in both LBP-98-22 and LBP-98-20 (an earlier Board order granting standing in a companion case), the Board repeatedly cited our decision in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87 (1993). *Perry*, however, dealt with a highly unusual claim of *procedural injury* and considered the kinds of harm necessary to sustain such a claim. Outside that context, *Perry* has little precedential force. *Cf. Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 50-029-LA**

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station) **October 23, 1998**

On June 12, 1998, the Licensing Board issued LBP-98-12, 47 NRC 343, rejecting three petitions to intervene and terminating this proceeding — on the ground that Petitioners had failed to establish standing. All three Petitioners appealed LBP-98-12 to the Commission. The Commission affirms the Board's rejection of one petition to intervene and, in the alternative, dismisses the same Petitioner's appeal on procedural grounds. The Commission reverses the Board's rejection of the remaining two intervention petitions. Finally, the Commission curtails the scope of this proceeding and offers guidance to the Board.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

The Commission's organizational and representational standing criteria are ultimately grounded on section 189a of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), which requires the Commission to provide a hearing upon the request of any person "whose interest may be affected by the proceeding."

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

The Commission's procedural regulations provide that, to establish standing as of right, an intervention petition must set forth with particularity "the reasons why petitioner should be permitted to intervene, with particular reference to . . . the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene" and also "the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section." 10 C.F.R. § 2.714(a)(2). The referenced provisions of subsection (d)(1) in turn provide that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner: (i) the nature of the petitioner's right under the [AEA] to be made a party to the proceeding; (ii) the nature and extent of the petitioner's property, financial or other interest in the proceeding; and (iii) the possible effect of any order that may be entered in the proceeding on the petitioner's interest. 10 C.F.R. § 2.714(d)(1)(i)-(iii).

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

An organization may satisfy the standing criteria set forth in sections 2.714(a)(2) and (d)(1) in either of two different ways — based either upon the licensing action's effect upon the interest of the petitioning organization itself (i.e., organizational standing) or upon the interest of at least one of its members who has authorized the organization to represent him or her (i.e., representational standing). *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

When determining whether a petitioner has established the necessary "interest" under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing. *See, e.g., Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 115. The federal jurisprudence provides that, to qualify for standing, a petitioner must (1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995).

These three criteria are commonly referred to, respectively, as "injury in fact," causality, and redressability. The injury may be either actual or threatened. *See, e.g., Wilderness Society v. Griles,* 824 F.2d 4, 11 (D.C. Cir. 1987). In addition, the Commission has required potential intervenors to show that their "injury in fact" lies arguably within the "zone of interests" protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act ("NEPA"). *See Ambrosia Lake Facility, supra,* 48 NRC at 6.

RULES OF PRACTICE: STANDING (PARTICIPATION BY GOVERNMENTAL ENTITIES); INTERVENTION (STANDING); NONPARTY PARTICIPATION; RIGHT TO PARTICIPATE

Regarding governmental participation, 10 C.F.R. § 2.715(c) provides that presiding officers will offer states, counties, municipalities and/or agencies thereof a reasonable opportunity to participate in a proceeding. However, section 2.715(c) does not entitle those governmental bodies to full party status.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING); STANDARD OF REVIEW

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (DISMISSAL)

COMMISSION PROCEEDINGS: APPELLATE REVIEW

A licensing board's determinations regarding standing are entitled to substantial deference and the Commission will generally uphold them absent an error of law or an abuse of discretion. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998).

RULES OF PRACTICE: SCOPE OF PROCEEDING

LICENSE TERMINATION PLAN

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 50.82(a), 72.218(b), 50.54(bb))

Spent fuel management is off-limits in a license termination plan proceeding, which is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10). The requirement in 10 C.F.R. § 72.218(b) (that an application for termination of a Part 50 license include a description of how spent fuel stored under the general license will be removed from the reactor site) is unrelated to the requirement in section 50.82(a)(9) for submission of a license termination

plan (LTP). Section 72.218(b) requires the licensee, at the time it files its license termination request, to submit a description of how spent fuel will be removed. By contrast, section 50.82(a)(9) specifically provides that the LTP may be filed in advance of the submission of the license termination request. The scope of this proceeding is likewise not determined by the Commission's regulation requiring the submission of a plan for management and removal of the spent fuel (10 C.F.R. § 50.54(bb)) — for that regulation nowhere mentions the LTP. Rather, the scope of the LTP application is defined solely by the terms of 10 C.F.R. § 50.82(a)(10), as read in light of the filing requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A)-(G). Importantly, sections 50.82(a)(9) and (10) do *not* refer to spent fuel management. This omission in the Commission's decommissioning rule was intentional. *See* Final Decommissioning Rule, 61 Fed. Reg. at 39,292.

RULES OF PRACTICE: APPELLATE REVIEW; DISMISSAL OF PARTIES; NONTIMELY SUBMISSION OF APPEAL

Where a governmental entity has neither filed a timely appeal of LBP-98-12 nor offered any explanation of the appeal's untimeliness, this procedural default alone suffices to justify rejection of the untimely appeal in its entirety.

RULES OF PRACTICE: *PRO SE* LITIGANTS; RESPONSIBILITIES OF PARTIES

The Commission does not expect *pro se* litigants always to meet the same high standards to which the Commission holds entities represented by lawyers. However, a *pro se* litigant is nevertheless expected to comply with the Commission's basic procedural rules — especially ones as simple to understand as those establishing filing deadlines. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984) (citing *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981)), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985).

RULES OF PRACTICE: APPELLATE REVIEW

While missing a deadline for appeal is not necessarily a jurisdictional bar to further action on an appeal, the Commission has historically excused a failure to meet appeal deadlines only in "extraordinary and unanticipated circumstances." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982). Its general policy has been to enforce them strictly. *Id. See also Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991).

RULES OF PRACTICE: STANDING (GOVERNMENTAL ENTITIES); INTERVENTION (STANDING); NONPARTY PARTICIPATION; *AMICUS CURIAE*

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.715(c))

Not all organizations with governmental ties are entitled to participate in Commission proceedings as governmental "agencies." The federal, state and local governments are all replete with numerous boards, commissions, advisory committees, and other organizations -- all of which have governmental or quasi-governmental responsibilities. The Commission does not, however, understand section 2.715(c) to authorize automatic participation in its adjudications by each and every subpart of state and local government. The Commission concludes that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c). However, such an entity may still contribute its views to the board by a variety of other means (e.g., filing briefs *amicus curiae* or providing witnesses for other parties). *See Private Fuel Storage, L.L.S.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35 (1998).

LICENSE TERMINATION PLAN

RULES OF PRACTICE: SCOPE OF PROCEEDING

The scope of a license termination plan is coextensive with the scope of the plan itself.

LICENSE TERMINATION PLAN

In 1996, when the Commission promulgated the current version of its decommissioning rule, the Commission considered the license termination plan (LTP) a significant enough event that the Commission required the LTP to be treated as a license amendment, complete with a hearing opportunity. *See* Final Decommissioning Rule, 61 Fed. Reg. at 39,284, 39,286, 39,289. Acceptance of the view that the LTP is a kind of hortatory document, without important effects, would defeat the carefully crafted process that the Commission established just two years ago.

LICENSE TERMINATION PLAN

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.82(a))

The minimal *current* effects of a license termination plan (LTP) do not render a hearing on the LTP superfluous. The LTP has at least one important *future* consequence which must be litigated now or never. The NRC's approval of the LTP would entitle the Licensee to proceed with its final decommissioning activities secure in the knowledge that, absent extraordinary circumstances, the NRC would not later (at the license termination stage) second-guess its site survey methodology. Indeed, the regulation governing license termination — 10 C.F.R. § 50.82(a)(11) — does not provide for consideration of this methodology's adequacy at the termination stage. Thus, the LTP approval's effects would, in a sense, lie dormant until the Licensee sought to terminate its license. At that future time, however, the LTP's effects would become critically important because the LTP's prior approval would greatly restrict the scope of this agency's review of the request to terminate the license and would likewise preclude Petitioners from challenging *any* part of the survey methodology. The LTP stage, in other words, is Petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination. They are precluded from doing so at the license termination stage. In short, the time to obtain a hearing on license termination decisions comes at the LTP stage, as the Commission's rules unambiguously provide.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

LICENSE TERMINATION PLAN

Allegations of injury such as the claim that ineffectual cleanup of the reactor site under the license termination plan (LTP) may result in adverse health effects, loss of aesthetic enjoyment, and diminished property values for those who live, work, or play in the immediate vicinity are sufficient for standing. Numerous judicial decisions recognize allegations closely similar to these as sufficient "injury in fact" for standing in environmental cases. *See, e.g., Dubois v. USDA*, 102 F.3d 1273, 1282 (1st Cir. 1996); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 555-57 (5th Cir. 1996); *Kelley v. Selin*, 42 F.3d 1501, 1509 (6th Cir. 1995). *See generally Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc) (collecting cases). The Commission also has regularly admitted into its proceedings petitioners who show a close connection to the site, either as neighbors or regular visitors, and a realistic possibility that the NRC licensing action could injure them. *See, e.g., Private Fuel Storage,*

CLI-98-13, 48 NRC at 31-32. Indeed, in its two most recent decommissioning decisions, one involving Yankee Rowe itself, the Commission concluded that nearby citizens could challenge the efficacy of the facility's decommissioning activities. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996); *Sequoyah Fuels Corp.* (Gore, Oklahoma, Site), CLI-94-12, 40 NRC 64, 71-75 (1994).

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

LICENSE TERMINATION PLAN

An ill-considered license termination plan — for example, one with inadequate provisions for radiation monitoring — plausibly could result in injury to people who live near a decommissioned facility and reasonably might be expected to come into contact with the site.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

LICENSE TERMINATION PLAN

The purpose of the license termination plan (LTP) process is to ensure that the property will be left in such a condition that nearby residents can frequent the area without endangering their health and safety. To insist that potential intervenors show more — that they demonstrate with certainty that they will be allowed onto the site once the license is terminated — would go beyond what is necessary to show injury-in-fact in license termination cases. In the context of an LTP that proposes unrestricted release, requests for hearings would founder on the requirement to show a future legal entitlement to enter the property, a showing no one realistically can be expected to make at the LTP stage. The Commission cannot accept that result, as it would undercut its deliberate decision in 1996 to provide for an opportunity for a hearing on approval of LTPs.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

LICENSE TERMINATION PLAN

Even in the absence of a showing of injury away from the reactor site, it is enough for standing in license termination plan (LTP) proceedings to allege that an improvident approval of an insufficient LTP today could result in future real impacts to people traversing the current onsite land. After license termination

(whether with restricted release or, as in this proceeding, unrestricted release), that land presumptively will be sufficiently accessible to the public to allow a colorable claim of a realistic threat of injury sufficient to establish standing.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING); SCOPE OF PROCEEDING

A claim that Licensee's proposed surface contamination patterns allow grossly contaminated patches and hotspots to be overlooked is relevant to the adequacy of both the site remediation plan and the final radiation survey (10 C.F.R. § 50.82(a)(9)(ii)(C), (D)). A claim that the license termination plan (LTP) failed to address significant environmental information such as the changes in site characteristics, including paving and compaction of soil, which are likely to affect the flow of contaminated groundwater is relevant to the presence of "new information or significant environmental change associated with the licensee's proposed termination activities" (10 C.F.R. § 50.82(a)(9)(ii)(G)). Consequently, these two grounds for concern fall within the scope of an LTP proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

The Commission does not require a petitioner to demonstrate the "certainty" of his position's correctness at the "standing" stage of a proceeding. *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 74.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

If the license termination plan (LTP) were approved despite a failure to satisfy the requirements of 10 C.F.R. § 50.82(a)(9)(ii), then the subsequent implementation of the LTP and termination of the possession-only license could result in the inappropriate release of a site that still poses a threat to public health and safety. For this reason, the threatened injuries are "fairly traceable" to the licensing action at issue in this LTP proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING)

In a license termination plan (LTP) approval proceeding, a decision in petitioner's favor would result in a denial of the licensee's request for Commission

approval of the LTP or a Commission-mandated change to the LTP. For this reason, the asserted injury is susceptible of redress.

RULES OF PRACTICE: STANDING TO INTERVENE; INTERVENTION (STANDING); EVIDENCE; EXPERT WITNESSES; BURDEN OF PROOF

EVIDENCE: DUTY TO PROVIDE; EXPERT WITNESSES

No regulation or Commission decision requires submission of expert affidavits in order to demonstrate standing. Only when technical fact disputes arise at the standing stage are such affidavits necessary. *See Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 71-75.

TECHNICAL ISSUES DISCUSSED: TOTAL EFFECTIVE DOSE EQUIVALENT ("TEDE")

When determining total effective dose equivalents, it is inappropriate to use worst-case-scenario assumptions.

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 72.214, 72.40)

TECHNICAL ISSUES DISCUSSED: ISFSI

A licensee of an atomic power reactor is entitled to a general license to operate an independent spent fuel storage installation (ISFSI) as long as it retains its Part 50 license and as long as it stores spent fuel in a cask approved by rulemaking for listing in 10 C.F.R. § 72.214. However, once the Commission terminates the licensee's Part 50 license, the licensee's authority under the general license (should it employ one) would automatically and simultaneously end, because the general ISFSI license draws its existence solely from the Part 50 license. Thus, if the licensee wishes to operate an ISFSI to hold the spent fuel for the period of time following the termination of the Part 50 license, it must *first* obtain a site-specific ISFSI license under section 72.40 of the Commission's regulations — a process that requires safety and environmental reviews and provides the public an opportunity to seek a hearing on the underlying license application.

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTIONS

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

Adjudications are not the appropriate forum for resolving complaints about NRC Staff conduct. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995).

MEMORANDUM AND ORDER

This proceeding concerns a license amendment application in which Yankee Atomic Electric Company ("Yankee Atomic" or "Licensee") seeks approval of its License Termination Plan ("LTP") for the Yankee Nuclear Power Station ("Yankee Rowe"). The Yankee Rowe plant is located on about 10 acres of a 2000-acre site along the Deerfield River near the town of Rowe, Franklin County, Massachusetts. The New England Coalition on Nuclear Pollution, Inc. ("NECNP"), the Citizens Awareness Network ("CAN"), and the Franklin Regional Planning Board ("FRPB") oppose Yankee Atomic's application and have filed petitions for intervention and requests for hearing in an effort to defeat it.

On June 12, 1998, the Licensing Board issued LBP-98-12, 47 NRC 343, rejecting all petitions to intervene and terminating this proceeding. The Board concluded that Petitioners had failed to establish standing. All three Petitioners have appealed LBP-98-12 to the Commission pursuant to 10 C.F.R. § 2.714a(a) and (b). For the reasons set forth below, we affirm in part and reverse in part, and also dismiss FRPB's appeal. In addition, we curtail the scope of this proceeding and offer guidance to the Board governing further proceedings.

I. CRITERIA FOR STANDING AND PARTICIPATION

On appeal, FRPB challenges the Board's denial of its claims to organizational standing and governmental participation; it is not challenging the Board's denial of its claims to representational and discretionary standing. CAN and NECNP challenge the Board's denial of their claims to representational standing.

Our organizational and representational standing criteria are ultimately grounded on section 189a of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), which requires us to provide a hearing upon the request of any person "whose interest may be affected by the proceeding." Our procedural regulations provide that, to establish standing as of right, an intervention petition must set forth with particularity

> the reasons why petitioner should be permitted to intervene, with particular reference to . . . the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene

and also

> the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section.

10 C.F.R. § 2.714(a)(2). The referenced provisions of subsection (d)(1) in turn provide that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner:

> (i) The nature of the petitioner's right under the [AEA] to be made a party to the proceeding.
>
> (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
>
> (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

10 C.F.R. § 2.714(d)(1)(i)-(iii). An organization may satisfy the standing criteria set forth in sections 2.714(a)(2) and (d)(1) in either of two different ways — based either upon the licensing action's effect upon the interest of the petitioning organization itself (i.e., organizational standing) or upon the interest of at least one of its members who has authorized the organization to represent him or her (i.e., representational standing). *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

When determining whether a petitioner has established the necessary "interest" under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing. *See, e.g., Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Tech, supra*, 42 NRC at 115. The federal jurisprudence provides that, to qualify for standing, a petitioner must (1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995). These three criteria are commonly referred to, respectively, as "injury in fact," causality, and redressability. The injury may be either actual or threatened. *See, e.g., Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). In addition, the Commission has required potential intervenors to show that their "injury in fact" lies arguably within the "zone of interests" protected by the statutes gov-

erning the proceeding — here, either the AEA or the National Environmental Policy Act ("NEPA"). *See Ambrosia Lake Facility*, 48 NRC at 6.

Finally, regarding governmental participation, 10 C.F.R. § 2.715(c) provides that presiding officers will offer states, counties, municipalities, and/or agencies thereof a reasonable opportunity to participate in a proceeding. However, section 2.715(c) does not entitle those governmental bodies to full party status.

II. BACKGROUND

Yankee Atomic's submission of the LTP under 10 C.F.R. § 50.82(a)(9) and (10) is the latest in a series of events related to the Licensee's decommissioning of Yankee Rowe. These events began October 1, 1991, when Yankee Atomic ceased operation of the Yankee Rowe plant. By February 14, 1992, the Licensee had completed defueling the reactor, and shortly thereafter (on February 27, 1992) formally announced to the NRC its intention permanently to cease all power operations at Yankee Rowe. In response, the NRC amended the Yankee Rowe operating license on August 5, 1992, downgrading it to a possession-only license ("POL"). In December 1993, Yankee Atomic submitted its Decommissioning Plan, pursuant to a now-superseded version of 10 C.F.R. § 50.82(a). The Decommissioning Plan included spent fuel management plans currently required in 10 C.F.R. § 50.54(bb). The Commission approved the Decommissioning Plan on February 14, 1995, suspended that approval on October 12, 1995, due to a July 1995 court order (*Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995)), and ultimately reapproved the Plan on October 28, 1996.

Sections 50.82(a)(9) and (10), which the Commission promulgated in 1996, oblige a licensee who is decommissioning a power reactor to file an LTP in the form of a license amendment application. During the Commission's 1996 decommissioning rulemaking, some commenters argued that treating LTPs as license amendments was not "legally mandated." *See* Final Rule, "Decommissioning of Nuclear Power Reactors," 61 Fed. Reg. 39,278, 39,289 (July 29, 1996). But the Commission found it "appropriate," regardless of legal mandates, "to use the amendment process for approval of termination plans, including the associated opportunity for a hearing, to allow public participation on the specific order required for license termination." *Id.*

A licensee may file the LTP either prior to or concurrently with a license termination request. Section 50.82(a)(9) provides:

> All power reactor licensees must submit an application for termination of license. The application for termination of license must be accompanied or preceded by a license termination plan to be submitted for NRC approval.
>
> * * * *

(ii) The license termination plan must include —

(A) A site characterization;

(B) Identification of remaining dismantlement activities;

(C) Plans for site remediation;

(D) Detailed plans for the final radiation survey;

(E) A description of the end use of the site, if restricted;

(F) An updated site-specific estimate of remaining decommissioning costs; and

(G) A supplement to the environmental report, pursuant to § 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination activities.

(iii) The NRC shall notice receipt of the license termination plan and make the license termination plan available for public comment. The NRC shall also schedule a public meeting in the vicinity of the licensee's facility upon receipt of the license termination plan. The NRC shall publish a notice in the *Federal Register* and in a forum, such as local newspapers, which is readily accessible to individuals in the vicinity of the site, announcing the date, time and location of the meeting, along with a brief description of the purpose of the meeting.

Section 50.82(a)(10) establishes the following standard for Commission approval of an LTP:

If the license termination plan demonstrates that the remainder of decommissioning activities [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and safety of the public, and [3] will not have a significant effect on the quality of the environment and after notice to interested persons, the Commission shall approve the plan, by license amendment, subject to such conditions and limitations as it deems appropriate and necessary and authorize implementation of the license termination plan.

On May 15, 1997, Yankee Atomic filed a request for Commission approval of its LTP for Yankee Rowe. (Yankee Atomic exercised its right under our regulations to file an LTP in advance of seeking license termination.) On December 31, 1997, Yankee Atomic filed a revised LTP. Yankee Atomic's LTP states that the Licensee has set aside adequate funds to complete decommissioning and to release the Yankee Rowe site for unrestricted use, that the site release criteria ensure that exposure to residual levels of radiation is kept as low as reasonably achievable ("ALARA") and that the final status survey program is adequate to verify satisfaction of the release criteria. It goes on to offer a site characterization, identify the remaining dismantlement activities, offer site remediation plans, discuss the goal of returning the site to "green fields" condition, estimate the remaining decommissioning costs, provide an environmental statement, and set forth a Final Status Survey Plan.

Yankee Atomic explains that the spent fuel pool currently contains 533 spent fuel assemblies, 12 canisters of Greater-Than-Class-C ("GTCC") waste, and a small amount of reconfigured fuel. Although the Licensee states that it has not yet made a decision on the long-term storage method it will employ for the spent

fuel, Yankee Atomic assumes for purposes of the LTP that it will construct a dry cask storage facility on site which it will operate under its general license — all pursuant to 10 C.F.R. § 72.210. Yankee Atomic expects to transfer all spent fuel from the spent fuel pool to the onsite storage facility upon completion of the latter. It also expects that the Department of Energy ("DOE") will take some or all of the GTCC waste as part of a pilot project, with any remaining GTCC waste being stored in the onsite dry cask storage facility until final disposition by DOE.

On January 5, 1998, the Commission published in the *Federal Register* a notice of a January 13th public meeting regarding the LTP. 63 Fed. Reg. 275. The meeting was held as scheduled. On January 28, 1998, the Commission published in the *Federal Register* a Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration, and Opportunity for a Hearing regarding Yankee Atomic's LTP license amendment application. 63 Fed. Reg. 4308, 4328. In response, CAN, NECNP, and FRPB submitted petitions to intervene and requests for hearing in which they challenged the Staff's "No Significant Hazards Consideration" finding, alleged procedural and substantive violations of NRC regulations and federal statutes (the AEA, NEPA, and the Administrative Procedure Act), protested the conduct of the NRC's public meeting on the LTP, and raised various health and safety issues related to the LTP.

CAN and NECNP, both relying on a declaration of an expert witness, Mr. David A. Lochbaum, principally attacked Yankee Atomic's plans for handling spent fuel at the site. In addition, CAN and NECNP claimed that an ineffectual cleanup would spoil their members' ultimate use of the site and enjoyment of the area's aesthetic beauty. They also pointed to potential adverse effects on their members' property interests. CAN and NECNP relied on harms to members living within 6 miles of the Yankee Rowe site. FRPB claimed a right to organizational standing on behalf of the citizens of Franklin County and also a right to participate as a governmental body.[1]

III. THE BOARD'S ORDER DENYING STANDING AND PARTICIPATION

On June 12, 1998, the Board issued LBP-98-12. The Board first concluded that it lacked jurisdiction over both the Staff's "No Significant Hazards Consideration" findings and the issues associated with the notice and conduct of

[1] Although the Board also rejected FRPB's arguments in support of representational and discretionary standing (LBP-98-12, 47 NRC at 355, 356-58), FRPB challenged neither of those rulings on appeal. Thus, we consider them waived and need not describe them here.

the public meeting. 47 NRC at 345. The Board then considered and rejected each Petitioner's arguments on standing and/or participation, and terminated the proceeding. *Id.* at 347-59.

A. NECNP

The Board found that the concerns presented by NECNP, via a declaration filed by NECNP member Mr. Jean-Claude van Itallie, were unrelated to the LTP, not redressable in this proceeding, and therefore beyond the scope of this case. The Board referred specifically to Mr. van Itallie's concerns about the "long term environmental effects of low-level radiation," "the long term effects of an ineffectual cleanup . . . or an irradiated fuel accident" on his property value, and the need for the "final site condition projected under the LTP . . . [to] satisfy the NRC's criteria for general release." *Id.* at 347, quoting Declaration of Jean-Claude van Itallie at 1-3. The Board noted that spent fuel management and maintenance were previously licensed activities that had been considered and approved in Yankee Atomic's decommissioning plan, and that these matters as well as the satisfaction of the agency's general release criteria were already addressed in the Commission's existing and proposed decommissioning rules. The Board similarly found that the concerns voiced in the declaration of NECNP's expert, Mr. Lochbaum, addressed only spent fuel matters and therefore lacked available redress from the Board. 47 NRC at 347-48.

B. CAN

The Board similarly disagreed with CAN's position that spent fuel management must be considered in this LTP proceeding. The Board pointed out that 10 C.F.R. § 72.210 provides a general license to store spent fuel in an independent spent fuel storage installation ("ISFSI") at power reactor sites authorized to possess or operate Part 50 reactors. The Board further ruled that 10 C.F.R. § 50.82(a)(9)(ii) does not require an LTP to include information concerning spent fuel management and that nothing else suggests spent fuel management is appropriately at issue in this proceeding. The Board concluded that, because any injuries stemming from spent-fuel-related accidents or activities could not be remedied by the denial of the license amendment sought in this proceeding, the Board could not grant CAN standing based on its concerns about spent fuel management. *Id.* at 351.

The Board next rejected CAN's assertion that its authorizing member, Ms. Deborah B. Katz, would be harmed by long-term residual contamination of the site. The Board considered her purported injury to be hypothetical and

speculative and, more specifically, stated that CAN had offered no expert opinion to support her concerns about such possible injuries. *Id.* at 351, 352.

The Board also rejected CAN's assertions that the Massachusetts law setting site release criteria (a maximum of 10 millirem/year) governs instead of NRC regulations (10 C.F.R. § 20.1402, setting a maximum "total effective dose equivalent" limit of 25 millirem/year above background radiation levels), and that CAN's projected public dose level of 43-87 millirem/year for the Yankee Rowe site constituted a showing of "injury in fact." The Board concluded that it was inappropriate for CAN to calculate such doses by using worst-case assumptions for residual radioactivity levels (i.e., using average and maximum dose rates of 5 and 10 microrem/hour, respectively) and that, even ignoring CAN's inappropriate use of those assumptions, CAN still had not shown that Yankee Atomic would fail to meet the Licensee's own (and the Environmental Protection Agency's) site release criterion of 15 millirem/year. *Id.* at 351-52.

The Board next addressed CAN's argument that inadequate soil remediation and monitoring might preclude the Licensee's site release from being ALARA. Noting that the LTP's criterion for site release (15 millirem/year) was well within the Commission's standard of 25 millirem/year, the Board concluded that this argument did not explain how the requirements in the LTP for soil and groundwater monitoring failed to meet standards or would harm Ms. Katz. *Id.*

C. FRPB

The Board rejected FRPB's arguments in favor of organizational standing and governmental participation (and also representational and discretionary standing, neither of which is at issue on appeal). Regarding organizational standing, the Board concluded that FRPB had failed to explain how its responsibilities fall within the zone of interests protected by the AEA or NEPA, how those interests would be harmed by acceptance of the LTP, and how FRPB meets the "injury in fact" criterion for standing. The Board further found that FRPB's allegations of harm were too vague and appeared to be offsite concerns tied to the plant's past operation and current decommissioning — both of which were already licensed and were therefore beyond the scope of this proceeding. *Id.* at 354.

Next, the Board rejected FRPB's claim to governmental participation as an "interested County [body]" under 10 C.F.R. § 2.715(c). Acknowledging that the Commission had never spoken on this issue, the Board concluded that the Commission could not have intended to permit participation by a county agency that, as here, neither had standing on its own nor had legal authorization from a recognized government with sufficient "interest" in the proceeding. The Board's underlying premises were that (i) the opportunity for a governmental entity to participate is offered only to "units of the government which . . . have an interest in the licensing proceeding" (quoting Final Rule,

"Miscellaneous Amendments," 43 Fed. Reg. 17,798, 17,800 (April 26, 1978)), (ii) the words "interest" and "interested" party appear to be synonymous with the word "standing," (iii) only an elected body can have such an "interest," (iv) a letter to the Board from the Chair of the Franklin Regional Council of Governments indicates that FRPB is an advisory rather than an elected body, and (v) FRPB has not submitted an affidavit from the Franklin Regional Council of Governments delegating the Council's authority to FRPB for purposes of this proceeding. 47 NRC at 355-56.

IV. ANALYSIS OF ARGUMENTS ON STANDING AND PARTICIPATION

A licensing board's determinations regarding standing are entitled to substantial deference and we will generally uphold them absent an error of law or an abuse of discretion. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998). For the reasons set forth in Section IV.A below, we conclude that the Board reached the correct result in denying organizational standing and governmental participation to FRPB (although our rationale differs somewhat from the Board's). However, for the reasons set forth in Section IV.B below, we conclude that the Board should have granted standing to CAN and NECNP. Notwithstanding that conclusion, we agree fully with the Board that these two Petitioners' major concern — spent fuel management — is off-limits in this proceeding, which is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10), such as the plans for site remediation and for the final radiation survey.[2]

A. FRPB

FRPB neither filed a timely appeal of LBP-98-12[3] nor offered any explanation of the appeal's untimeliness. This procedural default alone suffices to justify rejection of FRPB's appeal in its entirety. We recognize that FRPB is acting *pro se* in this proceeding and we therefore might not expect it always to meet the same high standards to which we hold entities represented by lawyers. Even so, FRPB is still expected to comply with our basic procedural rules — especially ones as simple to understand as those establishing filing deadlines.

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[2] On remand, the Board will rule on admissibility of contentions and (if appropriate) will handle the merits of this proceeding. Because we reach a different result from LBP-98-12 regarding CAN's and NECNP's standing, the Board should not feel bound by the discussion in LBP-98-12 regarding CAN's and NECNP's "aspects."

[3] FRPB dated its appeal June 29, 1998 — two days after the June 27th expiration of the filing period specified in 10 C.F.R. §§ 2.714a(a), 2.710 (10 days after service plus 5 additional days if service was by mail).

See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984) (citing *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981)), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985). While missing a deadline for appeal is not necessarily a jurisdictional bar to further action on an appeal, we historically have excused a failure to meet appeal deadlines only in "extraordinary and unanticipated circumstances." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982). "[O]ur general policy has been to enforce them strictly." *Id. See also Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991). Here, FRPB has offered no explanation at all for its late appeal. Its appeal therefore is dismissed.

Even were we inclined to overlook the lateness of FRPB's appeal, we would find it without merit. FRPB's claimed entitlement to organizational standing fails because it neither filed a timely intervention petition before the Board[4] nor attempted to justify the tardiness of its petition by addressing the late-filing criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). And its claimed status as a governmental participant in our proceeding (*see* 10 C.F.R. § 2.715(c)), while not untimely when submitted to the Board,[5] nevertheless fails because FRPB cannot be viewed as an "agency" within the meaning of our rules.

Not all organizations with governmental ties are entitled to participate in our proceedings as governmental "agencies." The federal, state and local governments are all replete with numerous boards, commissions, advisory committees, and other organizations — all of which have governmental or quasi-governmental responsibilities. We do not, however, understand section 2.715(c) to authorize automatic participation in our adjudications by each and

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[4] Although FRPB submitted a filing on February 27, 1998, it was styled not as an intervention petition but rather as a letter to various Commission offices. While the letter contains the kinds of statements that would typically appear in an intervention petition, FRPB later indicated that its letter was *not* intended to constitute such a petition:

> A review of our filing with the Nuclear Regulatory Commission . . . will clearly demonstrate that the FRPB never requested intervenor status in the proceeding. FRPB has only requested that a public hearing be held on the License Termination Plan. . . . It is FRPB's intent, upon being granted a hearing, to consider the option to file for intervenor status under the applicable rules.

Response to Yankee Atomic Electric Company's Answer to Request for Hearing of Franklin Regional Planning Board, dated March 25, 1998, at 2. Finally, on April 6, 1998, FRPB belatedly sought intervenor status. Amendment to Franklin Regional Planning Board's Request for Hearing at 2.

[5] A claim to governmental participation in our proceedings is not governed by timeliness requirements. Governmental entities may apply at any time to participate in our proceedings (up to the closure of the record) and need not satisfy either the standing requirements of section 2.714(a)(2) or the late-filing requirements of section 2.714(a)(1)(i)-(v). *See* 10 C.F.R. § 2.715(c). *See generally Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980). However, even governmental entities are not guaranteed the right to participate under section 2.715(c) after the record has been closed and the case is on appeal before the Commission. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519-20 (1986), *aff'd sub nom. Ohio v. NRC*, 814 F.2d 258 (6th Cir. 1987), nor can they participate absent the Board's approval of an independent, valid petition for review and request for hearing that were filed pursuant to 10 C.F.R. § 2.714.

every subpart of state and local government. FRPB is, by its own admission, an advisory body and lacks executive or legislative responsibilities. *See* FRPB's Brief to Support Appeal, dated June 29, 1998, at 1-2. We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c). For this reason, we agree with the Board's conclusion that FRPB does not fall within the purview of section 2.715(c). *See* LBP-98-12, 47 NRC at 356.

However, FRPB may still contribute its views to the Board by a variety of other means (e.g., filing briefs *amicus curiae* or providing witnesses for other parties). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35 (1998). We also note that the Franklin Regional Council of Governments has expressed an interest in this proceeding — by endorsing FRPB's application to participate and explaining that FRPB was representing the interests of the Franklin County region. The Council is itself free to seek participation rights before the Licensing Board and to utilize the FRPB in such an effort however it sees fit.

B. NECNP and CAN

1. Scope of This Proceeding

As noted above, to qualify for representational standing in an NRC adjudication, a petitioner must allege a concrete and particularized injury to one of its members who has authorized it to represent his or her interests. In addition, the alleged injury must be fairly traceable to the challenged action and likely to be redressed by a favorable decision. *See* p. 195, *supra*. To determine whether CAN and NECNP have made an adequate showing with regard to these three factors, we must first determine the scope of this proceeding — i.e., before deciding if Petitioners' claims of injury establish a cognizable interest in an LTP proceeding, we must first determine what issues are raised by NRC approval of an LTP.

Not surprisingly, Petitioners and Yankee Atomic (supported by the NRC Staff) take diametrically opposed positions on the scope of an LTP proceeding. Petitioners demand a broad inquiry into Yankee Atomic's future plans for the Yankee Rowe site. Pointing to the NRC Staff's "no significant hazards consideration" finding on the LTP, which mentions fuel storage safety, and to an array of NRC rules on spent fuel, especially 10 C.F.R. § 72.218 and 10 C.F.R. § 50.54(bb), Petitioners argue in particular that the LTP approval process should address Yankee Atomic's plans for storing spent fuel and GTCC waste. Yankee Atomic, by contrast, insists that spent fuel management falls under a separate regulatory scheme (10 C.F.R. Part 72) entirely outside the LTP process.

Yankee Atomic goes further and contends (in effect) that the LTP creates no litigable issues at all, in view of Yankee Atomic's existing authority under an NRC-approved decommissioning plan to take all actions necessary to complete decommissioning. According to Yankee Atomic, "the LTP approval authorizes no activities . . . but merely establishes the site survey plan as definitive for demonstrating releasability."[6]

Our view of the LTP differs somewhat from both Yankee Atomic's and Petitioners'. We fully agree with Yankee Atomic, though, and disagree with Petitioners, on the spent fuel question. Nothing in our rules brings spent fuel management within the ambit of the LTP approval process. The scope of this proceeding is, of course, coextensive with the scope of the LTP itself. Notice of Consideration of Issuance of Amendment, *supra*, 63 Fed. Reg. at 4309 ("Contentions shall be limited to matters within the scope of the amendment under consideration").[7]

We find unpersuasive Petitioners' arguments for considering spent fuel storage questions in the context of LTP approval. Contrary to Petitioners' view, the requirement in 10 C.F.R. § 72.218(b) (that an application for termination of a Part 50 license include a description of how spent fuel stored under the general license will be removed from the reactor site) is unrelated to the requirement in section 50.82(a)(9) for submission of an LTP. Section 72.218(b) requires Yankee Atomic, at the time it files its license termination request, to submit a description of how spent fuel will be removed. By contrast, section 50.82(a)(9) specifically provides that the LTP may be filed in advance of the submission of the license termination request.

Likewise, CAN and NECNP err in concluding that the scope of this proceeding is determined by the Commission's regulation requiring the submission of a plan for management and removal of the spent fuel (10 C.F.R. § 50.54(bb)) — for that regulation nowhere mentions the LTP. Rather, the scope of the LTP application (and therefore the scope of this proceeding) is defined solely by the

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[6] Yankee Atomic's Brief in Response to CAN's Appeal Brief, dated July 10, 1998, at 3 n.4. *See also id.* at 6, 8; Yankee Atomic's Brief in Response to NECNP's Brief on Appeal, dated July 17, 1998, at 6, 11; Response of Yankee Atomic to Amendments to Petitions to Intervene, dated April 13, 1998, at 6.

[7] CAN and NECNP are mistaken in their belief that the proceeding's scope is defined instead by the scope of the NRC Staff's "No Significant Hazards Consideration" determination — for that determination is not at issue in this adjudication. 10 C.F.R. § 50.58(b)(6). ("No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.") *Accord Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), *rev'd and remanded on other grounds, San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986). *See also Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 34 n.1 (1994) (immediate effectiveness findings by the Staff are not subject to review by licensing boards), *aff'd on other grounds*, CLI-94-10, 40 NRC 43 (1994).

To the extent that CAN and NECNP may have intended to assert that the issues that were presented in the Notice of "No Significant Hazards Considerations" determination are also germane to the LTP license amendment, we deal with such issues elsewhere in this Order.

terms of 10 C.F.R. § 50.82(a)(10), as read in light of the filing requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A)-(G). Importantly, sections 50.82(a)(9) and (10) do *not* refer to spent fuel management. This omission in our decommissioning rule was intentional. *See* Final Decommissioning Rule, 61 Fed. Reg. at 39,292:

> The existing rule, as well as the proposed rule, consider the storage and maintenance of spent fuel as an operational consideration and provide separate Part 50 requirements for this purpose. Regarding maintaining the capability to handle fuel for dry cask storage, these requirements are maintained in 10 CFR Part 72.[8]

We thus conclude that, quite apart from the LTP, Yankee Atomic already possesses the necessary license authority for both continued use of the spent fuel pool pursuant to its existing Part 50 license and the movement of spent fuel from the pool to NRC-approved dry casks in an onsite ISFSI pursuant to 10 C.F.R. § 72.210, if and when Yankee Atomic decides that such movement should be made. (We also agree with Yankee Atomic that it has authority to move heavy loads over the spent fuel pool pursuant to Amendment 149 to its Part 50 POL — a conclusion Petitioners do not contest.) Yankee Atomic's existing licensing authority and the Commission's current regulatory structure thus combine to place the issue of spent fuel management beyond the scope of this proceeding. Given the heavy emphasis Petitioners have placed on spent fuel issues, this limitation severely circumscribes the issues germane to this proceeding.

Eliminating the spent fuel issue leaves the question whether the LTP results in any real-world consequences that conceivably could harm Petitioners and entitle them to a hearing. Yankee Atomic believes it does not. We disagree. Indeed, in 1996, when we promulgated the current version of our decommissioning rule, we considered the LTP a significant enough event that we required it to be treated as a license amendment, complete with a hearing opportunity. *See* Final Decommissioning Rule, 61 Fed. Reg. at 39,284, 39,286, 39,289. Acceptance of Yankee Atomic's apparent view that the LTP is a kind of hortatory document, without important effects, would defeat the carefully crafted process we established just 2 years ago.

Yankee Atomic stresses that it does not need our approval of its LTP at this stage in the decommissioning process in order to proceed with implementation

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[8] *See also id.* at 39,293 ("the NRC definition of decommissioning excludes interim storage of spent reactor fuel"). A further indication of our intent to exclude spent fuel management from consideration in any review of an LTP is found in the fact that the following language in the Final Decommissioning Rule's Statement of Consideration does *not* include a requirement that the Licensee submit any information on spent fuel management:

> The requirement for submittal of a termination plan is retained in the final rule because the NRC must make decisions, required in the current rule on the decommissioning plan, regarding (1) the licensee's plan for assuring that adequate funds will be available for final site release; (2) radiation release criteria for license termination; (3) adequacy of the final survey required to verify that these release criteria have been met. (*Id.* at 39,289.)

of all remaining activities set forth in the Decommissioning Plan. Consequently, according to Yankee Atomic, LTP approval in and of itself would have only the limited effect of determining that the proposed framework for site characterization, cleanup, and final survey will be adequate to demonstrate compliance with the regulations, the license conditions, and the previously approved Decommissioning Plan to the extent necessary to allow unrestricted release of the site. It may very well be (and it has been Yankee Atomic's repeated representation in this instance, *see* note 6, *supra*) that the LTP is not proposing any authorizations for future activities that would require amendments to either the license conditions or the previously approved Decommissioning Plan. For purposes of this decision, we accept Yankee Atomic's characterization on this issue and therefore rule that any Commission approval of this LTP will not and cannot be construed to approve actions by Yankee Atomic beyond those already authorized. To this extent, Yankee Atomic is correct in its conclusion that the effects of an LTP approval are minimal.

However, Yankee Atomic's logic fails in next suggesting that these minimal *current* effects render a hearing on the LTP superfluous. The LTP has at least one important *future* consequence which Yankee Atomic itself acknowledges and which must be litigated now or never. The NRC's approval of the LTP would entitle Yankee Atomic to proceed with its final decommissioning activities secure in the knowledge that, absent extraordinary circumstances, the NRC would not later (at the license termination stage) second-guess Yankee Atomic's site survey methodology. Indeed, the regulation governing license termination — 10 C.F.R. § 50.82(a)(11) — does not provide for consideration of this methodology's adequacy at the termination stage.[9] Thus, the LTP approval's effects would, in a sense, lie dormant until Yankee Atomic sought to terminate its license — an action it has not yet taken. At that future time, however, its effects would become critically important because the LTP's prior approval would greatly restrict the scope of this agency's review of the request to terminate Yankee Atomic's license and would likewise preclude Petitioners from challenging *any* part of the survey methodology.[10] The LTP stage, in other words, is Petitioners' one and only chance to litigate whether the survey methodology is adequate

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[9] Section 50.82(a)(11) provides only that:

> The Commission shall terminate the license if it determines that —
>
> (i) The remaining dismantlement has been performed in accordance with the approved license termination plan, and
>
> (ii) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release in accordance with the criteria for decommissioning in 10 CFR part 20, subpart E.

[10] *See* Final Rule on Decommissioning, 61 Fed. Reg. at 39,289. Although the relevant regulatory history of the Decommissioning Rule does not directly address the scope-of-proceeding issue we are now considering, the following statements in that history point the way to the interpretation the Commission is now spelling out.

(Continued)

to demonstrate that the site has been brought to a condition suitable for license termination. They are precluded from doing so at the license termination stage.[11]

In short, the time to obtain a hearing on license termination decisions comes at the LTP stage, as our rules unambiguously provide. Having decided what matters are germane (the matters listed in 10 C.F.R. § 50.82(a)(9) and (10)) and not germane (spent fuel storage) to the LTP proceeding, we now turn to the "injury in fact," causality, and redressability aspects of standing.

2. NECNP's Standing

NECNP claims "injury in fact," and hence standing to intervene, based on Mr. van Itallie's concerns about the effect of an "ineffectual cleanup" upon his own health, safety, and property. NECNP argues that Mr. van Itallie is a local resident who lives, walks, and hikes in the immediate vicinity of the reactor site and that he would therefore be personally at risk of injury if the site were not adequately cleaned up prior to its unrestricted release. According to NECNP, Mr. van Itallie is concerned "whether the LTP's provisions for site surveys, identification of remaining decommissioning tasks, and decommissioning funding are adequate to provide reasonable assurance that the LTP site release criteria will, in fact, be satisfied." NECNP's Reply Brief on Appeal of LBP-98-12, dated Aug. 5, 1998,

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The Statement of Consideration for the Final Decommissioning Rule declares that one of the Rule's general overall purposes is the enhanced efficiency of the process by which a licensee terminates its license. *See id.* at 39,296. ("The final rule clarifies current decommissioning requirements for nuclear power reactors in 10 CFR Part 50 and presents a more efficient, uniform, and understandable process.") The Commission intended that the preimplementation review of the LTP would enhance the efficiency of the final decommissioning stages by enabling licensees, absent extraordinary circumstances, to avoid retracing their decommissioning steps as a result of a detailed NRC post-implementation review. *See* Proposed Rule, "Decommissioning of Nuclear Power Reactors," 60 Fed. Reg. 37,374, 37,375 (July 20, 1995):

> Once the licensee had completed implementation of the termination plan and the Commission had verified that the licensee had satisfactorily implemented the termination plan then, as in the existing rule, the Commission would terminate the license.

and *id.* at 37,377,

> [T]he licensee would then execute the plan and, after this was accomplished and verified by the NRC, the Commission would terminate the license.

[11] We observe that this latter limitation is highlighted by the fact that our regulations nowhere expressly require a licensee to file a license amendment application in order to seek termination of its Part 50 license and therefore do not provide hearing rights with regard to such a request for termination. *Compare* the Statement of Consideration for the Final Decommissioning Rule, which makes clear that a Part 50 license cannot be terminated prior to the completion of a hearing on the *license termination plan*. 61 Fed. Reg. at 39,286, 39,289. *See also* Statement of Consideration for Proposed Decommissioning Rule, 60 Fed. Reg. at 37,375. *Cf.* 10 C.F.R. § 72.218(b) (referring to "[a]n application for termination of the reactor operating license submitted under § 50.82 " rather than to a license amendment application). Notably, the Commission considered and rejected the option of requiring licensees to file license amendment applications in order to terminate their licenses. *See* Draft Proposed Rule, "Decommissioning of Nuclear Power Reactors," at 50 (proposed revision to 10 C.F.R. § 50.82(b), which the Commission later rejected), *attached as Enclosure 2 to* SECY-94-179, "Notice of Proposed Rulemaking on Decommissioning of Nuclear Power Reactors" (July 7, 1994); Draft Proposed Rule ("Option 2"), "Decommissioning of Nuclear Power Reactors," at 11 (alternative proposed revision to 10 C.F.R. § 50.82(b), which the Commission also rejected), *attached as Enclosure 5 to* SECY-94-179, *supra*. The Commission takes official notice of these last two documents, both of which were released to the public on July 14, 1994.

at 2-3 n.2.[12] He also says that contamination at the reactor site "interferes with [his] enjoyment of the local scenic beauty." Declaration of Jean-Claude van Itallie at 2. According to NECNP, all these claims of injury are directly related to the purpose of the amendment — which is to establish criteria and monitoring sufficient to restore the site to the "green fields" condition of unrestricted use.

We agree with NECNP that Mr. van Itallie's claims of "injury in fact" suffice for standing to intervene in this case. To be sure, some of his allegations of injury relate solely to spent fuel storage — a subject, as we explained earlier in this opinion, not germane to LTP approval. But he makes several other allegations of injury not tied to spent fuel, including his core claim that "ineffectual cleanup" of the reactor site under the LTP may result in adverse health effects, loss of aesthetic enjoyment, and diminished property values for those who live, work, or play in the immediate vicinity. Numerous judicial decisions recognize allegations closely similar to these as sufficient "injury in fact" for standing in environmental cases. *See, e.g., Dubois v. USDA*, 102 F.3d 1273, 1282 (1st Cir. 1996); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 555-57 (5th Cir. 1996); *Kelley v. Selin*, 42 F.3d at 1509. *See generally Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc) (collecting cases).

Our agency, too, has regularly admitted into our proceedings petitioners who show a close connection to the site, either as neighbors or regular visitors, and a realistic possibility that the NRC licensing action could injure them. *See, e.g., Private Fuel Storage*, CLI-98-13, 48 NRC at 31-32. Indeed, in our two most recent decommissioning decisions, one involving Yankee Rowe itself, we concluded that nearby citizens could challenge the efficacy of the facility's decommissioning activities. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996); *Sequoyah Fuels Corp.* (Gore, Oklahoma, Site), CLI-94-12, 40 NRC 64, 71-75 (1994).

We see no reason to reach a different result here. It seems obvious to us that an ill-considered LTP — for example, one with inadequate provisions for radiation monitoring — plausibly could result in injury to NECNP members, like Mr. van Itallie, who live near Yankee Rowe and reasonably might be expected to come into contact with the site. The NRC Staff opposes NECNP's standing on the ground that Mr. van Itallie has failed to show any legal entitlement to enter the Yankee Rowe site after the license is terminated. Therefore, the argument goes, his claims of injury are too speculative, as he himself may never suffer harm if the LTP proves inadequate. We find this an overly legalistic view. The purpose of the LTP process is to ensure that the property will be left in such a condition that nearby residents like Mr. van Itallie can frequent the area without endangering their health and safety. To insist that potential intervenors show

[12] NECNP's motion for leave to file this brief is granted.

more — that they demonstrate with certainty that they will be allowed onto the site once the license is terminated — would go beyond what is necessary to show injury-in-fact in license termination cases. In the context of the Yankee Atomic LTP, which proposes unrestricted release, requests for hearings would founder on the requirement to show a future legal entitlement to enter the property, a showing no one realistically can be expected to make at the LTP stage. We cannot accept that result, as it would undercut our deliberate decision in 1996 to provide for an opportunity for a hearing on approval of LTPs.

We similarly reject Yankee Atomic's argument that LTP approval will result in no offsite consequences. Yankee Atomic's position is largely a red herring in the LTP context. Even in the absence of a showing of injury away from the reactor site, it is enough for standing in LTP proceedings to allege, as NECNP does, that an improvident approval of an insufficient LTP today could result in future real impacts to people traversing the current onsite land. After license termination (whether with restricted release or, as in this proceeding, unrestricted release), that land presumptively will be sufficiently accessible to the public to allow a colorable claim of a realistic threat of injury sufficient to establish standing.

There can be no real question that NECNP's claims of injury flow directly from the LTP. NECNP alleges, for example, that Yankee Atomic's proposed surface contamination patterns "allow grossly contaminated patches and hot-spots to be overlooked" (NECNP Appeal Brief at 20, quoting NECNP's Amended Petition at 36) and that the LTP failed to address "significant environmental information . . . , such as the changes in site characteristics, including paving and compaction of soil, which are likely to affect the flow of contaminated groundwater" (NECNP Appeal Brief at 20, citing Amended Petition for Intervention at 26-28). The first of these is relevant to the adequacy of both the site remediation plan and the final radiation survey (10 C.F.R. § 50.82(a)(9)(ii)(C), (D)) and the second is relevant to the presence of "new information or significant environmental change associated with the licensee's proposed termination activities" (10 C.F.R. § 50.82(a)(9)(ii)(G)). Consequently, these two grounds for concern fall within the scope of this proceeding. Moreover, these grounds are sufficiently detailed to support Mr. van Itallie's claims of threatened injury and provide sufficient support for the existence of a "realistic threat" of injury. Although we recognize that Mr. van Itallie's grounds are subject to dispute on their merits, we do not require him (or NECNP) to demonstrate the "certainty" of his position's correctness at this early a stage of the proceeding. *Sequoyah Fuels*, CLI-94-12, 40 NRC at 74. ("Although NACE has not established the existence of these flow patterns with certainty, such certainty is not required at this threshold stage" (footnote omitted).)

We also conclude that the threatened injuries discussed above are "fairly traceable" to the licensing action at issue here, i.e., the approval of the LTP. If

the LTP were approved despite a failure to satisfy the requirements of 10 C.F.R. § 50.82(a)(9)(ii), then the subsequent implementation of the LTP and termination of the POL could result in the inappropriate release of a site that still poses a threat to public health and safety — the very injury Mr. van Itallie claims. We further conclude (to state the obvious) that Mr. van Itallie's asserted injury is susceptible of redress by a decision in Mr. van Itallie's and NECNP's favor, viz., a denial of Yankee Atomic's request for Commission approval of the LTP or a Commission-mandated change to the LTP. Such a decision would necessarily conclude that the LTP did not comply with 10 C.F.R. § 50.82(a)(9)(ii) and/or (10), and would require Yankee Atomic to redraft the LTP in a way that would satisfy the requirements of those regulations — the very result that Mr. van Itallie and NECNP seek here.[13]

Because of the conclusions set forth above regarding NECNP's standing, we do not need to address Mr. van Itallie's or NECNP's remaining allegations of injury. However, NECNP should not interpret our grant of standing to mean we have also concluded that its allegations of injury are sufficiently supported to pass muster at the "contention" stage of this proceeding. That is an issue on which the Board has yet to rule and on which we offer no opinion.

3. CAN's Standing

The declaration of Ms. Katz, who is represented by CAN in this proceeding, is in most significant respects the same as that of Mr. van Itallie. As we did with NECNP, we conclude CAN has alleged enough potential harm from an ineffectual cleanup that it has standing to intervene.

Although this resolves the issue of CAN's standing, we comment briefly, in the form of guidance to the Board, on two of CAN's arguments. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, *passim* (1998) (discussing the Commission's inherent supervisory authority over our adjudications). We address these arguments now because they may well resurface at the contention stage of this proceeding.

As one ground for its concerns, CAN challenges the Board's ruling that ALARA issues are not germane to this LTP proceeding. We agree with CAN that ALARA theoretically *could* apply to the instant proceeding. As we clearly stated in CLI-96-7 (in the Yankee Rowe decommissioning proceeding), section 50.82 "expressly requires decommissioning 'to be performed in accordance with

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[13] Yankee Atomic asserts that NECNP's (and CAN's) claims of standing are deficient because they are not supported by an expert affidavit. Our regulations admittedly require that the petition "set forth *with particularity* . . . the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2) (emphasis added). But no regulation and no Commission decision requires submission of expert affidavits in order to demonstrate standing. Only when technical fact disputes arise at the standing stage are such affidavits necessary. *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-75.

the regulations in this chapter' [and that t]hese regulations include, of course, the ALARA rule in 10 C.F.R. Part 20." 43 NRC at 250-51 (footnote omitted), quoting 10 C.F.R. § 50.82(e) (superseded by 10 C.F.R. § 50.82(a)(10) which contains the same language). However, CAN appears to raise this ALARA issue only in conjunction with its argument that Yankee Atomic's calculations sidestep the fact that, upon release, the site would have an excessive radioactivity rate of 43-87 millirem/year above background radiation levels. We agree with the Board that CAN, in reaching this conclusion, inappropriately used worst-case-scenario assumptions.[14] Therefore, although ALARA could be germane to a decommissioning proceeding, CAN has not yet shown that its particular ALARA concerns are in fact germane to the instant case.[15]

CAN also contends that the Board failed to address its concerns regarding site release criteria, and insists that the Commission require Yankee Atomic to adhere to a 15-millirem criterion to which Yankee Atomic had agreed, rather than the 25-millirem criterion subsequently adopted by the Commission in its 1997 license termination rule. This is a nonissue. Yankee has already agreed in its LTP to meet the 15-millirem criterion. Consequently, without some new showing by CAN, there is simply no controversy for the Board (and the Commission) to resolve.

4. Relief Requested by CAN and NECNP

Although our discussion above resolves the issues of whether NECNP and CAN have standing, we take this opportunity to deny two of the requests for relief that NECNP and CAN lodged with us on appeal. Our rulings on these matters will further limit the scope of the remaining proceeding.

CAN and NECNP first express concern that the Board's ruling in LBP-98-12 would forever deprive them of any opportunity for a hearing on spent fuel storage issues. The source of these Petitioners' concern is the Board's rejection, as irrelevant, of all concerns regarding hazards posed by spent fuel

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[14] *See* LBP-98-12, 47 NRC at 352. 10 C.F.R. § 20.1402 provides that:

> A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a [total effective dose equivalent] to an *average member of the critical group* that does not exceed 25 mrem . . . per year. [Emphasis added.]

10 C.F.R. § 20.1003 defines "critical group" as "the group of individuals *reasonably* expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances" (emphasis added). Section 20.1402 (the Commission's recent rule on site release criteria) prescribes the pertinent standards for termination of the Yankee Rowe reactor license, and is not subject to challenge or litigation in an adjudication. *See generally* 10 C.F.R. § 2.758.

[15] Morever, it may not always be necessary to make a separate showing of compliance with ALARA. For example, the Generic Environmental Impact Statement for the license termination rule finds that, for soil, doses that meet the 25 millirem per year dose limit are ALARA. *See* NUREG-1496, Vol. 1, § 6.2 and Table 6.1 (discussing, *inter alia*, costs of cleaning up soil to 25 millirem or below at a reference power reactor). In these cases, additional demonstration of compliance with ALARA may not be necessary.

storage in dry casks on the ground that they are "activities previously licensed and considered in the Licensee's decommissioning plan and approved therein." *See, e.g.*, NECNP Appeal Brief at 22-23, quoting LBP-98-12, slip op. at 7 [47 NRC at 347]. NECNP (which provided the more thorough discussion of this point) points out that an earlier Board had dismissed as premature these same concerns when NECNP tried to raise them in the 1995-1996 proceeding on Yankee Rowe's Decommissioning Plan. The earlier Board had explained that the dry cask issues were not ripe because Yankee Atomic had yet to decide whether to build a dry cask storage facility. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 79 (1996). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257 & n.16 (1996). NECNP also notes that Yankee Atomic has yet to seek licensing authority for such a facility and that, consequently, NECNP has not had an opportunity for a hearing on that subject.

According to NECNP, LBP-98-12 is completely inconsistent with the earlier Board's decision in LBP-96-12 and in effect transforms the cask storage matters from prospective issues into issues previously decided, thereby depriving NECNP of any opportunity for a hearing on issues related to cask storage. NECNP believes that nothing has occurred sufficient to alter the accuracy of the decommissioning Board's 1996 statement, *supra*. To correct this problem, NECNP asks the Commission to rule that Yankee Atomic is not entitled to proceed with dry cask storage absent licensing of an ISFSI under Part 72 of our regulations, with safety and environmental reviews and an opportunity for a public hearing.

This request for relief reflects Petitioners' confusion regarding the two different kinds of ISFSI licenses. Under 10 C.F.R. §§ 72.210 *et seq.*, Yankee Atomic is entitled to a general license to operate an ISFSI as long as it retains its Part 50 license and as long as it stores spent fuel in a cask approved by rulemaking for listing in 10 C.F.R. § 72.214. However, once the Commission terminates Yankee Atomic's Part 50 license, Yankee Atomic's authority under the general license (should it employ one) would automatically and simultaneously end, because the general ISFSI license draws its existence solely from the Part 50 license. Thus, if Yankee Atomic wishes to operate an ISFSI to hold the spent fuel for the period of time following the termination of the Part 50 license, it must *first* obtain a site-specific ISFSI license under section 72.40 of our regulations — a process that requires safety and environmental reviews and provides the public an opportunity to seek a hearing on the underlying license application. However, it is not at all clear that Yankee Atomic will ever seek the latter kind of ISFSI license (since it is possible that Yankee Atomic will transfer the fuel from the site prior to termination of the Part 50 license). For now, Yankee Atomic would be entitled under its current license and under Part 72 of our regulations to proceed with onsite dry cask storage in Commission-approved dry casks. Petitioners,

of course, are entitled to participate in rulemakings in which the Commission considers whether to approve particular types of dry casks.

NECNP and CAN also seek a second form of relief. They challenge the Board's denial of their requests that the Commission correct certain alleged errors associated with the notice and conduct of the NRC Staff's January 13, 1998 public meeting. Petitioners raise a panoply of grievances concerning that meeting. The Board correctly declined to address this set of issues. Adjudications are not the appropriate forum for resolving complaints about NRC Staff conduct. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995) ("in adjudications, the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns"). However, the Commission will treat Petitioners' complaints as if they were directed to the Commission outside the adjudicatory context. We have instructed the NRC Staff to provide us with a written response to Petitioners' complaints. After reviewing the Staff's response, we will respond directly to Petitioners by letter.

VIII. CONCLUSION AND ORDER

For the foregoing reasons, we affirm in part and reverse in part LBP-98-12, and dismiss FRPB's appeal. FRPB is denied standing in this proceeding. CAN and NECNP are granted standing in this proceeding. However, to gain a hearing, CAN and NECNP must still present at least one germane contention that satisfies the admissibility requirements of 10 C.F.R. § 2.714. Moreover, if the Board does grant CAN and NECNP a hearing, the scope of the proceeding will be far more restricted than they have requested. It will consider neither (1) Staff's "No Significant Hazards Consideration" determination nor issues pertaining to (2) the conduct of the January 13, 1998 public meeting, (3) spent fuel (including storage, management, and removal), (4) any future application by Yankee Atomic to terminate its Part 50 license, (5) the general ISFSI license currently available to Yankee Atomic pursuant to 10 C.F.R. § 72.210, nor (6) any possible future application by Yankee Atomic for a site-specific license to establish and operate an ISFSI pursuant to 10 C.F.R. § 72.40.

This case is remanded to the Licensing Board for further proceedings consistent with this Memorandum and Order.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of October 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 40-8968-ML**

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120) **October 23, 1998**

The Commission denies Eastern Navajo Diné Against Uranium Mining and the Southwest Research and Information Center's joint petition for interlocutory review of the Presiding Officer's September 22, 1998, scheduling order that, among other things, split the proceeding into phases.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The Commission does not readily entertain petitions for review of interlocutory rulings by presiding officers or licensing boards, particularly on scheduling or other "housekeeping" matters, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g)(1) and (2); *see Oncology Services Corp.*, CLI-93-13, 37 NRC 419 (1993).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The Commission also stands ready, as we recently have emphasized, to use its supervisory authority to step into ongoing adjudications when necessary to clarify its view on substantive or procedural questions. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998);

cf. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132 (1998) (adjusting filing deadlines).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

It would be unproductive and premature for the Commission to consider whether litigation on some questions can be suspended indefinitely when the Presiding Officer himself has not yet decided to do so and in a situation where additional developments may shed more light on the question. *Compare Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995) (interlocutory Commission review denied on issue that the Atomic Safety and Licensing Board would possibly have to revisit in light of new federal legislation).

MEMORANDUM AND ORDER

In this Subpart L proceeding, several Intervenors challenge Hydro Resources, Inc.'s, license to conduct an *in situ* leach mining project in McKinley County, New Mexico. The license authorizes mining on four separate properties. On September 22, 1998, the Presiding Officer issued a scheduling order that, among other things, "bifurcated" the proceeding — i.e., split it into phases whereby the Presiding Officer would first consider and decide issues pertinent to the only one of the properties (the so-called "Church Rock Section 8" property) where mining activity may begin soon, and reserve until later issues pertinent solely to the remaining three properties. More recently, on October 13, the Presiding Officer issued a second order on bifurcation, where he declined to certify the question for immediate interlocutory review by the Commission.

In the meantime, however, two Intervenors, the Eastern Navajo Diné Against Uranium Mining and the Southwest Research and Information Center, already had petitioned the Commission for interlocutory review of the Presiding Officer's September 22 ruling to bifurcate the proceeding and had sought a stay of all proceedings pending Commission action on the petition for review. The Intervenors also have filed a motion to expedite a Commission ruling on whether to grant interlocutory review. We have decided to act promptly on the petition for review and hereby deny it as premature. We deny the stay motion as moot.

The Commission does not readily entertain petitions for review of interlocutory rulings by presiding officers or licensing boards, particularly on scheduling or other "housekeeping" matters, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a

pervasive or unusual manner." 10 C.F.R. § 2.786(g)(1) and (2); *see Oncology Services Corp.*, CLI-93-13, 37 NRC 419 (1993). The Commission also stands ready, as we recently have emphasized, to use its supervisory authority to step into ongoing adjudications when necessary to clarify its view on substantive or procedural questions. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998); *cf. Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132 (1998) (adjusting filing deadlines).

Here, Intervenors argue that the Presiding Officer's bifurcation will result inevitably in an unlawful "suspension" or "segmentation" of issues vital to the proper resolution of claims under the National Environmental Policy Act and the Atomic Energy Act. We believe that it would be premature to rule on the "suspension" or "segmentation" questions now. The Presiding Officer has not definitively decided whether to "suspend" consideration of certain issues. As we understand the Presiding Officer's ruling, "bifurcation" means only that the Presiding Officer will devote his (and the parties') efforts first to issues relevant to the initial phase of the Hydro project, and will leave until later issues that relate solely to the project's remaining phases. As his most recent order on the bifurcation question explicitly states:

> No decision has yet been made concerning possible delay in determining any of the issues in this case. At the end of this phase of litigation, [the Presiding Officer] will then determine whether to proceed immediately with the remainder of the case or wait until there is greater confidence that HRI [Hydro] will [proceed with the other phases]. . . ."

Presiding Officer Memorandum and Order (Reconsideration of the Schedule for the Proceeding) at 4 (Oct. 13, 1998).

The Presiding Officer's decision to concentrate on deciding the most time-critical issues at the outset should conserve resources and expedite decisions, and thus is consistent with our guidance calling on presiding officers "to establish schedules for promptly deciding the issues before them, with due regard for the complexity of contested issues and the interests of the parties." *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 20. Our most recent decision in this very proceeding stressed our interest in fair, but speedy, decisionmaking. *See* CLI-98-16, 48 NRC 119, 120 (1998).[1]

The Intervenors' concern that the Presiding Officer's bifurcation order will leave some vital issues unaddressed need not be resolved now. The nature of undecided questions will be clearer, and the Presiding Officer (and ultimately the Commission itself) will be better positioned to assess whether additional issues

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[1] The Commission has also issued two other decisions in this proceeding, CLI-98-8, 47 NRC 314 (1998), and CLI-98-4, 47 NRC 111 (1998).

require immediate adjudication, after the parties submit their initial presentations and the Presiding Officer issues his initial decisions. It would be unproductive and premature for the Commission to consider now whether litigation on some questions can be suspended indefinitely given that the Presiding Officer himself has not yet decided to do so and in a situation where additional developments may shed more light on the question. *Compare Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995) (interlocutory Commission review denied on issue that the Atomic Safety and Licensing Board would possibly have to revisit in light of new federal legislation).[2]

Similarly, we are not persuaded to take interlocutory review based on the Intervenors' vague argument that they are harmed because the September and October Presiding Officer orders have not clearly defined the issues that are ripe for litigation in the first phase. The Presiding Officer has defined a category of issues that will fall into the first phase of litigation, i.e., all issues pertinent solely to Church Rock Section 8, and issues clearly relevant jointly to Section 8 and the other sites. This is enough of an outline to proceed with the first phase. To avoid expense and delay, if the Intervenors have specific questions about the ripeness of a certain issue, they should address those questions to the Presiding Officer. We expect the Presiding Officer to continue to manage the case with an eye toward a prompt resolution of all outstanding issues.

In conclusion, we have considered the petition for review on an expedited basis and have decided to deny it. Specifically, we decline review of the Presiding Officer's bifurcation approach, as reflected in his September 22 and October 13 orders, and deny as moot the motion to stay proceedings pending appellate review.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of October 1998.

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[2]Recently, the Commission issued a *sua sponte* order granting interlocutory review on an Atomic Energy Act "segmentation" issue that was potentially dispositive of a major portion of the case and that we characterized as "novel." *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998). Here, by contrast, the Intervenors' "segmentation" issue is not potentially dispositive and, with the case in its current posture, principally concerns questions of timing, i.e., when particular claims are ripe for presentation and decision.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

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**Permanent panel members*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket Nos. 50-295-LA-2
50-304-LA-2
(ASLBP No. 98-750-06-LA)

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

October 5, 1998

In this proceeding in which the Joint Intervenors seek to intervene in connection with the NRC Staff's no significant hazards consideration determination regarding the license amendment application of Commonwealth Edison Company for its Zion Nuclear Power Station, the Licensing Board concludes that 10 C.F.R. § 50.58(b)(6) precludes any challenges to the Staff's finding and dismisses the intervention petition.

RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS)

Section 50.58(b)(6) of 10 C.F.R. stands as a bar to the Joint Petitioners' intervention petition seeking to challenge the Staff's final no significant hazards consideration determination.

RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS)

The Licensing Board has no jurisdiction to consider an intervention petition seeking to challenge a Staff's final no significant hazards consideration determination. Only the Commission has the discretion upon its own motion to review such a final finding.

MEMORANDUM AND ORDER
(Dismissing Intervention Petition)

On August 18, 1998, Mr. Edwin D. Dienethal, Mr. Randy Robarge, and the Committee for Safety at Plant Zion ("Joint Petitioners") filed a petition to intervene in connection with the July 24, 1998 no significant hazards consideration finding made by the NRC Staff regarding the license amendment application of Commonwealth Edison Company ("Applicant") for its Zion Nuclear Power Station, Units 1 and 2. This Licensing Board was established on September 1, 1998, to preside over the proceeding initiated by the intervention petition.

On September 2, 1998, the Licensing Board directed the Joint Petitioners to show cause by September 11, 1998, why their petition should not be dismissed as precluded by 10 C.F.R. § 50.58(b)(6). That regulation specifically prohibits any hearing on, or review of, the Staff's no significant hazards determination, except upon the Commission's own initiative. The Applicant and the Staff were ordered to file responses to the Joint Petitioners' filing by September 21, 1991. For the reasons set forth below, the Joint Petitioners' intervention request is dismissed.

I. BACKGROUND

The Applicant filed a license amendment application on March 30, 1998, to make certain changes to the operating licenses for the two Zion plants in order to facilitate plant activities following defueling and the permanent shutdown of the facility. Thereafter, on May 6, 1998, the NRC published a notice of opportunity of hearing for the license amendment application. *See* 63 Fed. Reg. 25,101 (1998). That notice was part of the Commission's regular biweekly listing of applications and amendments to facility operating licenses involving no significant hazards considerations, in this instance for the period of April 10 to April 24, 1998. It indicated that the Commission, inter alia, had made a proposed determination that the Commonwealth Edison Company's amendment request involved no significant hazards consideration. *Id.* at 25,105-06. The notice also invited the filing of public comments within 30 days on

the proposed no significant hazards consideration determination and stated that such comments "will be considered in making any final determination." *Id.* at 25,101. Next, it explained that the Commission normally does not issue a license amendment until the expiration of the 30-day comment period on the proposed no significant hazards consideration determination but that the Commission retained the authority to do so if circumstances warranted such action. *Id.* at 25,101-02. Finally, the May 6, 1998 notice stated that any person whose interest may be affected by the license amendment and who wished to participate in the proceeding on the amendment application must file a written request for a hearing and a petition to intervene by June 5, 1998. *Id.* at 25,102.

In response to the May 6, 1998 notice of opportunity for hearing, one of the three Joint Petitioners in the instant proceeding, Edwin D. Dienethal, filed a timely petition to intervene seeking to challenge the Applicant's license amendment request. A Licensing Board was established on June 11, 1998, to rule upon the Dienethal petition and preside over that proceeding. Thereafter, in a communication served upon all participants in that pending proceeding as part of Board Notification 98-01 (Aug. 4, 1998), the Staff informed the Commission of its intent to make a final no significant hazards consideration determination and to issue the license amendments for the Zion facility. On August 12, 1998, the Commission published notice of the issuance of the Zion license amendments. *See* 63 Fed. Reg. 43,200, 43,217 (1998). That notice was part of another NRC biweekly notice of applications and amendments to facility operating licenses involving no significant hazards considerations. In a section of the notice set out in bold typeface and entitled "Notice of Issuance of Amendments to Facility Operating Licenses," the notice set forth the name of the utility applicant, the date of the amendment application, a description of the amendments, the July 24, 1998 date the amendments were issued, and the May 6, 1998 date and citation of the initial *Federal Register* notice. Further, the notice indicated that the NRC had received no comments on the Staff's proposed no significant hazards consideration determination. *Id.* at 45,216-17.

In the August 18, 1998 petition now before us seeking to intervene in the matter of the Commission's final no significant hazards consideration determination, the Joint Petitioners claim that the Commission's August 12, 1998 *Federal Register* notice announcing the issuance of the license amendments for the Zion facility provided an opportunity for persons interested in the finding to file an intervention petition by September 11, 1998. Additionally, in responding to the Licensing Board's order directing them to show cause why their petition should not be dismissed as precluded by 10 C.F.R. § 50.58(b)(6), the Joint Petitioners argue that section 50.58(b)(6) is not controlling here because that regulation only precludes review of NRC Staff no significant hazards consideration determinations, not those determinations made by the Commission. The Joint Petitioners assert that 10 C.F.R. § 2.105(a)(4)(i) provides an exception to

section 50.58(b)(6) and that provision applies in those situations when, as here, the Commission makes the no significant hazards consideration determination with respect to the amendment of a Class 104 license issued under 10 C.F.R. § 50.21(b). The Joint Petitioners argue, therefore, that they have a right to a hearing on the no significant hazards consideration determination noticed in the August 12, 1998 *Federal Register*.

In their responses, the Applicant and the Staff both argue that the Joint Petitioners have misapprehended the Commission's August 12, 1998 *Federal Register* notice and that that notice did not provide any opportunity for a hearing on the Staff's final no significant hazards consideration determination. Similarly, they both assert that 10 C.F.R. § 50.58(b)(6) expressly prohibits petitions to intervene in no significant hazards consideration determinations and that the Joint Petitioners characterization of section 50.58(b)(6) and 10 C.F.R. § 2.105(a)(4)(i) is simply wrong.

II. ANALYSIS

The Applicant and the Staff are correct that 10 C.F.R. § 50.58(b)(6) stands as a bar to the Joint Petitioners' intervention petition seeking to challenge the Staff's final no significant hazards consideration determination. That regulation provides:

> No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.

10 C.F.R. § 50.58(b)(6). This regulatory prohibition is clear and unequivocal. The Licensing Board has no jurisdiction to consider an intervention petition seeking to challenge a Staff's final no significant hazards consideration determination. Only the Commission has the discretion upon its own motion to review such a final finding. *See* 51 Fed. Reg. 7744, 7759 (1986) (statement of consideration on final rule) ("To buttress this point, the Commission has modified § 50.58(b)(6) to state that only it on its own initiative may review the staff's final no significant hazards consideration determination.")

As the Licensing Board in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 183 (1991), stated:

> A determination of no significant hazards consideration is not a substantive determination of public health and safety issues for the hearing on the proposed amendment. The only effect of such a determination on the hearing is to establish whether the amendment may be approved before a hearing is held or, if there is a finding of significant hazards consideration, a final decision must await the conclusion of the hearing.

> Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards consideration determination. 10 C.F.R. § 50.58(b)(6).

Accord Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990). Because section 50.58(b)(6) deprives the Licensing Board of jurisdiction to entertain the Joint Petitioners' intervention petition seeking to challenge the Staff's final no significant hazards consideration determination, the petition must dismissed.

The Joint Petitioners' assertion that the Commission's notice in the August 12, 1998 *Federal Register* invited the filing of intervention petitions on the Staff's no significant hazards consideration determination and provided an opportunity for hearing on that finding is simply incorrect. No reasonable reading of the entire notice leads to that conclusion. Indeed, even a casual and cursory reading of the notice does not lead to that conclusion. The August 12, 1998 notice did nothing more than announce the issuance of the license amendments for Commonwealth Edison Company's Zion plants. The notice did not provide a new opportunity for hearing on the Zion license amendments or invite new public comments on the Staff's no significant hazards consideration determination. The Commission's earlier May 6, 1998 *Federal Register* notice, 63 Fed. Reg. 25,101 (1998), did both those things. And, contrary to the Joint Petitioners' unfounded and erroneous assertion, the August 12, 1998 notice did not invite the filing of intervention petitions on the Staff's final no significant hazards consideration determination or provide an opportunity for hearing on that finding. The Joint Petitioners' argument in this regard is totally without merit.

Equally without merit is the Joint Petitioners' argument that 10 C.F.R. § 2.105(a)(4)(i) provides an exception to the prohibition contained in section 50.58(b)(6) for those no significant hazards consideration determinations made by the Commission itself for amendments to Class 104 licenses issued under 10 C.F.R. § 50.21(b). Contrary to the Joint Petitioners claim, section 2.105(a)(4)(i) provides no exception to the prohibition in section 50.58(b)(6) against challenges to the NRC's final no significant hazards consideration determination. The former section contains the notice provisions that parallel the Commission's regulations found in 10 C.F.R. §§ 50.91 and 50.92 for issuing immediately effective license amendments. That provision states:

> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the *Federal Register* a notice of proposed action with respect to an application for:
>
> . . . .
>
> (4) An amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 of this chapter or for a testing facility, as follows:

> (i) If the Commission determines under § 50.58 of this chapter that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafter[.]

10 C.F.R. § 2.105(a)(4)(i).

This provision merely describes the manner in which the Commission provides public notice of its proposed action on a license amendment application and the opportunity to petition for a hearing on the amendments. By its terms, section 2.105(a)(4)(i) creates no independent right to a hearing on the Staff's no significant hazards consideration determination. Nor is there any significance to the Joint Petitioners' reliance upon the fact that the underlying licenses at issue are Class 104 licenses. Under 10 C.F.R. § 2.105, the notice requirements for amendments to Class 104 licenses issued under 10 C.F.R. § 50.51(b) are the same as the notice requirements for amendments to Class 103 licenses — the other class of Commission licenses — issued under 10 C.F.R. § 50.22. Similarly, in the circumstances presented, the Joint Petitioners' asserted distinction between those actions taken by the Commission and actions taken by the Staff is meaningless because the Staff, pursuant to a delegation of authority, is acting for the Commission in making the proposed and final no significant hazards consideration determination.

III. CONCLUSION

The Commission's regulations, 10 C.F.R. § 50.58(b)(6), prohibit the Licensing Board from entertaining the Joint Petitioners' intervention petition seeking to challenge the Staff's July 24, 1998 final no significant hazards consideration determination. Accordingly, the petition is dismissed and the proceeding is terminated.

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

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 5, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges.

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. IA 97-070
(ASLBP No. 98-734-01-EA)
(Order Superseding Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately))

MAGDY ELAMIR, M.D.
(Newark, New Jersey)

October 8, 1998

In an enforcement proceeding, the Atomic Safety and Licensing Board approves a settlement agreement between the parties and terminates the proceeding.

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

On September 15, 1997, the Staff of the Nuclear Regulatory Commission (Staff) issued to Dr. Magdy Elamir an "Order Superseding Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately)" (Staff's Order). 62 Fed. Reg. 49,536 (Sept. 22, 1998). The Staff's Order, *inter alia*, would have prohibited Dr. Elamir's involvement in NRC-licensed activities for a period

of 5 years from July 31, 1997.[1] On October 4, 1997, Dr. Elamir answered the Staff's Order, denying the alleged violations and requesting a hearing.

This Atomic Safety and Licensing Board was established to preside over this proceeding. 62 Fed. Reg. 54,656 (Oct. 21, 1997). By Memorandum and Order (Request for Hearing and Stay of Proceeding), dated October 23, 1997, we granted Dr. Elamir's hearing request. We also issued a Notice of Hearing. 62 Fed. Reg. 56,207 (Oct. 29, 1997).

At the joint request of the parties, this proceeding has been stayed several times, beginning with our Memorandum and Order (Stay Pending Settlement Negotiations), dated June 23, 1998, to accommodate settlement negotiations between the parties. On October 1, 1998, the parties filed a "Joint Motion for Approval of Settlement Agreement."

Upon consideration of the Joint Motion for Approval of Settlement Agreement, and upon consideration of the Settlement Agreement, a copy of which is attached hereto and incorporated herein by reference, we find, pursuant to 10 C.F.R. § 2.203, that the settlement of this matter as proposed by the parties is in the public interest and should be approved.

Accordingly, without making any findings with respect to matters in dispute among the parties, or any resolution of any disputes arising from the Staff's Order or any challenges thereto, the Settlement Agreement is hereby *approved* and incorporated into this Order, pursuant to section 81 and subsections (b) and (i) of section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2111, 2201(b) and 2201(i), and is subject to the enforcement provisions of the Commission's regulations and Chapter 18 of the Atomic Energy Act, as amended, 42 U.S.C. § 2271 *et seq.*

It is therefore ORDERED:

1. The Joint Motion for Approval of Settlement Agreement is hereby *granted*;

2. The parties' Settlement Agreement, attached to and incorporated by reference into this Order, is hereby *approved*;

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[1] This Order superseded a July 31, 1997 "Order Prohibiting Involvement in NRC Licensed Activities (Effective Immediately)." 62 Fed. Reg. 43,360 (Aug. 13, 1997). The prohibition in the Superseding Order continued to run from the date of the earlier order.

3. This proceeding is hereby *terminated.*

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam (by CB)
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 8, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of **Docket No. IA-97-070**

MAGDY ELAMIR, M.D.
(Newark, New Jersey)

SETTLEMENT AGREEMENT

On September 15, 1997, the Staff issued an "Order Superseding Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)" to Magdy Elamir, M.D. 62 Fed. Reg. 49,536 (Sept. 22, 1997). Dr. Elamir answered the Superseding Order on October 4, 1997, and requested a hearing, resulting in the establishment of an Atomic Safety and Licensing Board. 62 Fed. Reg. 54,656 (Oct. 21, 1997). On July 31, 1997, the Staff also issued a Demand for Information, Docket No. 030-34086, EA 97-308, to Newark Medical Associates ("NMA") (licensee under Byproduct Materials License No. 29-30282-01) regarding the same matters at issue in this proceeding.

WHEREAS, the Staff contends that Dr. Elamir caused and permitted NMA to be in violation of NRC requirements and that there was an adequate basis for issuance of the Superseding Order;

WHEREAS, Dr. Elamir denies the Staff's contentions and asserts that there was not an adequate basis for issuance of the Superseding Order;

WHEREAS, Dr. Elamir and NMA have, nevertheless, decided that they do not intend to engage in any NRC-licensed activity until after July 31, 2000, at the earliest;

WHEREAS, the parties have agreed that it is in the public interest to terminate this proceeding, without further litigation;

The parties hereby agree to the following terms and conditions:

1. Dr. Elamir agrees to withdraw his request for a hearing.

2. Dr. Elamir agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities for three years from the date of the Staff's original Order, i.e., from July 31, 1997, through July 31, 2000.

3. The prohibition described in Paragraph 2 includes any and all activities that are conducted pursuant to a specific or general license issued by the NRC,

including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

4. Dr. Elamir further agrees that NMA will relinquish and surrender its license, Byproduct Materials License No. 29-30282-01, to the NRC.

5. In consideration of Dr. Elamir's agreement to the conditions of Paragraphs 1 through 4 above, the Staff agrees that it will take no further enforcement action against Dr. Elamir or NMA based on (i) the facts outlined in the September 15, 1997 Superseding Order; (ii) the 1997 inspections of Newark Medical Associates, or (iii) any other facts disclosed, assertions made, or conclusions reached as a result of the NRC's Office of Investigation's investigation relating to Newark Medical Associates' operations and/or Dr. Elamir's activities. In the event that either Dr. Elamir or NMA fails to comply with any term or condition set forth in Paragraphs 1 through 4 above, the Staff expressly reserves the right to take whatever action is necessary and appropriate to enforce the terms of this Settlement Agreement.

6. The Staff and Dr. Elamir understand and agree that this Settlement Agreement is limited to the issues in and the parties to the above-captioned proceeding.

7. The Staff and Dr. Elamir understand and agree that this Settlement Agreement does not constitute and should not be construed to constitute any admission or admissions in any regard by Dr. Elamir regarding any matters set forth by the NRC in its Order or Superseding Order.

8. The Staff and Dr. Elamir understand and agree that the matters upon which the Superseding Order is based have not been resolved as a result of this Settlement Agreement; this Settlement Agreement shall not be relied upon by any person or other entity as proof or evidence of any of the matters set forth in the Superseding Order, in the Inspection Report dated September 4, 1997, or in the Report of the Office of Investigation dated July 23, 1997.

9. The Staff and Dr. Elamir shall jointly move the Atomic Safety and Licensing Board for an order approving this Settlement Agreement and terminating the above-captioned proceeding.

FOR MAGDY ELAMIR, M.D.

Thomas H. Lee, II, Esquire
Counsel for Magdy Elamir, M.D.

Magdy Elamir, M.D.

Newark Medical Associates, Inc.
by Dr. Magdy Elamir, President

FOR THE NRC STAFF:

Catherine L. Marco, Esquire
Counsel for the NRC Staff

James Lieberman
Director, Office of Enforcement
Nuclear Regulatory Commission

Dated this 1st day of October, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Thomas D. Murphy

In the Matter of

Docket Nos. 50-317-LR
50-318-LR
(ASLBP No. 98-749-01-LR)

BALTIMORE GAS AND ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2)

October 16, 1998

In this proceeding concerning the application of Baltimore Gas and Electric Company to renew the 10 C.F.R. Part 50 operating licenses for its two-unit Calvert Cliffs Nuclear Power Plant, the Licensing Board denies the sole petition to intervene and request for a hearing and terminates the proceeding because of the Petitioner's failure timely to submit any admissible contentions.

RULES OF PRACTICE: CONTENTIONS; INFORMAL HEARINGS (AREAS OF CONCERN)

The label "areas of concern" has no meaning in the context of a formal adjudicatory proceeding conducted under 10 C.F.R. Part 2, Subpart G. *Compare* 10 C.F.R. § 2.714(b) (petitioner must submit contentions in Subpart G proceeding) *with* 10 C.F.R. § 2.1205(e)(3) (petitioner must submit areas of concern in 10 C.F.R. Part 2, Subpart L informal adjudication).

RULES OF PRACTICE: CONTENTIONS (PLEADING IMPERFECTIONS FOR LATE-FILED CONTENTIONS)

If a petitioner fails to address the five criteria in 10 C.F.R. § 2.714(a) that govern late-filed contentions, a petitioner does not meet its burden to establish the admissibility of such contentions. *Cf. Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (petitioner has burden to supply information necessary to demonstrate admissibility of contentions under 10 C.F.R. § 2.714(b)(2) criteria).

RULES OF PRACTICE: SCHEDULING (FILING OF CONTENTIONS)

LICENSING BOARD/PRESIDING OFFICER: AUTHORITY TO REGULATE PROCEEDINGS

The provisions of 10 C.F.R. § 2.714 concerning amending and supplementing a hearing request/intervention petition set an automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.178 authority to regulate the proceeding by, among other things, setting schedules. Licensing board authority in this regard is well established in agency practice. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159-63, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150-54 (1996).

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTION

LICENSING BOARD/PRESIDING OFFICER: REVIEW OF NRC STAFF ACTIONS

RULES OF PRACTICE: STAFF AUTHORITY

How thoroughly the Staff conducts its license application preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in an adjudicatory proceeding. *See Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395-96 (1995); *see also New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

The focus of an adjudication is the adequacy of the application as it has been accepted and docketed for licensing review. *See* 10 C.F.R. § 2.714(b)(2)(iii). If there are deficiencies in that application, in its contentions a petitioner can specify what those are and, if the petitioner is correct such that the application is insufficient to support issuance of the requested license, then the application must be denied.

RULES OF PRACTICE: EXTENSIONS OF TIME (FILING CONTENTIONS)

The Staff's postacceptance requests for additional information (RAIs) and meetings with an applicant to discuss the status of its application are not matters that give any cause for delaying the filing of petitioner contentions.

ATOMIC ENERGY ACT: LICENSE REVIEW

LICENSE APPLICATION: AMENDMENT OR MODIFICATION

The agency's licensing review procedures, including 10 C.F.R. § 2.102, contemplate an ongoing process in which the application may be modified or improved. *See Curators*, 41 NRC at 395; *New England Power*, 7 NRC at 281. Staff RAIs directed to the applicant and Staff/applicant status meetings are well-established parts of that dynamic process.

RULES OF PRACTICE: SCHEDULING (FILING OF CONTENTIONS)

The availability of the application, not ongoing Staff and applicant license review-related activities, is the central concern relative to setting a deadline for filing contentions. *See Private Fuel Storage*, 47 NRC at 160 (delay in filing contentions relating to security plan portion of application granted because of need to issue protective order to grant petitioner access to security plan).

RULES OF PRACTICE: CONTENTIONS (LICENSE REVIEW-RELATED ACTIVITIES)

Staff RAIs, applicant RAI responses, and Staff/applicant status meetings are not irrelevant to the adjudicatory process. For example, if a petitioner concludes that a Staff RAI or an applicant RAI response raises a legitimate question about

the adequacy of the application, the petitioner is free to posit this issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).

MEMORANDUM AND ORDER
(Denying Intervention Petition/Hearing Request and Dismissing Proceeding)

Petitioner National Whistleblower Center (NWC) has pending before the Licensing Board a petition to intervene and request for a hearing in connection with the application of Baltimore Gas and Electric Company (BG&E) for renewal of the 10 C.F.R. Part 50 operating licenses for the two units of its Calvert Cliffs Nuclear Power Plant located near Lusby, Maryland. Commission and Board directives mandated that for NWC contentions regarding the BG&E application to be timely, the contentions and supporting bases had to be submitted by October 1, 1998. On that date, however, NWC failed to provide its issue statements. Instead, NWC waited until October 13, 1998, to submit two contentions, albeit without addressing the standards governing the admissibility of late-filed contentions. Both BG&E and the NRC Staff urge us to reject the NWC hearing request because it has failed to submit any admissible contentions as required by Commission regulations.

For the reasons set forth below, we deny NWC's intervention petition/hearing request and terminate this proceeding.

I. BACKGROUND

Following receipt of BG&E's Calvert Cliffs license renewal application in April 1998, *see* 63 Fed. Reg. 20,663 (1998), on July 1, 1998, the agency issued a *Federal Register* notice that provided an opportunity for a hearing for the Applicant or anyone affected by the proceeding. *See* 63 Fed. Reg. 36,966 (1998). Petitioner NWC responded on August 7, 1998, with a timely intervention petition/hearing request indicating it wished to challenge the BG&E renewal request. In its petition, NWC asserted it had standing to intervene as the representative of two NWC officers, one of whom is also an NWC employee and one of whom is a Board of Directors member.[1] *See* Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 2-3.

[1] In the petition, NWC also declared that if the organization was denied standing, the two individuals it was representing then wished to proceed as Intervenors in their personal capacity. *See* Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 3.

Twelve days later, the Commission issued an order referring the NWC petition to the Atomic Safety and Licensing Board Panel to conduct an adjudicatory hearing, as appropriate. *See* CLI-98-14, 48 NRC 39, 44 (1998). Among other things, in its referral order the Commission provided guidance on a schedule for conducting any adjudication, including a 90-day time frame from the date of the order for Licensing Board issuance of a decision on whether NWC has standing and admissible contentions so as to merit admission as a party. *See id.* at 43.

That same day, this Board was established to rule on the NWC hearing request. *See* 63 Fed. Reg. 45,268 (1998). The following day we issued an initial prehearing order. Consistent with the Commission's guidance on the timing for Board issuance of a ruling on NWC's intervention request, in that order we established a schedule of August 24 and August 27, 1998, respectively, for BG&E and Staff answers to the NWC petition, *see* 10 C.F.R. § 2.714(c), and gave NWC until September 11, 1998, to supplement its hearing petition, including providing its list of contentions and supporting bases, *see id.* § 2.714(a)(3), (b)(1). Also in that order, we gave the Applicant and the Staff until October 2, 1998, to respond to NWC's supplement and announced the Board's intent to hold a prehearing conference the week of October 13, 1998, to entertain oral arguments concerning NWC's standing to intervene and the admissibility of any proffered contentions. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Aug. 20, 1998) at 2-4 (unpublished).

One day later, NWC filed a motion for an enlargement of time to postpone the proposed date for the prehearing conference. In its request, NWC asserted it needed approximately two additional months to retain experts and allow them to prepare its contentions for filing. It also declared that any new schedule for filings had to conform to the provisions of 10 C.F.R. § 2.714(b)(1), which provides that an intervention petition may be supplemented with a list of contentions without permission of the presiding officer any time up to 15 days before the first prehearing conference is held. *See* Petitioner's Motion for Enlargement of Time (Aug. 21, 1998) at 1-4. Both BG&E and the Staff opposed the Petitioner's extension request. *See* [BG&E] Answer Opposing Petitioner's Motion for Enlargement of Time (Aug. 24, 1998) at 1; NRC Staff's Answer to Petitioner's Motion for Enlargement of Time (Aug. 26, 1998) at 1. In addition, both these participants submitted answers that questioned the efficacy of NWC's intervention petition, as filed, particularly its standing to intervene. *See* [BG&E] Answer to Petition to Intervene and Request for Hearing of [NWC] (Aug. 24, 1998) at 4-10; NRC Staff's Response to [NWC] Request for a Hearing and Petition to Intervene (Aug. 27, 1998) at 6-9.

On August 27, 1998, we denied the NWC extension request.[2] In doing so, we noted that the Petitioner had failed to make a showing sufficient to establish the requisite "'unavoidable and extreme circumstances'" required under the Commission's CLI-98-14 guidance. *See* Licensing Board Memorandum and Order (Denying Time Extension Motion and Scheduling Prehearing Conference) (Aug. 27, 1998) at 2-3 (unpublished) (quoting CLI-98-14, 48 NRC at 44) [hereinafter August 27 Issuance]. We also found no basis for its argument that section 2.714 provided an absolute right to file contentions up to 15 days before the initial prehearing conference. That provision, we observed, operates only in the absence of a presiding officer's action in accordance with 10 C.F.R. §§ 2.711(a), 2.718, setting a specific deadline for the filing of intervention petition supplements, including contentions. *See id.* at 3-4.

NWC responded to this denial by filing a pleading with the Board noting its disagreement with our ruling. *See* Petitioner's Filing in Response to the Board's Initial Prehearing Order (Sept. 11, 1998). In addition, NWC requested Commission interlocutory review of our determination. *See* Petition for Review (Sept. 11, 1998). Although declaring it was not dissatisfied with the Board's August 27 extension denial decision, the Commission nonetheless granted the NWC petition for review and provided NWC an additional 2½ weeks to submit its contentions. *See* CLI-98-19, 48 NRC 132, 134 (1998). In addition, the Commission stated that "[t]he Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions." *Id.* at 134 (footnote omitted).

Within a day of this Commission directive, the Petitioner filed a new motion requesting that the Board postpone holding a prehearing conference until it had conducted discovery to aid in the preparation of its contentions. *See* Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time (Sept. 18, 1998). We denied this motion, noting that longstanding agency precedent precludes a petitioner from obtaining discovery to assist it in framing contentions. *See* Licensing Board Memorandum and Order (Scheduling Matters and Electronic Hearing Database) (Sept. 21, 1998) at 2 (unpublished) [hereinafter September 21 Issuance]. In that same issuance, we also established a new date for BG&E and Staff responses to any NWC petition supplement and tentatively scheduled the initial prehearing conference for the week of November 9, 1998. *See id.* at 3. Thereafter, taking into account participant input concerning scheduling conflicts, we set November 12, 1998, as the starting date for the

[2] Contemporaneous with its request to the Board for additional time to submit contentions, NWC filed a motion with the Commission asking that CLI-98-14 be vacated on the grounds, among others, that the order's scheduling guidance was improper. *See* [NWC] Motion to Vacate Order CLI-98-14 (Aug. 21, 1998). The Commission subsequently denied that request. *See* CLI-98-15, 48 NRC 45 (1998).

initial prehearing conference. *See* Licensing Board Order (Revised Prehearing Conference Schedule) (Sept. 29, 1998) at 1 (unpublished).

On the October 1, 1998 date established for filing NWC's intervention petition supplement,[3] including its contentions and supporting bases, the Petitioner submitted four documents. One was a reply to the BG&E and Staff answers to its intervention petition contesting their arguments concerning NWC's standing to intervene. *See* [NWC] Reply to the NRC Staff and [BG&E] Answers to NWC's Petition to Intervene and Request for Hearing (Oct. 1, 1998). The second was a status report in which NWC provided a listing of the "experts" whom it asserts have agreed to assist it in the proceeding and the "areas of concern" those experts have identified to be raised as contentions or bases for contentions. *See* Status Report (Oct. 1, 1998) at 2-10. In this filing, however, NWC repeatedly stated that the list of concerns was not to be considered a tabulation of contentions. *See id.* at 1, 2, 10. Instead, reiterating its position it was entitled to amend its petition up to 15 days before the initial prehearing conference, NWC declared that under the Board's schedule, which it was again seeking to extend, it had until at least October 28 to file its contentions. *See id.* at 1.

Also in this vein, NWC filed a third document asking the Board to vacate its September 29 order establishing a mid-November date for the initial prehearing conference. *See* Petitioner's Motion to Vacate and Re-schedule the Pre-Hearing Conference (Oct. 1, 1998) [hereinafter Motion to Vacate]. According to NWC, this was necessary because BG&E would not be responding to an August 28, 1998 Staff request for additional information (RAI) concerning the BG&E renewal application until after the prehearing conference. According to NWC, its experts need to review the Applicant's RAI responses before they could render opinions upon which it would rely in formulating its contentions. *See id.* at 4-6.

The Petitioner's final October 1 filing requested that the Board require the Applicant and the Staff to (1) put NWC and the Board on their service lists for all written communications relating to the Calvert Cliffs renewal application; and (2) give NWC written notification of all status meetings concerning the application before they are held. *See* Petitioner's Motion Requesting To Be Informed of Communication Between the NRC Staff and Applicant (Oct. 1, 1998) [hereinafter Communications Motion]. These measures are necessary, NWC declared, because a 2-week delay in getting application-related materials

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[3] In its September 17 issuance, the Commission set September 30, 1998, as the filing date for NWC's intervention petition supplement. *See* CLI-98-19, 48 NRC at 134. Thereafter, as part of its September 18 filing, NWC requested a one-day religious holiday-related extension, which the Board subsequently granted. *See* September 21 Issuance at 2.

into the agency's public document room (PDR) had made it difficult for NWC to participate effectively in this otherwise expedited proceeding. *See id.* at 1-2.

Thereafter, as an apparent followup to its October 1 request to change the November 12 initial prehearing conference date, on October 7, 1998, NWC submitted a filing listing an additional eighteen Staff RAIs that were sent to the Applicant, most of which were not received in the PDR until after October 1. *See* Petitioner's Notice of Filing (Oct. 7, 1998) at 2-4. In that pleading, NWC also complained of the Staff's failure to notify NWC representatives about a September 28, 1998 meeting with BG&E and declared the nineteen Staff RAIs make it apparent the BG&E renewal application was not sufficiently complete so as to be acceptable for docketing in accordance with various provisions of 10 C.F.R. Part 2, Subpart A. *See id.* at 5-6.

In responses to the Petitioner's third and fourth October 1 submissions and NWC's October 7 filing,[4] BG&E declared (1) NWC's motion to reschedule the prehearing conference is really another inadequately supported request to extend the time for filing contentions that ignores prior Commission and Board rulings on the Board's authority to set a contentions filing deadline; (2) NWC's arguments regarding the need to delay contentions because of the Staff RAIs is legally and factually inaccurate; (3) agency rules do not require that a petitioner be served with applicant and Staff correspondence; (4) NWC's argument about the sufficiency of the BG&E application has significant factual errors; and (5) NWC's intervention petition should be dismissed because it has failed to comply with the October 1, 1998 deadline for filing contentions. *See* BGE's Answer to Petitioner's Motion to Vacate and Reschedule the Pre-Hearing Conference (Oct. 9, 1998) at 2-10 [hereinafter BG&E Motion to Vacate Response]; BGE's Answer to Petitioner's Motion Requesting To Be Informed of Communication Between the NRC Staff and Applicant (Oct. 9, 1998) at 1; BGE's Answer to "Petitioner's Notice of Filing" (Oct. 9, 1998) at 1-2. Similarly, in its responses to the second, third, and fourth NWC October 1 pleadings and NWC's October 7 filing, the Staff declared (1) without designating it as such, NWC is attempting to obtain an extension of the contentions filing date without demonstrating the requisite "unavoidable and extreme circumstances" in that (a) the Staff's determination to accept the BG&E application for filing is not the subject of this proceeding, and (b) the Applicant's responses to any Staff RAIs can be addressed in late-filed contentions; (2) the Board acted within its authority in establishing the contentions filing deadline; (3) NWC has failed to demonstrate that it has been harmed by not being on the Staff's document or public meeting distribution lists; and (4) NWC's intervention petition/hearing request should be denied because it failed to comply with the October 1, 1998 contentions

[4] Applicant chose not to respond to NWC's October 1, 1998 status report because that filing did not contain contentions. *See* Letter from David R. Lewis, Counsel for BG&E, to the Licensing Board (Oct. 9, 1998).

filing deadline. *See* NRC Staff's Answer in Opposition to Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference (Oct. 9, 1998) at 3-10; NRC Staff's Response to Status Report and Petitioner's Motion To Be Informed of Communication Between NRC Staff and Applicant (Oct. 9, 1998) at 4-8 [hereinafter Staff Status Report/Communications Motion Response].

Petitioner NWC subsequently made two additional submissions. On October 13, 1998, NWC filed a notice in which it set forth what are labeled its first supplemental set of contentions. As contention one, NWC proffered the following:

> As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 is incomplete and must be withdrawn and/or summarily dismissed.

Petitioner's Notice of Filing (Oct. 13, 1998) at 1. As the basis for this contention, NWC references the Staff RAIs and the possibility of future RAIs. *See id.* at 2. NWC then set forth its second contention as follows:

> As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations and must be denied.

Id. at 2. The basis given for these contentions is essentially the same as for contention one. *See id.* at 2-3. Finally, on October 15, 1998, NWC provided another notice of filing in which it lists additional Staff RAIs that have recently come to its attention. These, it asserted, provide additional bases for its contentions as well as support for rescheduling the November 12 initial prehearing conference. *See* Petitioner's Second Notice of Filing (Concerning RAIs) (Oct. 15, 1998) at 1-4.

II. ANALYSIS

As we have noted, in its September 17 issuance giving NWC additional time to submit its contentions, the Commission advised us that an NWC failure to submit admissible contentions should result in the prompt termination of this proceeding. *See* CLI-98-19, 48 NRC at 134. NWC did not file any contentions on or before the October 1 filing date set by the Commission (and the Board, *see supra* note 3). NWC did submit two contentions nearly 2 weeks after that

date;[5] however, it made no attempt to show that either issue statement meets the 10 C.F.R. § 2.714(a) standards so as to permit late-filing.[6] By failing to address the five section 2.714(a) criteria that govern late-filed contentions, NWC has not met its burden to establish the admissibility of its two contentions. *Cf. Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (petitioner has burden to supply information necessary to demonstrate admissibility of contentions under 10 C.F.R. § 2.714(b)(2) criteria). If the October 1 contentions deadline thus is controlling, these contentions are not admissible and, in accordance with the Commission's September 17 directive, this proceeding must be terminated.

As a consequence, the only question we must answer relative to NWC's various filings is whether there is any cause that excuses NWC's failure to comply with the clearly established contentions filing deadline. NWC does not explicitly request an extension of the contention filing deadline or make any attempt to address the standard of "unavoidable and extreme circumstances" the Commission established for obtaining such a postponement. Rather, NWC again asserts its purported "rights" under 10 C.F.R. § 2.714(b)(1) to a filing deadline based on the date of the initial prehearing conference. It also suggests that ongoing Staff and Applicant written exchanges (i.e., the Staff RAIs and Applicant RAI responses) and status meetings regarding the renewal application provide sufficient cause to put off the scheduled prehearing conference and, with it, the filing deadline for NWC's contentions.

We need not dwell at any length on NWC's renewed challenge to the Board's authority to establish the October 1 deadline for filing contentions that is not tied to the initial prehearing conference date. As we noted in our August 27 order, the provisions of section 2.714 concerning amending and supplementing a hearing request/intervention petition set "an automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.178[,] authority to regulate the proceeding by, among other things, setting schedules."[7] August 27 Issuance

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[5] Rather than submitting contentions, NWC designated "areas of concern" in its October 1 status report. *See* Status Report at 2-10. That label, however, has no meaning in the context of a formal adjudicatory proceeding conducted under 10 C.F.R. Part 2, Subpart G. *Compare* 10 C.F.R. § 2.714(b) (petitioner must submit contentions in Subpart G proceeding) *with* 10 C.F.R. § 2.1205(e)(3) (petitioner must submit areas of concern in 10 C.F.R. Part 2, Subpart L informal adjudication).

[6] Because this deficiency is so apparent, we see no need to call for Applicant and Staff responses to this filing. Moreover, because this defect supports rejection of these contentions, we need not reach the question of their sufficiency. Nonetheless, it seems apparent for the reasons we set forth below in discussing the Staff application acceptance and license review process that the substantive validity of the two contentions is, at best, problematic. *See infra* pp. 242-43.

[7] Section 2.714 contains two provisions concerning hearing request/intervention petition changes. Section 2.714(a)(3) relates to the filing of "amendments," while section 2.714(b)(1) concerns "supplements." The former provision generally relates to the ability of a petitioner to revise its showing regarding its standing to intervene. *(Continued)*

at 3-4. Certainly, the Board's authority in this regard is well established in agency practice.[8] *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159-63, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150-54 (1996). As before, we find this assertion meritless.

With this conclusion, and Petitioner NWC's failure to make any attempt to obtain a timely extension of the October 1 deadline or to address the governing standard of "unavoidable and extreme circumstances,"[9] we would be justified in dismissing this case without further discussion. Nonetheless, so that there will be no lingering uncertainty about the validity of the arguments presented by NWC in support of its quest for additional time, we provide the following additional observations on the matters of the adequacy of Staff preacceptance review of the BG&E application and Staff postacceptance RAIs and status meetings with BG&E.

As the Commission has made clear, how thoroughly the Staff conducts its preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in this adjudicatory proceeding. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 395-96 (1995); *see also New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978). Instead, the focus of this case is the adequacy of the application as it has been accepted and docketed for licensing review. *See* 10 C.F.R. § 2.714(b)(2)(iii). If there are deficiencies in that application, in its contentions a petitioner can specify what those are and, if the petitioner is correct such that the application is insufficient to support issuance of the requested license, then the application must be denied. Thus, any NWC concerns about

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while the latter relates to the petitioner's list of contentions or issues. Relative to either provision, however, absent some Commission directive, it is the Board's prerogative under its general scheduling authority to override their "automatic" limits as is warranted in a particular situation.

[8] The intervention petition amendment and contention supplement deadlines in paragraphs (a)(3) and (b)(1) of section 2.714 seemingly had more utility under earlier agency practice in construction permit and operating license (CP/OL) cases in which there was a recognized proximity presumption for standing and the threshold for admitting contentions was more relaxed. With the Commission's acknowledgment that any proximity presumption generally does not apply outside the CP/OL realm and the adoption of a higher contention admission threshold, *see Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247 (1996); 54 Fed. Reg. 33,168, 33,168 (1989), petitioner submissions in support of standing and contentions generally have become more voluminous and complex, rendering insufficient the 15-day period allotted by these provisions for Applicant and Staff responses and Board review of amended/supplemental filings before the initial prehearing conference.

In this regard, Petitioner NWC apparently perceives some inequality in our provision of more time for BG&E and Staff contention supplement responses following the Commission's grant of additional time to NWC to prepare its contentions. *See* Motion to Vacate at 3 & n.1. This Board action, however, was nothing more than a practical recognition that the time afforded to draft pleading responses should, when possible, be roughly equivalent to the time allotted to prepare the initial pleading. *See* September 21 Issuance at 3 & n.1.

[9] As the Applicant points out, *see* BG&E Motion to Vacate Response at 2, pursuant to the terms of our initial prehearing order, such an extension request would have been due at least 3 business days before the filing deadline.

the propriety of the Staff's preacceptance review provide no basis for extending the time for filing its contentions.

So too, the Staff's postacceptance requests for additional information and meetings with BG&E to discuss the status of its application are not matters that give any cause for delaying the filing of NWC contentions. The agency's licensing review procedures, including 10 C.F.R. § 2.102, contemplate an ongoing process in which the application may be modified or improved. *See Curators*, 41 NRC at 395; *New England Power*, 7 NRC at 281. Staff RAIs directed to the applicant and Staff/applicant status meetings are well-established parts of that dynamic process. Yet, as section 2.714 makes clear, the application as docketed, not Staff RAIs and status meetings, remain the focal point for any contentions. Concomitantly, the availability of the application, not ongoing Staff and Applicant license review-related activities, is the central concern relative to setting a deadline for filing contentions. *See Private Fuel Storage*, 47 NRC at 160 (delay in filing contentions relating to security plan portion of application granted because of need to issue protective order to grant petitioner access to security plan).

This is not to say that Staff RAIs, applicant RAI responses, and Staff/applicant status meetings are irrelevant to the adjudicatory process. For example, if a petitioner concludes that a Staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).[10] But as justification for delaying (or ignoring) a contention filing deadline, the pendency or possibility of Staff RAIs or status meetings provides no exceptional cause.

III. CONCLUSION

Petitioner NWC has failed to establish cause for extending the October 1, 1998 contentions filing deadline. NWC also has failed to (1) submit any contentions on or before that filing date, and (2) establish that the two contentions it filed on October 13, 1998, meet the standards for late-filing set forth in

[10] In its October 1 communications motion, NWC expresses concern about the amount of time it takes Calvert Cliffs license renewal-related documents, including meeting notices, to become available in the agency PDR. *See* Communications Motion at 1-2. Although the Staff notes that Calvert Cliffs meeting notices are available on the agency's Internet web site and states it has acted to put NWC on its distribution list for Staff renewal application-related correspondence to BG&E and Staff/Applicant meeting notices, *see* Staff Status Report/Communications Motion Response at 7-8, relative to the timeliness of contentions it seems apparent that the delay about which NWC complains arguably would be a factor it could invoke in justifying any late-filed contention based on information from such documents or meetings.

10 C.F.R. § 2.714(a). We must, therefore, deny its intervention petition/hearing request and dismiss this proceeding for want of any admissible contentions.[11]

For the foregoing reasons, it is, this 16th day of October 1998, ORDERED that:

1. The August 7, 1998 intervention petition/hearing request of Petitioner National Whistleblower Center is *denied* and this proceeding is *terminated.*

2. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules on an intervention petition, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD[12]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 16, 1998

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[11] Because dismissal of this case is appropriate based on NWC's failure to provide any admissible contentions, we need not reach the issue of the standing to intervene of NWC or the individuals whose interests it purportedly represents.

[12] Copies of this Memorandum and Order were sent this date to counsel for the Applicant BG&E, petitioner NWC, and the Staff by Internet e-mail transmission.

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of	**Docket Nos. 50-335**
	50-389
	50-250
	50-251
	(License Nos. DPR-67
	NPF-16
	DPR-31
	DPR-41)
FLORIDA POWER & LIGHT COMPANY	
(St. Lucie Nuclear Power Plant, Units 1 and 2; Turkey Point Nuclear Generating Plant, Units 3 and 4)	**October 21, 1998**

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

I. INTRODUCTION

By petitions dated February 26 and 27, March 6, 1998 (as supplemented March 15 and 17, 1998), and petitions dated March 29 and 30, and April 4, 1998, submitted pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (Petition), Mr. Thomas J. Saporito, Jr., and the National Litigation Consultants (NLC) (Petitioners) requested that the U.S. Nuclear Regulatory Commission (NRC or Commission) take numerous actions with regard to operations at Florida Power and Light Company's (FPL's or Licensee's) St. Lucie and Turkey Point plants. Briefly summarized, the Petitioners requested that the Commission: (1) take escalated enforcement action, including modifying, suspending, or revoking FPL's operating licenses until FPL demonstrates that

there is a work environment that encourages employees to raise safety concerns directly to the NRC, and issue civil penalties for violations of the NRC's requirements; (2) permit Petitioners to intervene in a public hearing regarding whether FPL has violated the NRC's employee protection regulations and require FPL to allow NLC to assist its employees in understanding and exercising their rights under these regulations; (3) conduct investigations and require FPL to obtain appraisals and third-party oversight of its performance; (4) require the Licensee to inform all employees of their rights under the Energy Reorganization Act and NRC's regulations to raise nuclear safety concerns; and (5) establish a website on the Internet to allow employees to raise concerns to the NRC.

On May 4, 1998, I acknowledged receipt of the petition and informed the Petitioners that the petition had been assigned to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. In my acknowledgment letter, the Petitioners were informed that their request for immediate action was denied. I also informed the Petitioners that certain of their requests did not meet the criteria for treatment under section 2.206 (in particular, the request that the NRC establish a website for the raising of nuclear safety concerns and the request to intervene in a public hearing), and that these requests would be addressed in separate correspondence.[1] The Petitioners were further advised that their assertions of inadequate NRC action had been referred to the Office of the Inspector General (OIG), and that action would be taken on the Petitioners' remaining requests within a reasonable time.

On August 6, 1998, the Licensee filed its response to the petition. In its response, the Licensee maintained that the Petitioners had not raised any substantial health or safety issues, and that the petition should therefore be denied.

II. DISCUSSION

The Petitioners have raised numerous issues as bases for their requests for various actions by the NRC. In order to facilitate consideration of the Petitioners' requests, they have been grouped together in the following categories: (1) requests related to assertions of Licensee discrimination, "chilling effect" on the raising of nuclear safety concerns, and a hostile work environment; (2) requests related to assertions of Licensee failure to establish or implement procedures or meet technical specifications; and (3) requests related to investigation of radioactive contamination and additional safety concerns. The issues raised by the Petitioners in support of each of these requests, and the NRC's evaluation of these issues, are summarized below.

[1] These requests were addressed in correspondence to Mr. Saporito, dated July 15, 1998.

A. Requests Related to Assertions of Licensee Discrimination, "Chilling Effect" on the Raising of Nuclear Safety Concerns, and a Hostile Work Environment

The Petitioners have made numerous and repetitive requests in connection with their claim that the Licensee has discriminated against employees and that the work environment at both St. Lucie and Turkey Point discourages the raising of nuclear safety concerns. In their February 26, 1998 submittal, they request that the NRC: (1) take escalated enforcement action, including action to modify, suspend, or revoke FPL's operating licenses, until the Licensee demonstrates that there is a work environment that encourages employees to raise safety concerns directly to the NRC; (2) require the Licensee to post and provide notice to employees and ensure through its training program that employees are aware that they may raise safety concerns to the NRC, and provide written documentation to the NRC affirming that the Licensee has complied with these requirements; (3) investigate the circumstances surrounding adverse actions taken against a certain named employee and other employees to determine if a hostile work environment or "chilling effect" exists, if FPL's Employee Concerns Program (ECP) is effectively utilized, and whether management needs further training in developing skills to encourage utilization of the ECP; and (4) establish an Augmented Maintenance Inspection Team to investigate Petitioners' concerns regarding asserted deterioration of Licensee performance, inadequate work force, and strained resources. As grounds for these requests, Petitioners assert that as a result of the NRC's failure to protect employees, a "chilling effect" has been instilled, that FPL has discriminated against employees including one specifically named employee, and that FPL has engaged in "punitive suspensions" which one can infer are intended to prevent the work force from engaging in protected activity. The Petitioners make similar requests and assertions in their February 27, 1998 submittal. For example, they repeat their request that the NRC initiate an Augmented Maintenance Inspection Team to determine if Licensee layoff "restructuring" has resulted in an inadequate work force. In addition, they request that the NRC initiate actions to investigate recent allegedly discriminatory actions taken by the Licensee against another named employee. As grounds for these requests, the Petitioners assert that this named employee and other employees are concerned about retaliation against them for raising safety concerns, and that FPL has announced intentions to significantly cut its work force.

With regard to the Petitioners' assertions regarding alleged discrimination against specifically named individuals, the Petitioners have not provided sufficient information to indicate that these individuals suffered any adverse action for having engaged in protected activity. Therefore, no action by the NRC is warranted based upon these assertions. With regard to the Petitioners' assertions

concerning a "chilling effect" at the Licensee's facilities, the Petitioners have offered no evidence to substantiate this claim. The results of the two most recent NRC inspections of FPL's ECP, conducted in April-May 1996 and June 1997, indicate that FPL's ECP has been effective in handling and resolving individual concerns. The inspections also determined that the ECP has been readily accessible, and employees are familiar with the various available avenues by which they can express their concerns. The results of these inspections are documented in Inspection Report Nos. 50-250/96-05, 50-251/96-05, 50-335/96-07, and 50-389/96-07, dated May 31, 1996, and Inspection Report Nos. 50-335/97-08 and 50-389/97-08, dated July 16, 1997. Although some weaknesses were noted during the April-May 1996 inspection, the June 1997 inspection determined that improvements had been made. In addition, during this inspection, all of the employees interviewed by the NRC inspectors indicated that they would be willing to raise perceived safety concerns to Licensee management. In addition, senior NRC regional management has met with FPL on several occasions to ensure the continued sensitivity to this matter.

In addition, FPL has taken various actions since the weaknesses in its program were identified in 1996, to ensure that employees feel free to raise safety concerns. These actions included conducting specific training for managers and supervisors in handling safety concerns, the inclusion of a discussion on the rights and responsibilities of employees in general employee training; the posting of ECP information in the plants, and the issuance of various site communications on the topic of raising safety concerns. Most recently, in April 1998, the Licensee issued a communication to all employees emphasizing their right to raise safety concerns to their supervisors, to the ECP, or to the NRC. The Licensee included as an attachment to this communication a copy of the NRC Policy Statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation."

With regard to the Petitioners' assertion that the Licensee has engaged in "punitive suspensions" to prevent the work force from engaging in protected activity, although the Licensee established a more stringent disciplinary action program in mid-1997, including suspensions of employees, this program was established in response to continued noncompliances. Contrary to the Petitioners' assertion, the NRC has not found any indication that FPL has engaged in "punitive suspensions" intended to prevent the work force from engaging in protected activity nor have the Petitioners provided any information in support of this assertion. The NRC's assessment is based on the Staff's continued involvement in monitoring Licensee performance by way of the Resident Inspector Program and management meetings regarding the effectiveness of FPL's ECP. Based on the above, there is no basis for initiation of any of the actions that the Petitioners have requested in these submittals.

In their March 15 submittal, Petitioners request that the NRC order FPL to: (1) provide, through its training program, and by written communication to employees, information about the Energy Reorganization Act (ERA) and Department of Labor (DOL) process; and (2) permit NLC to address its employees as to their rights under the ERA, assist them in resolving complaints of retaliation, and act as a "conduit" for employees providing concerns confidentially to the NRC. As grounds for these requests, Petitioners have submitted a newspaper article which they assert documents FPL's employees' fear of raising safety concerns to the NRC. In this connection, in their March 17 submittal, Petitioners additionally request that the NRC order FPL to immediately inform a specifically named employee in writing that FPL encourages him to raise safety concerns directly to the NRC and will not retaliate against him for this conduct. As grounds for this request, the Petitioners assert that this individual fears retaliation as a result of the NRC having released his identity to the Licensee with respect to safety concerns that he provided.

As fully explained in Director's Decisions issued on May 11, 1995 (DD-95-7, 41 NRC 339) and September 8, 1997 (DD-97-20, 46 NRC 96) in response to earlier petitions filed by Mr. Saporito, the NRC has in place numerous measures that ensure that employees will be aware of their right to raise nuclear safety concerns and of their rights under the ERA. These measures include the requirement in 10 C.F.R. § 19.11(c) that all licensees post NRC Form 3, "Notice to Employees," which describes employee rights and protections. In addition, 10 C.F.R. § 50.7 and associated regulations were amended in 1990 to prohibit agreements and/or conditions of employment that would restrict, prohibit, or otherwise discourage employees from engaging in protected activity. Finally, in November 1996, the NRC issued a brochure, "Reporting Safety Concerns to the NRC" (NUREG/BR-0240), which provided information to nuclear employees on how to report safety concerns to the NRC, the degree of protection that was afforded the employee's identity, and the NRC process for handling an employee's allegations of discrimination. These measures are sufficient to alert employees in the nuclear industry that they may take their concerns to the NRC, and alert licensees that they shall not take adverse action against an employee who exercises the right to take concerns directly to the NRC.

The newspaper article submitted by the Petitioners in support of their requests[2] claims that, because the NRC inadvertently released names of some employees who filed confidential reports of safety concerns about the St. Lucie plant, employees are afraid to continue to raise concerns to the NRC or FPL. By way of background, in January 1998, the NRC was made aware that, in response to two inquiries under the Freedom of Information Act (FOIA), it had

[2] Neither the source nor date of the article have been provided.

released numerous documents in December 1997 and January 1998 to a local newspaper, which inadvertently included the names of employees who had filed allegations with NRC, and information that could be used to identify certain other allegers. Although, to the NRC's knowledge, the names of these employees were not released by the newspaper, FPL obtained some of the documents that provided sufficient information such that there may have been a possibility that the employees' identities could have been determined by the Licensee.[3]

In response to this occurrence, NRC Region II staff performed a review of previous responses to FOIA requests, to determine if there had been additional instances in which information may have been inappropriately released to the public. As a result of this review, it was determined that in response to two additional FOIA requests involving the St. Lucie facility, names of allegers and certain information that could be used to identify allegers had been inadvertently released.

The NRC took numerous actions in response to these events. For example, on February 27, 1998, the Regional Administrator, Region II, sent a letter to FPL documenting the inappropriate release of information and stressing the need for FPL and its managers to emphasize awareness of the Commission's Employee Protection regulations and policies so as to maintain an environment where individuals are not subject to retaliatory discrimination for raising safety concerns.[4] In addition, telephone and written notifications were made to the allegers affected by the release of information, apologizing for the inadvertent release of this information. Furthermore, the NRC initiated extensive corrective actions to ensure that there would not be a recurrence of such an incident.[5]

With regard to the Petitioners' assertions regarding the specifically named employee's fear of retaliation as a result of the release of the individual's identity, the NRC Region II staff contacted this employee orally and in writing soon after the release of this information was discovered and apologized for the error. The Staff assured the employee that the Regional Administrator had emphasized to the Licensee the need for maintaining an environment where employees are free from retaliatory discrimination for raising safety concerns.

As contained in this Decision, the Licensee has taken numerous actions to ensure that there is a safety-conscious work environment at its facilities in which employees are encouraged to raise such concerns. These actions have included incorporating into its training program for supervisors instructions regarding the

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[3] In its response to the petition, dated August 6, 1998, FPL maintained that it was not aware of the identities of these employees until the Petitioners themselves identified an alleger by name in a letter to the President of the United States, dated February 9, 1998, and provided a copy of the letter to FPL.

[4] By letter dated April 3, 1998, FPL responded to the NRC Region II Regional Administrator's letter. In its response, FPL emphasized its agreement with the importance of maintaining a safety-conscious work environment, and outlined numerous steps that it has taken to ensure that such an environment exists at its facilities.

[5] This matter has also been referred to the NRC OIG.

handling of safety concerns, incorporating into its general training of employees information regarding the right of employees to raise such concerns without fear of retaliation, and issuing numerous communications to employees regarding this subject.

The Petitioners have not provided any specific information demonstrating that these measures are inadequate to ensure that employees will continue to raise nuclear safety concerns to the Licensee and the NRC. Therefore, there is no need for the NRC to take the additional actions that they have requested.

Finally, as described in this Decision, FPL has incorporated into its training program for supervisors instructions regarding the handling of safety concerns and into its general training of employees information regarding the rights of employees to raise such concerns without fear of retaliation, and has issued numerous communications to employees regarding this subject. The NRC has carefully evaluated each of the issues raised by the Petitioners. However, for reasons discussed previously, the Petitioners have failed to demonstrate that there is any need for NRC to take the additional actions requested.

In their March 29 submittal, the Petitioners repeat their request for an NRC investigation of whether "a violation of NRC requirements occurred" with regard to the individuals already named in their earlier submittals, as well as "seven instrument control specialists" and Mr. Saporito. In addition, Petitioners request that the NRC determine whether FPL's settlement of a complaint filed with DOL pursuant to section 211 contains a confidentiality provision that may "chill" the Licensee's work force and determine what actions by the NRC provided any measure of protection to employees against retaliation for raising safety concerns. The Petitioners' grounds for these requests can be summarized as follows: (1) there appears to be a hostile work environment at St. Lucie, (2) the confidentiality provision prevents employees from gaining sufficient knowledge about the settlement agreement to determine if they may be afforded a "make-whole" remedy if they elect to exercise their rights under section 211, and the "secret nature of sealed settlement agreements undermines the effectiveness" of that statute, and (3) the NRC has failed to take enforcement action based upon decisions of DOL Administrative Law Judges in a case involving Mr. Saporito at Turkey Point which was litigated before DOL, and in cases involving other employees and other licensees.

With regard to their assertion that a violation of NRC requirements may have occurred involving "seven instrument control specialists," as the Petitioners have provided no further information regarding these individuals or the alleged violation that may have occurred, further action on this matter is not warranted. With regard to Petitioners' assertion that there may have been a violation involving Mr. S[illegible] and that the NRC failed to take enforcement action for this violatio[illegible] upon a decision by a DOL Administrative Law Judge (ALJ), this matte[illegible]s fully addressed in earlier Director's Decisions responding

to petitions filed by Mr. Saporito (DD-95-7 and DD-97-20). In DD-97-20, which was issued on September 8, 1997, I explained that there had been no final determination by the Secretary of Labor in Mr. Saporito's DOL case (89-ERA-7/17) that discrimination had occurred. Rather, the Secretary of Labor had remanded the case to the ALJ to submit a new recommendation on whether FPL would have discharged Mr. Saporito absent his engaging in protected activities. I also stated in that Decision that NRC would monitor the DOL proceeding and determine on the basis of further DOL findings and rulings whether enforcement action against the Licensee was warranted. In that connection, on October 15, 1997, the ALJ issued a Recommended Decision and Order on Remand finding that FPL had proven that Mr. Saporito's unprotected conduct would have led to his termination absent his protected activity. In a Final Decision and Order issued on August 11, 1998, the Administrative Review Board[6] issued a final decision affirming the ALJ's Recommended Decision and dismissing Mr. Saporito's complaint. Based upon this final determination by DOL, the NRC has determined that enforcement action against FPL is not warranted in this matter.

As noted above, Petitioners also assert that the NRC should take the action they have requested because the NRC has failed to take enforcement action based upon decisions of DOL ALJs in cases involving other licensees. The Petitioners have not offered any explanation as to why their assertions regarding the NRC's alleged failure to take enforcement action against other licensees should have any bearing upon the disposition of Petitioners' requests regarding this Licensee. Nonetheless, Petitioners' assertions of NRC's failure to take appropriate enforcement action have been referred to the OIG.

The Petitioners also assert that a confidentiality provision in a particular settlement agreement may "chill" the work force, and that such provisions in general undermine the effectiveness of section 211 because employees are unable to ascertain whether they can obtain a sufficient remedy for raising safety concerns. Although section 211 does not address this matter, settlement agreements may not contain any provision that would prohibit, restrict, or otherwise discourage an employee from participating in protected activity. *See, e.g.*, 10 C.F.R. § 50.7(f). The NRC has reviewed the settlement agreement referred to by the Petitioners and determined that it does not contain any restrictive provisions that would violate the Commission's regulations in this regard. In addition, contrary to the Petitioners' assertion that employees are unable to determine the content of settlement agreements, DOL has made clear that such agreements may be obtained under the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA). *See Coffman v. Alyeska Pipeline Services Co. and*

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[6] The Administrative Review Board (ARB) now reviews decisions of ALJs on behalf of the Secretary of Labor. 63 Fed. Reg. 6614 (Feb. 9, 1998).

Arctic Slope Inspection Services, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. Therefore, Petitioners' assertion that settlement agreements such as the one at issue are "secretive" is without merit. Nonetheless, the Commission emphasizes that all employees have a right to raise nuclear safety concerns to their management and/or the NRC and that such employees may not be retaliated against for doing so.

In their March 30 submittal, Petitioners requested the NRC to immediately issue an order requiring FPL to conduct an independent third-party oversight of FPL's nuclear energy department's resolution of employees' safety concerns. As grounds for this request, Petitioners assert that the Licensee does not maintain a comprehensive plan for handling safety concerns raised by employees and for ensuring a discrimination-free environment, that FPL has not tolerated dissenting views or been effective in reviewing and addressing safety issues, and that the NRC's process for handling allegations at FPL appears inadequate.

The Petitioners' assertions are without merit. As previously described, the NRC has determined that FPL's ECP has been effective in handling and resolving employees' concerns. The assertion that the NRC's process for handling allegations at FPL appears inadequate has been referred to the OIG.

In sum, for all of the reasons discussed above, the Petitioners have not provided support for their assertions that FPL has discriminated against particular employees for raising nuclear safety concerns, that there has been a "chilling effect" upon the raising of such concerns, or that there is a hostile work environment at the Licensee's facilities that would provide a basis for the NRC to take the actions that they have requested. Therefore, no further action by the NRC is warranted based upon these assertions.

B. Requests Related to Assertions of Licensee Failure to Establish or Implement Procedures or Meet Technical Specifications

In their March 6 submittal, the Petitioners request that: (1) the NRC order FPL to submit a plan within 30 days for an independent written appraisal of St. Lucie site and corporate organizations and activities to develop recommendations for improvement in management controls and oversight and ensure compliance with required procedures; (2) the Licensee implement an oversight program to monitor safety pending completion of NRC review of the appraisal results; (3) the Licensee implement and complete the recommendations within 6 months of NRC approval; and (4) the NRC issue a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of $500,000 for repetitive violations at St. Lucie. As grounds for these requests, Petitioners assert that the Licensee has failed to establish or implement procedures at St. Lucie to ensure configuration control over safety-related systems; has repeatedly failed to meet Technical

Specifications, which has resulted in repetitive NRC enforcement actions; and has been ineffective in ensuring lasting improvements as a result of leadership deficiencies. In further support of their requests, Petitioners have included, as attachments to their submittal, newspaper articles documenting similar concerns.

Petitioners are correct that during the 1995-1996 time frame, the NRC identified certain violations involving configuration control for which escalated enforcement action was taken, that certain violations have also been identified since 1996 associated with equipment clearance problems, and that there have been instances in which certain Technical Specification requirements were not met. However, the Licensee has initiated extensive corrective actions in regard to violations of Technical Specifications and the NRC has concluded that these corrective actions are acceptable. In addition, overall configuration control of safety-related equipment has been adequately implemented, and the Licensee's performance in connection with configuration control of safety-related equipment has improved. For example, the SALP report issued in August 1998 for the St. Lucie plant specifically noted marked improvement in the identification of equipment deficiencies. For the SALP period of January 1996 to March 1997, the St. Lucie plant received scores of "Good" for the categories of Operations, Maintenance, Engineering, and Plant Support, and "Superior" for Engineering and Maintenance for the period of April 1997 to June 1998.

Furthermore, the newspaper articles provided by the Petitioners do not include any information not already known to the NRC. The information[7] was previously considered by the NRC. In fact, much of the information was taken from NRC inspection reports and other NRC documents. For these reasons, the Petitioners have not provided a sufficient basis for the NRC to take the actions that they have requested in this submittal. Nonetheless, NRC inspectors continue to monitor the Licensee's performance in areas such as equipment clearances.

C. Request for Investigation of Radioactive Contamination and Additional Safety Concerns

In their April 4, 1998 submittal, Petitioners request that the NRC immediately investigate certain additional safety concerns. Briefly summarized, these concerns are that: (1) a violation occurred and remains uncorrected involving the flow of water from an area contaminated with radioactivity at the St. Lucie facility into an unlined pond and that the Licensee directs personnel to sample only the surface water and not to survey or sample sediment from the pond; (2) the Licensee is "discriminating" by not allowing certain employees to be inter-

[7] A number of the articles are based upon a Florida Public Service Commission report on the decline in FPL's distribution system (i.e., customer service) and provide no information that would indicate this decline had any impact upon the safety performance of the Licensee's facilities.

viewed by evaluators of the Institute of Nuclear Power Operations (INPO) on site conducting investigations; (3) the Licensee's "Work It Now" (WIN) team is improperly grouping work orders in order to reduce the number of open orders; (4) an excessive amount of outside contract labor remains on site due to understaffing resulting from restructuring; and (5) NRC Resident Inspectors (RIs) are only assigned to work the day shift, so that many employees do not have access to the NRC on site, and the three inspectors on site are insufficient to monitor many safety-related work functions outside the day shift.

Regarding the Petitioners' assertions of radioactive contamination from the flow of water from storm drains, this matter was initially evaluated during an inspection conducted April 26-29, 1977 (Inspection Report No. 50-335/77-6).[8] The inspection determined that, as a result of an overflow of the refueling water tank on April 6, 1977, water contaminated with radioactivity was released from the radiologically controlled area to a stormwater basin within the site boundary. The layout of the stormwater basin was such that, under routine operating conditions, liquids collected in the system could not drain from the site and, after evaluating alternative means of removal, the Licensee elected to pump the water from the storm basin to the discharge canal. However, there was no indication that the release of the water to the discharge canal resulted in any violations of the Licensee Technical Specifications or that the limits established in 10 C.F.R. Part 20 had been exceeded.

During an inspection conducted February-March 1996 at the St. Lucie plant (Inspection Report 50-335/96-04; 389/96-04, dated April 29, 1996), NRC inspectors noticed that the east pond was posted with signs displaying a radiation symbol and the words "Restricted Area Keep Out," and "Radioactive Materials Area." The inspector determined that the posting was due to the east pond having received some contaminated water from the 1977 spill. The inspector learned that the Licensee had sampled and evaluated the soil from the pond berm and bottom in 1992 and observed detectable radioactive contamination at various depths of 1 to 6 feet, with the activity decreasing with depth. The most significant level of contamination detected was in the first 3 feet of sediment below the pond. In addition, the inspection determined that the water was free of measurable contamination. No violations or deviations from NRC requirements were identified in connection with this matter. The presence of residual contamination in the sediment of the pond poses no public health or safety hazard because the pond is on the Licensee's controlled property and not accessible to the public and because the area is posted. Furthermore, the Petitioners have failed to provide any evidence that personnel were "warned" or "directed" only to survey or sample the water. Finally, given the age of this

[8] NRC's May 4, 1998 acknowledgment letter to the Petitioners incorrectly referenced NRC Inspection Report 50-335/93-17 as addressing this issue.

issue, the fact that there is no danger to public health and safety, and the fact that the NRC is aware of, and has evaluated, the circumstances of this event, this issue does not provide a basis for the actions requested by the Petitioners.

With regard to the Petitioners' concern that certain employees are not allowed to speak to INPO evaluators, the NRC has found no evidence that the Licensee is preventing employees from speaking to INPO evaluators in order to prevent them from raising nuclear safety concerns or for any other purpose such as would violate the Commission's Employee Protection regulations. FPL has stated in its July 1998 response to the petition that, although FPL selects certain employees to speak with INPO evaluators on certain technical issues, those selections are based on the employee having knowledge of the issue under review by INPO. Moreover, INPO evaluators are free to speak with any FPL employee or contractor at any time and INPO evaluators who visit nuclear plant sites are generally badged for unescorted access, which allows them to conduct their evaluations and interviews with employees without first consulting Licensee management. The Petitioners have not provided any information that would support their assertion, or contradict these statements by the Licensee, and, therefore, the Petitioners' request is denied.

With regard to the Petitioners' assertion that the Licensee's WIN team is improperly grouping plant work orders to artificially reduce the number of outstanding requests, the Licensee's WIN process was intended as an expedited process to resolve minor maintenance and toolpouch maintenance tasks that are considered within the "skill of the craft." These tasks include replacing lightbulbs, painting, and replacing piping insulation. This process and procedures for expediting minor maintenance tasks does not violate any NRC requirements, nor does it artificially reduce the number of outstanding requests. The Petitioners' concern regarding the grouping of plant work orders was also reviewed during an inspection conducted between February 15 and March 28, 1998. The results of that inspection are documented in NRC Inspection Report 50-335/98-03, 50-389/98-03 dated April 27, 1998. As described in the Inspection Report, the inspectors observed portions of maintenance associated with fifteen work orders, most notably the replacement of a reactor coolant pump seal cartridge. The inspectors concluded that the work was adequately performed and procedures were being appropriately used by qualified personnel. After reviewing the plant work order and maintenance programs, the inspectors concluded that the Licensee was aggressive in reducing the maintenance backlog and the backlog was being well controlled.

Regarding the Petitioners' concern about the Licensee's staffing levels and the use of outside contract labor, NRC requirements on staffing are included in the Licensee's Technical Specification administrative requirements. The Technical Specifications contain no requirements as to the minimum number of maintenance workers or regarding the use of outside contractors. However,

the NRC is continuing to monitor the quality and timeliness of maintenance work at the Licensee's facilities on equipment important to safety.

Finally, there is no merit to the Petitioners' assertions that RIs are only assigned to the day shift and that the three inspectors on site are insufficient. The Commission's policy (as established in Inspection Manual Chapter 2515) provides that RIs should spend 10% of their total time on site during other than normal working hours. The adequacy of onsite coverage is reviewed on an ongoing basis by Regional management. The number of RIs and the percentage of time spent by RIs during normal working hours at the St. Lucie plant is consistent with Commission policy and that at other U.S. nuclear power plants. The Petitioners have not provided sufficient information to support their assertion that Licensee employees do not have reasonable access to the NRC RIs or that there are too few RIs on site to monitor safety-related work.

For all of these reasons, the Petitioners have not set forth a sufficient basis that would warrant the NRC to take any of the actions that they have requested. Therefore, these requests by the Petitioners are denied.

III. CONCLUSION

The NRC has carefully evaluated each of the many issues raised by the Petitioners. As described above, the NRC has undertaken certain of the actions that the Petitioners have requested. Specifically, the NRC has conducted numerous inspections evaluating the circumstances of many of the issues that the Petitioners have raised, and has reviewed the settlement agreement referred to by the Petitioners in order to determine whether it contains any restrictive provisions that may "chill" the work force. Thus, to the extent that Petitioners have requested that the NRC investigate these issues and review the settlement agreement, the petition is granted. However, for the reasons discussed previously, no basis exists for taking the additional actions requested in the petition. Therefore, in all other respects, the petition is denied.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute the final action of the

Commission 25 days after issuance unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 21st day of October 1998.