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INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - June 1986



U. S. NUCLEAR REGULATORY COMMISSION

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**INDEXES TO
NUCLEAR REGULATORY
COMMISSION ISSUANCES**

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U. S. NUCLEAR REGULATORY COMMISSION

Foreword

Digests and indexes for issuances of the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions of Rulemaking are presented in this document. These digests and indexes are intended to serve as a guide to the issuances.

Information elements common to the cases heard and ruled upon are:

- Case name (owner(s) of facility)
- Full text reference (volume and pagination)
- Issuance number
- Issues raised by appellants
- Legal citations (cases, regulations, and statutes)
- Name of facility, Docket number
- Subject matter of issues and/or rulings
- Type of hearing (for construction permit, operating license, etc.)
- Type of issuance (memorandum, order, decision, etc.).

These information elements are displayed in one or more of five separate formats arranged as follows:

1. Case Name Index

The case name index is an alphabetical arrangement of the case names of the issuances. Each case name is followed by the type of hearing, the type of issuance, docket number, issuance number, and full text reference.

2. Digests and Headers

The headers and digests are presented in issuance number order as follows: the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking.

The header identifies the issuance by issuance number, case name, facility name, docket number, type of hearing, date of issuance, and type of issuance.

The digest is a brief narrative of an issue followed by the resolution of the issue and any legal references used in resolving the issue. If a given issuance covers more than one issue, then separate digests are used for each issue and are designated alphabetically.

3. Legal Citations Index

This index is divided into four parts and consists of alphabetical or alphanumerical arrangements of Cases, Regulations, Statutes, and Others. These citations are listed as given in the issuances. Changes in regulations and Statutes may have occurred to cause changes in the number or name and/or applicability of the citation. It is therefore important to consider the date of the issuance.

The references to cases, regulations, statutes, and others are generally followed by phrases that show the application of the citation in the particular issuance. These phrases are followed by the issuance number and the full text reference.

4. Subject Index

Subject words and/or phrases, arranged alphabetically, indicate the issues and subjects covered in the issuances. The subject headings are followed by phrases that give specific information about the subject, as discussed in the issuances being indexed. These phrases are followed by the issuance number and the full text reference.

5. Facility Index

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CLI-86-1 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; January 30, 1986; MEMORANDUM AND ORDER

- A The Commission denies the remaining aspect of Joint Intervenor's motion to reopen the record in this operating license proceeding on management character and competence. The Commission finds that Joint Intervenor's motion to reopen, which is based on the pendency of ongoing investigations of the Office of Investigations, does not meet the heavy burden required to reopen a closed record.
- B The standards for reopening a closed record require consideration of three factors: (1) whether the motion to reopen is timely; (2) whether the information raises a significant safety (or environmental) concern; and (3) whether the information might have led the Licensing Board to reach a different result. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 311 (1985).
- C The burden of satisfying the reopening requirements is a heavy one. See, e.g., Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620-21 (1976). Bare allegations or the simple submission of new contentions are not enough to meet these standards. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).
- D At a minimum, the new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. It must be tantamount to evidence and possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be relevant, material and reliable. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366-67, *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted on other grounds*, 760 F.2d 1320 (1985). Information that investigations are under way by itself does not meet this standard.
- E A movant in seeking to meet the heavy burden required to justify reopening a closed record is not entitled to engage in discovery in order to support the motion. Rather, the issue in each case is whether the available information meets the standards for reopening. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). It is not the duty of the adjudicatory boards to search for evidence that might fill in gaps in the moving party's submissions.
- F The Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984), addresses the conflict between the duty to disclose investigation or inspection information to the boards and parties and the need to protect that information. The provisions of that Policy Statement come into play only when Staff or OI have new information material and relevant to any "issue in controversy in the proceeding." Previously uncontested issues raised in a motion to reopen are not "issues in controversy in a proceeding" unless and until both the motion to reopen is granted and the contention is admitted.
- G Boards have the authority to examine issues not placed in controversy by the parties only where specific facts are brought to their attention indicating that there is a serious safety, environmental, or common defense and security matter. See 10 C.F.R. § 2.760a; Texas Utilities

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- Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). The mere pendency of OI investigations by themselves does not raise a serious safety matter.
- CLI-86-2 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart); SPECIAL PROCEEDING; February 6, 1986; ORDER
- A The Commission decides that review of ALAB-826, 22 NRC 893 (1985), is unwarranted. The Commission reaches no judgment on whether the Licensing Board statement regarding INPO's compliance with its own criteria is correct.
- CLI-86-3 INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION, Docket No. LRP; DISCRETIONARY PROCEEDING; February 13, 1986; MEMORANDUM AND ORDER
- A The Commission denies a request to modify the December 18, 1985 Notice of Hearing on leak rate falsifications at TMI-2.
- CLI-86-4 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Unit 1), Docket No. 50-445; REQUEST FOR ACTION; March 13, 1986; MEMORANDUM AND ORDER
- A The Commission denies a motion requesting that Texas Utilities Electric Company, which neglected to request a timely renewal of its Unit 1 construction permit prior to expiration of the permit, be required to apply for a new construction permit. The Commission agrees with the NRC Staff's finding that the construction permit amendment granting extension of the construction completion date involves no significant hazards considerations, and it therefore refuses to stay an extension of that construction permit granted by the NRC Staff, to halt further construction, or to grant a "preextension" hearing. The Commission refers the request for a hearing on the construction permit extension to the Atomic Safety and Licensing Board Panel for appointment of a hearing board, and it refers the request for enforcement action against the Licensee for construction activities after expiration of the construction permit, to the NRC Staff for appropriate action.
- B Failure to make a timely application for an extension prior to the expiration date of a construction permit does not have the effect of causing a complete forfeiture of the permit such as to preclude issuance of an extension and to require an entirely new construction permit proceeding.
- C The filing of a timely request for an extension under 10 C.F.R. § 2.109 keeps a construction permit in force.
- D An amendment extending a construction permit does not necessarily involve a significant hazards consideration, especially when the amendment does not involve substantive changes in construction design or methods, but merely gives a licensee more time to complete construction.
- E The Commission has delegated the responsibility for making significant hazards consideration findings to the discretion of the NRC Staff. See, e.g., 48 Fed. Reg. 14,864, 14,867 (April 6, 1983).
- F Section 189(a)(1) of the Atomic Energy Act allows the Commission to issue a construction permit amendment on an immediately effective basis, without offering a prior hearing, upon a finding that the amendment involves no significant hazards considerations. 42 U.S.C. § 2239(a)(1) (1985 Supp.).
- G The scope of the postextension hearing is limited to challenges to the licensee's effort to show "good cause" for its extension.
- H After expiration of its construction permit, a licensee is not free to continue construction until told to stop. 10 C.F.R. §§ 2.109, 50.10.
- CLI-86-5 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; March 20, 1986; ORDER
- A The Commission declines review of ALAB-819, but provides comments on (a) adjudication of severe accident mitigation measures and (b) emergency planning arrangements for treatment of onsite personnel who are radiologically contaminated and traumatically injured.
- B Parties are to file petitions for review within the time limits prescribed by 10 C.F.R. § 2.786(b)(1). If parties cannot meet that filing schedule, motions are to be filed seeking an extension of time.

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- C A petition for review filed with the Commission shall contain a concise statement why in the petitioner's view the Appeal Board's decision is erroneous. 10 C.F.R. § 2.786(b)(2)(iii).
- D The Commission's "Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants," 50 Fed. Reg. 32,138 (Aug. 8, 1985), bars litigation in case-related safety or environmental hearings of accident mitigation measures beyond those found in Commission regulations.
- E The reasonableness of emergency plans must be determined in each case in light of the specific facts. In areas where many nearby medical facilities are available to treat onsite personnel who are radiologically contaminated or traumatically injured, a prudent course of action under 10 C.F.R. § 50.47 would be to select for a backup hospital a facility reasonably close to the reactor site, but outside of the emergency planning zone.
- CLI-86-6 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; March 20, 1986; MEMORANDUM AND ORDER
- A The Commission denies joint intervenors' request to reopen the record and to stay operation of Limerick Unit 1. The Commission finds that the "new information" proffered by intervenors does not meet the criteria required to reopen a closed record, and, that since no significant safety issue was raised, there is no basis for a stay.
- B The standards for reopening a closed record require consideration of three factors: (1) whether the motion to reopen is timely; (2) whether the information raises a significant safety (or environmental) concern; and (3) whether the information might have led the Licensing Board to reach a different result. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 311 (1985).
- C In seeking to reopen a record on contentions not within the scope of issues raised previously, parties must address the criteria for determining whether late-filed contentions should be admitted. 10 C.F.R. § 2.714(a)(1).
- D Summary denial of a motion for stay is appropriate when the criteria set forth in 10 C.F.R. § 2.788 have not been addressed.
- E The following technical issues are discussed: Flood Protection; Pipeline Rupture.
- CLI-86-7 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; April 18, 1986; MEMORANDUM AND ORDER
- A The Commission reiterates that the Board must decide motions to reopen on the pleadings before it. The Commission finds that the Appeal Board's uncertainty as to whether Intervenor's motion to reopen raised an issue of safety significance should have resulted in the Board's denial of the motion rather than its orders setting up exploratory hearings. The Commission notes that the issues raised by the orders can be handled by Staff outside of the adjudicatory context. Because the Board did not find the pleadings were sufficient to reopen, the Commission vacates the Board's orders and denies Intervenor's motion to reopen.
- B The Commission's inherent supervisory authority over the conduct of NRC adjudications gives it the authority to intervene in a proceeding at any time.
- C The standards for reopening a closed record require consideration of three factors: (1) whether the motion to reopen is timely; (2) whether the information raises a significant safety (or environmental) concern; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 311 (1985).
- D The burden of satisfying reopening requirements is on the movant. A Board is to decide a motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986).
- E The fact that newly proffered contentions raise serious issues is insufficient justification to reopen the record to consider them as Board issues when they are being dealt with in the course of ongoing NRC investigation and Staff monitoring. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982).

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CLI-86-8 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL; OPERATING LICENSE; April 24, 1986; MEMORANDUM AND ORDER

A The Commission dismisses intervenors' quality assurance contention because the Licensing Board erred in its finding that the contention satisfies the five-part balancing of factors test set forth in 10 C.F.R. § 2.714(a)(1). The Commission finds that the contention would not satisfy the test even if reevaluated in light of the developments since admission. The Commission directs the Board to evaluate the admissibility of intervenors' inspector harassment contention, which was admitted by a Board-approved stipulation, under the criteria set forth in 10 C.F.R. § 2.714(a)(1).

B Acceptance or rejection of nontimely filings is controlled by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1): (i) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected; (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (iv) The extent to which the petitioner's interest will be represented by existing parties; and (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

C Absent a showing of good cause for late filing, a "compelling" showing of the other four factors must be made. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

D The second and fourth prongs of the test are accorded less weight, under established Commission precedent, than the other three factors. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

E In addressing criterion (iii) of the test, a petitioner should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

F In weighing the contribution which a party is likely to make in the development of a sound record, the performance of its counsel in a different proceeding is not a relevant consideration.

G The five-factor test assumes that a contention's significance under factor (iii) may have to be balanced against the likelihood of delay under factor (v), as part of an overall balancing of factors. It is inappropriate, however, to balance significance versus delay in evaluation of the fifth factor alone.

H Voluntary withdrawal of other, unrelated contentions from a proceeding does not serve to counterbalance the delaying effect of a late-filed contention.

I Even a waiver of objections by all parties does not serve to render an otherwise untimely contention admissible. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

CLI-86-9 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-RA, 50-289-EW; SPECIAL PROCEEDING; May 15, 1986; ADVISORY OPINION AND NOTICE OF HEARING

A The Commission issues an advisory opinion regarding the involvement of former Licensee official Robert Arnold in Licensee's December 5, 1979 response to an October 25, 1979 NRC Notice of Violation. The Commission finds that there is no reasonable basis to conclude that Arnold made a knowing, willful, or reckless material false statement in the response. The Commission grants Edward Wallace's request for a hearing on whether he made a knowing, willful, or reckless material false statement in Licensee's December 5, 1979 response.

CLI-86-10 GOVERNOR OF NEW MEXICO'S REQUEST TO RETURN TO THE UNITED STATES THE NEW MEXICO PROGRAM FOR THE LICENSING OF EXTRACTION OR CONCENTRATION OF SOURCE MATERIAL FROM SOURCE MATERIAL ORE AND THE RESULTING BYPRODUCT MATERIAL; TRANSFER OF AGREEMENT STATE AUTHORITY; May 23, 1986; ORDER

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- A The Commission grants the Governor of New Mexico's request to return a portion of New Mexico's regulatory program to NRC jurisdiction. On an interim basis, the Commission keeps all affected licenses in effect as currently issued.
- B The Commission believes that a hearing is not required when the NRC reasserts its regulatory authority in an Agreement State at the request of the Governor of that State.
- CLI-86-11 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3; OPERATING LICENSE; June 6, 1986; MEMORANDUM AND ORDER
- A The Commission (1) directs the appointment of a licensing board for immediate initiation of a hearing on the emergency plan exercise results; (2) offers guidance on the timing of summary disposition motions; and (3) offers guidance on the standard for admissibility of contentions concerning emergency exercise results.
- B The Commission continues the Appeal Board's stay of the remand in ALAB-832 (22 NRC 135 (1986)), instructing the Licensing Board not to initiate proceedings on the remand issues until the Commission completes its review of ALAB-832.
- C The Commission is in the process of reviewing the "realism" and "immateriality" issues of ALAB-818 (22 NRC 651 (1985)) and expects to issue shortly a decision on those issues.
- D Commission rules provide that summary disposition motions may be filed "within such time as may be fixed by the presiding officer." 10 C.F.R. § 2.749(a). The rules further provide that if essential facts are not available for response to the motion, the Board may deny it or make such other order as is appropriate. 10 C.F.R. § 2.749(c).
- E Intervenor's are not necessarily entitled to discovery to oppose summary disposition of their contentions. First they must show that discovery is necessary and is likely to produce evidence supporting the existence of a genuine issue of material fact.
- F Under Commission regulations and practice, Staff review of exercise results is consistent with the predictive nature of emergency planning, and is restricted to determining whether the exercise revealed any deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan. Since only fundamental flaws are material licensing issues, hearings on the exercise results may be restricted to those issues.
- G The Commission's rule change in response to the court's decision in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 815 (1985), emphasizes the predictive nature of emergency planning findings. See 47 Fed. Reg. 30,232 (July 13, 1982); 50 Fed. Reg. 19,323 (May 8, 1985).
- H Imposition of an admissibility requirement that intervenors' contentions must demonstrate fundamental flaws in the emergency plan has the potential to require premature evidentiary decisions. What is required is that intervenors' contentions satisfy the specificity and other requirements of 10 C.F.R. § 2.714 by (1) pleading that the exercise demonstrated fundamental flaws in applicant's plan, and (2) providing bases for the contentions which, if shown to be true, would demonstrate fundamental flaws in the plan.

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ALAB-827 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; January 9, 1986; MEMORANDUM AND ORDER

- A The Appeal Board denies the intervenors' request for leave to file a 20-page brief in addition to the 100-page joint brief already filed by them.
- B The Commission's regulations impose a 70-page limit on appellate briefs. A motion requesting an increase in this page limit for good cause may be made, but such a motion must be submitted at least seven days in advance of the due date for filing the brief. 10 C.F.R. § 2.762(e).
- C Not every error of a hearing board justifies an appellate remedy.
- D Appellate review is not intended to offer losing parties a forum for simply renewing claims presented to, but rejected by, the trial tribunal.
- E Proceedings on appeal are intended to focus on significant matters, not every colorable claim of error. See generally *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983) (the purpose of an appellate presentation is to select the most promising issues for review). See also *id.* at 761 (Brennan and Marshall, JJ., dissenting) (good appellate advocacy demands selectivity among arguments).

ALAB-828 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; January 16, 1986; MEMORANDUM AND ORDER

- A The Appeal Board affirms the Licensing Board's denial of intervenors' request to reopen the record in this operating license proceeding.
- B In ruling on a motion to reopen the record, adjudicatory boards consider three factors: (1) whether the motion is timely; (2) whether it addresses a significant safety or environmental issue; and (3) whether a different result might have been reached had the newly proffered material been considered initially. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-85-2, 21 NRC 282, 285 n.3, reconsideration denied, CLI-85-7, 21 NRC 1104 (1985).
- C When a motion to reopen seeks to inject an entirely new issue into the proceeding, a board must consider both the criteria for reopening the record and the standards for admitting late-filed contentions, set forth in 10 C.F.R. § 2.714(a)(1). See *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-82-39, 16 NRC 1712, 1714-15 (1982).
- D Section 2.714(a)(1) sets out the standards for admitting late-filed contentions. They are: (i) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected; (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (iv) The extent to which the petitioner's interest will be represented by existing parties; (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.
- E The Appeal Board has consistently applied 10 C.F.R. § 2.714(a)(b) to appeals from orders that have the effect of completely denying party status to a petitioner. See, e.g., *Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2)*, ALAB-712, 17 NRC 81, 82 (1983). The briefing schedule for appeals from all other types of final orders, however, is that found in 10 C.F.R. § 2.762.
- F Parties to adjudicatory proceedings have an obligation to monitor publicly available documents with a view toward raising issues in a timely fashion. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1048 (1983). This is particularly so with re-

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spect to environmental impact statements, which are expressly intended for public scrutiny and, if necessary, litigation.

- G The most important factor of the three-factor test for reopening the record is whether the motion raises a significant safety issue.
 - H Appeal boards generally do not consider matters raised in the first instance on appeal; rather, appeals are decided on the basis of the record developed below. ALAB-819, 22 NRC 681, 720 n.51 (1985); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978).
 - I Issues that a party fails to brief on appeal are considered waived. See Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982).
 - J An appeal board will not overturn a licensing board's determination weighing the five factors specified in 10 C.F.R. § 2.714(a)(1) absent a showing that the board has abused its discretion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763 (1982).
 - K In a request under 10 C.F.R. § 2.206, any person may seek the suspension, modification, or revocation of a license, or other appropriate action, for alleged regulatory violations or potentially hazardous conditions. See 10 C.F.R. §§ 2.202(a), 2.202(a).
 - L A petition for relief from the Director of Nuclear Reactor Regulation under 10 C.F.R. § 2.206 will not always provide adequate other means to protect a petitioner's interest, so as to satisfy the second factor of section 2.714(a)(1). Whether alternative protective means are, in fact, available depends on the issues sought to be raised, the relief requested, and the stage of the proceeding. In some circumstances, this may well require the equivalence of an adjudicatory hearing. But in other cases, a 10 C.F.R. § 2.206 petition could provide a sufficient vehicle to protect one's interest.
 - M In considering the admissibility of a late-filed contention, the fifth factor of 10 C.F.R. § 2.714(a)(1) requires an adjudicatory board to determine, inter alia, the extent to which the proceeding — not license issuance or plant operation — will be delayed. Fermi, 16 NRC at 1766.
- ALAB-829 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; February 5, 1986; NOTICE
- A The Appeal Board directs that an order it had entered earlier in this proceeding be published in the NRC Issuances. That order directed the NRC staff and the Commission's Office of Investigations (OI) to provide the Board with information gathered in certain OI investigations, which had been described in several Board notifications as potentially relevant to two motions then pending before the Board.
 - B As a general rule, the NRC staff has a responsibility to disclose to adjudicatory boards and the parties all information that is potentially relevant and material to a pending adjudication. 49 Fed. Reg. 36,032 (1984).
 - C In the event of a conflict between the board notification responsibility and the need to protect investigative material from premature public disclosure, Commission policy authorizes adjudicatory boards to conduct a preliminary ex parte, in camera inspection of the material at issue. Of course, information presented to a board ex parte cannot serve as the basis for an adjudicatory decision. The authority for deciding if and when disclosure of the disputed information will occur is retained by the Commission. 49 Fed. Reg. at 36,033-34.
- ALAB-830 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; February 7, 1986; MEMORANDUM AND ORDER
- A In this operating license proceeding, the Appeal Board dismisses intervenor's contention dealing with medical arrangements for the treatment of individuals contaminated and injured onsite, per the stipulation of the parties. The Board also vacates the Licensing Board decision that, despite the stipulation, contained findings of fact and conclusions of law on this matter.

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- B Except for significant safety, environmental, and security issues raised sua sponte pursuant to 10 C.F.R. § 2.760a, the Commission regulations do not authorize boards in operating license proceedings to "decide" matters not in controversy.
- C Once previously contested issues are no longer in dispute, whether before or after the hearing, the proceeding should be dismissed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985).
- ALAB-831 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; February 27, 1986; MEMORANDUM AND ORDER
- A The Appeal Board denies in part and dismisses in part, without prejudice, an intervenor's motion to reopen the record for the purpose of permitting the submission of new contentions.
- B When seeking to reopen an evidentiary record to consider new evidence, a movant must satisfy a tripartite test: (1) is the motion timely; (2) does it address a significant safety or environmental issue; and (3) might a different result have been reached had the newly proffered material been considered initially. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 875, 879 (1980); cited with approval in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985).
- C Each operating nuclear power plant is required to have a fire protection plan that satisfies General Design Criterion 3 in Appendix A to 10 C.F.R. Part 50. See 10 C.F.R. 50.48(a).
- D Operating license technical specifications are meant to be limited in scope to "those items that are directly related to maintaining the integrity of the physical barriers designed to contain radioactivity." 33 Fed. Reg. 18,610 (1968).
- E The Atomic Energy Act and the regulations which implement it contemplate that technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 271-74 (1979).
- F Mere allegations are not enough to satisfy the standard for reopening an evidentiary record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).
- G Among the 10 C.F.R. 2.714(a)(1) factors that determine the acceptability of late contentions, a particularly important one is the extent to which the participation of the contention's submitter "may reasonably be expected to assist in developing a sound record."
- ALAB-832 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; March 26, 1986; DECISION
- A Deferring action on the applicant's appeals, the Appeal Board acts on the appeals of the intervenors from two Licensing Board decisions on emergency planning in this operating license proceeding. The Appeal Board affirms the decisions in part and remands them in part. It directs the Licensing Board, however, not to proceed with the remand unless and until directed to do so by the Commission.
- B It is well-settled that a party may appeal from a Licensing Board decision only if aggrieved by the ultimate result — i.e., the party wishes that result altered in some material respect. See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958 (1982), and cases there cited.
- C It is established that a party prevailing on the trial level may defend its favorable result on any ground that is supported by the record. In this connection, it matters not that the precise claim(s) offered as a basis for affirmance may have been urged upon and rejected by the trial tribunal. Of crucial importance is simply that an adequate record foundation for the claim be present. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 n.3 (1984); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Niagara

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- Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975) (citing *Jaffke v. Dunham*, 352 U.S. 280 (1957) and *California Bankers Assn. v. Schultz*, 416 U.S. 21 (1974)).
- D Appellate review is not intended to offer losing parties a forum for simply renewing claims presented to, but rejected by, the trial tribunal. Proceedings on appeal are intended to focus on significant matters, not every colorable claim of error. ALAB-827, 23 NRC 9, 11 (1986).
- E The emergency preparedness planning for a nuclear facility is focused to a large extent on assuring that prompt and effective actions can be taken to protect the public from exposure to released gases or other radioactive material. NUREG-0654 (FEMA-REP-1), Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980), at 10-12.
- F The 10-mile radius figure for the plume EPZ contained in 10 C.F.R. 50.47(c)(2) was calculated in order to remove the need for site-specific calculations. NUREG-0396 (EPA 520/1-78-016), "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants" (December 1978), at 15-17, 24 and III-7 through III-8.
- G Although the regulations provide that the exact size and configuration of a particular EPZ is to be determined with reference to site-specific factors, the wholesale enlargement of the Commission-prescribed EPZs by a state cannot preclude a licensing decision based upon the requirements of the NRC regulations. The Commission's regulations "clearly allow leeway for a mile or two in either direction, based on local factors. But [section 50.47] . . . clearly precludes a plume EPZ radius of, say, 20 or more miles." *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-781, 20 NRC 819, 831 (1984) (quoting *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, LBP-82-39, 15 NRC 1163, 1181 (1982), *aff'd*, ALAB-717, 17 NRC 346 (1983), *aff'd* sub nom. *Carstens v. NRC*, 742 F.2d 1546 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2675 (1985)).
- H A party seeking to impose a substantial change in the area of the Commission's prescribed EPZ should seek an exception to the rule pursuant to 10 C.F.R. 2.758. *Diablo Canyon*, 20 NRC at 831.
- I It may be true that evidence need be adduced but a single time on any alleged fact, no matter how many contentions might rest upon the purported existence of that fact. But once that fact is established, there is no good reason why it cannot serve more than one purpose — i.e., to buttress multiple claims.
- J "The Commission's emergency planning regulations are premised on the assumption that a serious accident might occur and that evacuation of the EPZ might well be necessary. . . . As a corollary, a possible deficiency in an emergency plan cannot properly be disregarded because of the low probability that action pursuant to the plan will ever be necessary." *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 713 (1985).
- K Emergency response planning for nuclear facilities must make provision for the care of persons removed from the plume EPZ should circumstances necessitate evacuation measures.
- L Section II.J.10.h of NUREG-0654 provides that a relocation center must be at least five miles, and preferably 10 miles, beyond the boundaries of the plume EPZ.
- M Licensing boards are vested with broad discretion in the conduct of the proceedings before them. Thus, so long as they have a rational foundation, board determinations on such questions as the timeliness of motions are not likely candidates for reversal.
- N Neither the law nor the Commission's regulations dictate how many opportunities an applicant has to bring itself into compliance with the Commission's regulatory rules. *Consolidated Edison Co. of New York (Indian Point, Unit No. 2)*, CLI-83-16, 17 NRC 1006, 1014 (1983).
- ALAB-833 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket No. 50-352-OLA (Check Valve); OPERATING LICENSE AMENDMENT, April 4, 1986; MEMORANDUM AND ORDER

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- A The Appeal Board denies the licensee's motion for directed certification of a Licensing Board ruling conditionally admitting an intervenor in this operating license amendment proceeding.
- B Even though a late petitioner seeking to intervene demonstrates standing to be heard and good cause for being late, unless that petitioner also submits an acceptable contention, intervention may still be denied. Cincinnati Gas and Electric Co. (Wm H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 865 (1980).
- C The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that a party must litigate an additional issue, or that a matter will be subject to adversarial exploration rather than staff review, does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474-75 (1985).
- D Claimed violations of the Commission's Rules of Practice, standing alone, are not enough to warrant invocation of the Appeal Board's discretionary interlocutory review of a licensing board ruling. This is especially true where another remedy is provided by the Rules of Practice.
- E The grant of a petition to intervene is appealable immediately on the question whether the petition should have been wholly denied. See 10 C.F.R. § 2.714a(c); Zimmer, 11 NRC 860; Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).
- ALAB-834 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; April 9, 1986; MEMORANDUM AND ORDER
- A The Appeal Board denies an intervenor's motion to reopen the record and introduce a new contention in this operating license proceeding.
- B To prevail on a motion to reopen the record, a movant must demonstrate that (1) the motion is timely; (2) it addresses a significant safety or environmental issue; and (3) a different result might have been reached had the newly proffered material been considered initially. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), review declined, CLI-85-3, 21 NRC 471, 473 n.1 (1985). The most important of these criteria is whether the motion raises a significant safety or environmental issue. ALAB-828, 23 NRC 13, 19 (1986).
- ALAB-835 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket Nos. 50-352-OLA-1 (Check Valve), 50-352-OLA-2 (Containment Isolation); OPERATING LICENSE AMENDMENT; April 11, 1986; MEMORANDUM AND ORDER
- A The Appeal Board denies intervenor's motion for a stay of the effectiveness of two license amendments under which Unit 1 of the Limerick Generating Station is currently operating.
- B Whether requesting a stay from an appeal board under 10 C.F.R. § 2.788 or one under its broader authority as the Commission's delegate under 10 C.F.R. § 2.785, a movant must show that it is entitled to this equitable relief based on an analysis of four factors: (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) Whether the party will be irreparably injured unless a stay is granted; (3) Whether the granting of a stay would harm other parties; and (4) Where the public interest lies. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974), reh'g denied, ALAB-227, 8 AEC 416 (1974), rev'd on other grounds, Porter County Chapter of the Izaak Walter League v. AEC, 515 F.2d 513 (7th Cir. 1975), rev'd and remanded, 423 U.S. 12 (1975).
- C The second of the four stay factors, irreparable injury, is often the most important in determining if a stay is warranted. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984).
- D Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for a stay. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984).

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- E A party seeking a stay is required to demonstrate that the claimed irreparable injury is both certain and great. *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-820, 22 NRC 743, 747 (1985).
- ALAB-836 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; May 7, 1986; DECISION
- A The Appeal Board affirms, subject to an additional license condition, the Licensing Board's third partial initial decision in this operating license proceeding, LBP-85-14, 21 NRC 1219 (1985), with one exception; that matter, relating to the availability of an adequate number of bus drivers to evacuate students, is remanded to the Licensing Board for further prompt action.
- B Appeals that are not briefed are considered waived. See 10 C.F.R. § 2.707; *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-461, 7 NRC 313, 315 (1978); *Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)*, ALAB-140, 6 AEC 575 (1973).
- C The purpose of an evacuation time estimate (ETE) is to provide information (i.e., the time required to evacuate the emergency planning zone and any unusual problems) so that emergency coordinators can decide what protective actions (such as sheltering or evacuation) might be necessary. The Commission's emergency planning regulations, however, do not set any particular time limits for evacuation of the plume emergency planning zone. *Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1)*, ALAB-727, 17 NRC 760, 770-71 (1983).
- D NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Rev. 1 1980) [hereafter, "NUREG-0654"], simply serves as guidance for the NRC staff's review and does not prescribe regulatory requirements. ALAB-819, 22 NRC 681, 710 (1985).
- E There are four categories of radiological emergencies. They are (in ascending order of significance) — "(1) notification of unusual events, (2) alert, (3) site area emergency, and (4) general emergency." 10 C.F.R. Part 50, Appendix E, § IV.C.
- F The purpose of an ETE in emergency planning is to provide a representative time frame for evacuation so that emergency officials can make well-informed, realistic decisions about protective action options. An ETE need not be based on "worst case" assumptions. See NUREG-0654, Appendix 4 (especially at 4-6, 4-7). See also *Zimmer*, 17 NRC at 770-71.
- G The low probability that an accident requiring evacuation might occur is not an appropriate consideration when determining the adequacy of an emergency plan. ALAB-819, 22 NRC at 713. This does not mean, however, that the options provided for under the plan must assume, in addition, the presence of the worst conceivable extraneous conditions. See generally *San Luis Obispo Mothers for Peace v. NRC*, No. 84-1410 (D.C. Cir. April 25, 1986).
- H Technical documents are properly excluded from the record in the absence of sponsorship by an appropriate witness. See *Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2)*, ALAB-669, 15 NRC 453, 477 (1982).
- I In general, contested issues should be resolved through the hearing process and not be left for post-hearing resolution by the NRC staff. *Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2)*, CLI-74-23, 7 AEC 947, 951-52 (1974).
- J Findings in the emergency planning area are essentially predictive in nature: an emergency plan need not be final in every detail, just sufficiently developed to permit the "reasonable assurance" finding required by the Commission's regulations, 10 C.F.R. § 50.47(a)(1). Consequently, in some instances post-hearing verification by the staff of emergency planning measures is not an improper delegation of decisionmaking authority to the staff. See *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1103-04 (1983).
- K The determination of the overall adequacy of medical arrangements, specifically required by 10 C.F.R. § 50.47(b)(12), is not a proper subject for post-hearing staff oversight. See ALAB-819, 22 NRC at 711-15.
- L Even if a licensing board wrongly denies a party cross-examination the complaining party must demonstrate actual prejudice. See *Waterford*, 17 NRC at 1096.

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- M** Issues not raised before a licensing board cannot be properly raised on appeal. See ALAB-819, 22 NRC at 699 n.20; ALAB-828, 23 NRC 13, 20 (1986).
- N** While Federal Emergency Management Agency (FEMA) findings constitute rebuttable presumptions on the adequacy of state and local emergency plans (10 C.F.R. § 50.47(a)(2)), it is not the NRC's function to monitor FEMA's work for compliance with that agency's own regulations. See Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission, 50 Fed. Reg. 15,485 (1985), which sets forth the respective emergency planning responsibilities of, and the areas of cooperation between, FEMA and the NRC.
- O** A licensing board's consolidation, on its own initiative, of parties with "substantially the same interest . . . and who raise substantially the same questions" is explicitly authorized by the Commission's Rules of Practice, 10 C.F.R. § 2.715a. Consolidation can, of course, be improper if it results in prejudice to an intervenor. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).
- P** Although the Commission's Rules of Practice do not expressly refer to the imposition of time restrictions on witness examination, this is clearly among the necessary tools an NRC adjudicatory board possesses to regulate the course of a hearing — providing there is no prejudice to the rights of any party. See 10 C.F.R. §§ 2.718, 2.743(c), 2.757. See also Statement of Policy, 13 NRC at 453.
- Q** A mere demonstration that a licensing board erred by curtailing cross-examination is not sufficient to warrant appellate relief. The complaining party must demonstrate actual prejudice — i.e., that the ruling had a substantial effect on the outcome of the proceeding. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 75-76 (1985); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985).
- R** A party is bound by the literal terms of its own contentions. ALAB-819, 22 NRC at 709.
- S** Offsite emergency plans need not be final before a board can make the reasonable assurance finding required by 10 C.F.R. § 50.47(a)(1). See, e.g., Waterford, 17 NRC at 1104; Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983).
- T** A contention that the ten-mile EPZ concept does not afford adequate protection to people residing near a nuclear power plant amounts to a challenge to the Commission's emergency planning regulations and is thus barred by 10 C.F.R. § 2.758.
- U** Hearsay evidence is generally admissible in NRC proceedings. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 501 n.67 (1985). See also *Mobile Consortium of CETA v. Dep't of Labor*, 745 F.2d 1416, 1419 n.2 (11th Cir. 1984).
- V** Neither 10 C.F.R. § 50.47(b)(5) nor Planning Standard E of NUREG-0654 specifies the means for notifying emergency workers; they simply require that such procedures be established.
- W** It is the applicant's burden to prove reasonable assurance that adequate protective measures can and will be taken in an emergency. See 10 C.F.R. § 50.47(a)(1); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).
- X** Under 10 C.F.R. § 50.47(c)(1), emergency planning deficiencies could result in the suspension of an outstanding license unless it is demonstrated "that [the] deficiencies . . . are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation."
- Y** Formal FEMA review of state and local radiological emergency plans is not triggered until the state has reasonable assurance of the adequacy of the plans and applies to FEMA for final approval. See 44 C.F.R. § 350.7.
- ALAB-837** CAROLINA POWER AND LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL; OPERATING LICENSE; May 29, 1986; DECISION
- A** The Appeal Board affirms the first partial initial decision in this operating license proceeding, LBP-85-5, 21 NRC 410 (1985), in which the Licensing Board determined that the final environmental statement for the Shearon Harris plant satisfies the National Environmental Policy

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- Act and the Commission's implementing regulations. The Appeal Board also affirms earlier Licensing Board rulings rejecting certain contentions and denying an intervenor's petition for a waiver of the Commission's rule prohibiting the litigation of need for power and alternative energy source issues in operating license proceedings.
- B When reviewing factual findings of a licensing board, an appeal board will overturn them only where it is "convinced that the record compels a different result." Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). Accord Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975).
- C All parties appearing before an appeal board, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of facts. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391, 1395-96, reconsideration denied, ALAB-418, 6 NRC 1 (1977).
- D On appeal, "it is not enough [for a party] simply to declare flatly that a particular Board ruling was in error. Rather, it is incumbent upon the appellant to confront directly the reasons assigned for the challenged ruling and to identify with particularity the infirmities purportedly inherent in those reasons." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 n.128 (1985).
- E "[A] party's failure to submit a brief containing sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issues raised . . . is tantamount to their abandonment." Catawba, ALAB-355, 4 NRC 397, 413, reconsideration denied, ALAB-359, 4 NRC 619 (1976). See Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 954-57 (1982); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786-87 (1979), vacated in part and remanded, CLI-80-8, 11 NRC 433 (1980).
- F In deciding the admissibility of contentions, the validity of the factual allegations comprising the contentions should not be considered. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-50 (1979); Duke Power Co. (Transportation of Spent Fuel from Oconee to McGuire), ALAB-528, 9 NRC 146, 151 (1979); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).
- G It is settled that the doctrine of collateral estoppel should be applied in NRC adjudicatory proceedings to preclude a party to the litigation of an issue considered and decided in the construction permit proceeding from relitigating the issue in the operating license proceeding for the same reactor. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212-16, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974). See also Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977).
- H Just as in the judicial context, the purpose of collateral estoppel in administrative proceedings is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues.
- I An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Farley, CLI-74-12, 7 AEC at 203.
- J In order for the doctrine of collateral estoppel to apply, the individual or entity against whom the estoppel is asserted must have been a party, or in privity with a party, to the earlier litigation. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695, aff'd, CLI-82-11, 15 NRC 1383 (1982); id., ALAB-717, 17 NRC 346, 353-54 (1983). The issue to be precluded also must be the same as that involved in the prior proceeding and the issue must have been actually raised, litigated, and adjudged. Additionally, the issue must have been material and relevant to the disposition of the first action, so that its resolution was necessary to the outcome of the earlier proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), aff'd,

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ALAB-575, 11 NRC 14, 15 (1980). Even where these requirements are met, however, the doctrine must be "applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case." Farley, ALAB-182, 7 AEC at 216.

K "Like a cause of action, 'an issue may not be . . . split into pieces [to avoid application of the doctrine of collateral estoppel] 'if it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result.' Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.443[2] at 761 (2nd ed. 1984) (footnotes omitted).

L A party who did not participate in the construction permit proceeding for a reactor but who wishes to relitigate in the operating license proceeding an issue already fully investigated at the construction permit stage, although not collaterally estopped from doing so, has the burden of providing much greater specificity with his contention than is typically required. Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 n.5 (1983).

M It is well settled that in passing upon the admissibility of contentions "it is not the function of a licensing board to reach the merits of any contention." Grand Gulf, 6 AEC at 426. Whether the contention ultimately can be proven on the merits is "not the appropriate inquiry at the contention-admission stage." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985), review denied, CLI-86-5, 23 NRC 125 (1986). See Allens Creek, 11 NRC at 546-49.

N A party to a proceeding before a licensing board has no standing to press before an appeal board grievances of other parties to the proceeding not represented by that party. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-631, 13 NRC 87, 89 (1981). See Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979). Cf. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985).

O The Commission's Rules of Practice require that "[a]n appellant's brief . . . clearly identify the errors of fact or law that are the subject of the appeal." 10 C.F.R. § 2.762(d)(1). See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 792-93 (1985).

ALAB-838 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; June 25, 1986; MEMORANDUM AND ORDER

A The Appeal Board dismisses as interlocutory a state attorney general's appeal from a Licensing Board ruling that rejected at the threshold the attorney general's sole pending contention, on the ground that the denial of the contention did not deprive him of the right to continue to participate in the proceeding inasmuch as the state that he represents was earlier granted the status of an interested state under 10 C.F.R. 2.715(c).

B If the petition for leave to intervene of a private litigant (necessarily filed under 10 C.F.R. 2.714) is denied in its entirety for want of an acceptable contention, the petitioner has the right to take an immediate appeal under 10 C.F.R. 2.714a. By the same token, if all of the accepted contentions of an admitted private intervenor are disposed of adversely to that intervenor during the course of the proceeding (e.g., by summary disposition under 10 C.F.R. 2.749), an immediate appeal may be taken under the general appellate provisions found in 10 C.F.R. 2.762. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75, 77 n.2 (1981).

C In carving out an exception to the general proscription against appeals from interlocutory orders found in 10 C.F.R. 2.730(f), section 2.714a implicitly recognizes that the effect of the denial in its entirety of a private litigant's intervention petition perforce is to foreclose any participation in the proceeding on the part of the petitioner. See Philadelphia Electric Co. (Limerick

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- Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986). Thus, as to that petitioner, the denial is in essence a final order.
- D Section 2.715(c) of the Rules of Practice permits the representative of an interested state to participate in a licensing proceeding without the necessity of submitting (and having accepted) a single contention. By the express terms of the section, that participation may include the introduction of evidence, the interrogation of witnesses, the filing of proposed findings, and the seeking of appellate review by an appeal board and the Commission itself.
- E Although an "interested State" need not take a position with respect to issues raised by other parties, section 2.715(c) provides that its representative may be required "to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate."
- F Only those orders which are directly concerned with the grant or denial of status as an intervenor are excepted by 10 C.F.R. 2.714a from the general prohibition against interlocutory review. A party may not invoke that section to obtain interlocutory review of an order which does no more than exclude from consideration in the proceeding certain of the issues which the party has sought to raise. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976).
- G Appeal boards employ their directed certification authority only where a licensing board ruling either threatens the party adversely affected by it with immediate and serious irreparable impact that, as a practical matter, could not be alleviated by a later appeal, or affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).
- H Neither of the Marble Hill tests for directed certification ordinarily is satisfied where a licensing board simply admits or rejects particular issues for consideration in a case. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 615, rev'd on other grounds, CLI-76-13, 4 NRC 67 (1976).
- I Section 50.47(b)(10) of the Commission's regulations requires that a range of protective actions including sheltering and evacuation be developed for the public — the overall objective being the avoidance of as much radiation exposure as possible. See Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 765 (1983).
- J The emergency response plans for nuclear power plants must meet the specific standards of 10 C.F.R. 50.47(b) — or an applicant must demonstrate pursuant to 10 C.F.R. 50.47(c) that compliance with section 50.47(b) is not necessary — in order for the Commission to be able to make the ultimate finding required by section 50.47(a)(1).

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LBP-86-1 PACIFIC GAS AND ELECTRIC COMPANY (Humboldt Bay Power Plant, Unit 3), Docket No. 50-133-OLA (ASLBP No. 77-357-07-LA); OPERATING LICENSE AMENDMENT; January 14, 1986; MEMORANDUM AND ORDER TERMINATING PROCEEDING

A The Licensing Board grants Licensee's motion to withdraw its license amendment application and dismisses the proceeding.

LBP-86-2 PRECISION MATERIALS CORPORATION (Mine Hill, New Jersey Irradiator Facility), Docket No. 30-22063 (ASLBP No. 85-512-02-ML); MATERIALS LICENSE; January 28, 1986; MEMORANDUM AND ORDER

LBP-86-3 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL (ASLBP No. 81-465-07-OL); OPERATING LICENSE; February 4, 1986; FIFTH PARTIAL INITIAL DECISION

A In this Partial Initial Decision, the Licensing Board finds that the Licensee's onsite emergency plans demonstrate that adequate provisions have been made for medical services for contaminated injured individuals, and concludes that the issue remanded by the Atomic Safety and Licensing Appeal Board has been resolved.

LBP-86-4 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE; February 10, 1986; MEMORANDUM AND ORDER

A The Licensing Board grants motions by Kerr-McGee and NRC Staff to dismiss the People of the State of Illinois Contention AG-1 for their failure to comply with earlier board discovery rulings (LBP-85-38, 22 NRC 604 (1985), and LBP-85-46, 22 NRC 830 (1985)). The Board also denies the People's motion for an extension of time to comply with their discovery obligations as the decision to impose the sanction renders that request moot.

B In determining whether to impose a sanction, and what that sanction should be, licensing boards are guided by NRC regulation 10 C.F.R. § 2.707, the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), and NRC cases containing other Boards' rulings on requests for sanctions. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983); Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977).

C The NRC Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) puts participants in NRC proceedings on notice that they must meet their obligations or sanctions may be imposed. In selecting a proper sanction to impose on parties who disregard their obligations, a board must consider specific factors: "the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances." Id.

D Parties have a responsibility to respond to discovery to enable other parties to gain an understanding of the bases of their contentions in order to properly prepare their own cases, and because thorough discovery minimizes the possibility for surprise at hearing, focusses testimony and cross-examination, and leads to a fully developed record.

E Of the several factors considered in imposing a sanction, those addressing the relative importance of the unmet obligations and potential harm to other parties or to the orderly conduct of the proceeding may be heavily weighted, as discovery is crucial to the conduct of a fair proceeding.

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- F A party may not delay in answering interrogatories even if such delay will not affect the timing of the proceeding in its later stages.
- G A Licensing Board may be justified in imposing sanctions on a party for failure to meet discovery obligations because discovery provides the other parties to the proceeding with factual information undergirding the admitted contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983).
- H If a party upon whom sanctions have been imposed files new or revised contentions out of time, the sanction will be considered in evaluating whether the petitioner sponsoring the contention can be expected to assist in developing the record. See 10 C.F.R. § 2.714(a)(1)(i-v); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).
- LBP-86-5 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; February 14, 1986; MEMORANDUM AND ORDER
- A The Licensing Board grants an intervenor's motion to withdraw one of its contentions. Since the contention involved a previously unresolved generic safety issue, the Board examined the Staff's resolution of that issue and determined that such resolution represented a plausible method for dealing with the issue.
- B A licensing board in an operating license proceeding must examine unresolved generic safety issues, even when they become uncontested, to determine whether the Staff's resolution of the issue is "plausible."
- C The following technical issue is discussed: Overpressurization.
- LBP-86-6 COMMONWEALTH EDISON COMPANY (Zion Station, Units 1 and 2), Docket Nos. 50-295-OLA, 50-304-OLA (ASLBP No. 84-500-06-LA); OPERATING LICENSE AMENDMENT; February 19, 1986; MEMORANDUM AND ORDER DISMISSING PROCEEDING
- A The Licensing Board denies petitioner's petition to intervene and dismisses the proceeding.
- LBP-86-6A PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket No. 50-352-OLA (ASLBP No. 86-522-02-LA) (Check Valve); OPERATING LICENSE AMENDMENT; March 13, 1986; MEMORANDUM AND ORDER RULING ON ROBERT L. ANTHONY'S PETITION FOR LEAVE TO INTERVENE
- LBP-86-6B PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket Nos. 50-352-OLA-1 (ASLBP No. 86-522-02-LA) (Check Valves), 50-352-OLA-2 (ASLBP No. 86-526-04-LA) (Containment Isolation); OPERATING LICENSE AMENDMENT; March 14, 1986; MEMORANDUM AND ORDER CONSOLIDATING PROCEEDINGS AND SETTING SCHEDULE FOR IDENTIFICATION OF ISSUES
- LBP-86-7 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-410-03-OL); OPERATING LICENSE; March 28, 1986; MEMORANDUM AND ORDER
- A The Licensing Board rules on a motion to compel discovery of matters on which attorney-client privilege and attorney work product privilege are asserted.
- B In accordance with recent NRC decisions, Rule 26(b)(4) of the Federal Rules of Civil Procedure is applied to permit discovery of a nontestifying expert only upon a showing of exceptional circumstances.
- C The input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize these documents from discovery.
- LBP-86-8 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; March 28, 1986; SEVENTH PREHEARING CONFERENCE ORDER
- A The Licensing Board issues a Prehearing Conference Order discussing issues for which further hearings are sought.
- B There is no programmatic requirement under the provisions of 10 C.F.R. Part 50, Appendix B (setting standards for a quality assurance program for operation) for a program to control the use and/or sale of illegal drugs by plant personnel.

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- C Where the Commission has suspended a rulemaking pending the development of standards by industry, and in the absence of any statement by the Commission that issues involved in such rulemaking should not be litigated, there is no generic bar to a Licensing Board's consideration of issues which may fall within that rulemaking, under standards in effect prior to such rulemaking or under ad hoc "reasonable assurance" criteria where no programmatic standards exist.
- D The Commission's Rules of Practice require that, for a contention to be litigable, there must be "bases for each contention set forth with reasonable specificity." An anonymous telephone call to a party's representative does not, without more, constitute an acceptable basis.
- E The following technical issue is discussed: Quality assurance program for operation.
- LBP-86-9 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket Nos. 50-352-OLA-1 (ASLBP No. 86-522-02-LA) (Check Valves), 50-352-OLA-2 (ASLBP No. 86-526-04-LA) (Containment Isolation); OPERATING LICENSE AMENDMENT; April 4, 1986; MEMORANDUM AND ORDER DENYING AND DISMISSING PETITIONS FOR LEAVE TO INTERVENE AND TERMINATING PROCEEDING
- LBP-86-10 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-OLA-1, 50-289-OLA-2 (Steam Generator Plugging Criteria); OPERATING LICENSE AMENDMENT; April 9, 1986; MEMORANDUM AND ORDER
- A The Board issues a Memorandum and Order which, inter alia, discusses rulings on admissibility of contentions.
- B There are five purposes for the basis-for-contention requirement in 10 C.F.R. § 2.714.
- C The degree of specificity required involves the exercise of judgment by licensing boards on a case-by-case basis.
- D Section 2.714 of 10 C.F.R. does not require the petition to detail the evidence which will be offered in support of the contentions, and it is not the function of a licensing board to reach the merits of a contention at this stage of the proceeding.
- E At the petition level, all that a petitioner is required to do is to state the reasons (i.e., the basis) for each contention.
- F While the doctrine of collateral estoppel may be raised in opposition to the admissibility of a contention, the petitioner may resist that affirmative defense, in whole or in part, on grounds outside the record of the prior proceeding; e.g., he may claim that, since the conclusion of the prior proceeding, there has been a material change in factual or legal circumstances, or that there exists some special public interest factor in the case. Confronted with such a claim, a licensing board may not reject the contention as barred by the doctrine of collateral estoppel.
- LBP-86-11 CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); OPERATING LICENSE; April 28, 1986; FINAL LICENSING BOARD DECISION
- A In this Final Licensing Board Decision the Board resolves two remaining contentions in Applicants' favor and authorizes the issuance of an operating license for the Shearon Harris Plant. The Board finds that drug use at the Shearon Harris construction site has not been "widespread" as alleged in the Intervenor's contention, and further finds no evidence that drug use has resulted in any specific deficient work or any specific safety concerns at the Harris Plant. The Board also finds that under summer nighttime conditions the combination of siren, informal alerting, and tone alert radio systems demonstrates compliance with the requirement of "essentially 100%" notification within 15 minutes in the first 5 miles of the Harris Emergency Planning Zone (EPZ).
- B Although the NRC has no regulations specifically addressed to drug use at a nuclear power plant construction site, where the evidence has established relationships between onsite use and the possibility of deficient work, an effective program to hold employee drug use to a minimum is an essential element of an applicant's Quality Assurance program, whether or not formally so denominated.

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- C In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability. 10 C.F.R. § 50.47(a)(2). Thus, the FEMA position on an issue may be accepted if that issue is uncontested. But if an intervenor contests such an issue, the rebuttable presumption "dissolves" and the FEMA testimony is given no special weight "beyond that to which [it] would be entitled by virtue of the expertise of the witnesses and the bases presented for their views." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298 (1982), aff'g LBP-81-59, 14 NRC 1211, 1460-66 (1981).
- D The NUREG-0654, Appendix 3 provisions concerning percentages of people to be alerted and times for alerting in the 0-5- and 5-10-mile EPZs have the legal status of a Commission interpretation of 10 C.F.R. § 50.47(b)(5) and Appendix E to Part 50, and are thus binding on the licensing board. This legal status does not, however, extend to other provisions of NUREG-0654, Appendix 3.
- E Reasonable assurance of an alerting rate higher than 95% under summer nighttime conditions is acceptable in the first 5 miles of the EPZ, and therefore meets the NUREG-0654, Appendix 3 requirement of "essentially 100%" alerting within 15 minutes in the first 5 miles. The 90% alerting within 15 minutes under summer nighttime conditions to be expected of the Shearon Harris system is acceptable for the 5-10 mile EPZ.
- LBP-86-12 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-410-03-OL); OPERATING LICENSE; April 21, 1986; MEMORANDUM AND ORDER
- A In an operating license proceeding, the Licensing Board rules on Applicant's motion for partial summary disposition by dismissing some of the Intervenor's subcontentions and by adopting a number of material facts on the subcontentions not dismissed.
- B The Commission's rules governing summary disposition are analogous to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Co. (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).
- C In operating license proceedings, the burden of proof with respect to summary disposition is upon the applicant-movant, who must demonstrate the absence of any genuine issue of material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977).
- D In determining whether a motion for summary disposition should be granted, the record must be viewed in the light most favorable to the opponent of such a motion. Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982).
- E Where the proponent of a motion for summary disposition has met his burden, his opponent must set forth specific facts to demonstrate that there exists a genuine issue of material fact for trial. Mere allegations and denials are not sufficient to overcome an otherwise persuasive summary disposition request. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 444 (1979).
- F On motion for summary disposition, the opposing party need not show that he would prevail on the issues but only that there are genuine issues to be tried. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 NRC 159, 163 (1977), citing Poller v. CBS, Inc., 368 U.S. 464, 473 (1962); American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 280 (2d Cir. 1967).
- G In deciding a motion for summary disposition, the presiding officer has some leeway, under 10 C.F.R. § 2.749, in accepting affidavits based in part on reliable hearsay.
- H In administrative proceedings, the presiding officer has some leeway in accepting hearsay testimony, if reliable, to shortcut what might otherwise be a laborious procedure in establishing the facts.
- I On summary disposition, 10 C.F.R. § 2.749(b)'s requirement that an affiant be "competent to testify to the matters," relates both to competence as an expert witness and competence as a fact witness.
- J In general, a fact witness is competent only if he has personal knowledge of the facts.

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- K Although an administrative board can accept some hearsay to expedite and facilitate the adjudicatory process, it should not exclude fair opportunity for rebuttal of the evidence.
- L Where material facts appear legitimately in dispute and a witness with personal knowledge, or a document relied upon, is readily available, the witness and document should be presented.
- M The leeway given an expert witness to base his testimony upon hearsay, if of the type reasonably relied upon by experts in that field, does not permit the expert to establish material facts of which he lacks personal knowledge.
- N A witness, if he is competent as an expert, may base his opinions on hearsay if of the type reasonably relied upon by experts in that field, but he cannot establish material facts about which he lacks competence as a fact witness.
- LBP-86-13 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-4 (ASLBP No. 77-347-01D-OL) (Low Power), OPERATING LICENSE; May 5, 1986; ORDER DISMISSING PROCEEDING AS MOOT
- LBP-86-14 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-OLA-1, 50-289-OLA-2 (Steam Generator Plugging Criteria); OPERATING LICENSE AMENDMENT; May 19, 1986; MEMORANDUM AND ORDER
 - A The Licensing Board issues a memorandum and order which memorializes a prehearing conference and rules on an intervenor's motion for a time extension and on scheduling matters.
 - B It is a basic principle that "a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Moreover, "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 730 (1985); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982). Finally, "[i]t is well-settled that a participant in an NRC proceeding should anticipate having to manipulate its resources, however limited, to meet its obligations." Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983).
 - C Neither the Licensee nor the Staff can be permitted to leave the presiding body and the other parties to the proceeding in the dark about any information which is relevant and material to the adjudication. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 408 (1975); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387, 1394 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357-58 (1984). Even if there is a reasonable doubt with regard to the Board notification obligation, the information should be disclosed for the Board to decide its true worth. Three Mile Island, supra, at 1358; McGuire, supra, 6 AEC at 625 n.15.
 - D In proceeding to hear those matters which are ripe for hearing, the Board complies with the Commission's direction that the hearing process should move along at an expeditious pace, consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).
 - E The Board's adoption of the procedural mechanism utilized in Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861, 865 (1973), aff'd, ALAB-226, 8 AEC 381, 400 (1974) does not conflict with the decision in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (1984).
- LBP-86-14A PUBLIC SERVICE COMPANY OF INDIANA, INC. and WABASH VALLEY POWER ASSOCIATION, INC. (Marble Hill Nuclear Generating Station, Units 1 and 2), Docket Nos. 50-546-OL, 50-547-OL (ASLBP No. 83-487-02-OL); OPERATING LICENSE; May 30, 1986; MEMORANDUM AND ORDER DIRECTING BRIEFS

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LBP-86-15 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2). Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; June 13, 1986; PARTIAL INITIAL DECISION

- A The Licensing Board issues its second Partial Initial Decision in an operating license proceeding, resolving issues concerning the character and competence of the lead Applicant (HL&P) which were raised by the Commission in CLI-80-32, 12 NRC 281 (1980) and not previously resolved by the Board's first Partial Initial Decision, LBP-84-13, 19 NRC 659 (1984). The Board grants summary disposition of several issues (or portions thereof) and also denies two motions to reopen the record. The Board determines that HL&P properly fulfilled the reporting requirements of 10 C.F.R. § 50.55(e) with respect to the Quadrex Report, except for one additional finding therein, which should have been submitted as "potentially reportable." In addition, the Board rules that, notwithstanding a few instances of less-than-complete disclosure to the Licensing Board, and subject to several conditions or caveats, the Applicants currently possess adequate managerial character and competence to be permitted to complete construction of, and to operate, the South Texas Project. The Board denies summary disposition of a portion of a contention questioning the design of the facility to withstand hurricane-generated missiles and will require further development of the record on that contention.
- B Reportability under 10 C.F.R. § 50.55(e) is determined by a three-part test, all parts of which must be satisfied: a deficiency must be found, it must have the potential to affect safety adversely if left uncorrected, and it must fall into one of the four categories specified in 10 C.F.R. § 50.55(e)(1)(i) through (iv).
- C The requirements of 10 C.F.R. § 50.55(e)(1)(iii) and (iv) apply only to construction deficiencies. To be reportable, design deficiencies must fall within 10 C.F.R. § 50.55(e)(1)(i) or (ii).
- D Failure to submit a "potentially reportable" item, as identified by Staff guidance, is not a violation, since the "potentially reportable" category stems from Staff guidance rather than regulation. But failure to submit as a potentially reportable item an item that later proves to have been reportable constitutes a violation of NRC requirements that may lead to the imposition of penalties.
- E Under 10 C.F.R. § 50.55(e), neither inexperience nor slow accomplishment by a design engineer is per se reportable.
- F A failure of an applicant to submit a requisite report to the NRC pursuant to 10 C.F.R. § 50.55(e) does not, by itself, reflect a deficiency in character or competence. Additionally, to reflect such a deficiency, such failure would have to be a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith.
- G The McGuire doctrine stems from a long line of Appeal Board decisions, extending as far back as 1973, which obligate applicants and licensees to keep licensing or appeal boards informed of newly developing information that is "relevant and material" to issues pending before such boards. The doctrine has been enunciated only through adjudicatory decisions and has not been promulgated into a rule or regulation.
- H It is not improper for a party, in its proposed findings of fact and conclusions of law, to seek reconsideration of an earlier ruling of a licensing board, on the basis of new factual information developed during the course of hearings and not available when a motion for reconsideration would normally have been required to have been submitted.
- I A failure of an applicant to inform a licensing board of information pursuant to the McGuire doctrine does not, by itself, reflect a deficiency in character or competence. Additionally, it would have to be demonstrated that the failure to notify the Board was itself motivated by or reflective of a character deficiency. The additional showing would be that the failure was a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or any indications of bad faith ("a design to mislead or deceive another").
- J The timely submission of information to the NRC Staff (although not to a licensing board) counters a claim that a licensee intentionally acted to conceal from such Board information that should have been furnished earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350 (1984).

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- K** Summary disposition of an issue may be granted if the filings demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law. The burden of proof is on an applicant/movant to demonstrate the absence of a genuine issue. The record is viewed in the light most favorable to the opponent of such a motion. To preclude summary disposition, the opponent must set forth specific facts; naked assertions or general denials are insufficient.
- L** Failure to respond to a motion for summary disposition does not mean that the motion must be granted. A Board must still find no genuine issue of material fact and that the movant is entitled to prevail as a matter of law. Where significant health and safety issues are involved, a Board should only grant an Applicant's motion for summary disposition if it is convinced from the material filed that the public health and safety will be satisfactorily protected.
- M** Perfection in plant construction and the facility construction quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety.
- N** Summary disposition procedures may be utilized with respect to all or any part of the matters involved in a proceeding. A licensing board may grant partial summary disposition of an issue, where such result is warranted.
- O** The purpose of the summary disposition procedures is not to deny a litigant the right to a full hearing on legitimately disputed issues of material fact but, rather, to ensure that evidentiary hearing time is not unnecessarily devoted to issues as to which there is no genuine issue of material fact.
- P** Under NRC rules, the structures, systems, and components of nuclear power plants important to safety are to be designed to withstand the effects of natural phenomena, including hurricanes and tornadoes. They must also be appropriately protected against dynamic effects, including the effects of missiles. 10 C.F.R. Part 50, Appendix A, § 1, General Design Criteria 2 and 4.
- Q** Under a currently effective Commission Policy Statement (Safety Goal Development Program, 48 Fed. Reg. 10,772 (Mar. 14, 1983)), safety goals and preliminary numerical design objectives may not replace NRC regulations as a licensing basis. Safety inferences from probabilistic risk analyses also may not be used to reach bottom-line safety conclusions.
- R** Under certain circumstances, a failure to conform to regulatory requirements may be regarded as de minimis and accepted on that basis.
- S** Current NRC requirements regarding shift technical advisors are set forth in a Policy Statement on Engineering Expertise on Shift, 50 Fed. Reg. 45,621 (Oct. 28, 1985). Since the Commission utilized notice-and-comment procedures comparable to those required for rulemaking in adopting the Policy Statement, the Statement must be accorded considerable regulatory weight.
- T** Three criteria govern a motion to reopen a record filed before a decision has been rendered: (1) the motion must be timely filed; (2) it must address a significant safety (or environmental) issue; and (3) it must demonstrate that the information sought to be added to the record might potentially alter the result which would be reached in its absence.
- U** A licensing board cannot authorize discovery to permit a party to develop information to be used to ascertain whether the record should be reopened.
- V** The following technical issues are discussed: Quality assurance; Reportable occurrences; Hurricanes and tornadoes; Externally generated missiles; Probabilistic risk assessment; Shift technical advisor program; Soils.
- LBP-86-16** PUBLIC SERVICE COMPANY OF INDIANA, INC., and WABASH VALLEY POWER ASSOCIATION, INC. (Marble Hill Nuclear Generating Station, Units 1 and 2), Docket Nos. 50-546-OL, 50-547-OL (ASLBP No. 83-487-02-OL); OPERATING LICENSE; June 18, 1986; MEMORANDUM AND ORDER
- LBP-86-17** GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-OLA-1, 50-289-OLA-2 (Steam Generator Plugging Criteria); OPERATING LICENSE AMENDMENT; June 18, 1986; MEMORANDUM AND ORDER

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A The Licensing Board denies Licensee's motion to the extent that it requests reconsideration of scheduling as set forth in the Memorandum and Order issued on May 19, 1986 (LBP-86-14, 23 NRC 553). To preclude the filing of a frivolous motion to reopen the record, the Board partially grants the motion by ordering that any party must indicate in such a motion to reopen that the Licensee's test data and the analyses thereof in the Staff's SSER are so significant as to change the result of the prior hearing.

LBP-86-18 KERR-McGEE CHEMICAL CORPORATION (Kress Creek Decontamination). Docket No. 40-2061-SC (ASLBP No. 84-502-01-SC); SHOW CAUSE; June 19, 1986; INITIAL DECISION

- A Upon consideration of an Order to Show Cause issued to require preparation of a remedial action plan to clean up certain radiological contamination, Licensing Board rules that:
1. Jurisdiction exists under the Atomic Energy Act independently of the Uranium Mill Tailings and Radiation Control Act to require that a remedial action plan be prepared which is necessary or desirable to protect health because of the radiological contamination of Kress Creek and the West Branch of the DuPage River.
 2. The radium-in-soil standard promulgated by the U.S. Environmental Protection Agency under the Uranium Mill Tailings and Radiation Control Act is not appropriate to protect health in the situation posed by this radiological contamination.
 3. Part 20 of the Commission's regulations contains numerical radiological dose limitations which are appropriate to protect health in the situation posed by this radiological contamination.
 4. The record in this proceeding does not demonstrate that the Part 20 numerical radiological dose limitations are exceeded as a result of this contamination.

Order to Show Cause dismissed.

B The regulatory scheme set forth in Part 20 of the Commission's regulations clearly indicates that jurisdiction exists to regulate a licensee's activities to control radiological doses regardless of whether those doses result from material which may be classified as special nuclear, source, or byproduct material.

C The radium-in-soil standards promulgated by the U.S. Environmental Protection Agency under UMTRCA are not appropriate to protect health in the situation presented by this radiological contamination because the principal hazard is gamma radiation, not radon or thoron.

D The numerical radiological dose limitations contained in Part 20 of the NRC regulations are applicable to materials licensees and are appropriate to protect health where the principal hazard is gamma radiation.

LBP-86-19 BABCOCK AND WILCOX (Parks Township, Pennsylvania, Volume Reduction Facility). Docket No. 70-364 (ASLBP No. 815-511-01-ML); MATERIALS LICENSE; June 23, 1986; MEMORANDUM AND ORDER

A In this Memorandum and Order, the presiding Administrative Judge rules on the admission of supplemental complaints and establishes procedures and a schedule for further proceedings.

B The degree of specificity with which the basis for a complaint must be alleged initially involves the exercise of judgment on a case-by-case basis. In the exercise of this judgment, it is appropriate to keep in mind the purpose of the basis-for-contention requirement as set forth by the Appeal Board in Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

C The procedures to be followed in hearing issues admitted in this informal proceeding are established pursuant to the Commission Order directing the institution of the proceeding.

LBP-86-20 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2). Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL); OPERATING LICENSE; June 26, 1986; MEMORANDUM

A In this Memorandum, the Licensing Board expresses preliminary concerns during the early stages of an intensive program intended to verify the adequacy of the Comanche Peak Plant in order to permit Applicants to make mid-course corrections in their study plan should they choose to do so.

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- B It is appropriate for a Board to inform parties of its preliminary concerns at an early stage of a lengthy study, review process. This permits Applicants to make mid-course corrections that might be more expensive or time-consuming if made at a later date.
- C The following technical issues are discussed: Sampling, to review adequacy of design and construction; Trending of discrepancies or deficiencies; Statistics, effect of inter-observer reliability.
- LBP-86-21 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA, 50-323-OLA (ASLBP No. 86-523-03-LA); OPERATING LICENSE AMENDMENT; June 27, 1986; MEMORANDUM AND ORDER
- A In this Memorandum and Order, the Licensing Board rules on the admissibility of contentions considered at a prehearing conference. The Board finds that all petitioners have filed at least one admissible contention, and admits them as intervenors.
- B The mere fact that otherwise unidentified allegations are under investigation by two Commission offices does not constitute a particularized issue for litigation in this proceeding.
- C The fact that a geologic repository site for nuclear waste is not being considered in California, allegedly in part because of seismic conditions, is not relevant to the decision to permit or deny expansion of a spent fuel pool. The safety considerations, including engineering criteria and seismic forces governing the design and construction of an aboveground spent fuel pool with a life of several decades differ substantially from those for construction of a permanent, underground repository that must remain stable for thousands of years.
- D The thrust of § 132 of the Nuclear Waste Policy Act is that federal officials are to encourage utilities to use and add spent fuel storage capacity. The requirement that the views of the population surrounding a reactor be considered goes to the congressional program of encouraging onsite interim storage, not to the question whether the public health and safety and the environment are protected by the terms of any license. This very administrative proceeding is one mechanism for ascertaining those views.

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ISSUANCES OF THE ADMINISTRATIVE LAW JUDGE

ALJ-86-1 KENNETH L. BURTON, Docket No. 55-60575 (ASLBP No. 86-515-01-SP) (Senior Operator License for Millstone Nuclear Power Station, Unit 3); SPECIAL PROCEEDING; January 27, 1986; ORDER TERMINATING PROCEEDING

ALJ-86-2 NORTH AMERICAN INSPECTION, INC., Docket No. 30-20982, License Nos. 37-23370-01, EA 85-01 (ASLBP No. 86-516-01-OT); CIVIL PENALTY; April 15, 1986; MEMORANDUM AND ORDER TERMINATING PROCEEDING

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DIGESTS **ISSUANCES OF DIRECTORS' DECISIONS**

DD-85-19 ARKANSAS POWER AND LIGHT COMPANY (Arkansas Nuclear One, Unit 1), Docket No. 50-313; SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312; FLORIDA POWER CORPORATION (Crystal River Unit No. 3 Nuclear Generating Plant), Docket No. 50-302; DUKE POWER COMPANY, et al. (Oconee Nuclear Station, Units 1, 2, and 3), Docket Nos. 50-269, 50-270, 50-287; GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289; REQUEST FOR ACTION; January 29, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A The Director of the Office of Nuclear Reactor Regulation denies the petition of Mr. John Doherty requesting institution of proceedings to show cause why the operating licenses for certain named facilities should not be suspended or revoked until alleged problems associated with operation of control rod drive mechanisms at the facilities are resolved.

DD-86-1 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1), Docket No. 50-352; REQUEST FOR ACTION; January 21, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A The Acting Director of Nuclear Reactor Regulation denies petitions filed by Robert L. Anthony and Frank R. Romano which sought revocation of certain exemptions from NRC regulations issued by the NRC Staff for operation of Limerick Generating Station, Unit 1. The petitioners had not identified any safety or environmental information that would warrant a change in the Staff's previous conclusions regarding the exemptions.

- B In the absence of an adequate factual basis for a petition or a nexus between the issues raised in the petition and the request for relief, no action need be taken on a petition under 10 C.F.R. § 2.206. Matters which are before the Board in a licensing proceeding are not the appropriate subject of a § 2.206 petition.

DD-86-2 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. 50-483; REQUEST FOR ACTION; February 10, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A The Director of the Office of Inspection and Enforcement denies a petition filed by Alan S. Nemes on behalf of the Missouri Coalition for the Environment and Kay Drey. The petition requested action with respect to the Callaway Plant Unit 1, based upon issues concerning the certification and qualification of quality assurance inspectors to conduct inspections at the Callaway facility.

- B The granting of an NRC operating license does not hinge upon a demonstration of error-free construction. Rather, what is required is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety.

- C Section 2.206(a) requires petitioners to set forth the facts that constitute the basis for their request.

- D The requirements of Regulatory Guides 1.8 and 1.58 for qualification of inspection personnel are discussed.

- E Not every violation compels the suspension or revocation of an operating license. Such action could be appropriate if there has been a pervasive breakdown of quality assurance.

- F Acceptability of the licensee's quality assurance program under 10 C.F.R. Part 50, Appendix B, is discussed.

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ISSUANCES OF DIRECTORS' DECISIONS

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DD-86-3 NUCLEAR FUEL SERVICES, INC. (Erwin, Tennessee Plant), Docket No. 70-143; REQUEST FOR ACTION, March 3, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Inspection and Enforcement denies in part a petition filed by the Oil, Chemical and Atomic Workers International Union requesting that the Commission investigate certain allegations and take other action with regard to Nuclear Fuel Services' Erwin, Tennessee facility. The request rested on the claim that the nonbargaining unit workers carrying out limited operations at the facility as a result of a strike are neither trained nor qualified to perform the work, thus posing a threat to public health and safety. The Director determined that the Staff had already investigated the specific allegations raised in the petition and taken appropriate enforcement action, and that the further relief requested in the petition was unwarranted.

B Not every violation of the Commission's regulations or licenses compels suspension or revocation of a license.

C In accordance with the NRC Enforcement Policy, a violation involving a failure to perform an adequate search, resulting in the entry of a weapon on the site, is normally classified as a Severity Level III violation and warrants consideration by the NRC of the proposed imposition of a civil penalty.

DD-86-4 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440, 50-441; REQUEST FOR ACTION, March 18, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Donald L. Schlemmer on behalf of the Western Reserve Alliance and denies in part a petition filed by Susan Hiatt on behalf of Ohio Citizens for Responsible Energy. The petition filed by the Western Reserve Alliance requested that the Commission suspend construction and other activities at the Perry plant on the grounds that the seismic design of the facility is inadequate in light of an earthquake which occurred January 31, 1986, and take other actions with regard to the Perry facility. The petition filed by Ohio Citizens for Responsible Energy requested that the Commission not authorize fuel loading or issue an operating license for the Perry plant until certain actions have been completed in connection with the earthquake, including inspecting the facility for damage which may have resulted, investigating the earthquake, and reevaluating local seismicity. The Director determined that the Staff had already extensively investigated the earthquake and its effects upon the Perry structure and equipment and is reevaluating the geology and seismology, and that no adequate basis existed to grant the additional relief requested by the petitioners.

B The Commission has ruled that § 2.206 is not an appropriate avenue for relief where an issue is pending, or has been considered, or could have been raised before a board in an ongoing adjudication.

C Under 10 C.F.R. Part 100, Appendix A, the design basis for earthquakes must be determined through evaluation of the geologic and seismic history of the site and surrounding region. The largest earthquakes occurring in the site region must be assessed.

D It is not unusual for an earthquake to have high-amplitude, high-frequency peak accelerations of limited duration. These high-frequency peak accelerations are not used in scaling Regulatory Guide 1.60 design spectra because they are usually of short duration and have little energy and are not representative of spectral response at the lower, more significant frequencies.

E Appendix A to 10 C.F.R. Part 100 describes procedures to be followed in determining whether a fault is capable and whether the nuclear power plant is required to be designed to withstand the effects of surface faulting.

F Section 2.206(a) of 10 C.F.R. requires that a petitioner "set forth the facts that constitute the basis for the request." Absent such a showing, no action need be taken on a request.

G The Director, upon receipt of a request to initiate an enforcement proceeding, is not required to accord presumptive validity to every assertion of fact by a petitioner. Rather, his role is to make an inquiry appropriate to the facts asserted, and to obtain and assess the information he believes necessary to make that determination.

DIGESTS
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DD-86-5 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 2),
Docket No. 50-353; REQUEST FOR ACTION; March 21, 1986; DIRECTOR'S DECISION
UNDER 10 C.F.R. § 2.206

- A The Director, Office of Nuclear Reactor Regulation, denies a petition filed pursuant to 10 C.F.R. § 2.206 by Marvin I. Lewis on behalf of himself and Citizen Action in the Northeast requesting the immediate suspension and ultimate revocation of the construction permit for the Limerick Unit 2 facility. The Petitioners argued that recent findings by an Administrative Law Judge of the Pennsylvania Public Utility Commission demonstrate that Unit 2 is economically unviable, that the cost/benefit ratio required to be evaluated by the NRC under the National Environmental Policy Act is now unfavorable and, consequently, the construction permit should be revoked.

DD-86-6 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Unit 1),
Docket No. 50-352; OPERATING LICENSE AMENDMENT; May 13, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A A request for a stay of a May 13, 1986 amendment to the Limerick Unit 1 Operating License which was filed by R.L. Anthony and the Friends of the Earth is denied under 10 C.F.R. § 2.206 because it failed to raise substantial health or safety issues warranting suspension of the license amendment which permits a limited extension of time for certain equipment surveillances.

DD-86-7 ALABAMA POWER COMPANY (Joseph M. Farley Nuclear Plant, Units 1 and 2),
Docket Nos. 50-348A, 50-364A; REQUEST FOR ACTION; June 16, 1986; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A The Director of Nuclear Reactor Regulation grants in part and denies in part a petition of the Alabama Electric Cooperative, Inc., which requested action to enforce the antitrust conditions incorporated in the licenses for Alabama Power Company's Farley Nuclear Plant. A Notice of Violation under 10 C.F.R. § 2.201 accompanies the decision and describes the circumstances in which the Director agrees that Alabama Power Company has violated the antitrust license conditions.

DIGESTS
ISSUANCE OF DENIAL OF PETITION FOR RULEMAKING

DPRM-86-1 A.N. TSCHAECHÉ, Docket No. PRM-20-16. RULEMAKING DENIAL: April 23, 1986. DENIAL OF PETITION FOR RULEMAKING

- A The Nuclear Regulatory Commission is denying a petition for rulemaking submitted by A.N. Tschaeche. The petitioner requested that the Commission amend its regulations to state that full compliance with the Commission's regulations is evidence acceptable in a court of law that the licensee was not negligent, and that the Commission's regulations must be violated before a prima facie case is pleaded on the issues of negligence and causation in any action to recover for injuries claimed to have resulted from exposure to ionizing radiation. The Commission is denying the petition because it is inconsistent with the intent of the Commission's regulations and because the Commission lacks the legal authority to grant the petitioner's request.
- B The Commission has no legal authority to promulgate rules of evidence for the courts.
- C Evidence of compliance with the Commission's nuclear safety regulations constitutes evidence of a person's having acted reasonably but is not conclusive proof of the absence of negligence. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 577-79 (W.D. Okla. 1979), *aff'd in part and rev'd in part*, 667 F.2d 908 (10th Cir. 1981), *rev'd and remanded*, 464 U.S. 238 (1984), *on remand*, 769 F.2d 1451, 1457-58 (1985).
- D The Commission's radiation protection standards are not intended to establish absolute safe levels of exposure below which it can be conclusively presumed that no injury could occur. Rather, in view of scientific uncertainty about radiation exposure, the Commission requires its licensees to ensure that radiation exposures are kept "as low as is reasonably achievable."
- E Pursuant to 10 C.F.R. § 2.802(e), the Commission may seek public comments prior to denying a petition for rulemaking; however, it is not required to do so.

DIGESTS

ISSUANCES OF DENIALS OF PETITIONS FOR RULEMAKING

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 OPERATING LICENSE AMENDMENT: June 18, 1986; MEMORANDUM AND ORDER: LBP-86-17, 23 NRC 792 (1986)
- THREE MILE ISLAND NUCLEAR STATION, Unit 1; Docket Nos. 50-289-RA, 50-289-EW
 SPECIAL PROCEEDING: May 15, 1986; ADVISORY OPINION AND NOTICE OF HEARING: CLI-86-9, 23 NRC 465 (1986)
- WATERFORD STEAM ELECTRIC STATION, Unit 3; Docket No. 50-382-OL
 OPERATING LICENSE: January 30, 1986; MEMORANDUM AND ORDER: CLI-86-1, 23 NRC 1 (1986)
 OPERATING LICENSE: February 5, 1986; NOTICE: ALAB-829, 23 NRC 55 (1986)
- WEST CHICAGO RARE EARTHS FACILITY; Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML)
 MATERIALS LICENSE: February 10, 1986; MEMORANDUM AND ORDER: LBP-86-4, 23 NRC 75 (1986)
- ZION STATION, Units 1 and 2; Docket Nos. 50-295-OLA, 50-304-OLA (ASLBP No. 84-500-06-LA)
 OPERATING LICENSE AMENDMENT: February 19, 1986; MEMORANDUM AND ORDER DISMISSING PROCEEDING: LBP-86-6, 23 NRC 92 (1986)