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APPLICATIONS

1.0 APPLICATION FOR LICENSE/PERMIT

1.1 Applicants

All co-owners of a nuclear power plant must be co-applicants for NRC licenses for the facility. To hold otherwise could place a cloud on significant areas of the NRC's regulatory authority and is not consistent with the safety considerations with which Congress was primarily concerned in the Atomic Energy Act. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 200-201 (1978). The Appeal Board's decision in Marble Hill thus overrules the Licensing Board's holding to the contrary in Omaha Public Power District (Fort Calhoun Station, Unit 2), LBP-77-5, 5 NRC 437 (1977).

1.2 Renewal Applications - See Section 6.11 for Reactor License Renewal Proceedings

Applications for a renewal of a license may be filed with the NRC. 10 CFR § 2.109 provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license authorizing activities of a continuing nature, the existing license will not be deemed to expire until the renewal application has been finally determined. A construction permit is a "license" for these purposes. 10 CFR § 2.109(a)(1993). See AEA § 185, 42 U.S.C. 2235 ("[f]or all other purposes of this Act, a construction permit is deemed to be a 'license'"); see also 10 CFR § 2.4. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 202 n.38 (1993).

As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management. The past performance of management may help indicate whether a licensee will comply with agency standards. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

Because NRC regulations provide that operating license renewals do not have to furnish information regarding the onsite storage of spent fuel or high level waste disposal, low-level waste storage and disposal, and mixed waste storage and disposal, these subjects are barred as contentions. Duke Energy Corp., LBP-98-33, 48 NRC 381, 391 (1998).

For environmental issues listed in Subpart A, Appendix B of 10 CFR 51 as Category 1 issues, the Commission resolved the issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding. See 61 Fed. Reg. 28,467 (1996). Consequently, the Commission's license renewal regulations also limit the information that the Applicant need include in its environmental report, see 10 CFR 51.171(d), and the matters the agency need consider in draft and final supplemental environmental impact statements to the GEIS. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 154 (2001).

10 CFR Part 51, Subpart A, Appendix B, Category 2 issues are site specific and must be addressed by the applicant in its environmental report and by the NRC in its draft and final supplemental environmental impact statements for the facility. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 153 (2001).

The scope of the draft and final supplemental environmental impact statement is limited to the matters that 10 CFR 51.33(c) requires the applicant to provide in its environmental report. These requirements do not include severe accident risks, but only "severe accident mitigation alternatives (SAMA)." 10 CFR 51.53(c)(3)(ii)(L). The Commission, therefore, has left consideration of SAMAs as the only Category 2 issue with respect to severe accidents. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 160-161 (2001).

Probabilistic risk assessments are not required for the renewal of an operating license. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-160 (2001).

1.3 Applications for Early Site Review

The Commission's regulations in 10 CFR Part 2 have been amended to provide for an adjudicatory early site review. See 10 CFR §§ 2.101(a-1), 2.600 to 2.606. These early site review procedures, which differ in both form and effect from those of Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), are designed to result in the issuance of a partial initial decision with regard to site suitability matters chosen by the applicant.

An applicant who seeks early site review is not required to own the proposed power plant site. The real test for deciding on early site review is whether or not the applicant can produce the information required by regulation and necessary for an effective hearing. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1136 (1981).

The Commission's early site review regulations do not require that the applicant have a "firm plan" to construct a plant at the site, but rather are meant to provide an opportunity to resolve siting issues in advance of any substantial commitment of resources. 10 CFR § 2.101(a-1), §§ 2.600 *et seq.* Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 975-976 (1981).

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

1.4 Application for License Transfer

A formal application for a license transfer is not necessary where the current owner filed for bankruptcy and the transfer was arranged in the settlement agreement and was published in the Federal Register. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 219-220 (2000).

The question in indirect transfer cases is whether the proposed shift in ultimate corporate control will affect a licensee's existing financial and technical qualifications. See 65 Fed. Reg. at 18,381 (2000). The transfer applicants need provide only information bearing on the

inquiry at hand, and not more extensive information that may be required in other contexts. Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000). "A license transfer proceeding is not a forum for a full review of all aspects of current plant operation." GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000), cited in Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 133 (2000).

1.5 Form of Application for Construction Permit/Operating License

1.5.1 Form of Application for Initial License/Permit

Regulations permit the filing of an application in three parts: Antitrust Information; SAR; and ER (10 CFR § 2.101). The application is initially treated as a "tendered application" pending a preliminary Staff review for completeness. 10 CFR § 2.101(a)(2).

1.5.2 Form of Renewal Application for License/Permit

(RESERVED)

1.6 Contents of Application

1.6.1 Incomplete Applications

The determination as to whether an application is sufficiently complete for docketing is for the Staff, rather than an adjudicatory board, to make. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 280 (1978).

A materials licensee may submit evidentiary material to supplement its license application where intervenors seek to invalidate the license because of alleged deficiencies and omissions in the license application. Curators of the University of Missouri, LBP-90-45, 32 NRC 449, 454-55 (1990). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 109-110 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

Although the Commission by no means encourages defective applications, an application which is minimally flawed is not automatically totally rejected. Further, the application may be modified or improved as NRC review goes forward. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995). "An application need not be rejected whenever an omission or error is found." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001).

Pending staff review of a license extension application does not constitute a fatal defect in the application and does not afford an adequate basis for a contention. Such "open items" in license applications are not unusual and are generally not a cause for concern since they must eventually be dealt with by the Staff before the license can be granted. Duke Energy Corp., LBP-98-33, 48 NRC at 381, 386-87 (1998).

It is not true that all licensee commitments must be converted into express license conditions to be enforceable. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235-236 (2001).

For a materials license, having no final estimates, no final plan, and no final NRC Staff review indicates that the NRC staff has not yet resolved all issues material to licensing. Also, an adequate financial assurance plan is material to licensing. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 241 (2000).

1.6.2 Material False Statements

Under Section 186 of the Atomic Energy Act of 1954 (42 U.S.C. § 2236), a license or permit may be revoked for material false statements in the application. The Commission depends on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993).

Liability of an applicant or licensee for a material false statement in violation of Section 186a of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), *aff'd sub nom.* Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).

Licensee remains responsible for the contents of the application even if licensee used a consultant to assist in the preparation of the application. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 429 (1993).

Intent to deceive is irrelevant in determining whether there has been a material false statement under Section 186a of the Atomic Energy Act; a deliberate effort to mislead the NRC, however, is relevant to the matter of sanctions, once a material false statement has been found. Consumer Power Co. (Midland Plant, Units 1 and 2) ALAB-691, 16 NRC 897, 915 (1982); The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1387 (1984).

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347 (1976), the Appeal Board held that:

(1) A statement may be "false" within the meaning of Section 186 even if it is made without knowledge of its falsity - *i.e.*, scienter is not a necessary element of a false statement under Section 186.

(2) Information is material under Section 186 if it would have a natural tendency or capability to influence the decision of the person or body to whom it is to be submitted - *i.e.*, the information is material if a reasonable Staff member would consider it in reaching a conclusion. The information need not be relied upon in fact.

Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker, not whether the decisionmaker would, in fact, have relied on it. Determinations of materiality require careful, common sense judgments of the context in which information appears and the stage of the licensing process involved. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), *aff'd sub nom.* Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984); The

Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1408-09 (1984); Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427-29 (1993).

The mere existence of a question or discussion about the possible materiality of information does not necessarily make the information material. Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-691, 16 NRC 897, 914 (1982). The nature (e.g., physical attributes and capabilities) and status of an applicant's proposed facility are material matters in a decision whether to grant a radioactive byproduct materials license. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 428 (1993).

The Commission that it need not rely on a false statement in order for it to be material, nor must the statement in fact induce the agency to grant an application. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 428 (1993).

For each alleged misrepresentation, section 186 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2236), requires that the Board be apprised of the following as precisely as possible: (1) what was said, (2) in what context the statement existed, (3) the proof that the statement was inaccurate or incomplete, (4) when (if applicable) the statement was corrected, and (5) whether the Board should be concerned about the length of delay between the statement and when it was corrected. This will require proof of the time line of actual events, demonstrating not only that they occurred but also when they occurred. In addition, the Board will require that the proof offered will make some allowance for inaccuracies in expression, understanding, and memory. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288, 303-04 (1994).

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), the Commission affirmed the Appeal Board's rulings *supra* and, in addition, held that silence (omissions) as to material facts regarding issues of major importance to licensing decisions is included in the Section 186 phrase "material false statement" since such an interpretation will effectuate the health and safety purposes of the Act. Thus, the sanctions of Section 186 apply not only to affirmative statements but to omissions of material facts important to health and safety.

A "material false statement" under Section 186a of the Atomic Energy Act encompasses omissions as well as affirmative statements. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 911 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), *aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission*, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984). The Commission has indicated, however, that it is reconsidering its views on what constitutes a material false statement in this regard. See 49 Fed. Reg. 8583, 8584 (1984).

Information concerning a licensee's or applicant's intent to deceive may call into question its "character," a matter the Commission is authorized to consider under Section 182 of the Atomic Energy Act, 42 U.S.C. 2232a, or its ability and willingness to comply with Agency regulations, as Section 103b, 42 U.S.C. § 2133b, requires. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 915 n.25 (1982).

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

A deliberate false statement or withholding of material information would warrant the imposition of a severe sanction. Not only are material false statements and omissions punishable under Sections 234 and 186 of the Atomic Energy Act, but deliberate planning for such statements or concerns on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where those plans are not carried to fruition. When parties and their attorneys engage in conduct which skirts close to the line of improper conduct, they are running a grave risk of serious sanction if they cross that line. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

The penalties that flow from making a false statement to a presiding officer and the NRC staff, including the possibility of criminal violations under 18 U.S.C. § 1001 and agency enforcement actions, can be sufficient to ensure compliance without the additional step of incorporating into a decision a list of commitments that an applicant has clearly acknowledged it accepts and will fulfill. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 410 (2001), citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plants, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988) (holding that there was no need to incorporate applicant commitment in order given potential Staff enforcement).

1.7 Docketing of License/Permit Application

If the application is found to be complete, a docket number will be assigned and the applicant and other appropriate officials notified. 10 CFR § 2.101(a)(3).

1.8 Notice of License/Permit Application

1.8.1 Publication of Notice in Federal Register

The Federal Register Act (44 U.S.C. § 1508) provides that a publication of a notice in the Federal Register constitutes notice to all persons residing in the United States. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982).

One may be charged with notice of matters published in the Federal Register. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). (**Note** - The Appeal Board expressly declined to reach the question of whether the Federal Register notice bound the petitioners to its terms. Id. at 10).

The notice to parties wishing to intervene in hearings before the Commission published in the Federal Register is notice to all the world. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1085 (1982).

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice establish the time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

There appears to be no requirement that the rights of interested local governmental bodies to be made parties to a proceeding be spelled out in the notice of opportunity for hearing. Thus, a notice of opportunity for hearing is not defective simply because it fails to state the right of an interested governmental body to participate in a proceeding. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978).

1.8.2 Amended Notice After Addition of New Owners

(RESERVED)

1.8.3 Notice on License Renewal

(RESERVED)

1.9 Staff Review of License/Permit Application

An ASLB has ruled that the Staff has a right to continue to meet privately with parties even though a hearing has been noticed, and that, while an ASLB has supervisory authority over Staff actions that are part of the hearing process, it has no such authority with regard to the Staff's review process. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975).

Note that 10 CFR § 2.102 explicitly provides that the Staff may request any one party to a proceeding to confer informally with the Staff during the Staff's review of an application.

In the absence of a demonstration that meetings were deliberately being scheduled with a view to limiting the ability of intervenors' representatives to attend, the imposition of hard and fast rules would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenor's opportunity to attend as one of the factors to be taken into account in making its decisions on the location of such meetings. Fairness demands that all parties be informed of the scheduling of such meetings at the same time. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

Adjudicatory boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, boards cannot direct the Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

It is up to the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980). However, where a Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling for review. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

One aspect of the NRC role in regulating nuclear power plants is to provide criteria forming the engineering baseline against which licensee system designs, including component specifications, are judged for adequacy. It has not been the Staff's practice to certify that any particular components are qualified for nuclear service, but, rather, it independently reviews designs and analyses, qualification documentation and quality assurance programs of licensees to determine adequacy. This review approach is consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.). Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 426 (1978).

Pursuant to 10 CFR § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1008 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 506 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693-94 (1986), aff'd on other grounds sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 12 (1987).

The NRC is not required to make a new finding on the adequacy of emergency preparedness plans for the issuance of a renewed nuclear power reactor operating license. 10 CFR § 50.47(a)(1), 56 Fed. Reg. 64943, 64966-67 (Dec. 13, 1991). In accordance with Section 50.47(a)(2), the Commission is to base its finding on a review of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented", and on a review of the NRC Staff assessment of applicant's onsite emergency plans. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Union Electric Co. (Callaway Plant, Unit 1), ALAB-754, 18 NRC 1333, 1334-1335 (1983), affirming, LBP-83-71, 18 NRC 1105 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 652 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). However, 10 CFR 50.47(a)(2) does not mandate that a Board's finding on the adequacy of an emergency plan must be based on a review of FEMA findings and determinations. Since 10 CFR § 50.47(a)(2) also provides that any other information available to FEMA may be considered in assessing the adequacy of an emergency plan, a Board may rely on such evidence, properly admitted into the hearing record, when FEMA findings and determinations are not available. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 531-32 (1988). In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of the adequacy of an emergency plan. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing 10 CFR § 50.47(a)(2); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 365 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 239 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 714 (1988), aff'd in part and rev'd in part on other grounds, ALAB-924, 30 NRC 331 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 397, 624 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 139 n.38 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 360 (1989). The presumptive validity of FEMA findings does not depend upon the presentation of testimony by FEMA witnesses. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 437 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor is thus free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991), aff'd, CLI-95-1, 41 NRC 71, 121 (1995).

1.10 Withdrawal of Application for License/Permit/Transfer

10 CFR § 2.107(a) provides, in part, that “[t]he Commission...may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 581 (1988).

A Licensing Board has no jurisdiction to impose conditions on the withdrawal of an application for an operating license where the applicant has filed a motion to terminate the operating license proceeding prior to the Board's issuance of a notice of hearing on the application. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986), citing 10 CFR § 2.107(a). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-91-36, 34 NRC 193, 195 (1991). A notice of hearing is only issued after a Board considers any requests for hearing and intervention petitions which may have been submitted, and makes a determination that a hearing is warranted. Thus, the notice of receipt of an application for an operating license, notice of proposed action, and notice of opportunity for hearing are not functionally the notice of hearing referred to in 10 CFR § 2.107(a). Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 723-24 (1986).

Where a party has prevailed or is about to prevail, an unconditional withdrawal cannot be approved. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1135 (1982).

While Section 2.107 is phrased primarily in terms of requests for withdrawal of an application by an applicant, the Commission itself has entertained such requests made by other parties to a construction permit proceeding, Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974), and has indicated that such a request is normally to be directed to, and ruled upon by, the Atomic Safety and Licensing Board presiding in the proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-37, 8 AEC 627, n.1 (1974). Thus, it appears that a Licensing Board has the authority, under 10 CFR § 2.107, to consider a motion to compel withdrawal of an application filed by a party other than the applicant.

The filing of an application to construct a nuclear power plant is wholly voluntary. The decision to withdraw an application is a business judgment. The law on withdrawal does not require a determination of whether the decision is sound. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

Where an applicant abandons its construction of a nuclear facility and requests that the construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating LBP-83-8, 17 NRC 158 (1983).

Withdrawal of a license transfer application also moots an adjudicatory proceeding on the proposed transfer. Niagara Mohawk Power Corp., et. al. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000).

The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. The record must support any findings concerning the conduct and harm in question. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58.

Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1137 (1982).

A Licensing Board has substantial leeway in defining the circumstances in which an application may be withdrawn but the withdrawal terms set by the Board must bear a rational relationship to the conduct and legal harm at which they are aimed. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983).

Under 10 CFR § 2.107(a), withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. However, to make a serious case for conditions, the Intervenors reasonably can be held to an obligation to offer some indication of their objective. The proponent of litigation always bears the burden of explaining which direction the litigation will take. Sequoyah Fuels Corp. (Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 191-93 (1995).

The applicant for a license bears the cost of Staff work performed for its benefit, whether or not it withdraws its application prior to fruition. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1137 (1981).

The antitrust information required to be filed under 10 CFR § 50.33a is part of the permit application; therefore, any applicant who wishes to withdraw after filing antitrust information, must comply with the Commission's rule governing withdrawal of license applications (10 CFR § 2.107(a)), even if a hearing on the application had not yet been scheduled. To instead file a Notice of Prematurity and Advice of Withdrawal is an impermissible unilateral withdrawal, and the filing will be treated as a formal request for withdrawal under 10 CFR § 2.107(a). Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

With regard to design changes affecting an application, where there is a fairly substantial change in design not reflected in the application, the remedy is not summary judgment against the applicant, nor is withdrawal and subsequent refile of the application necessarily required. Rather, an amendment of the application is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974).

1.10.1 Withdrawal Without Prejudice

An applicant may withdraw its application without prejudice unless there is legal harm to the intervenors or the public. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976). The Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976).

The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982), citing Jones v. SEC, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

In the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal without prejudice where the applicant has prevailed or where there has been a nonsuit as to particular issues. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1136 (1982).

Where a motion for leave to withdraw a license application without prejudice has been filed with both an Appeal Board and a Licensing Board, it is for the Licensing Board, if portions of the proceeding remain before it, to pass upon the motion in the first instance. As to whether withdrawal should be granted without prejudice, the Board is to apply the guidance provided in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982).

A Board may authorize the revocation of a Limited Work Authorization and the withdrawal of an application without prejudice after determining the adequacy of the applicant's site redress plan and clarifying the responsibilities of the applicant and Staff in the event that an alternate use for the site is found before redress is completed. United States Dep't of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

1.10.2 Withdrawal With Prejudice

Following a request to withdraw an application the Board may dismiss the case "without prejudice," signifying that no disposition on the merits was made; or "with prejudice," suggesting otherwise. (10 CFR § 2.107(a), 10 CFR § 2.321 (formerly 2.721(d))). A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties. It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 978-979 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), LBP-8281, 16 NRC 1128, 1134 (1982), citing Fed.R. Civ.P. 41(a)(1), (2); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976), citing 5 Moore's Federal Practice, §41.05 (2d ed. 1981).

General allegations of harm to property values, unsupported by affidavits or unrebutted pleadings, do not provide a basis for dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984), citing Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981), Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 979 (1981).

Allegations of psychological harm from the pendency of the application, even if supported by the facts, do not warrant the dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

The Commission has the authority to condition the withdrawal of a license application on such terms as it thinks just. See 10 CFR 2.107(a). However, dismissal with prejudice is a severe sanction which should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999).

1.11 Abandonment of Application for License/Permit

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980).