NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

July 1, 1998 — December 31, 1998

Volume 48
Pages 1 – 415

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

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PREFACE

This is the forty-eighth volume of issuances (1 – 415) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 1998, to December 31, 1998.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards—LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and Decisions on Petitions for Rulemaking—DPRM.

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

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Cite as 48 NRC 1 (1998) **CLI-98-11**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 40-8905-MLA**

QUIVIRA MINING COMPANY
(Ambrosia Lake Facility,
Grants, New Mexico) **July 17, 1998**

The Commission reviews an Atomic Safety and Licensing Board decision that denied a request for hearing and leave to intervene to challenge a materials license amendment. The Commission affirms the Board's finding that the Petitioner lacks standing to intervene. The Petitioner's economic interests, which were unrelated to any radiological harm, did not fall within the zone of interests of the Atomic Energy Act, the Commission found.

RULES OF PRACTICE: STANDING TO INTERVENE

To demonstrate standing in Commission licensing proceedings under AEA § 189a, a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

Increased competition represents a cognizable Article III injury.

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTERESTS)

Under our case law, to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also must show that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (NEPA)

NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions. A petitioner who suffers only economic injury has no standing to bring a challenge under NEPA.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (NEPA)

The fact that economic interest or motivation is involved will not preclude standing, but the petitioner must also be threatened by environmental harm.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Merely because one is injured by a particular agency action does not necessarily mean one is within the zone of interests protected by the applicable statute. The zone of interests test would prove meaningless if it encompassed any party affected by an agency's decision.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

The petitioner must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the ''zone of interests'' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. The two-pronged test set forth by the Supreme Court thus asks: (1) what are the interests ''arguably . . . to be protected'' by the relevant statutory provisions; and (2) are the petitioner's interests that are affected by the challenged agency action among them? *National Credit Union Administration v. First National Bank & Trust Co.,* 118 S. Ct. 927, 935 (1998).

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

The Atomic Energy Act contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose. Unlike the statutes under which the courts have found competitors within a statutory ''zone

of interests,'' the AEA includes no express provision effectively cordoning off a portion of the market from competition. The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. These provisions by themselves do not necessarily turn all competitor licensees into suitable challengers of agency action.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Permitting routine adjudicatory challenges to agency decisions solely because one company sues to complain of a competitive advantage would be more likely to frustrate than to further statutory objectives.

RULES OF PRACTICE: STANDING/ZONE OF INTERESTS (AEA)

Section 84 of the AEA, 42 U.S.C. § 2014, was intended by Congress merely to ensure that licensees did not have to bear unnecessary costs. Section 84 has nothing to do with competitors' interests.

MEMORANDUM AND ORDER

I. INTRODUCTION

In this Decision we review the Atomic Safety and Licensing Board's Memorandum and Order, LBP-97-20, 46 NRC 257 (1997). The Board's order denied Envirocare of Utah, Inc.'s request for a hearing and leave to intervene to challenge a materials license amendment granted to the Quivira Mining Company (Quivira or QMC). The Board found that Envirocare lacked standing to challenge the license amendment and accordingly terminated this proceeding. Pursuant to 10 C.F.R. § 2.1205, Envirocare has appealed to the Commission, requesting us to reverse LBP-97-20. Quivira and the NRC Staff support the Board's Decision. We affirm the Decision.

II. BACKGROUND

This proceeding stems from the Quivira Mining Company's request for a materials license amendment. The amendment, approved by the NRC Staff on May 16, 1997, permits Quivira to accept and dispose of specified amounts of

11e(2) byproduct material[1] at its Ambrosia Lake facility, located near Grants, New Mexico. Prior to the amendment, Quivira was already authorized to possess byproduct material generated by its own operations at the Ambrosia Lake uranium mill, and also to receive limited amounts of byproduct material from *in situ* leach uranium mining facilities. The license amendment at issue in this proceeding authorizes Quivira to receive 11e(2) material from unspecified outside generators.

Envirocare, which itself operates a commercial disposal facility for 11e(2) material, filed a request for a hearing on: (1) the Quivira license amendment and (2) the Finding of No Significant Impact (FONSI) issued by the NRC for that license amendment. Envirocare's core complaint is that the license amendment permits Quivira to become a general commercial disposal facility like Envirocare, but that the NRC did not require Quivira to meet the same regulatory standards the agency imposed upon Envirocare when Envirocare sought *its* license to become a commercial disposal facility for 11e(2) material.

Envirocare, for example, states that to obtain its disposal facility license, it bore the expense of a full environmental review, which included an environmental impact statement (EIS), while in contrast the NRC did not require and has never required an EIS for the Quivira facility. In Envirocare's view, the NRC improperly relied upon outdated and incomplete information when it determined that there was no need for an EIS. Envirocare further claims that Quivira apparently did not or does not have to comply with various strict regulatory standards, found under 10 C.F.R. Part 40, Appendix A, which Envirocare states it must meet at great financial cost. Instead, argues Envirocare, Quivira's ''summary application'' for its license amendment simply failed to show that Quivira has met or will meet these Appendix A requirements for groundwater protection, radon barriers, detection monitoring, inspections, siting and design, and other matters. Envirocare's Request for Hearing (May 28, 1997) at 16. Envirocare states that ''it is not clear that the NRC has required QMC to meet these standards,'' and ''[t]o the extent that the NRC has not required QMC to meet the strict standards applied to Envirocare, NRC approval of QMC's License Amendment discriminates against Envirocare.'' Envirocare's Supplement to Its Request for Hearing (July 3, 1997) at 16.

In short, Envirocare's petition for a hearing argued that it is ''unfair and inconsistent for the NRC to apply different, less stringent standards for the commercial disposal of 11e.(2) wastes at a former mill site, than the NRC applies for the commercial disposal of 11e.(2) at a disposal facility.'' Envirocare's Request for Hearing (May 28, 1997) at 12-13. If Quivira does not have to meet the same regulatory standards, Envirocare argues, it will suffer a ''severe

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[1] Such material is defined as ''the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.'' AEA § 11.e(2), 42 U.S.C. § 2014(e)(2).

competitive disadvantage,'' for Quivira's ''lower costs will allow it to attract customers away from Envirocare.'' *Id.* at 12. Envirocare, therefore, claims an ''economic interest in ensuring that all licensees that propose to accept 11e(2) byproduct material from other persons for disposal comply with applicable NRC standards.'' *Id.* at 11. Envirocare submits that the NRC's approval of Quivira's license amendment violated the Atomic Energy Act (AEA), the National Environmental Policy Act (NEPA), and the Due Process Clause of the United States Constitution.

Quivira and the NRC Staff opposed Envirocare's petition for hearing. Both argued that Envirocare, which operates its disposal facility some 500 miles away from Quivira's Ambrosia Lake facility, has no standing to request a hearing on Quivira's license amendment. Both stressed that the AEA focuses upon the protection of public health and safety — protection from radiological harm and not the alleged economic ''competitive injury'' alleged by Envirocare. Neither the AEA nor the NRC's regulations permit ''market competitors to use the administrative process to oppose new applications,'' submits Quivira. Answer of Quivira Mining Co. in Opposition to the Request for Hearing of Envirocare of Utah, Inc., at 10 (June 12, 1997). Nor does Envirocare's alleged economic injury fall within the interests of NEPA, argues Quivira and the NRC Staff, stressing that although NEPA encompasses economic interests, it also requires there to be some concrete environmental risk to the petitioner, not simply economic risk untied to any environmental injury. Because Envirocare is located nowhere near the Ambrosia Lake facility and thus faces no risk of radiological harm to health or property, Envirocare cannot simply rely upon its status as a market ''competitor'' to challenge this license amendment, concludes Quivira and the Staff.

The Licensing Board in LBP-97-20 denied Envirocare's petition, finding no standing to intervene. Because there ''clearly is a real possibility . . . that competition from the Ambrosia Lake facility will cause economic harm to Envirocare,'' the Board found that Envirocare had demonstrated sufficient ''injury in fact'' for standing. 46 NRC at 265. The Board, however, went on to conclude that the alleged ''competitor'' injury did not fall within the ''zone of interests'' of either the AEA or of NEPA, the two statutes upon which Envirocare had based its standing.

III. ANALYSIS

Under section 189a of the Atomic Energy Act, the Commission must grant a hearing upon the request of any person ''whose interest may be affected by the proceeding.'' 42 U.S.C. § 2239(a). In evaluating whether a petitioner's ''interest'' provides an appropriate basis for intervention, the Commission has

long looked for guidance to current judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *see, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).[2] To demonstrate standing in Commission licensing proceedings under section 189a, a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *see generally Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). Injury must be ''actual or imminent.'' *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983). Consistent with an additional, so-called ''prudential'' requirement of standing, the Commission also has required the petitioner's interest to fall, arguably, within the ''zone of interests'' protected or regulated by the governing statute(s) — here, the AEA and NEPA. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *see also Bennett v. Spear,* 117 S. Ct. 1154, 1167 (1998); *Reytblatt v. NRC,* 105 F.3d 715, 721 (D.C. Cir. 1997). The actual ''breadth'' of the applicable zone of interests will vary according to the particular statutory provisions at issue. *Bennett v. Spear,* 117 S. Ct. at 1161. At bottom, the standing analysis seeks to determine ''whether Congress intended for a particular class of plaintiffs to be relied upon to challenge an agency's disregard of the law.'' *Clarke v. Securities Industry Association,* 479 U.S. 388, 389 (1987).

Here, we hold that Envirocare meets the actual injury test but fails the zone of interests requirement. Because the question of ''competitor standing'' is essentially a matter of first impression for the Commission, we lay out our reasoning at some length.

A. Injury in Fact Traceable to Challenged Action

The Licensing Board found that Envirocare adequately had demonstrated injury in fact for standing. Noting the ''realities of market competition,'' the Board concluded that there is more than a speculative possibility that Envirocare may suffer economic injury from competition with the Ambrosia Lake facility, and that such injury need not be great to satisfy standing requirements. 46 NRC at 264-65. In their appeal briefs, Quivira and the NRC Staff continue to challenge Envirocare's showing of injury. Specifically, the Staff maintains that

[2] Although the Commission customarily follows judicial concepts of standing, we are not bound to do so given that we are not an Article III court. Our principal concern is to ensure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA. *See* 42 U.S.C. § 2239.

Envirocare's alleged ''competitor'' injuries are too speculative. Staff Appeal Brief (Dec. 23, 1997) at 5 n.5. Both Quivira and the Staff also assert that Envirocare's alleged injury lacks any causal connection to the agency action complained of, and therefore would not be redressable by a favorable decision. *Id.* at 11-12. As the Staff's argument goes, any alleged economic harm to Envirocare would not be caused by Quivira's licensing but by Envirocare's licensing. *Id.* at 12.

We reject these claims and agree with the Licensing Board that Envirocare has shown sufficient injury in fact for standing. Envirocare and Quivira are competitors providing a similar service. Envirocare's argument is not simply that it faces added competition from the Ambrosia Lake facility, but that through an alleged inappropriately lax licensing of the Quivira facility, Quiivira will have an unfair competitive edge over Envirocare, which faced more stringent — and more expensive — licensing.

There is no question that ''increased competition represents a cognizable Article III injury.'' *MD Pharmaceutical Inc. v. Drug Enforcement Administration,* 133 F.3d 8, 11 (D.C. Cir. 1998) (citing *Liquid Carbonic Industries Corp. v. FERC,* 29 F.3d 697 (D.C. Cir. 1994)). Here, as the Licensing Board found, the alleged competitive injury ''would not occur absent the licensing'' at issue. Envirocare does not claim that *its* licensing violated statutory requirements, but that the licensing of the Ambrosia Lake facility did. 46 NRC at 265. And if, as Envirocare argues, Quivira obtained improper licensing advantages in violation of the AEA, it is certainly conceivable that these allegedly insufficient license requirements could be remedied through the imposition of additional license conditions or through invalidating the Quivira license pending further safey or environmental reviews. Such actions by the NRC could remedy the ''unfair'' competition of which Envirocare complains.

We disagree with the Staff's claim that the alleged competitor injury is too speculative. For standing purposes, it suffices that an alleged improper licensing of the Ambrosia Lake facility has the ''clear and immediate'' potential to compete with Envirocare's own services. *See Associated Gas Distributors v. FERC,* 899 F.2d 1250, 1259 (D.C. Cir. 1990); *see also Fisons Corp. v. Shalala,* 860 F. Supp. 859, 862 (D.D.C. 1994) (alleged injury not too speculative because of the potential for ''an improper FDA approval of a generic drug to hurt'' competitor). Petitioners need not wait until actual increased competition occurs. *Louisiana Energy and Power Authority v. FERC,* 141 F.3d 364, 367 (D.C. Cir. 1998); *UPS Worldwide Forwarding, Inc. v. United States Postal Service,* 66 F.3d 621, 626 (3d Cir. 1995), *cert. denied,* 516 U.S. 1171 (1996).

B. Zone of Interests

Under our case law, to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue. *See, e.g., River Bend,* 40 NRC at 47; *Reytblatt v. NRC,* 105 F.3d at 721. The zone-of-interests test derives from *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152-53 (1970), and has been followed by the courts ever since. *See, e.g., Liquid Carbonic Indus. v. FERC,* 29 F.3d at 704. Envirocare argues that its economic injury as a competitor falls within the zone of interests of both the National Environmental Policy Act and the Atomic Energy Act. The Licensing Board rejected both these claims and so do we.

1. NEPA

Envirocare first argues that its economic injury is encompassed by NEPA. Envirocare claims, in effect, that a purely economic injury suffices for standing, so long as the challenged agency action — here the licensing of the Ambrosia Lake facility — will have environmental effects *somewhere,* even if those effects will occur hundreds of miles away and could not possibly impact Envirocare. In sum, Envirocare argues it need not suffer any environmental injury to bring an action under NEPA, as long as the facility has a ''primary effect on the natural environment,'' regardless of where that effect may be. *See* Envirocare's Substitute Appeal Brief (Dec. 2, 1997) at 3.

We find Envirocare's position inconsistent with a long line of judicial cases. NEPA's purpose is to protect the environment, ''not the economic interests of those adversely affected by agency decisions.'' *Nevada Land Action Association v. United States Forest Service,* 8 F.3d 713, 716 (9th Cir. 1993) (citing *Portland Audubon Society v. Hodel,* 866 F.2d 302, 309 (9th Cir.), *cert. denied,* 479 U.S. 911 (1989)). A petitioner who suffers only economic injury has no standing to bring a challenge under NEPA. *Id.* Indeed, parties whose motivation is solely ''economic self-interest and welfare are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest.'' *Churchill Truck Lines, Inc. v. United States,* 533 F.2d 411, 416 (8th Cir. 1976). An interest in ''economic well-being vis-a-vis [] competitors is clearly not within the zone of interests'' of NEPA, which was ''not designed to prevent the loss of profits.'' *Id. See also Mountain States Legal Foundation v. Glickman,* 92 F.3d 1228, 1236 (D.C. Cir. 1996) (NEPA's ''rather sweeping list of interests . . . do not include purely monetary interests, such as the competitive effect that a . . . project might have on plaintiff's commercial enterprise'').

It has long been established that the risk that environmental harm ''will be overlooked — is itself sufficient 'injury in fact' to support standing, provided

this injury is alleged by a plaintiff having a *sufficient geographical nexus* to the site of the challenged project [such that they can] expect [] to suffer whatever environmental consequences the project may have.'' *Sabine River Authority v. United States Department of Interior,* 951 F.2d 669, 674 (5th Cir.) (citation omitted, emphasis added), *cert. denied,* 506 U.S. 823 (1992). Parties affected solely by economic harm should not be able to use NEPA ''as a device'' to ''thwart governmental activity under the guise of environmental interest'' simply by ''invoking the magic word 'environment,' when their injury has factually nothing to do with the environment.'' *Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp. 457, 487-88 (D. Kan. 1978) (citations omitted), *aff'd,* 602 F.2d 929 (10th Cir. 1979), *cert. denied,* 444 U.S. 1073 (1980). *See also* David J. Hayes and James A. Hourihan, ''NEPA Requirements for Private Projects,'' 13 B.C. Envtl. Aff. L. Rev. 61, 75 (1985) (''Courts should vigorously apply standing principles to ensure that the judicial system is not clogged with economic dog-fights hidden behind 'environmental' disguises'').

The fact that economic interest or motivation is involved will not preclude standing, but the petitioner must also be threatened by environmental harm. *See, e.g., City of Los Angeles v. United States Department of Agriculture,* 950 F. Supp. 1005, 1011-12 (C.D. Cal. 1996). Otherwise, to permit a competitor ''under the banner of environmental champion'' to raise ''legal challenges to a project approved by federal and state agencies would be so marginally related to and inconsistent with the purposes implicit in NEPA that it cannot be assumed that Congress intended to permit'' the lawsuit. *Id.* at 1013 (citations omitted). *See also Florida Audubon Society v. Bentsen,* 94 F.3d 658, 665-66 (D.C. Cir. 1996) (environmental harm must threaten petitioner's interest).

Envirocare's argument for NEPA standing relies heavily upon *Port of Astoria v. Hodel,* 595 F.2d 467 (9th Cir. 1979). Envirocare cites this case in support of its claim that economic injury is sufficient for standing under NEPA, as long as the project at issue also has environmental effects, no matter where these might occur. But like the Licensing Board, we do not read *Port of Astoria* to stand for so broad a proposition.

In *Port of Astoria,* a broadcasting company had standing to challenge a power plant whose power lines would interfere with the station's broadcasts. Although the injury was economic, it was nevertheless ''the immediate and direct result'' of the power plant, located in the broadcasting company's area. *Id.* at 476. In other words, the injury directly resulted from the project's environmental impacts. The same decision rejected standing for a party threatened only by monetary losses ''not coupled with environmental considerations.'' *Id.* at 474-75. Indeed, the court's reasoning in *Port of Astoria* is similar to that of several of our own agency decisions which hold that economic injury may be protected under NEPA, but only when the economic harm is directly caused by environmental effects.

As the Commission summarized in *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992):

> It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage. For example, if the licensing action in question destroyed a woodland area, those persons who would be deprived of their livelihood in a local timber industry could assert a protected interest under NEPA. *See, e.g., Jersey Central Power and Light Co.* (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business, resulting from the operation of a nuclear power plant); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water that may affect his catch).

Here, unlike *Port of Astoria* and the cases cited in *Rancho Seco,* no direct environmental effects would lead Envirocare to lose any profits. Envirocare's competitor injury is therefore not protected under NEPA.

2. AEA

We turn now to a more difficult question, and one of first impression: whether Envirocare's alleged ''competitor'' injuries fall within the zone of interests of the Atomic Energy Act. As the Licensing Board and the Staff have noted, this agency historically has rejected bare economic injury — unlinked to any radiological harm — as a basis for standing. *See, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). Envirocare did raise a ''competitor'' injury claim a few years ago when it sought to intervene in a different proceeding. *See UMETCO Minerals Corp.,* LBP-94-7, 39 NRC 112 (1994). But by rejecting Envirocare's petition as untimely, the Licensing Board in that earlier proceeding did not need to resolve the question of Envirocare's standing. We now hold that a petitioner's mere claim of ''competitor'' injury, unlinked to a claim of radiological injury, is not among those interests arguably protected or regulated under the Atomic Energy Act.

We begin our analysis by looking at what the Supreme Court has stated about ''zone of interests.'' The Court has said that the zone of interests test is ''not meant to be especially demanding.'' *Clarke,* 479 U.S. at 399-400. There need not be, for instance, any showing of a specific congressional intent to protect or otherwise benefit the particular petitioner or his class. *Id.* Nevertheless, the Court consistently has looked for ''some indication'' that the petitioner's interest is arguably among those interests protected by the relevant statute. *National Credit Union Administration v. First National Bank & Trust Co.,* 118 S. Ct. 927, 936 n.7 (1998).

Merely because one may be injured by a particular agency action, then, ''does not necessarily mean one is within the zone of *interests to be protected by a given statute.*'' *Air Courier Conference of America v. American Postal Workers Union,* 498 U.S. 517, 524 (1991) (emphasis added). The zone-of-interests test would prove ''meaningless'' if it encompassed any party affected by an agency's decision. *Liquid Carbonic Indus. v. FERC,* 29 F.3d at 704. Indeed, the test is ''meant to narrow the field of potential challengers.'' *Id.*

In short, the petitioner ''must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.'' *Air Courier,* 498 U.S. at 523-24 (rejecting standing for postal workers because employment issues were not among the interests postal statutes sought to advance). The two-pronged test set forth in the latest Supreme Court decision on competitor standing thus asks: (1) what are the interests ''arguably . . . to be protected'' by the relevant statutory provisions; and (2) are the petitioner's interests that are affected by the challenged agency action among them? *National Credit Union,* 118 S. Ct. at 935. Here, we find no indication in the AEA of an intent to protect the competitor interest Envirocare asserts — a purely economic interest entirely unrelated to any radiological harm to Envirocare. Envirocare therefore lacks standing. A review of ''zone of interests'' decisions, particularly at the Supreme Court level, supports our view.

In support of standing, Envirocare cites the various Supreme Court cases that have found standing for ''competitors'' adversely affected by administrative rulings. But while it is true that these cases involved statutes not specifically designed to protect the competitor plaintiffs bringing suit, it was simply not sufficient for standing that these competitors might suffer competitive injury. In every Supreme Court decision to date involving ''zone of interests'' and competitor standing, the Court has found some form of statutory interest in or provision for restricting competition — typically a restriction on market activities or a limitation on the available customer base. Because these cases in some form or other have all involved a statutory intent to limit competition, the interests of competitors seeking to challenge allegedly illegal competition properly fell within these statutes' zone of interests.

For example, in the most recent of these cases, the Court found that banks fall within the zone of interests of the Federal Credit Union Act, a statute enacted without any intent to protect banks, but instead to promote the financial soundness of credit unions and to help make credit more readily available to those who otherwise might not be able to obtain loans. *National Credit Union,* 118 S. Ct. at 935-36 n.6. To promote these dual goals, the statute contains a provision restricting credit union membership to those who share a ''common bond.'' As competitors of the credit unions, the banks had an interest in upholding this restriction on the credit unions' customer base. *Id.* at 936.

Because the National Credit Union Administration had interpreted the ''common bond'' restriction in an expansive fashion that would permit credit unions to greatly enlarge their membership, banks, who might suffer competitively by losing current or future members to credit unions, had standing to challenge the agency's interpretation. The banks had more than ''merely . . . an interest in enforcing the statute in question.'' *Id.* at 937 n.7. Their particular interest as competitors was directly related to the statute's ''interest in limiting the markets that federal credit unions can serve.'' *Id.* at 935-36 n.6; *see also id.* at 936 n.7. As the Court wrote, this statutory interest ''is *precisely* the interest of respondents. . . . As competitors of federal credit unions, respondents certainly have an interest in *limiting the markets* that federal credit unions can serve, and the NCUA interpretation has affected that interest by allowing federal credit unions to increase their customer base.'' *Id.* at 936 (emphasis added). There was, then, an ''unmistakable link'' between the competitor interest of the banks and an express statutory provision that effectively limited the credit unions' market. *Id.* at 936 n.7.

In similar fashion, all other Supreme Court ''competitor'' zone-of-interests cases have been rooted in some applicable statutory provision whose clear intent or effect is to restrict competition, thereby drawing ''competitors'' within the statutes' zone of interests. *See, e.g., Clarke,* 479 U.S. 388 (1987); *Investment Co. Institute v. Camp,* 401 U.S. 617 (1971); *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970). Following this reasoning, the Court has permitted securities dealers, data processors, and investment companies to challenge rulings made by the Comptroller of Currency under various banking-related statutes. But again, by these statutes, ''Congress had arguably *legislated against the competition that the petitioners sought to challenge,* and from which flowed their injury.'' *Investment Co. Inst.,* 401 U.S. at 620 (emphasis added); *see also Clarke,* 479 U.S. at 403. Congress thus had ''provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.'' *Association of Data Processing,* 397 U.S. at 155; *see also Clarke,* 479 U.S. at 403. Standing in these cases was predicated, therefore, upon the fact that ''Congress, for its own reasons, primarily its concern for the soundness of the banking system, *had forbidden banks to compete with plaintiffs*'' by ''limit[ing] the activities [available to] national banks.'' *Clarke,* 479 U.S. at 398 (emphasis added).

Cognizant of the potential for litigants to frivolously delay or otherwise frustrate administrative action, the Supreme Court indeed has stressed that ''where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit.'' *Clarke,* 479 U.S. at 399.

Applying these various Supreme Court principles, the District of Columbia Circuit rejected standing for an association representing competitor waste disposal firms seeking to challenge an EPA rule. Under existing regulations, these firms incurred high disposal costs for ash generated from their incineration facilities. They objected to an EPA interpretation that would, among other effects, permit some other kinds of utilities and smelters to generate ash ''without incurring comparable costs,'' and thus to potentially ''undersell them.'' *Hazardous Waste Treatment Council v. EPA,* 861 F.2d 277, 281 (D.C. Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989). Although the association vigorously asserted that their members' interests — albeit financial — would promote the environmental aims of the relevant statute, the Resource Conservation and Recovery Act (RCRA), the court refused to find the firms' financial interests any more than ''marginally related'' to RCRA's environmental goals. *Hazardous Waste,* 861 F.2d at 283. That the firms ''may suffer competitive loss because EPA ha[d] not forced on their competitors as demanding (and expensive) techniques as they themselves employ'' did not by itself prove a sufficient ground for standing. *Id.* at 280.

Moreover, the Court went on to emphasize the following:

> Petitioner wants to increase the regulatory burden on others. Its interest lies in the competitive advantage that its membership might secure if the government imposed higher costs on other firms. As noted above, that interest carries a considerable potential for judicial intervention that would distort the regulatory process. . . . [W]e see no special reason to suppose that Congress might have thought them suitable advocates of the environmental interests underlying the statute.

Id. at 285.

''A firm has no common law interest, much less a constitutional one, in having . . . government force competitors' services to be of the same quality (and cost) as its own.'' *Id.* Thus, the firms' status as competitors of facilities ''allegedly advantaged by [the EPA's] failure to adequately perform a statutory duty'' did not bring their purely economic concerns within the zone of interests of RCRA. *National Federation of Federal Employees v. Cheney,* 883 F.2d 1038, 1047 (D.C. Cir. 1989), *cert. denied,* 496 U.S. 936 (1990). The ''interest in stricter regulation of their competitors'' simply ''fell outside the zone of interests Congress intended to protect in enacting RCRA.'' *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 435 (D.C. Cir.), *cert. denied,* 490 U.S. 1106 (1989). RCRA's intent was to promote the safe disposal and recycling of hazardous wastes — health and safety interests that provided no reason to view competitor firms as ''suitable challengers'' of EPA violations. *See id.* at 435-36. *See also Calumet Industries, Inc. v. Brock,* 807 F.2d 225, 229 n.3 (D.C. Cir. 1986) (competitor would not have standing to ''contest [agency's] failure to similarly burden others'').

As Envirocare points out, there have been a number of court of appeals and district court decisions basing standing upon competitive injury. The bulk of these cases, however, can be analogized to the Supreme Court cases, for they similarly involve statutory provisions whose intent or effect is to bar or limit competition in some fashion. By setting forth restrictions on specific market activities or customer base, these statutes effectively cordoned off a segment of the relevant market from competition. ''When the core purpose of a statute is to *barricade an area from competitive entry,* the interests of firms that operate in the reserved area are presumptively congruent with the statutory goal. It is thus appropriate to treat them as 'arguably within the protected zone.' '' *National Coal Association v. Hodel,* 825 F.2d 523, 533 (D.C. Cir. 1987) (concurrence) (emphasis added).

Acknowledging that these zone-of-interest ''competitor'' cases can be ''devilishly complex,'' the D.C. Circuit has nevertheless attempted to parse these cases and explain what makes one competitor meet the standing requirements while another does not, even where their ''economic motivations could be thought analogous.'' *First National Bank & Trust Co. v. National Credit Union Administration,* 988 F.2d 1272, 1278-79 (D.C. Cir. 1993).[3] Competitors are more likely to further congressional purposes, the court reasoned, when the applicable statutory restriction ''itself reflects a congressional judgment that . . . *constraint on competition is the means to secure the statutory end.*'' *Id.* (emphasis added). Even where the intent of restrictions has nothing to do with any party's ''competitive'' or economic interests, competitors satisfy standing requirements where the statute involves a ''restraint on competition'' and this restraint is ''the means to assure the statutory end.'' *Id.* at 1279 (concurrence); *see also Liquid Carbonic Indus.,* 29 F.3d at 705. This reasoning follows that of the Supreme Court competitor cases.

Here, although Envirocare has a general interest in limiting the competition for its services, the AEA contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose. *See Cities of Statesville v. AEC,* 441 F.2d 962, 975 (D.C. Cir. 1969). Unlike the statutes under which the courts have found competitors within a statutory ''zone of interests,'' the AEA includes no express provision effectively cordoning off a portion of the market from competition. The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. These provisions by themselves do not necessarily turn all competitor licensees into suitable challengers of agency action. The only express statutory direction regarding competition concerns

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[3] The standing portion of this decision was affirmed by the Supreme Court in *National Credit Union Administration v. First National Bank & Trust Co.,* 118 S. Ct. 927 (1998).

antitrust reviews for commercial nuclear power reactors and production facilities, which are not involved here. *See* AEA §§ 103, 105, 42 U.S.C. §§ 2133, 2135.

Permitting routine adjudicatory challenges to agency decisions solely because one company ''sues to complain of [a] competitive advantage'' would be ''more likely to frustrate than to further statutory objectives.'' *See National Coal Association v. Hodel,* 825 F.2d 523, 530 n.9 (D.C. Cir. 1987); *see also Hazardous Waste Treatment Council v. Thomas,* 885 F.2d 918, 927 (D.C. Cir. 1989) (waste disposal firms have business interests that may prove ''fundamentally inconsistent'' with the environmental interests of RCRA and thus a disposal firm might be a ''peculiarly unsuitable proxy for those whom Congress intended to protect''). The AEA's focus upon health and safety interests is more akin to the environmental and safety interests of RCRA, under which competitors were not permitted to challenge EPA action, than to the drug, banking, and other cases that rest explicitly upon statutory provisions intended to prohibit or limit competition, either for the protection of a particular class, or to further some other statutory goal.[4]

Although a few judicial decisions seemingly have accorded standing to a competitor without expressly tying the competitor's interest to an interest of the applicable statute,[5] such a generalized approach seems at odds with the principles the Supreme Court has until now consistently followed. There would be no reason at all to examine and discern the congressional intent and ''interests protected'' under a given statute if all competitors could be readily deemed to have standing. Indeed, courts have cautioned against permitting competitors to obtain standing ''through a facile assertion that they are enforcing entry-restricting legislation.'' *First National Bank & Trust Co.,* 988 F.2d at 1277 n.4. Moreover, there is a growing concern about competitors improperly seeking litigation before regulatory agencies simply to ''trigger . . . litigation costs

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[4] *See, e.g., Schering Corp. v. FDA,* 51 F.3d 390, 395-96 (3d Cir.) (where Drug Competition and Patent Restoration Act's market entry provisions were designed as a ''statutory compromise of the competing concerns'' of ''pioneer'' and generic drug manufacturers), *cert. denied,* 516 U.S. 907 (1995); *UPS Worldwide Forwarding, Inc. v. United States Postal Service,* 66 F.3d 621, 630-31 (3d Cir. 1995) (UPS within zone of interests of postal rate statutes, which relate to postal monopoly and reflect congressional concern with balancing interests of the government, various categories of mailers, and competitors), *cert. denied,* 516 U.S. 1171 (1996); *Louisiana Energy and Power Authority v. FERC,* 141 F.3d 364, 367-68 n.5 (D.C. Cir. 1998) (petitioner's ''both concerns, predation and competition, come within the zone of interests of the Federal Power Act''); *MD Pharmaceutical, Inc. v. Drug Enforcement Administration,* 133 F.3d 8, 12 (D.C. Cir. 1998) (where statute established quotas for registered drugs; and therefore already registered manufacturers, ''[e]ven more so than traditional licensees,'' would have an interest in keeping out each new market entrant who would produce a percentage of the total allowable quota); *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration,* 822 F.2d 1105, 1107-09 (D.C. Cir. 1987) (where a primary factor to be considered under National Gas Act was ''competitiveness'' of import); *Associated Gas Distributors v. FERC,* 899 F.2d 1250 (D.C. Cir. 1990) (action brought under Natural Gas Act which has express concerns about monopoly power and various effects on competition); *MOVA Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1076 (D.C. Cir. 1998) (pioneer drug company's interest in limiting additional competition was '' 'by its very nature' linked with the statute's goal of limiting competition'') (citing and following *National Credit Union,* 118 S. Ct. at 935 n.6).

[5] *See, e.g., Old Town Trolley Tours, Inc. v. Washington Metropolitan Area Transit Commission,* 129 F.3d 201, 203 (D.C. Cir. 1997). *See also Michigan Gas Co. v. FERC,* 115 F.3d 1266, 1272 (6th Cir. 1997).

and other administrative burdens'' and thereby impose expenses upon their competitors. *See* Lars Noah, ''Sham Petitioning as a Threat to the Integrity of the Regulatory Process,'' 74 N.C. L. Rev. 1, 7 (1995).

Envirocare claims that it does not propose here an ''open-ended'' inquiry because it merely seeks to ensure that Quivira has complied with the detailed regulatory standards for mill tailings disposal. Envirocare Substitute Appeal Brief at 18. These standards, however, contained in Appendix A to Part 40, address an extensive list of different matters, and Envirocare appears poised to raise any number of them, in addition to raising challenges under a number of other sections, spanning record-keeping, waste manifest, worker safety, and other regulations. *See, e.g.,* Envirocare's Request for Hearing at 4. The risk of Envirocare — which has no radiological interest of its own — inordinately burdening the administrative process is not insignificant.

Envirocare further suggests that its economic injury falls specifically within the interests protected by section 84 of the AEA, 42 U.S.C. § 2014. As amended in 1983, this section directs the Commission, in managing 11e(2) byproduct material, to take into account not only public health, safety, and environmental risks, but also ''economic costs.'' Yet as the Licensing Board found, Congress added this section merely to ensure that licensees did not have to bear unnecessary costs.[6] Section 84 has nothing to do with competitors' interests.

Envirocare does not seek to challenge its own regulatory burdens, but essentially to urge that identical burdens be imposed upon another licensee. Envirocare seeks, as the Licensing Board stated, to make its own ''precise licensing requirements the floor (rather than the ceiling).'' 46 NRC at 267. Moreover, ''any competitor of QMC anywhere in the country'' would also be able to have a hearing on QMC's licensing requirements. This outcome would, as the Board noted, go against the flexibility Congress intended the Staff to have in considering the particular site-specific factors of each facility, particularly those of preexisting mill sites.[7]

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[6] *See, e.g.,* 128 Cong. Rec. S2976 (daily ed. Mar. 30, 1982) (statement of Sen. Wallop) (amendment intended to protect health and safety without imposing unnecessary costs on already economically depressed industry); 128 Cong. Rec. S2977 (daily ed. Mar. 30, 1982) (statement of Sen. Schmitt) (vital that nuclear industry ''not be saddled with unreasonably stringent restrictions in a misguided effort to eliminate remote and hypothetical risks without regard to the enormous costs involved''); 128 Cong. Rec. S13056 (daily ed. Oct. 1, 1982) (statement of Sen. Simpson) (regulatory approach should be ''reasonably related to the risks in terms of costs''); 128 Cong. Rec. S15313 (daily ed. Dec. 16, 1982) (statement of Sen. Schmitt) (''it is contrary to the public interest . . . to impose requirements which are totally unnecessary or which are out of line with the risks involved''); 128 Cong. Rec. H8816 (daily ed. Dec. 2, 1982) (statement of Rep. Lujan) (''costly regulatory burdens should not be imposed upon the uranium industry to address insubstantial risks'').

[7] *See, e.g.,* H.R. Conf. Rep. No. 97-884, at 44 (1982) (NRC should consider the site-specific conditions of existing mills); 128 Cong. Rec. S2973 (daily ed. Mar. 30, 1982) (statement of Sen. Simpson) (section 84 amendment intended to allow NRC ''flexibility in applying . . . requirements at existing sites where large quantities of mill tailings already exist''); 128 Cong. Rec. S2975 (daily ed. Mar. 30, 1982) (statement of Sen. Simpson) (amendment

(Continued)

When Envirocare applied for and received its own NRC license, it had ample opportunity to contest and where appropriate to request an exemption from any of the regulatory burdens imposed by the NRC Staff. Envirocare now remains free to request a relaxation of any current license requirement it deems unwarranted or no longer necessary. But Envirocare's purely competitive interests, unrelated to any radiological harm to itself, do not bring it within the zone of interests of the AEA for the purpose of policing the license requirements of a competitor. Indeed, it would be disruptive of our statutory scheme if all competitors could easily obtain hearings to second-guess the Staff's actions toward other licensees.[8]

To say that Envirocare lacks standing to bring this action is not to say that Envirocare has no meritorious arguments about Quivira's environmental conditions and current license requirements. Standing requirements determine only who may bring an action, not whether the claims made are valid. Those claims are not before us now. It is for the purpose of considering safety and environmental claims outside of adjudication that the NRC has the 10 C.F.R. § 2.206 petition process, by which Envirocare may bring its concerns to the attention of the Director.

IV. CONCLUSION AND ORDER

For the reasons stated in this decision, the Commission hereby *affirms* the Atomic Safety and Licensing Board order LBP-97-20.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of July 1998.

''provides, as under existing law, that NRC has greater flexibility in developing and applying requirements to uranium mills in existence prior to November 1, 1981, taking into account'' particular additional factors that would not be applicable to new NRC licensees); 128 Cong. Rec. S2968 (daily ed. Mar. 30, 1982) (statement of Sen. Domenici) (amendment ''specifically authorizes NRC to take into account various site-specific factors in applying requirements to existing facilities'').

[8] Envirocare also claims standing on the ground that the NRC's inconsistent application of its licensing requirements violates constitutional guarantees of due process and equal protection. Agencies like the NRC, however, have wide discretion to perform regulatory functions on a case-by-case basis. Nothing in Envirocare's generalized and unsupported argument provides a basis for a claim of constitutional injury. Moreover, as the Licensing Board suggests, there are inherent, obvious differences between Envirocare and Quivira. *See* 46 NRC at 271-72. ''Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause.'' *Strickland v. Alderman,* 74 F.3d 260, 265 (11th Cir. 1996) (citation omitted).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS **July 28, 1998**

I. INTRODUCTION

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings, within the framework of its existing Rules of Practice in 10 C.F.R. Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. *Statement of Policy*

on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); 46 Fed. Reg. 28,533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment of and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 C.F.R. Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. SPECIFIC GUIDANCE

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, prefiled testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 C.F.R. Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 C.F.R. § 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under section 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied ''as otherwise ordered by the presiding officer.'' Boards should exercise their authority under these options and 10 C.F.R. § 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such a motion will likely substantially reduce the

number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the Staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, e.g., by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the Staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307 (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. Parties' Obligations

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 C.F.R. § 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in section 2.714(b)(2). *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The Commission reemphasizes that licensing boards should continue to require adherence to section 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 C.F.R. Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1427, ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants.'' *See* 10 C.F.R. §§ 55.71(d) and 51.95(c).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 C.F.R. § 2.760a. Such authority

[1] ''[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.'' *Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule,* 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). The board may not proceed further with *sua sponte* issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise *sua sponte.*

Currently, 10 C.F.R. § 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 C.F.R. Part 54 may arise as the Staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 C.F.R. § 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 C.F.R. § 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pretrial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the Staff. *See, e.g.,* 10 C.F.R. §§ 2.720(h), 2.744. Under the existing practice, however, the Staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall

provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the Staff, such orders shall provide only that the Staff identify the witnesses whose testimony the Staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the Staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 C.F.R. § 2.1231. Accordingly, the Staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the Staff until the Staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the Staff before the Staff's review documents are issued will expedite the hearing, discovery against the Staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the Staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, e.g., by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular, the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. CONCLUSION

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to

monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

For the Commission

ANNETTE VIETTI-COOK
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 28th day of July 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 72-22-ISFSI**

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation) **July 29, 1998**

The Commission considers two appeals of an Atomic Safety and Licensing Board decision, LBP-98-7, 47 NRC 142 (1998), which made various rulings on intervention. The Commission affirms the Board's grant of intervention to the Confederated Tribes of the Goshute Reservation. The Commission also affirms the Board's decision to deny the intervention request of the Scientists for Secure Waste Storage.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission must grant intervention to any person whose ''interest may be affected by the proceeding.'' Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). To determine whether a petitioner's interest provides a sufficient basis for intervention, the Commission has long looked for guidance to current judicial concepts of standing.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

Where an organization asserts a right to represent the interests of members, judicial concepts of standing require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim

asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977). Longstanding agency practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

An organization must allege that one of its members will suffer a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING

The Commission historically has accorded substantial deference to board determinations for or against standing, except when the board has clearly misapplied the facts or law.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

The interest that the organization seeks to represent in a proceeding must be germane to the organization's overall purposes. The ''germaneness'' test requires that an ''organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together.'' The purpose of the test is to ensure ''a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing.'' (Citations omitted.)

INTERVENTION: DISCRETIONARY

The Commission considers appeals of licensing board rulings on discretionary intervention under an ''abuse of discretion'' standard.

INTERVENTION: DISCRETIONARY

Generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute.

ENVIRONMENTAL JUSTICE

Whether there was ''discrimination in the site selection process'' is not a cognizable claim in our adjudicatory proceedings. President Clinton's executive order on environmental justice, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), expressly stated that it creates no new legal rights or remedies; accordingly, it imposed no legal requirements upon the Commission. Its purpose was merely to underscore certain provisions of existing law. The only ''existing law'' applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

ENVIRONMENTAL JUSTICE

Disparate impact analysis is the Commission's principal tool for advancing environmental justice under NEPA. Questions of motivation and social equity lie outside of NEPA's purview. The NRC's goal with respect to analyzing disparate impacts is to identify and adequately weigh, or mitigate, effects of the proposed action on low-income and minority communities.

FINANCIAL QUALIFICATIONS

Part 50 financial qualifications provisions are not applicable *in toto* to Part 72 ISFSI applicants, but should merely be used as guidance. Financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context. Our financial qualifications standards and other licensing regulations do not require the board to undertake a full-blown inquiry into an applicant's likely business success. To the maximum extent possible, both the NRC Staff and the licensing board should avoid second-guessing private business judgments.

MEMORANDUM AND ORDER

The Commission is considering together two appeals that arise from the application of Private Fuel Storage, L.L.C. (PFS), for a license to store spent nuclear fuel at an Independent Spent Fuel Storage Installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. Both appeals challenge the Atomic Safety and Licensing Board's rulings on intervention in LBP-98-7, 47 NRC 142 (1998).

The first appeal, taken by PFS, seeks reversal of the Board's grant of intervention to the Confederated Tribes of the Goshute Reservation. The

Confederated Tribes represents the interests of one of its members, Chrissandra Reed. The NRC Staff and an Intervenor, Skull Valley Band of Goshute Indians (hereinafter Skull Valley Band), support PFS's appeal, while another Intervenor, the State of Utah, opposes it. The second appeal, taken by Scientists for Secure Waste Storage (SSWS), seeks reversal of the Board ruling that denied it intervention. PFS and the Skull Valley Band support SSWS's appeal; the NRC Staff and the State of Utah oppose it. We affirm both of the challenged Board rulings. We also take this opportunity to comment briefly on several other aspects of this adjudication.

BACKGROUND

The agency published a notice and opportunity for hearing on PFS's license application in July 1997. The notice set September 15, 1997, as the deadline for filing petitions for intervention. *See* 62 Fed. Reg. 41,099 (July 31, 1997). The Confederated Tribes, a federally recognized Native American tribe of 450 members, filed a timely response to this notice, as did numerous other potential intervenors. On January 20, 1998, more than 4 months after the intervention filing deadline, SSWS filed its initial intervention petition. SSWS explained that it was a group of renowned scientists, engineers, and educators interested in presenting sound technical and scientific information to the Commission in connection with this proceeding.

The Board received the SSWS petition just prior to the January 27, 1998 prehearing conference, at which the Board heard oral arguments from various petitioners on their standing and on the admissibility of their contentions. Subsequent to the prehearing conference, at the Board's direction, SSWS filed two amendments to its original intervention petition, dated February 2 and 27, 1998.

On April 22, the Board resolved all petitions for intervention. Among other rulings, the Board granted intervention to the Confederated Tribes and denied intervention to SSWS. LBP-98-7, 47 NRC at 170-71, 172-78. The Board granted the Confederated Tribes standing only as an authorized representative of the interests of one of its members, Chrissandra Reed, although the Confederated Tribes had also sought standing in its own capacity. Ms. Reed had provided an affidavit stating that she visits the Skull Valley reservation regularly and is legal guardian of her granddaughter, who also makes frequent visits. *Id.* at 170-71. Ms. Reed's affidavit expressed concern about the health, safety, and environmental impacts of the proposed PFS ISFSI on her and on her granddaughter. The Board acknowledged that the record contained conflicting information about the frequency of Skull Valley visits by Ms. Reed and her granddaughter, but found that the Reeds' contacts with the Skull Valley

reservation are not ''so attenuated as to provide an insufficient basis for standing.'' *Id.* at 171.

On appeal, PFS argues that the Confederated Tribes lacks standing to represent the health, safety, or environmental interests of Ms. Reed and her granddaughter because these interests are not ''germane'' to the purposes for which the Confederated Tribes was established. PFS also argues that Ms. Reed's contacts with the Skull Valley reservation are not frequent enough to establish that she would have standing on her own to challenge the PFS license application. The NRC Staff, which had conceded the Confederated Tribes' standing before the Board, now urges the Commission to remand the issue to the Board to resolve the uncertainty in the record over the frequency of the Reeds' visits.

As for SSWS, the Board denied intervention as a matter of right because of SSWS's failure to point to an interest of its own directly affected by the proceeding. LBP-98-7, 47 NRC at 176-77. The Board also found that SSWS had failed to demonstrate good cause for petitioning late and had failed to show that it met the other factors recognized by the NRC as weighing in favor of late intervention. *Id.* at 172-75. Finally, the Board denied discretionary intervention to SSWS, ruling that SSWS's potential contributions to the proceeding, which it saw as overlapping to some extent the NRC Staff's safety and environmental reviews, did not outweigh the risk of delay that could result from SSWS's ''academic interest'' rather than ''particular concern.'' *Id.* at 173-74, 177-78. On appeal, SSWS argues that the Board abused its discretion in denying discretionary intervention; it does not appeal the rulings on intervention as of right or on the untimeliness of its filing.

CONFEDERATED TRIBES' STANDING

By statute, the Commission must grant intervention to any person ''whose interest may be affected by the proceeding.'' Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). To determine whether a petitioner's interest provides a sufficient basis for intervention, ''the Commission has long looked for guidance to current judicial concepts of standing.'' *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *see, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

Where, as with the Confederated Tribes in the current case, an organization asserts a right to represent the interests of members, ''judicial concepts of standing'' require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are

germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977). Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. *See Georgia Tech,* 42 NRC at 115.

At issue in this proceeding is whether the Confederated Tribes meets the first and second prongs of the *Hunt* test.

1. Injury to Ms. Reed

To meet the first *Hunt* requirement — that a member of the organization would have standing on her own to intervene as of right in an NRC proceeding — an organization must allege that one of its members will suffer ''a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.'' *Georgia Tech,* 42 NRC at 115. *Accord International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). For the reasons discussed below, we agree with the Board that the Confederated Tribes meets this test.

Before the Board, the Confederated Tribes relied on two affidavits filed by Ms. Reed. The affidavits authorize the Confederated Tribes to represent Ms. Reed's interests and state that she is concerned with the impacts of the proposed ISFSI on her own health and safety and on that of her 3-year-old granddaughter, also a member of the Confederated Tribes. Ms. Reed states that she is the legal guardian of her granddaughter and that, approximately every other week, her granddaughter visits cousins who live on the Skull Valley reservation for visits that last from one night to two weeks. Ms. Reed further asserts that she herself visits the reservation eight to ten times a year. *See* LBP-98-7, 47 NRC at 170-71.

Ms. Reed's averments are sufficient to establish standing. To begin with, no one challenges the Board's finding that the visits to Skull Valley by Ms. Reed and her granddaughter ''bring one or both of them within distances of the facility'' that have been deemed ''sufficient to provide standing for other participants'' in this case. LBP-98-7, 47 NRC at 171. And, while the record contains some conflicting evidence about the exact frequency of the Reeds' visits, nothing in the record contradicts the Confederated Tribes' claim that Ms. Reed and her granddaughter have relatives on the Skull Valley reservation whom they visit regularly. Indeed, the declaration provided by PFS itself (in opposition to standing) concedes that Ms. Reed visits the reservation at least once a year and that her granddaughter visits the reservation three to four times a year ''or more

whenever Chrissandra needs a place for Michaela [Ms. Reed's granddaughter] to stay.'' *See* PFS Answer to the Confederated Tribes Supplemental Memorandum, exh. 1 (Wash Declaration), at 1-2 (Dec. 12, 1997). Thus, PFS's own declaration establishes that the Reeds' familial ties are close (so close that the granddaughter is left alone with her Skull Valley relatives whenever necessary) and that their visits to Skull Valley, while not on a rigid schedule, are commonplace.[1]

The NRC Staff, while not opposing the Confederated Tribes' standing outright (the Staff had conceded the Tribes' standing before the Board), suggests that the Commission remand the standing question to the Board with a directive to determine, presumably through a hearing or a further exchange of affidavits, the frequency of the Reeds' visits to Skull Valley. We think a remand unnecessary and likely to result in unproductive collateral litigation. The Confederated Tribes' standing does not depend on the precise number of the Reeds' visits. It is the visits' length (up to 2 weeks) and nature — for necessary child care and visiting relatives — that establish a bond between the Reeds and Skull Valley and the likelihood of an ongoing connection and presence sufficient for standing. *Compare, e.g., Dubois v. Department of Agriculture,* 102 F.3d 1273, 1282-83 (1st Cir. 1996) (a son's ''return 'regularly,' at least annually, to his parents' home'' sufficient to establish standing to challenge expansion of nearby ski facility), *cert. denied,* 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1977). *Cf. also Georgia Tech,* 42 NRC at 117 (''driving by'' a reactor daily sufficient for standing); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 (1979) (''recreational'' canoeing near reactor sufficient for standing).

We historically have accorded ''substantial deference'' to Board determinations for or against standing, except when the Board has clearly misapplied the facts or law. *See International Uranium (USA) Corp.,* 47 NRC at 118; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996); *Georgia Tech,* 42 NRC at 116; *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). The Board did not misapply the facts or law here. It reviewed the entire record and reached the reasonable conclusion that Ms. Reed's contacts with the Skull Valley reservation are enough for standing under prevailing judicial and Commission precedent.

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[1] At the prehearing conference, counsel for the Confederated Tribes stated that the Skull Valley Band had ''cut off'' the granddaughter's visits. Transcript at 20. Counsel for the Skull Valley Band stated that this was ''blatantly not true.'' Transcript at 24. The Confederated Tribes' statement seems peculiar in that it is against its own interest. Nevertheless, a colorful exchange by counsel at an oral argument is not evidentiary and does not suffice to undermine Ms. Reed's sworn claims that she will continue to visit her relatives and rely on them for child care. However, if any party develops new evidence that conclusively shows that Ms. Reed and her granddaughter will no longer be visiting the Skull Valley reservation, they are free to submit it to the Board on summary disposition, if appropriate, or at hearing and ask the Board to revisit its threshold standing decision.

2. Germaneness

The second prong of the *Hunt* test is whether the interest that the organization seeks to represent in a proceeding is germane to the organization's overall purposes. As a general matter, it may seem self-evident that organizations will rarely wish to go to the trouble and expense of litigation to contest matters that are unrelated to their interests. *Cf. Consolidated Edison Co. of New York* (Indian Point, Units 2 and 3), CLI-82-15, 16 NRC 27, 32 (1982). Nevertheless, PFS argues here that the Confederated Tribes fails the germaneness test. It appears to take the position that the Confederated Tribes has no legitimate interest in the health and safety concerns of its members except when they are on the reservation. The NRC Staff does not support PFS's germaneness argument. The Board itself did not discuss it.

In the leading judicial case on the issue, *Humane Society of the United States v. Hodel,* 840 F.2d 45, 58-59 (D.C. Cir. 1988), the court of appeals articulated what it deemed to be a ''modest but sensible'' test for organizational germaneness. The test requires that ''an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together.'' *Id.* at 56 (footnote omitted). The purpose of the test, according to the court in *Humane Society,* is to ensure ''a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing.'' *Id.* at 58.

The Confederated Tribes is not the equivalent of a ''law firm with standing''; it can hardly be seen as one of the ''litigious organizations'' that the germaneness test was meant to exclude. *See id.* at 57-58. To the contrary, the record shows that part of the Tribes' mission is to provide health, safety, social, educational and commercial services for its members. *See* Affidavit of David Pete at 17, 19 (Aug. 28, 1997), attached to Petition for Leave to Intervene Submitted by the Confederated Tribes (Aug. 28, 1997). As a sovereign body, it maintains a strong interest in its members' welfare as is exemplified by its efforts to provide these various services. With respect to health care, it takes responsibility for its members under any circumstance, even when a member's need for care stems from an illness or injury occurring off the reservation. *See* Brief of the Confederated Tribes of the Goshute Reservation in Response to the Appeal of Applicant Regarding Standing at 10 (May 8, 1998). The Confederated Tribes is well situated to represent a broad range of health and safety interests of its members on a daily basis and not just for purposes of litigating this case. The Confederated Tribes further cites its health care policy and the United States child welfare laws that permit it to intervene in any state child custody proceeding involving one of its members as support for its proposition that its responsibility for its members does not stop at the border of its reservation. *See id.* at 10-11, *citing* the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

Beyond bare assertions to the contrary, PFS has not countered with evidence that undermines the Confederated Tribes' claim.[2] For these reasons, we find that Confederated Tribes' interest in the health and welfare of its members, whether on or off the reservation, is sufficiently ''germane'' to the Tribes' organizational purpose.[3]

STANDING OF SSWS

SSWS appeals the Licensing Board's finding that it failed to meet the Commission's test for intervention as a matter of discretion under the standards enunciated in *Pebble Springs,* CLI-76-27, 4 NRC at 616. The Board weighed the various *Pebble Springs* factors and determined that:

> [G]iven SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the proceeding (factor six), we find discretionary intervention is not appropriate in this instance.

47 NRC at 177-78 (footnote omitted).

The Commission considers appeals of licensing board rulings on discretionary intervention under an ''abuse of discretion'' standard. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, *aff'd,* CLI-91-13, 34 NRC 185 (1991). In the present case, we see no such abuse of discretion. As the Board itself noted, ''at first blush'' it may seem anomalous to find that admission of SSWS, whose membership includes scientists of unquestioned accomplishment and renown, would be unlikely to add significantly to the development of a sound record. But as the Board explained, the intervention petition was deficient with regard to the specifics of the subject

[2] The Skull Valley Band argues that permitting the Confederated Tribes to intervene here would interfere with the Skull Valley Band's sovereign interests in running its own affairs. Taking this argument to its extreme, no party would be permitted to intervene in this proceeding because all intervenors, at least those contesting the facility, would risk interference with the sovereign rights of the Band. This conclusion would of course turn our statutory mandate to permit intervention in our agency proceedings on its head.

[3] The Applicant argues that the Confederated Tribes' posture here is no different from that of the organizations that unsuccessfully sought standing in *McKinney v. Department of the Treasury,* 799 F.2d 1544 (Fed. Cir. 1986), and *Medical Association of Alabama v. Schweiker,* 554 F. Supp. 955 (M.D. Ala.), *aff'd,* 714 F.2d 107 (11th Cir. 1983) (*per curiam*). We disagree. In *McKinney,* the court held that an organization that did nothing more than ''aver[ ] that it is a 'nonprofit public interest law firm' '' failed to demonstrate a nexus between its organizational purpose and the economic interests of producers and workers in barring the import of goods. 799 F.2d at 1553. In *Medical Association of Alabama,* the court rejected a medical association's claim that its physician members' taxpayer interests were related to its organizational purpose even though no physician had joined the association for tax purposes. 554 F. Supp. at 964-65. Here, by contrast, the Confederated Tribes has established that part and parcel of its mission is to represent health and safety interests of its members in numerous capacities beyond the scope of the proceeding.

matter of the proceeding, i.e., the PFS application. We agree with the Board that generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute.[4]

In declining to disturb the Board's ruling, we wish to point out, as did the Board, that there are other means by which SSWS can contribute to the proceeding and make its expertise available: as witnesses for other parties, by an *amicus* filing, or with an appearance under 10 C.F.R. § 2.715(a).

MISCELLANEOUS MATTERS

No additional issues remain before the Commission on appeal. The Commission is monitoring this proceeding, however, as it does all proceedings. We believe that two admitted contentions, on environmental justice and on financial qualifications, warrant brief comment even at this early stage of the case. We also offer a general observation on the proceeding's anticipated schedule.

1. Environmental Justice

The Board appropriately denied an environmental justice contention submitted by the State of Utah that proposed to litigate the issue of ''discrimination in the site selection process.'' LBP-98-7, 47 NRC at 203. As the Board recognized, we recently decided in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998), that such claims are not cognizable in our adjudicatory proceedings.

The Board did admit an environmental justice contention offered by another intervenor, Ohngo Gaudadeh Devia (OGD), that appears to focus more on disparate impacts, a legitimate issue for litigation under our *Claiborne* decision (47 NRC at 106-09), than on discriminatory siting. *See* LBP-98-7, 47 NRC at 233. As framed, however, OGD's contention suggests that PFS's application does not satisfy President Clinton's executive order on environmental justice, Exec. Order No. 12,898, 3 C.F.R. 859 (1995). *See id.* We remind the Board and the parties of our ruling in *Claiborne* that President Clinton's executive order stated expressly that it created no new legal rights or remedies; accordingly, it

[4] On appeal, SSWS complains that ''the Licensing Board excessively 'front loaded' the requirements for intervention by explicitly expecting intervenors to come to the proceeding with detailed knowledge of specific elements of the application . . . .'' Brief of SSWS in Support of Appeal from Denial of Petition to Intervene at 6 (May 1, 1998). SSWS's position reflects a basic misunderstanding of what is expected of an intervenor before this agency, particularly an intervenor coming to a proceeding late and seeking discretionary intervention. A petitioner seeking discretionary intervention must ''identify with particularity the issues on which it is willing to participate.'' *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). ''[B]road, generalized averments will not suffice.'' *Id.* It was therefore reasonable for the Board to conclude that despite the scientific expertise of SSWS's members, their failure to display sufficient special knowledge of *this* application weighs heavily against granting discretionary intervention.

imposed no legal requirements upon the Commission. *See* CLI-98-3, 47 NRC at 102. ''Its purpose was merely to 'underscore certain provision[s] of *existing* law.' '' *See id.* The only ''existing law'' applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

Our *Claiborne* decision held that '''[d]isparate impact' analysis is our principal tool for advancing environmental justice under NEPA.'' *Id.* at 100. The Board admitted OGD's environmental justice contention with the useful caveat that litigation on the contention was ''limited to the disparate impact matters'' raised in its admitted bases. LBP-98-7, 47 NRC at 233. OGD's contention (with its supporting bases), however, not only alleges ''disparate impacts,'' but also claims that the siting process was not ''just and fair.'' *Id.* This formulation arguably seeks a broad NRC inquiry into questions of motivation and social equity in siting. As we held in *Claiborne,* and as the Board held with regard to the State of Utah's environmental justice contention, such questions lay outside NEPA's purview. *See* CLI-98-3, 47 NRC at 101-06; LBP-98-7, 47 NRC at 203. ''The NRC's goal [with respect to analyzing disparate impacts] is to identify and adequately weigh, or mitigate, effects [of the proposed action] on low-income and minority communities that become apparent only by considering factors peculiar to those communities.'' CLI-98-3, 47 NRC at 100. *See also* Council on Environmental Quality ''Final Environmental Justice Guidance Under the National Environmental Policy Act'' at 8-9 (Dec. 10, 1997). That should be the focus of the Board's environmental justice inquiry.

2. *Financial Qualifications*

The Board agreed with the NRC Staff that the Part 50 financial qualifications provisions are not applicable *in toto* to Part 72 ISFSI applicants, but should be used as guidance in reviewing the financial qualifications of PFS. LBP-98-7, 47 NRC at 187. This is consistent with our holding last year in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997), that financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context. In *Claiborne* the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. *Id.* at 308-09. The conditions had the effect of assuring financial qualifications and obviating further litigation of these issues. The parties and the Board may wish to consider the feasibility of license conditions in this proceeding, and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success. *See id.* at 308. To the maximum extent practicable, both

the NRC Staff, in its safety and environmental reviews, and the Board, in its adjudicatory role, should avoid second-guessing private business judgments.

3. Schedule

Recently, in CLI-98-7 (June 5, 1998), we remarked that the Board in this proceeding had handled the early phases of this adjudication ''with admirable dispatch'' (47 NRC at 312). The Board also seems ready to manage the remaining phases of the adjudication with a similar eye on efficiency and speed. *See* Memorandum and Order (General Schedule for Proceeding and Associated Guidance), dated June 29, 1998 (unpublished). We see no purpose at this point in attempting to fine-tune the Board's proposed schedule. We urge the Board and the parties, however, to heed the guidance set out in our recently issued *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998).

Like the Board (*see* Memorandum and Order, June 29, 1998, at 4), we are concerned that the NRC Staff's ongoing safety and environmental reviews of the proposed PFS facility not be compromised or delayed by the demands of the adjudicatory process. In its supervisory capacity, the Commission is pressing the NRC Staff (which to some extent is relying on outside contractors) to complete its reviews as promptly as possible. If at any point the NRC Staff submits to the Board a sworn affidavit or declaration indicating that hearing, discovery, or other adjudicatory requirements are significantly disrupting or delaying the Staff reviews, we would expect the Board to consider staying proceedings or otherwise modifying adjudicatory deadlines or schedules to accommodate the need for a prompt and thorough NRC Staff review. Our goal is to see the entire licensing process, including both the NRC Staff's review and the adjudication, completed as expeditiously and efficiently as possible.

CONCLUSION

For the foregoing reasons, the Board decision in LBP-98-7 to admit Confederated Tribes as a party and to refuse admission to SSWS is *affirmed.*

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of July 1998.

Cite as 48 NRC 39 (1998) **CLI-98-14**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-317**
50-318
(License Renewal)

BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2) **August 19, 1998**

The Commission refers to the Atomic Safety and Licensing Board Panel, for assignment of a Licensing Board to rule on, a petition to intervene and a request for hearing filed in the matter of the Licensee's application for renewal of its operating licenses for Calvert Cliffs Units 1 and 2. The Commission provides the Licensing Board with guidance for the conduct of the proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

The scope of a proceeding on an operating license renewal application is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), and 54.4.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

Review of environmental issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c).

ORDER
REFERRING PETITION FOR INTERVENTION AND REQUEST FOR HEARING TO ATOMIC SAFETY AND LICENSING BOARD PANEL

I. INTRODUCTION

On April 10, 1998, Baltimore Gas & Electric Company (Applicant) submitted an application to renew the operating licenses for its Calvert Cliffs Nuclear Power Plant, Units 1 and 2, located in Lusby, Maryland. The notice of receipt of application was published in the *Federal Register* on April 27, 1998. Baltimore Gas & Electric Company; Calvert Cliffs Nuclear Power Plant Units 1 & 2; Notice of Receipt of Application for Renewal of Facility Operating Licenses Nos. DPR-53 and DPR-69 for an Additional 20-Year Period, 63 Fed. Reg. 20,663 (1998). A notice of acceptance for docketing of the application for renewal of the facility operating licenses was published in the *Federal Register* on May 19, 1998. Baltimore Gas & Electric Company; Calvert Cliffs Nuclear Power Plant Units 1 and 2; Notice of Acceptance for Docketing of the Application for Renewal of Facility Operating Licenses Nos. DPR-53 and DPR-69 for an Additional 20-Year Period, 63 Fed. Reg. 27,601 (1998). On July 8, 1998, the Staff of the Nuclear Regulatory Commission (Staff) issued a Notice of Opportunity for a Hearing, 63 Fed. Reg. 36,966 (1998).

On August 7, 1998, the National Whistleblower Center filed a ''Petition to Intervene and Request for Hearing of the National Whistleblower Center'' (petition) in accordance with 10 C.F.R. § 2.714. This Order refers the petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to rule on this and any additional requests for a hearing and petitions for leave to intervene and, if a hearing is granted, to conduct the proceeding. We also provide the Licensing Board with guidance for the conduct of any proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

II. COMMISSION GUIDANCE

A. Scope of Proceeding

The scope of this proceeding is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). *See* NUREG-1437, ''Generic Environmental Impact Statement (GEIS) for License Renewal of Plant''; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), *amended by* 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding. If rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy questions, the Licensing Board should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission itself is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists. Such consideration should be exercised only in extraordinary circumstances. If the Licensing Board decides to raise a matter on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and General Counsel. The Licensing Board should not proceed to consider such *sua sponte* issues unless the Commission approves the Licensing Board's proposal to do so.

B. Discovery Management

Similar to the practice under current Rule 26 of the Federal Rules of Civil Procedure, if a hearing is granted, the Licensing Board should order the parties to provide certain information to the other parties without waiting for discovery requests. This information will include the names and addresses of individuals likely to have discoverable information relevant to the admitted contentions, the

names of individuals likely to be witnesses in this proceeding, the identification and production of documents (not already publicly available) that will likely contain discoverable information, and any other information relevant to the admitted contentions which the Licensing Board may require in its discretion.

Within *30 days* of any Licensing Board order granting a request for a hearing, the Staff shall file in the docket, present to the Licensing Board, and make available a case file to the Applicant and any other party to the proceeding. The Staff will have a continuing obligation to keep the case file up to date, as documents become available. The case file will consist of the application and any amendments thereto, the Final Environmental Impact Statement (in the form of a plant-specific supplement to the GEIS), any Staff safety evaluation reports relevant to the application, and any correspondence between the Applicant and the NRC that is relevant to the application. Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h), 2.740, 2.742, and 2.744, regarding the Safety Evaluation Report (SER) and the Final Supplemental Environmental Impact Statement (FES) will be suspended until after issuance of these documents.[1]

The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round each for original and late-filed contentions.

C. Proposed Schedule

The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about 2 ½ years from the date that the application was received. In addition, if the Licensing Board grants a hearing, once the Licensing Board has ruled on any petition for intervention and request for a hearing, formal discovery against the Staff should be suspended until after the Staff completes its final SER and FES, subject to the discretion of the Licensing Board to proceed with discovery on either the FES or final SER as discussed in note 1. The evidentiary hearing should not commence until after completion of the final SER and FES.

The Commission believes that the goal of issuing a decision on the pending application in about 2 ½ years may be reasonably achieved under the current rules of practice and the enhancements directed by this Order and by our understanding of the Staff's current schedule for review of the application. We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite

[1] The above discussion is based on the Staff's review schedule for the BG&E application, which indicates that the final SER and FES will be issued fairly close in time. If this is not the case, the Board, in its discretion, may allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the FES or on environmental issues if the FES is issued before the final SER.

any hearing granted on this application. We do expect, however, the Licensing Board to use the techniques specified in this Order and in the Commission's policy statement on the conduct of adjudicatory proceedings to ensure prompt and efficient resolution of contested issues. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998). *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

If a hearing is granted, in developing a schedule, the Licensing Board should adopt the following milestones for conclusion of significant steps in the adjudicatory proceeding:

• Within *90 days* of the date of this Order:	Decision on intervention petitions and contentions. Start of discovery on admitted contentions, except against the Staff.
• Within *30 days* of the issuance of SER and FES:	Completion of discovery against the Staff on admitted contentions. Late-filed contentions to be filed.
• Within *40 days* of the issuance of SER and FES:	Responses to late-filed contentions to be filed.
• Within *50 days* of the issuance of SER and FES:	ASLB decision on late-filed contentions.
• Within *80 days* of the issuance of SER and FES:	Completion of discovery on late-filed contentions.
• Within *90 days* of the issuance of SER and FES:	Prefiled testimony to be submitted.
• Within *125 days* of the issuance of SER and FES:	Completion of evidentiary hearing.
• Within *220 days* of the issuance of SER and FES:	ASLB initial decision on application.

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date (''in-hand''). If pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in our regulations for

responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.710. In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. The Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.749, unless the Licensing Board finds that such motions are likely to substantially narrow the issues for which an evidentiary hearing is necessary or will otherwise expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

In addition, parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

If a hearing is granted on this application, the Commission directs the Licensing Board to promptly inform the Commission, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board should include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

III. CONCLUSION

The Commission directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this Order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-317-LR**
50-318-LR

BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2) **August 26, 1998**

RULES OF PRACTICE: EXPEDITED PROCEEDING; ADMINISTRATIVE FAIRNESS

LICENSING BOARD: EXPEDITION (FAIRNESS)

The Commission recognizes that license renewal applications require a major commitment of resources and effort by the renewal applicant, the NRC Staff, the Commission itself, and any party opposed to renewal. The Commission intends this license renewal proceeding to be managed in a way that prevents unnecessary delays and digressions and at the same time ensures a fair and meaningful process.

RULES OF PRACTICE: COMMISSION GUIDANCE; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY

The Commission has inherent supervisory authority to oversee the agency's own administrative adjudications, an authority that perforce includes instructions and guidance to its licensing boards.

RULES OF PRACTICE: SCHEDULING; EXPEDITED PROCEEDING; COMMISSION GUIDANCE

Like other kinds of Commission guidance, our case-specific scheduling guidance is nonbinding by nature.

RULES OF PRACTICE: COMMISSION GUIDANCE; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY

The Commission exercises its inherent supervisory authority both by issuing generic policy statements on the conduct of licensing proceedings and by issuing orders to the Board offering guidance that is specific to particular cases.

RULES OF PRACTICE: EXPEDITED PROCEEDING; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY; ADJUDICATORY RESPONSIBILITIES

While we may deal with matters before us in adjudicatory hearings only on the basis of the record that has been compiled, the NRC is not a court constrained to the ‘‘passive virtues’’ of judicial action. We have regulatory responsibility, which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings. Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal — subject only to the constraints of action on the record and reasoned explanation of the conclusions. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977).

RULES OF PRACTICE: SCHEDULING; EXPEDITED PROCEEDING; COMMISSION GUIDANCE; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY; ADJUDICATORY RESPONSIBILITIES

LICENSING BOARD: RESPONSIBILITIES; DELEGATED AUTHORITY; AUTHORITY; AUTHORITY TO GRANT TIME EXTENSIONS

ADMINISTRATIVE TRIBUNAL: AUTHORITY

ADJUDICATORY BOARDS: DELEGATED AUTHORITY (RELATION TO NRC STAFF)

Pursuant to its inherent supervisory authority, the Commission over the years repeatedly has issued orders expediting Board proceedings and suggesting time frames and schedules. *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-3, 45 NRC 49, 50 (1997); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9-11 (1996); *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 291 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-71 (1988). Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require.

RULES OF PRACTICE: SCHEDULING; EXPEDITED PROCEEDING; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS; ADMINISTRATIVE FAIRNESS

NRC: ADJUDICATORY RESPONSIBILITIES

LICENSING BOARD: EXPEDITION (FAIRNESS)

Commission orders expediting cases do not reflect inflexible or arbitrary action, but rather the Commission's best judgment on how to speed up the adjudicatory process without prejudicing anyone's rights to participate meaningfully. Although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were consistent with fairness to all parties and that we do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted under this application.

RULES OF PRACTICE: SCHEDULING; EXTENSIONS OF TIME; EXPEDITED PROCEEDING

When the Commission limits extensions of time to situations involving unavoidable and extreme circumstances we simply give content to our rule's general ''good cause'' standard.

RULES OF PRACTICE: EXTENSIONS OF TIME; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY

The Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules). Indeed, 10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit.

RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING

NRC: ADJUDICATORY RESPONSIBILITIES

The Commission, as the agency's ultimate adjudicator, also has full authority to define the scope of its proceedings. *Geo-Tech Associates* (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221, 222 (1992). *Cf. Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO COMMISSION RULE); CHALLENGE TO COMMISSION REGULATIONS

ADJUDICATORY HEARINGS: CONSIDERATION OF ISSUES INVOLVED IN RULEMAKING

To the extent that Petitioner is attempting to attack the regulations directly, it is precluded from doing so under 10 C.F.R. § 2.758.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Although Petitioner is entitled to file any contention that it believes is germane to the requested licensing action, it is not entitled to have each of those contentions admitted for litigation.

RULES OF PRACTICE: SUA SPONTE ISSUES; STAFF AUTHORITY; CONTENTIONS (SUA SPONTE ADOPTION); COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

NRC: SUPERVISORY AUTHORITY

LICENSING BOARD: DELEGATED AUTHORITY; AUTHORITY

ADMINISTRATIVE TRIBUNAL: AUTHORITY

ADJUDICATORY BOARDS: DELEGATED AUTHORITY (RELATION TO NRC STAFF)

The extent of the Board's authority to raise contentions *sua sponte* is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory Staff — a question of resources and expertise peculiarly within the Commission's province to decide.

RULES OF PRACTICE: SCHEDULING; EXPEDITED PROCEEDING; COMMISSION GUIDANCE; COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS; ADMINISTRATIVE FAIRNESS

LICENSING BOARD: DISCRETION IN MANAGING PROCEEDINGS

Although we expect the Board to adhere to our scheduling guidance to the maximum extent possible, we recognize that particular circumstances may justify deviations from our guidance, and we therefore have refrained from mandating a schedule.

MEMORANDUM AND ORDER

This proceeding involves an application by Baltimore Gas & Electric Co. (''BG&E'' or ''Applicant'') to renew its operating license for both units of its Calvert Cliffs Nuclear Power Plant in Lusby, MD. The National Whistleblower

Center (''NWC'' or ''Petitioner''), wishing to oppose BG&E's application, filed a timely petition for intervention and hearing. On August 19, 1998, the Commission issued CLI-98-14, 48 NRC 39, referring to the Atomic Safety and Licensing Board NWC's petition for intervention and hearing, providing guidance for the conduct of the proceeding (assuming a hearing is granted), and setting out a suggested procedural schedule for the case. On August 24, 1998, NWC filed a motion to vacate portions of CLI-98-14 as contrary to the Commission's own regulations (10 C.F.R. §§ 2.711(a), 2.718(m), 2.740, 2.756), the Atomic Energy Act, 42 U.S.C. § 2231 (''AEA''), the Administrative Procedure Act, 5 U.S.C. §§ 551-558 (''APA''), and Constitutional due process. For the reasons set forth below, we deny NWC's motion.

The gist of NWC's complaint is that CLI-98-14 denies it '' 'meaningful public participation' '' in this proceeding. Motion at 14, quoting *Union of Concerned Scientists v. NRC,* 735 F.2d 1437, 1441 (D.C. Cir. 1984). According to NWC, the Commission's order demonstrated alleged hostility towards NWC and the public adjudicatory process. Motion at 14. NWC asks the Commission to vacate the scheduling and guidance portions of CLI-98-14 and thereby to remove an alleged ''chilling effect'' on Petitioner's due process rights. *Id.* at 14-15.

CLI-98-14 derives not from hostility toward NWC but from the Commission's recognition that license renewal applications require a major commitment of resources and effort by the renewal applicant, the NRC Staff, the Commission itself, and any party opposed to renewal. Our order is designed to prevent unnecessary delays and digressions, but at the same time to ensure a fair and meaningful process. In our view, *30 months* to resolve license renewal controversies, as proposed in CLI-98-14, on its face seems sufficient time for NWC to make its case (should a hearing be granted) and for the Board and the Commission to consider all arguments. To be sure, diligence and effort will be required, but that is true in litigation of any stripe, at least where deadlines govern. With this perspective in mind, we turn now to NWC's particular concerns.

NWC first objects to the Commission's ''mandat[ory]'' 30-month schedule as arbitrary, capricious, and an abuse of discretion. NWC considers the issuance of such a schedule premature, given that the Commission knows nothing of what contentions NWC will offer, what conclusions the NRC Staff will reach in its Safety Evaluation Report (''SER'') and Final Supplemental Environmental Impact Statement (''FSEIS''), and what factors may require extending this first-of-its-kind proceeding. *Id.* at 3, 5. According to NWC, the schedule will prevent Petitioner from protecting both its procedural and substantive rights and the Board from fulfilling its regulatorily imposed obligation to '' 'regulate the course of the hearing' and 'dispose of procedural requests or similar matters.' '' *Id.* at 4, quoting APA, 5 U.S.C. § 556(c). Moreover, given that the Commission did not seek input from the parties prior to issuing the schedule,

NWC argues that the schedule violates the APA provision requiring agencies to manage their proceedings consistent with the ‘‘ ‘convenience and necessity of the parties.’ ’’ Motion at 4, 6, quoting APA, 5 U.S.C. § 554(b), and referring to 5 U.S.C. §§ 556(c)(5), 557(d)(1)(E). Further, NWC contends that the schedule's timing milestones themselves are improper in that they preclude Petitioner from ‘‘properly participat[ing] in this proceeding.’’ Motion at 5.

NWC's first line of argument reflects a basic misreading of CLI-98-14. That order did not impose an unalterable schedule, carved in stone, as Petitioner suggests. *See, e.g.,* CLI-98-14, 48 NRC at 42 n.1 (the Board still has the ‘‘discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER’’); *accord id.* at 42. (For further discussion of the procedural flexibility reflected in CLI-98-14, see discussion of Petitioner's fifth argument, below.) Rather, CLI-98-14 was issued as ‘‘guidance’’ pursuant to the Commission's inherent supervisory authority to oversee the agency's own administrative adjudications, an authority that perforce includes instructions to its Licensing Board.[1] Like other kinds of Commission guidance, our case-specific scheduling guidance is nonbinding by nature,[2] as the language of CLI-98-14 itself makes quite clear (again, see discussion of Petitioner's fifth argument, below).

The Commission exercises its inherent supervisory authority both by issuing generic policy statements on the conduct of licensing proceedings and by issuing orders to the Board offering guidance that is specific to particular cases. For instance, the Commission quite recently issued a *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998), 63 Fed. Reg. 41,872 (Aug. 5, 1998), setting forth guidance on a number of procedural issues. To a large degree, CLI-98-14 reflects the generic guidance we offered in that Policy Statement.[3] Likewise, the Commission regularly issues case-specific guidance to the Board on both procedural and substantive issues. For instance, we not only offered both these kinds of guidance to a Licensing Board in the Yankee Rowe decommissioning proceeding, but also set out a proposed expedited schedule, just as we did in CLI-98-14. *See Yankee Atomic Electric*

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[1] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 332 (1998) (regarding Commission's ‘‘inherent supervisory authority’’ over the Presiding Officer); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990) (‘‘the Commission has inherent supervisory authority over adjudicatory proceedings’’); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569 (1988) (same); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 234 (1986) (same); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977) (same).

[2] *Cf. Curators of the University of Missouri,* CLI-95-1, 41 NRC 71, 98 (1995) (‘‘NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements’’).

[3] The Commission also issued a general policy statement on this general subject in 1981. *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452 (1981), 46 Fed. Reg. 28,533 (May 27, 1981).

Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996).[4] Such case-specific guidance is fully appropriate for the reasons given more than 20 years ago in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977):

> While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the [NRC] is not a court constrained to the ''passive virtues'' of judicial action . . . . We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings. . . . Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal — subject only to the constraints of action on the record and reasoned explanation of the conclusions . . . .

Pursuant to its inherent supervisory authority, the Commission over the years repeatedly has issued orders expediting Board proceedings and suggesting time frames and schedules. *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-3, 45 NRC 49, 50 (1997); *Yankee,* CLI-96-1, 43 NRC at 9-11; *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 291 (1993); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-71 (1988). Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require — as CLI-98-14 itself suggests (48 NRC at 42-43, 44).

Commission orders expediting cases do not reflect inflexible or arbitrary action, but rather the Commission's best judgment on how to speed up the adjudi-

[4] For further instances where the Commission offered guidance to its Licensing Boards, *see Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-37 (1998) (noting that the Commission monitors all adjudicatory proceedings and offering guidance on two substantive issues); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-19, 38 NRC 81 (1993) (providing guidance on substantive issue); *Randall C. Orem, D.O.,* CLI-93-14, 37 NRC 423, 429-30 (1993) (offering guidance on policy matter); *Geo-Tech Associates* (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221, 222 (1992) (offering guidance regarding the scope of hearing held on enforcement sanctions imposed for failure to pay user fees); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187-88 (1991) (providing guidance on the requirements for organizational standing); *Curators of the University of Missouri,* CLI-91-7, 33 NRC 295, 296-97 (1991) (providing guidance to the Board regarding implementation of section 2.1251(c) in initial decisions relating to Subpart L proceedings); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991) (providing guidance regarding the admissibility of contentions); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61 (1991) (providing guidance to the parties regarding potential requests for NRC action to order operation of the Shoreham plant); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1 (1991) (providing guidance on the relationship of the ''possession only'' license and a decommissioning plan); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-11, 28 NRC 603, 603-04 (1988) (providing guidance as to the course of action to be followed if a problem is found with the scope of an emergency exercise). *Cf. Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-6, 35 NRC 86, 90 (1992) (announcing that, if the case developed in a particular direction, ''the Commission will provide appropriate instructions and guidance for the conduct of further proceedings'').

catory process without prejudicing anyone's rights to participate meaningfully. NWC's objections to the Commission's order ignore the Commission's express statements in CLI-98-14 that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were ''consistent with fairness to all parties'' and that ''[w]e do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted under this application.'' 48 NRC at 42-43.

NWC's second line of argument is that CLI-98-14 violates the Commission's own procedural rules. According to Petitioner, the Commission is bound to follow its own regulations and any deviation from these regulations constitutes a violation of law. More specifically, Petitioner complains that (1) the Commission's restriction of extensions of time to situations involving unavoidable and extreme circumstances violates 10 C.F.R. § 2.711(a) which provides that such restrictions may be imposed ''for good cause''; (2) the 30-month period and the deadlines within that period preclude a ''fair and impartial'' conduct of the hearing, as required in 10 C.F.R. § 2.718; (3) the schedule interferes with the authority of the Board under 10 C.F.R. § 2.718(e) to ''regulate the course of the hearing and conduct of the parties'' as well as the Board's obligation under 10 C.F.R. § 2.718(m) to act in accordance with the APA; and (4) the Commission's restrictions on discovery contravene 10 C.F.R. § 2.740(b) and (c) which purportedly grant such restricting authority only to the Board and which require the exercise of that authority to be preceded by a motion for such relief. Motion at 7-11.

This second line of argument runs afoul of the same well-established legal principles discussed above.[5] Contrary to NWC's view, the Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules). Indeed, 10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit. The Commission, as the agency's ultimate adjudicator, also has full authority to define the scope of its proceedings. In *Geo-Tech Laboratories,* CLI-92-14, 36 NRC at 222, the Commission limited the case's scope for reasons similar to those applicable to the instant proceeding, i.e., a prior rulemaking had already resolved most of the issues that the licensee would probably raise:

[5] It is also not clear that CLI-98-14 departs from the Commission's procedural rules. For example, limiting extensions of time to situations involving unavoidable and extreme circumstances simply gives content, under the circumstances of this case, to our rule's general ''good cause'' standard.

> The hearing scope shall be quite narrow. Neither the fee schedule nor its underlying methodology may be properly challenged in this type of proceeding. They have been fixed by rulemaking which this proceeding cannot amend. . . . If a Board determines that a hearing of substantially broader scope is warranted, it must receive authorization from the Commission before proceeding further.

Cf. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (directing the Licensing Board to suspend consideration of all but two issues), *reconsideration denied,* CLI-92-6, 35 NRC 86 (1992).

Third, NWC asserts that the Commission's limitation of the proceeding ''to a review of the plant structures and components that will require an aging management review for the period of extended operation of the plant's systems, structures, and components'' violates the provisions of 10 C.F.R. § 2.714. According to NWC, that regulation gives Petitioners ''the right to file *any* contentions which they determine, in good faith, to be related to Applicant's renewal process.'' Motion at 11-12 (emphasis added), referring to CLI-98-14, 48 NRC at 41.

In CLI-98-14, the Commission merely reiterated a decision on the scope of the license renewal inquiry that it had made 3 years ago when promulgating Part 54 of its regulations. *See* 60 Fed. Reg. 22,461 (May 8, 1995). *See generally Geo-Tech Laboratories,* CLI-92-14, 36 NRC at 222. In the Part 54 rulemaking, the Commission determined that the scope of the relicensing proceedings would be limited in precisely the manner set forth in CLI-98-14. Indeed, CLI-98-14 even cited the regulations governing the scope of such proceedings — 10 C.F.R. § 54.21(a) and (c). 48 NRC at 41.[6] Moreover, although Petitioner is entitled to file any contention that it believes is germane to the requested licensing action, it is not entitled to have each of those contentions admitted for litigation. The Commission in CLI-98-14 was appropriately indicating the proper scope of the proceeding, thereby saving the time and resources of the Board, Licensee, Staff, and Petitioner. *See Perry* and *Geo-Tech Laboratories, supra. See generally Bellotti v. NRC,* 725 F.2d 1380, 1381-82 (D.C. Cir. 1983).

Fourth, Petitioner complains that the Commission has established a new standard for the Board's raising of issues *sua sponte,* i.e., that they be raised by the Board itself only in ''extraordinary'' circumstances and that such issues must present ''serious safety, environmental, or common defense and security matters'' in order to be admissible. NWC asserts that *any* matter material to public health and safety is admissible as a contention. It further argues that the procedures of CLI-98-14 will have a ''chilling effect'' on the Board's willingness to initiate a contention *sua sponte.* Motion at 12-13, referring to CLI-98-14,

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[6] To the extent that Petitioner is attempting to attack the regulations directly, it is precluded from doing so under 10 C.F.R. § 2.758.

48 NRC at 41. Again, we disagree. The extent of the Board's authority to raise contentions *sua sponte* is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory staff — a question of resources and expertise peculiarly within the Commission's province to decide.[7]

Fifth and finally, NWC argues that, to the extent CLI-98-14 is an advisory opinion, it is improper and should be vacated. Oddly, Petitioner's supporting arguments all focus on the purportedly *mandatory* nature of the Commission's order. Motion at 13-14. As noted above, although the order is an expression of the Commission's inherent supervisory authority over the Board, its scheduling provisions constitute guidance rather than a mandate to the Board. The language on which NWC itself relies makes this clear:

> The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes *as a goal* the issuance of a Commission decision on the pending application in about 2 1/2 years from the date that the application was received.
>
> * * * *
>
> [T]he Licensing Board [should] conduct this proceeding in accordance with *the guidance* specified in this order.

48 NRC at 42, 44 (emphases added). *See also id.* at 40 (''We also provide the Licensing Board with *guidance* . . . . and a *suggested* schedule'') and 42 (''*proposed* schedule''; ''the *goal* of issuing a decision . . . in about 2 1/2 years'') (emphases added). Again, while we expect the Board to adhere to our scheduling guidance to the maximum extent possible, we recognize that particular circumstances may justify deviations from our guidance (*see id.* at 43, 44). Consequently, we have refrained from *mandating* a schedule.

Similarly, as previously noted, the Commission in CLI-98-14 provided that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were ''consistent with fairness to all parties'' and later stated that ''[w]e do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted under this application.'' CLI-98-14, 48 NRC at 42-43. Likewise, the Commission provided that the Board still has the ''discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER''). 48 NRC at 42 n.1. *Accord id.* at 42. None of the words quoted above suggests that the provisions of CLI-98-14 were, as Petitioner suggests, carved indelibly in stone. Unforeseen circumstances, or

[7] Moreover, the *sua sponte* review standards to which Petitioner objects mirror the language in 10 C.F.R. § 2.760a, applicable to proceedings on facility operating license applications. *See also Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110-11 (1982).

unexpected complexity, may require adjustments in the expected course of the proceeding. CLI-98-14 contains sufficient flexibility to deal with such situations.

For all the reasons set forth above, we conclude that Petitioner is in no way being denied ''meaningful public participation'' in this proceeding. We therefore deny NWC's motion to vacate.

It is SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of August 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Frederick J. Shon
Thomas D. Murphy

In the Matter of | **Docket No. IA 98-19**
(ASLBP No. 98-741-03-EA)

JOHN BOSCHUK, JR.
(Order Prohibiting Involvement in NRC-Licensed Activities) | **August 5, 1998**

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Dismissing Proceeding)

In a joint motion filed July 31, 1998, Petitioner John Boschuk, Jr., and the NRC Staff ask the Licensing Board to approve an attached settlement agreement and dismiss this proceeding. Finding their settlement accord is consistent with the public interest, we approve the agreement and terminate this case.

At issue in this proceeding is an April 10, 1998 Staff enforcement order issued in connection with Mr. Boschuk's activities while acting as president and owner of J&L Engineering Company (JLE) and as an agent for and consultant to J&L Testing Company (JLT).[1] JLE was the prior holder, and JLT is the present holder, of an NRC byproduct materials license that authorizes possession and use of Troxler portable nuclear gauges containing cesium-137 and americium-

[1] Mr. Boschuk is the spouse of JLT president and owner Lourdes T. Boschuk, who also was the subject of a Staff enforcement order in connection with her activities regarding the JLT license. *See* 63 Fed. Reg. 19,525 (1998). A Board issuance approving a settlement agreement and terminating an adjudicatory proceeding regarding that Staff order also is being issued this date. *See* LBP-98-16, 48 NRC 63 (1998).

241 in sealed sources.[2] The Staff order (1) precludes Mr. Boschuk for a period of 5 years from the date of the order from any involvement in NRC-licensed activities (including activities of Agreement State licensees conducted in areas of NRC jurisdiction pursuant to 10 C.F.R. § 150.20); (2) requires that within the 5-year period he must provide a copy of the order to any prospective employer or business partner who engages in NRC-licensed activities prior to accepting any employment or obtaining a partnership or ownership interest in such a licensed entity; and (3) mandates that following the 5-year period he must notify the Regional Administrator of NRC Region I prior to the first time he engages in NRC-licensed activities or obtains an interest in an NRC-licensed entity. As the basis for its order, the Staff relies on Mr. Boschuk's alleged (1) unauthorized transfer of byproduct material; (2) materially inaccurate statements to the NRC regarding use and storage of the Troxler gauges; and (3) improper destruction of records relating to gauge use. *See* 63 Fed. Reg. 19,522, 19,522-24 (1998).

In an answer submitted April 30, 1998, Mr. Boschuk denied that he willfully violated NRC requirements relative to the Staff's allegations and requested a hearing to contest the Staff's April 1998 order. After being appointed to conduct this adjudicatory proceeding, *see* 63 *id.* 28,526 (1998), in a May 21, 1998 initial prehearing order this Board requested a joint report from Mr. Boschuk and the Staff that, among other things, set forth the status of any settlement discussions between them. On June 15, 1998, and again on July 1, 1998, the participants provided joint reports that stated they were engaged in settlement negotiations and requested the proceeding be held in abeyance pending the outcome of those discussions. Thereafter, the participants filed the joint settlement motion now before us.

Under the terms of the July 30, 1998 settlement agreement, the Staff agrees to modify the April 1998 enforcement order to reduce from 5 to 2 1/2 years (specifically, until September 27, 2000) (1) the term of the prohibition on Mr. Boschuk having any involvement in NRC-licensed activities; and (2) the period during which Mr. Boschuk is required to provide a copy of the agency's enforcement order to employers or business partners. The order's requirement for post-prohibition notification of the Regional Administrator is not retained under the settlement agreement. The Staff also agrees not to take any further enforcement action against Mr. Boschuk based on the facts outlined in the April 1998 order. In turn, Mr. Boschuk agrees to withdraw his hearing request and waives any right to appeal or contest the settlement agreement once it is approved by this Board. Both participants agree there has not been any adjudication of wrongdoing by Mr. Boschuk and the settlement agreement is not to be

[2] Concurrently with the order directed to Mr. Boschuk, the Staff issued an order revoking the JLT license. *See* 63 Fed. Reg. 19,529 (1998). In an answer dated April 30, 1998, the Licensee consented to revocation of the license.

construed as an admission of wrongdoing by Mr. Boschuk or a concession of no wrongdoing or lack of agency jurisdiction by the Staff.

Pursuant to subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(b), (o), and 10 C.F.R. § 2.203, we have reviewed the participants' joint settlement agreement to determine whether approval of the agreement and termination of this proceeding is in the public interest. Based on that review, and according due weight to the position of the Staff, we have concluded both actions are consonant with the public interest. We thus grant the participants' joint motion to approve the settlement agreement and dismiss this proceeding.

For the foregoing reasons, it is, this fifth day of August 1998, ORDERED that:

1. The July 31, 1998 joint motion of John Boschuk, Jr., and the Staff is *granted* and we *approve* their July 30, 1998 ''Settlement Agreement,'' which is attached to and incorporated by reference in this Memorandum and Order.

2. This proceeding is *dismissed.*

THE ATOMIC SAFETY AND
LICENSING BOARD[3]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 5, 1998

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[3] Copies of this Memorandum and Order and the accompanying attachment were sent this date to counsel for Petitioner John Boschuk, Jr., by Internet e-mail transmission; and to counsel for the NRC Staff by e-mail through the agency's wide area network system.

ATTACHMENT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of **Docket No. IA 98-19**

JOHN BOSCHUK, JR.
(Order Prohibiting Involvement in
NRC-Licensed Activities)

SETTLEMENT AGREEMENT

On April 10, 1998, the staff of the Nuclear Regulatory Commission (Staff) issued an ‘‘Order Prohibiting Involvement in NRC-Licensed Activities’’ (‘‘Order’’) captioned ‘‘IA 98-19’’ to John Boschuk, Jr. (hereafter ‘‘Mr. Boschuk’’). *See* 63 Fed. Reg. 19,522 (April 20, 1998). On April 30, 1998, Mr. Boschuk answered the Order, denying that he engaged in a pattern and practice of willfully violating NRC requirements and requesting a hearing.

The parties to the above-captioned proceeding, the Staff and Mr. Boschuk, agree that it is in the public interest to terminate this proceeding without further litigation and without reaching the merits of the Order, subject to the approval of the Atomic Safety and Licensing Board.

NOW THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Mr. Boschuk agrees to withdraw his request for a hearing, dated April 30, 1998, and otherwise waive his right to a hearing in connection with this matter, and waive any right to contest or otherwise appeal this Settlement Agreement once approved by the Atomic Safety and Licensing Board. Such withdrawal and waiver will become effective only upon approval of this Settlement Agreement by the Atomic Safety and Licensing Board.

2. Mr. Boschuk agrees to refrain from engaging in NRC-licensed activities until September 27, 2000. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted in areas of NRC jurisdiction pursuant to the authority granted by 10 C.F.R. § 150.20.

3. Mr. Boschuk agrees, that until September 27, 2000, he will
   a. immediately provide a copy of this Settlement Agreement to any employer or other person who directs or requests Mr. Boschuk to perform duties involved in NRC-licensed activities as described in paragraph 2, above. The purpose of this requirement is to ensure that the employer or business partner is aware of the prohibition on Mr. Boschuk from engaging in NRC-licensed activities; and
   b. provide a copy of this Settlement Agreement to any NRC licensee prior to acquisition of an ownership or partnership interest in such licensee. The purpose of this requirement is to ensure that the NRC licensee is aware of the prohibition on Mr. Boschuk from engaging in NRC-licensed activities. This requirement does not apply to the purchase of stock in a licensee whose shares are publicly traded.

4. In consideration of Mr. Boschuk's agreement in paragraphs 1-3 of this Settlement Agreement and Mr. Boschuk's statement in paragraph IV.1 of his April 30, 1998 answer (sworn to in an affidavit appended thereto) that he has complied with the September 27, 1995 Suspension Order, the Staff hereby modifies paragraphs III, IV.1, IV.2, and IV.3 of the Order consistent with paragraphs 2-3 above; however, all other provisions of the Order shall remain in effect. The Staff further agrees not to take any further enforcement action against Mr. Boschuk based on the facts outlined in the Order. In the event that Mr. Boschuk fails to comply with the conditions set forth in paragraphs 1-3 of this Settlement Agreement, the Staff expressly reserves the right to take whatever action necessary and appropriate to enforce the terms of this Settlement Agreement.

5. The Staff and Mr. Boschuk understand and agree that this Settlement is limited to the issues in and the parties to the above-captioned proceeding.

6. Mr. Boschuk and the Staff (hereafter collectively referred to as ''the parties'') agree to file a joint motion requesting the Board to approve this Settlement Agreement and terminate the proceeding, pursuant to the Commission's regulations in 10 C.F.R. § 2.203. If this Settlement Agreement is not approved or is changed in any substantive manner by the Board, this Settlement Agreement may be voided by any party by giving written notice to the parties and the Board. The parties agree that under these circumstances and upon request they will negotiate in good faith to resolve differences.

7. The Staff and Mr. Boschuk agree and acknowledge that there has not been any adjudication of any wrongdoing by Mr. Boschuk and that this Settlement Agreement is the result of a compromise and shall not for any purpose be construed: (a) as an admission by Mr. Boschuk of any wrongdoing; or (b) as a concession by the NRC Staff that no violation or wrongdoing occurred or that the NRC lacks jurisdiction to issue orders to Mr. Boschuk.

IN WITNESS WHEREOF, Mr. Boschuk and the Staff have caused this Settlement Agreement to be executed by the parties or their duly authorized representatives on this 30th day of July, 1998.

Mitzi A. Young
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John Boschuk, Jr.

Harley N. Trice, II
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Frederick J. Shon
Thomas D. Murphy

In the Matter of **Docket No. IA 98-20**
(ASLBP No. 98-742-04-EA)

LOURDES T. BOSCHUK
(Order Prohibiting Involvement in NRC-Licensed Activities) **August 5, 1998**

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Dismissing Proceeding)

In a joint motion filed July 31, 1998, Petitioner Lourdes T. Boschuk and the NRC Staff ask the Licensing Board to approve an attached settlement agreement and dismiss this proceeding. Finding their settlement accord is consistent with the public interest, we approve the agreement and terminate this case.

At issue in this proceeding is an April 10, 1998 Staff enforcement order issued in connection with Ms. Boschuk's activities while acting as president and owner of J&L Testing Company (JLT).[1] JLT was the holder of an NRC byproduct materials license that authorizes possession and use of Troxler portable nuclear

[1] Ms. Boschuk is the spouse of John Boschuk, Jr., who also was the subject of a Staff enforcement order regarding his activities relating to JLT. *See* 63 Fed. Reg. 19,522 (1998). A Board issuance approving a settlement agreement and terminating an adjudicatory proceeding regarding that Staff order also is being issued this date. *See* LBP-98-15, 48 NRC 57 (1998).

gauges containing cesium-137 and americium-241 in sealed sources.[2] The Staff order (1) precludes Ms. Boschuk for a period of 5 years from the date of the order from any involvement in NRC-licensed activities (including activities of Agreement State licensees conducted in areas of NRC jurisdiction pursuant to 10 C.F.R. § 150.20); (2) requires that within the 5-year period she must provide a copy of the order to any prospective employer or business partner who engages in NRC-licensed activities prior to accepting any employment or obtaining a partnership or ownership interest in such a licensed entity; and (3) mandates that following the 5-year period she must notify the Regional Administrator of NRC Region I prior to the first time she engages in NRC-licensed activities or obtains an interest in an NRC-licensed entity. As the basis for its order, the Staff relies on Ms. Boschuk's alleged (1) materially inaccurate statements to the NRC regarding use and storage of the Troxler gauges; and (2) improper destruction of records relating to gauge use. *See* 63 Fed. Reg. 19,525, 19,525-26 (1998).

In an answer submitted April 30, 1998, Ms. Boschuk denied that she willfully violated NRC requirements relative to the Staff's allegations and requested a hearing to contest the Staff's April 1998 order. After being appointed to conduct this adjudicatory proceeding, *see* 63 *id.* 28,526 (1998), in a May 21, 1998 initial prehearing order this Board requested a joint report from Ms. Boschuk and the Staff that, among other things, set forth the status of any settlement discussions between them. On June 15, 1998, and again on July 1, 1998, the participants provided joint reports that stated they were engaged in settlement negotiations and requested the proceeding be held in abeyance pending the outcome of those discussions. Thereafter, the participants filed the joint settlement motion now before us.

Under the terms of the July 30, 1998 settlement agreement, the Staff agrees to modify the April 1998 enforcement order to reduce from 5 to 2½ years (specifically, until September 27, 2000) (1) the term of the prohibition on Ms. Boschuk having any involvement in NRC-licensed activities; and (2) the period during which Ms. Boschuk is required to provide a copy of the agency's enforcement order to employers or business partners. The order's requirement for post-prohibition notification of the Regional Administrator is not retained under the settlement agreement. The Staff also agrees not to take any further enforcement action against Ms. Boschuk based on the facts outlined in the April 1998 order. In turn, Ms. Boschuk agrees to withdraw her hearing request and waives any right to appeal or contest the settlement agreement once it is approved by this Board. Both participants agree there has not been any adjudication of wrongdoing by Ms. Boschuk and the settlement agreement is not

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[2] Concurrently with the order directed to Ms. Boschuk, the Staff issued an order revoking the JLT license. *See* 63 Fed. Reg. 19,529 (1998). In an answer submitted April 30, 1998, the Licensee consented to revocation of the license.

to be construed as an admission of wrongdoing by Ms. Boschuk or a concession of no wrongdoing or lack of agency jurisdiction by the Staff.

Pursuant to subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(b), (o), and 10 C.F.R. § 2.203, we have reviewed the participants' joint settlement agreement to determine whether approval of the agreement and termination of this proceeding is in the public interest. Based on that review, and according due weight to the position of the Staff, we have concluded both actions are consonant with the public interest. We thus grant the participants' joint motion to approve the settlement agreement and dismiss this proceeding.

For the foregoing reasons, it is, this fifth day of August 1998, ORDERED that:

1. The July 31, 1998 joint motion of Lourdes T. Boschuk and the Staff is *granted* and we *approve* their July 30, 1998 ''Settlement Agreement,'' which is attached to and incorporated by reference in this Memorandum and Order.
2. This proceeding is *dismissed.*

THE ATOMIC SAFETY AND
LICENSING BOARD[3]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 5, 1998

[3] Copies of this Memorandum and Order were sent this date to counsel for Petitioner Lourdes T. Boschuk by Internet e-mail transmission; and to counsel for the NRC Staff by e-mail through the agency's wide area network system.

ATTACHMENT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of **Docket No. IA 98-20**

LOURDES T. BOSCHUK
(Order Prohibiting Involvement in
NRC-Licensed Activities)

SETTLEMENT AGREEMENT

On April 10, 1998, the Nuclear Regulatory Commission (''NRC'') issued an ''Order Prohibiting Involvement in NRC-Licensed Activities'' (''Order'') captioned ''IA 98-20'' to Lourdes T. Boschuk (hereafter ''Mrs. Boschuk''). *See* 63 Fed. Reg. 19,525 (April 20, 1998). On April 30, 1998, Mrs. Boschuk answered the Order, denying that she engaged in a pattern and practice of willfully violating NRC requirements and requesting a hearing.

The parties to the above-captioned proceeding, the NRC Staff (''Staff'') and Mrs. Boschuk have engaged in negotiation and agree that it is in the public interest to terminate this proceeding without further litigation and without reaching the merits of the Order, subject to the approval of the Atomic Safety and Licensing Board.

NOW THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Mrs. Boschuk agrees to withdraw her request for a hearing, dated April 30, 1998, and otherwise waive her right to a hearing in connection with this matter, and waive any right to contest or otherwise appeal this Settlement Agreement once approved by the Atomic Safety and Licensing Board. Such withdrawal and waiver will become effective only upon approval of this Settlement Agreement by the Atomic Safety and Licensing Board.

2. Mrs. Boschuk agrees to refrain from engaging in NRC-licensed activities until September 27, 2000. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted in areas of NRC jurisdiction pursuant to the authority granted by 10 C.F.R. § 150.20.

3. Mrs. Boschuk agrees, that until September 27, 2000, she will
   a. immediately provide a copy of this Settlement Agreement to any employer or other person who directs or requests Mrs. Boschuk to perform duties involved in NRC-licensed activities as described in paragraph 2, above. The purpose of this requirement is to ensure that the employer or business partner is aware of the prohibition on Mrs. Boschuk from engaging in NRC-licensed activities; and
   b. provide a copy of this Settlement Agreement to any NRC licensee prior to acquisition of an ownership or partnership interest in such licensee. The purpose of this requirement is to ensure that the NRC licensee is aware of the prohibition on Mrs. Boschuk from engaging in NRC-licensed activities. This requirement does not apply to the purchase of stock in a licensee whose shares are publicly traded.

4. In consideration of Mrs. Boschuk's agreement in paragraphs 1-3 of this Settlement Agreement and Mrs. Boschuk's statement in paragraph IV.1 of her April 30, 1998 answer (sworn to in an affidavit appended thereto) that she has complied with the September 27, 1995 Suspension Order, the Staff hereby modifies paragraphs III, IV.1, IV.2, and IV.3 of the Order consistent with paragraphs 2-3 above; however, all other provisions of the Order shall remain in effect. The Staff further agrees not to take any further enforcement action against Mrs. Boschuk based on the facts outlined in the Order. In the event that Mrs. Boschuk fails to comply with the conditions set forth in paragraphs 1-3 of this Settlement Agreement, the Staff expressly reserves the right to take whatever action necessary and appropriate to enforce the terms of this Settlement Agreement.

5. The Staff and Mrs. Boschuk understand and agree that this Settlement is limited to the issues in and the parties to the above-captioned proceeding.

6. Mrs. Boschuk and the Staff (hereafter collectively referred to as ''the parties'') agree to file a joint motion requesting the Board to approve this Settlement Agreement and terminate the proceeding, pursuant to the Commission's regulations in 10 C.F.R. § 2.203. If this Settlement Agreement is not approved or is changed in any substantive manner by the Board, this Settlement Agreement may be voided by any party by giving written notice to the parties and the Board. The parties agree that under these circumstances and upon request they will negotiate in good faith to resolve differences.

7. The Staff and Mrs. Boschuk agree and acknowledge that there has not been any adjudication of any wrongdoing by Mrs. Boschuk and that this Settlement Agreement is the result of a compromise and shall not for any purpose be construed: (a) as an admission by Mrs. Boschuk of any wrongdoing; or (b) as a concession by the NRC Staff that no violation or wrongdoing occurred or that the NRC lacks jurisdiction to issue orders to Mrs. Boschuk.

IN WITNESS WHEREOF, Mrs. Boschuk and the Staff have caused this Settlement Agreement to be executed by the parties or their duly authorized representatives on this 30th day of July, 1998.

Mitzi A. Young
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lourdes T. Boschuk

Harley N. Trice, II
Counsel for Lourdes T. Boschuk
Reed Smith Shaw & McClay LLP
435 Sixth Avenue
Pittsburgh, PA 15219-1886

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of **Docket No. 72-22-ISFSI**
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation) **August 5, 1998**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board grants an Intervenor motion for reconsideration of a portion of its rulings in LBP-98-13, 47 NRC 360 (1998), and admits contentions concerning the validity of the Applicant's physical security plan (PSP) as the PSP relies on the local county sheriff's office to exercise law enforcement authority at the PFS ISFSI located on the reservation of the Skull Valley Band of Goshute Indians.

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR FIRST TIME; RAISING OVERLOOKED OR MISAPPREHENDED LEGAL OR FACTUAL MATTERS; RAISING PREVIOUSLY REJECTED ARGUMENTS; RAISING INHARMONIOUS RULINGS

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING MATTERS FOR FIRST TIME; RAISING OVERLOOKED OR MISAPPREHENDED LEGAL OR FACTUAL MATTERS; RAISING PREVIOUSLY REJECTED ARGUMENTS; RAISING INHARMONIOUS RULINGS)

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds,* ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See* LBP-98-10, 47 NRC 288, 296 (1998).

MEMORANDUM AND ORDER
(Granting Motion for Reconsideration)

In LBP-98-13, 47 NRC 360 (1998), we ruled on the admissibility of Intervenor State of Utah's (State) nine contentions challenging the adequacy of the physical security plan (PSP) submitted by Applicant Private Fuel Storage, L.L.C. (PFS) in support of its application for a 10 C.F.R. Part 72 license to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band). The State now seeks reconsideration of the portion of that ruling rejecting its argument in support of contention Security-C (as well as two other contentions) that a material issue exists regarding the jurisdiction of the Tooele

County sheriff's office, as the designated local law enforcement agency (LLEA) with which PFS has response arrangements, to exercise law enforcement authority at the PFS ISFSI on the Skull Valley Band reservation.

For the reasons set forth below, we find the State's reconsideration request has merit and so will admit contentions Security-A through Security-C on the issue whether a June 1997 cooperative law enforcement agreement that permits the Tooele County sheriff's office to exercise law enforcement authority on the Skull Valley Band reservation has been properly adopted by Tooele County, thereby allowing the county sheriff's office to fulfill its role as the designated LLEA for the PFS facility.

I. BACKGROUND

In LBP-98-13, 47 NRC at 370, we determined the State had provided inadequate legal and factual information to support that portion of the basis for its contention Security-C alleging noncompliance with the requirements of 10 C.F.R. Part 73, App. C, because the Tooele County sheriff's office lacked jurisdiction and law enforcement authority on the Skull Valley Band reservation and so could not fulfill its role as the designated LLEA for the PFS facility. In doing so, we referenced a June 1997 cooperative law enforcement agreement between Tooele County, the Bureau of Indian Affairs (BIA) of the United States Department of the Interior, and the Skull Valley Band.[1] *See id.* This agreement was first provided to the State, the NRC Staff, and the Board by PFS during a June 17, 1998 in camera prehearing conference and was later made part of the public record of this proceeding. *See* Tr. S-15 to S-16; Letter from Jay E. Silberg, Counsel for PFS, to Licensing Board (June 24, 1998). Under the agreement's terms, the Tooele County sheriff's office has the authority and responsibility to provide law enforcement services on the Skull Valley Band reservation. In our ruling we noted that ''nothing on the face of the cooperative agreement gives us cause to question its validity as it provides such jurisdiction on the Skull Valley Band's reservation for the designated LLEA.'' LBP-98-13, 47 NRC at 370 n.9.

In its July 10, 1998 filing requesting reconsideration of that determination,[2] the State acknowledges it was given an opportunity to address the significance

[1] In LBP-98-13, we identified the agreement as being between ''the LLEA,'' the BIA, and the Skull Valley Band. The agreement was actually executed by the Chairman of the Tooele County Commission and is administered by the sheriff's office on the county's behalf. *See* [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 10, 1998) exh. 1, at 1, 3 [hereinafter State Reconsideration Motion].

[2] Because the PFS security plan and a number of the parties' prior filings regarding the State's contentions challenging that plan involve 10 C.F.R. Part 73 safeguards information, they have been afforded confidential, nonpublic treatment. The State's July 10 reconsideration filing, however, was submitted as part of the public *(Continued)*

of the June 1997 cooperative agreement during the June 1998 prehearing conference, but suggests it was disadvantaged by the fact it had no opportunity to review the agreement before the conference. *See* [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 10, 1998) at 1-2. It further states that after the Board's LBP-98-13 contentions admissibility ruling, it made an inquiry to the Tooele County clerk's office and was advised there was no record of a Tooele County Commission resolution authorizing the county to enter into the June 1997 agreement. *See id.* exh. 3 (affidavit of Jean Braxton). This is significant relative to the Board's admissibility determination, the State declares, because of the ''Now, Therefore'' clause on page one of the agreement that states the accord is being entered into pursuant to section 11-13-5 of the Utah Code Annotated 1953. *See id.* at 2; *see also id.* exh. 1, at 1 (June 1997 cooperative agreement). By this statutory provision's terms, agreements between public agencies come into force only upon ''[a]doption of appropriate resolutions by the governing bodies of the participating public agencies . . . .'' *Id.* exh. 2 (Utah Code Ann. § 11-13-5 (1997)). The State argues that in light of this enactment, the Tooele County Commission's apparent failure to adopt a resolution authorizing the June 1997 cooperative agreement warrants reconsideration of the Board's (1) contention Security-C ruling that no legal or factual material issue exists about the LLEA's jurisdiction on the Skull Valley Band reservation; and (2) rejection of the bases for contentions Security-A and Security-B that likewise posited a lack of LLEA jurisdiction, based on the Board's Security-C ruling on LLEA jurisdiction.

In a July 22, 1998 response, the Staff supports the State's reconsideration request as it relates to contention Security-C. *See* NRC Staff's Response to [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 22, 1998) at 4-6. Noting there is a 1991 Tooele County Commission resolution approving a similar 1991 cooperative agreement that existed between Tooele County, the BIA, and the Skull Valley Band, the Staff declares it currently does not have enough information to determine whether the 1991 approval resolution applies to the 1997 agreement. According to the Staff, not only is it unclear if the 1997 agreement requires a separate resolution, but the 1991 agreement had a provision making it effective for 50 years, which raises questions about the continuing validity of the 1991 agreement. Suggesting there may be other state or county laws or ordinances that will clarify the effect of the 1991 resolution vis a vis the 1997 cooperative agreement, the Staff concludes that a material dispute exists regarding the validity of the 1997

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record of this proceeding based on its determination that no ''safeguards'' information was utilized in that pleading. *See* State Reconsideration Motion at 1. The PFS and Staff responses to the State's motion likewise were submitted as public record materials. Because it relies on these publicly filed pleadings, this issuance also is being placed in the public record of this proceeding.

agreement sufficient to support admission of the State's Security-C concern about LLEA jurisdiction. *See id.* at 5. As to Security-A and Security-B, however, the Staff urges denial of the State's reconsideration request on the grounds the Board's rejection of those contentions was based primarily on other grounds not challenged by the State in its reconsideration motion. *See id.* at 5 n.3.

Applicant PFS asks the Board to deny the State's reconsideration motion in all respects. In its July 22, 1998 pleading, PFS declares the State's challenge to the validity of the June 1997 agreement is an improper collateral attack on an existing, functioning intergovernmental agreement that the Board should not countenance. This is particularly so, PFS maintains, because the actual parties to the agreement — Tooele County, the BIA, and the Skull Valley Band — clearly believe their accord is effective. *See* Applicant's Response to [State] Motion for Reconsideration of Ruling on [PSP] Contentions (July 22, 1998) at 2-3. PFS further asserts there is no material dispute for the Board to consider because the Tooele County Commission (1) voted approval of the June 1997 cooperative agreement during a June 1997 meeting; and (2) agreed to an extension of the 1997 agreement in a June 23, 1998 meeting. With these approvals and the 1991 commission resolution cited by the Staff in place, PFS maintains, the Board has no cause to delve into the question whether the county has complied with the requirement in Utah Code Annotated section 11-13-5 for the adoption of ''appropriate resolutions'' by participating public agency governing bodies. *See id.* at 3-4.

II. ANALYSIS

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds,* ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have

the presiding officer correct what appear to be inharmonious rulings in the same decision. *See* LBP-98-10, 47 NRC 288, 296 (1998).

Applying these precepts, we conclude the State's argument is an attempt to have us consider existing information that was misapprehended or overlooked rather than an effort to interject an entirely new thesis, and so provides an appropriate basis for reconsideration. In declaring that nothing on the face of the June 1997 agreement seemingly raised a question about its validity, we were unaware of the import of Utah Code Annotated section 11-13-5 that is cited in the agreement. In this instance,[3] reconsideration of our ruling rejecting the State's claims about the agreement's validity as providing a basis for admitting contention Security-C is appropriate.

Regarding the admissibility of the State's Security-C as it relates to the validity of the PFS LLEA designation, we conclude the State has made a sufficient showing there is a genuine material dispute adequate to warrant further inquiry relative to the question whether the June 1997 agreement has been adopted by Tooele County so as to provide its officials with law enforcement authority at the Skull Valley Band reservation. As we noted above, Utah Code Annotated section 11-13-5 requires that a public agency entering into a cooperative agreement — in this instance Tooele County — must adopt an ''appropriate resolution.'' Provisions of the Utah Code also state that a local government resolution or ordinance ''shall be in writing before the vote is taken.'' Utah Code Ann. § 10-3-506 (1997); *see Patterson v. Alpine City,* 663 P.2d 95, 96 (Utah 1983) (statutory language requiring all resolutions to be in writing is mandatory); *see also* Utah Code Ann. § 11-13-20 (1997) (publication of resolutions or contracts relating to an interlocal cooperation agreement).

The State asserts there is no evidence of such a written resolution for the June 1997 agreement. The Staff apparently agrees, albeit with the caveat that any conclusion about the actual existence of a section 11-13-5 approval deficiency may depend on answers to the open questions whether (1) the written resolution adopted by the Tooele County Commission approving the 1991 version of the cooperative law enforcement agreement is effective to approve the 1997 pact; and (2) if the 1997 agreement is invalid, would the 50-year term 1991 agreement

[3] If the agreement had come into the record at an earlier point, the meaning and significance of this provision undoubtedly would have had a fuller predecisional airing. With its expressed concern about the need for an LLEA agreement, *see* [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998) at 4, it is unclear why the State chose not to contact the county earlier to ascertain whether, as the PSP represented, such an agreement existed. At the same time, given PFS's position that it was not required to include any LLEA agreement in its PSP, *see* Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998) at 20-21, it is not apparent why it chose to wait until the proverbial ''last minute'' to utilize the document in responding to the State's claim.

Neither party's approach is a particularly appealing technique for advancing its litigative position. Nonetheless, because we are more troubled by the element of surprise introduced by the Applicant's strategy, in this instance we are unwilling to reject the State's reconsideration rationale as impermissibly post hoc.

nonetheless remain in effect. Moreover, while PFS has provided Tooele County Commission meeting minutes indicating that within the last 14 months the commission has on two occasions reviewed and/or endorsed the June 1997 cooperative agreement, it has not demonstrated these actions were in the form of a written resolution, like the 1991 enactment, that seemingly would comply with the requirements of section 11-13-5.

Thus, an unresolved issue exists concerning the effectiveness of the June 1997 agreement that, concomitantly, raises a question about the Tooele County sheriff's office status to act as the designated LLEA for the PFS facility in accordance with 10 C.F.R. Part 73, App. C. Moreover, despite the Applicant's assertions to the contrary, our inquiry into this matter is not barred by the fact we may have to rule on the efficacy of Tooele County's approval of an agreement that the enacting parties, including the federal BIA, consider legitimate.[4] As the Staff points out, the agency's recently revised regulations require that a ''[d]ocumented liaison with a designated response force or [LLEA] must be established to permit timely response to unauthorized penetration or activities.'' 10 C.F.R. § 73.51(d)(6); *see* 63 Fed. Reg. 26,955, 26,963 (1998). In this instance, the State's claims regarding the county's failure to adopt the June 1997 agreement properly under the terms of Utah Code Annotated section 11-13-5 pose a legitimate question about whether the necessary documented liaison has, in fact, been established in accordance with section 73.51(d)(6) of the NRC's regulations. Consequently, our further inquiry into the matter is appropriate. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 189-96 (1978) (because agency must determine whether Applicant has obtained required Federal Water Pollution Control Act discharge certification from proper state, Board properly may consider dispute over location in river of boundary between states).

Previously, we concluded the State's contention Security-C assertion that PFS has not complied with the 10 C.F.R. Part 73, App. C, requirements for contingency plan contents was litigable in connection with its basis alleging PFS has not described the estimated response times for the Tooele County sheriff, as the principal LLEA, in compliance with agency regulations. Our ruling here means the State may pursue its Security-C claim of regulatory noncompliance that the Tooele County sheriff's office cannot act as the designated LLEA

[4] In support of this preclusion argument, PFS cites two agency cases, *Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702 (1978), and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423 (1982). We find both inapposite, for in each instance the preclusion finding was based on a specific statutory bar, of which there is none here. Nor do we find persuasive the Applicant's references to preclusion determinations in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, *aff'd,* ALAB-818, 22 NRC 651 (1985), *rev'd on other grounds,* CLI-86-13, 24 NRC 22 (1986), and *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, *remanded for further proceedings,* ALAB-905, 28 NRC 515 (1988), which relied on rulings rendered or likely to be rendered in pending state judicial proceedings, of which there likewise are none here.

because the alleged failure to comply with the requirements of Utah Code Annotated section 11-13-5 regarding approval of the June 1997 agreement arguably would deprive the sheriff's office of law enforcement authority on the Skull Valley Band reservation. Further, we admit contentions Security-A and Security-B on this same basis. The PSP clearly is premised on the Tooele County sheriff's office acting as the LLEA to respond in the event of unauthorized activities at the PFS facility. Consequently, the State's claim there is no valid cooperative agreement providing the sheriff's office with law enforcement authority on the reservation would provide adequate grounds for admission of those contentions as they express concerns about the sufficiency of security force staffing, equipment, and training.

III. CONCLUSION

In asking the Licensing Board to reexamine its ruling in LBP-98-13 regarding the validity of the June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation based on our misapprehension about compliance with requirements of Utah Code Annotated section 11-13-5, the State has put forth appropriate grounds for reconsideration. Further, as a basis for the admission of its contentions Security-A through Security-C, the State has shown that this claim establishes a genuine material dispute adequate to warrant further inquiry.

For the foregoing reasons, it is, this fifth day of August 1998, ORDERED that:

1. The July 10, 1998 reconsideration motion of the State of Utah is *granted.*

2. State physical security plan contentions Security-A and Security-B are *admitted* for litigation in this proceeding limited to the issues of whether staffing, equipment, and training deficiencies exist because the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from fulfilling its response role as the designated LLEA for the PFS facility.[5]

3. State physical security plan contention Security-C is *admitted* for litigation in this proceeding limited to the issues of whether the PSP fails to meet the requirements of 10 C.F.R. Part 73, App. C, in that (a) PFS has not adequately described the estimated response times for the Tooele County sheriff's office as the principal LLEA relied upon for security assistance at the PFS facility,

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[5] The language of these contentions as admitted is set forth in LBP-98-13, 47 NRC at 368, 369.

see LBP-98-13, 47 NRC at 369-70; and (b) the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from fulfilling its designated role as the LLEA for the PFS facility.[6]

THE ATOMIC SAFETY AND
LICENSING BOARD[7]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 5, 1998

[6] The language of this contention as admitted is set forth in LBP-98-13, 47 NRC at 369.

[7] Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Castle Rock Land and Livestock, L.C./Skull Valley Company, Ltd., and the State by Internet e-mail transmission; and to counsel for the Staff by e-mail through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of | **Docket No. 40-3453-MLA-2**
(ASLBP No. 98-747-02-MLA)
(Re: Tailings Pile Integrity)

ATLAS CORPORATION
(Moab, Utah) | **August 13, 1998**

The State of Utah sought to intervene in a license proceeding concerning the long-term safekeeping of a uranium mill tailings pile at Moab, Utah. However, the State's petition was considered untimely pursuant to 10 C.F.R. § 2.1205(d). The State argued that it had been cooperating with the NRC in an attempt to agree about the proper treatment of this tailings pile and that it petitioned as soon as it learned that its cooperative effort was not bearing fruit. The Presiding Officer held that a delay in filing a request for a hearing may not be excused because a person chose to rely on the Nuclear Regulatory Commission to protect its interests. Accordingly, the State's petition was dismissed.

RULES OF PRACTICE: SUBPART L; LATE FILING

A delay in filing a request for a hearing may not be excused because a petitioner chose to work with the Nuclear Regulatory Commission in order to protect its interests.

MEMORANDUM AND ORDER
(Petition of the State of Utah Dismissed as Untimely)

The State of Utah has sought to intervene in Atlas Corporation's August 2, 1988, Request to Amend Its License to provide for long-term safekeeping of its uranium mill tailings pile at Moab, Utah. The State objected that insufficient care had been taken to protect the tailings should the Colorado River migrate in the direction of the Pile. The Request for Hearing and Petition for Leave to Intervene (Petition) filed by the State of Utah is *denied* as untimely and referred to the Director of Nuclear Material Safety and Safeguards for further consideration.[1]

I. THE STANDARD FOR DETERMINING UNTIMELINESS

A. The Regulation

A timely request for a hearing must be filed within 30 days of the agency's publication of notice of the application or licensing action in the *Federal Register.* 10 C.F.R. § 2.1205(d)(1). If no notice is published, then the requester must file within 30 days of receiving actual notice either of a pending application or of the grant of an application. 10 C.F.R. § 2.1205(d)(2).

Untimely filings require a showing of good cause before a hearing may be granted. As the State of Utah acknowledges on page 16 of the Petition:

> An untimely petition to intervene must establish that ''(1) the delay in filing a request for a hearing or petition for leave to intervene was excusable; and (2) the grant of the request for a hearing or petition for leave to intervene will not result in undue prejudice or undue injury to any other participant to the proceeding.'' 10 C.F.R. § 2.1205(*l*)(1).

See also Atlas Response at 10.

B. Legal Precedent

A delay in filing a request for a hearing may not be excused because a person chose to rely on the Nuclear Regulatory Commission to protect its interests. The State should be in no better position than the Skagit Indians, who also claimed they should be permitted to file late because they had relied on the federal

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[1] The State of Utah's Request for Hearing and Petition for Leave to Intervene (Petition) was filed on July 13, 1998. The Staff of the Nuclear Regulatory Commission (Staff) filed a Response and Notice of Staff Participation (Response) on August 3, 1998. Atlas Corporation also filed a Response to the State of Utah's Request for Hearing and Petition for Leave to Intervene on August 11, 1998 (Atlas Response).

government to protect them. *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 715, *aff'd,* ALAB-559, 10 NRC 162 (1979). That case states:

> On the assumption that a special fiduciary relationship exists between the [Skagit] Indians and the Federal Government as a result of the Treaty of Point Elliott, there exists an obligation of the Government to protect the treaty interests of the petitioners. Such interests relate to the petitioners' fishing interests under the Treaty. Such interests do not extend to late intervention in this proceeding. The Treaty does not entitle petitioners to intervene late, particularly after they passed by the chance to intervene in a timely manner when there was good reason for them so to intervene. The Indians' disappointment with the Federal Government now is no basis for waiving their delinquency in filing their motion to intervene.

See id. at 114 (preoccupation with other matters does not afford the petitioners a basis for excusing their nontimely motion to intervene); *Nuclear Metals, Inc.,* LBP-91-27, 33 NRC 548, 551 (1991) (pursuit of negotiations is not an excuse for late filing); *but see Umetco Minerals Corp.*, LBP-92-20, 36 NRC 112 (1992).

These precedents are consistent with the purpose of 10 C.F.R. § 2.1205(d)(2). In the *Federal Register* announcement of the 1994 amendment to that regulation, the Commission explained that the amendment was adopted to resolve the issue of ''whether potential requesters with actual notice of an application for a particular licensing action were intended to have two bites at the apple, or should instead by required to file for a hearing at their earliest opportunity.'' 59 Fed. Reg. 29,188 (1994).

The general principle governing the determination of lateness may be found in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 70 (1992):

> The test for ''good cause'' is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available *and* when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

II. FACTS CONCERNING UNTIMELINESS

Although the petition of the State of Utah does not contain a complete chronology of the events governing the determination of untimeliness, the Staff Response does. For the sake of brevity, I have selected from the Staff Response some events that are important in this determination:

- Decommissioning of the Moab Mill, Source Material License SUA-917, began in 1988.[2]
- On July 20, 1993, the Staff published a notice of Intent to Amend Source License to approve Atlas' reclamation plan. 58 Fed. Reg. 38,796 (1993). At the same time, an Environmental Assessment was made available for public comment.[3]
- A Notice of Opportunity for a hearing was published April 7, 1994. 59 Fed. Reg. 16,665. Petition at 1.
- In January 1996, the Staff published a Draft Technical Evaluation Report and a draft EIS and made them available for public comment by an announcement in the *Federal Register*.[4]
- Comments made by the State of Utah and the Utah Division of Radiation Control were addressed in NUREG-1532, the Final Technical Evaluation Report (FTER), in March 1997. *See* Response, Attachment A, at A-22-23. The FTER explained why the Staff rejected Utah's arguments concerning the characterization of the tailings with respect to shear strain and concerning the adequacy of ''the rock apron that will provide the ultimate protection against erosion if the Colorado River channel erodes and migrates to the tailings pile.''
- In response to comments made by Mr. Sinclair, the Staff completed a further evaluation of the rock armoring on February 6, 1998.[5]
- On May 27, 1998, the State informed the Staff that it intended to pursue this matter further; and the Staff advised it that any petition for a hearing would have to meet the late filing requirements of 10 C.F.R. § 2.1205(*l*).[6]

III. CONCLUSIONS ABOUT UNTIMELINESS

I have decided that the Staff and Atlas are both correct in opposing Utah's petition as untimely.

The State of Utah has had many years to become familiar with this proceeding, which began in 1988 and was the subject of *Federal Register* notices in 1993 and April 7, 1994 — the latest date on which the State should have been informed. We know that the State had actual notice of this proceeding before April 29, 1996, when it filed comments on the Draft Technical Evaluation Report with the NRC.[7] Even were I to assume that the State first received notice of the NRC's views from the publication of the FTER in May 1997, the State's filing would still be untimely.

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[2] Response at 2.
[3] *Id.* at 2-3.
[4] *Id.* at 4.
[5] *Id.* at 5.
[6] *Ibid.*
[7] Response at 10.

That the State has been working with the Staff of the Nuclear Regulatory Commission does not provide it with an excuse for untimeliness. *See* p. 79. If it wanted to protect its rights to a public hearing, it should have filed a hearing request. Once it filed a request, the Presiding Officer would be responsible for managing the case and assuring that it was completed in a timely fashion. To permit intervention at this time would unduly delay final action on Atlas Corporation's request for a license amendment.

Since I have determined that the petition is inexcusably late, 10 C.F.R. § 2.1205(*l*)(1) requires me to dismiss the petition.

IV. REFERRAL

This Memorandum and Order does not determine the merit of the concerns of the State of Utah. Pursuant to 10 C.F.R. § 2.1205(*l*)(2), the State's Petition will be treated as a petition under 10 C.F.R. § 2.206. Should the State of Utah wish to supplement its petition, in order to make its substantive points clearer, it may promptly notify the Executive Director of Operations of its intention to file a supplement.

V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 13th day of August 1998, ORDERED that:

1. The Request for Hearing and Petition for Leave to Intervene (Petition) filed by the State of Utah on July 13, 1998 is *denied.*

2. Within 10 days after service of this Memorandum and Order, a party may file a petition for review with the Commission. 10 C.F.R. §§ 2.1205(o). The petition shall be no longer than ten (10) pages in length and shall contain the material specified in section 2.786(b)(2).

3. The State of Utah's Request for Hearing and Petition for Leave to Intervene (Petition) is referred to the Executive Director of Operations under 10 C.F.R. § 2.206. The State of Utah may promptly notify the Executive Director of Operations if it plans to supplement its petition.

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of | **Docket No. 40-8681-MLA-4**
(ASLBP No. 98-748-03-MLA)
(Re: Materials License Amendment)

INTERNATIONAL URANIUM (USA) CORPORATION
(Receipt of Material from Tonawanda, New York)

August 13, 1998

A request for a stay under 10 C.F.R. Part 2, Subpart L must be timely. Under 10 C.F.R. § 2.1263, motions for stay or temporary stay of any licensing decision issued by the Commission ''*must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later.*'' A party may not wait until an action is taken under the license before filing a request. Accordingly, the petition of the State of Utah for a stay was *denied.*

RULES OF PRACTICE: SUBPART L; STAY

A license may be granted containing a condition, such as a requirement for subsequent testing before material may be imported under the license. The condition does not create a fresh opportunity for filing a request for a stay. Timeliness depends on when the amendment was issued and not on the fulfillment of subsequent conditions.

MEMORANDUM AND ORDER
(Denial of Request for a Stay Filed by the State of Utah)

The State of Utah filed a Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay on August 6, 1998 (Request). The Stay motion requests that International Uranium (USA) Corporation (IUSA) be barred from receiving, processing, or disposing of uranium-bearing material from Ashland 2, reportedly on its way to IUSA from Tonawanda, New York.

The facsimile transmission of the request was received on the morning of August 7 and an on-the-record telephone prehearing conference was convened on August 7, 1998, at 2 p.m. During the conference, the parties agreed to settlement negotiations and an exchange of information. The negotiations were to continue until close of business August 11, and the parties have reported that further negotiations would not be fruitful.[1]

I have decided to *dismiss* the request as untimely, as urged by IUSA and by the Staff of the Nuclear Regulatory Commission at the August 7 telephone prehearing conference.

As IUSA ably and correctly argues on page 2 of its Opposition:

> Under 10 C.F.R. § 2.1263, motions for stay or temporary stay of any licensing decision issued by the Commission ''*must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later.*'' NRC granted the subject license amendment on June 23, 1998. Thus, the State was required to file its Motion for Stay and Temporary Stay no later than July 23, 1998 (when it filed its Request for a Hearing), since the staff action complained of — amendment of IUSA's license — occurred prior to the filing.

In its Timeliness Brief, on page 1, the State of Utah argued that the Staff action of granting a license amendment was *conditional* because waste material to be brought to the White Mesa Mill site was still subject to testing. I reject this interpretation. The requirement of a test was no different from any other license condition and there is, therefore, no reason to consider the Staff's licensing action to have been incomplete. *See Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); *Long Island Lighting Co.* (Shoreham Nuclear

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[1] The following additional filings have been received: State of Utah's Response on the Timeliness of Its Motion for a Stay and Request for a Temporary Stay, August 10, 1998 (Timeliness Brief); State of Utah's Supplement to Its Motion for a Stay and Request for a Temporary Stay After Review of Information Provided by the Licensee (marked ''Proprietary Pleading''), August 11, 1998 (Request Supplement); Amended Opposition of International Uranium (USA) Corporation to State of Utah's Request for a Stay, August 11, 1998 (Amended Opposition). The Amended Opposition was preceded by ''Opposition of International Uranium (USA) Corporation to State of Utah's Request for a Stay'' (Opposition).

Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). (A licensing board may refer minor matters that in no way pertain to the basic findings necessary for issuance of a license to the Staff for posthearing resolution.)

The State of Utah also argues that its stay request is timely because the shipment of material from Tonawanda, New York, represented ''changed circumstances'' because this was the first time it became aware that a shipment was on its way to the site. Timeliness Brief at 2. This argument is, however, unpersuasive. In the law, circumstances are considered to be changed when they are not reasonably foreseeable. However, the very purpose of the license amendment was to receive material that is now being shipped. The shipment was foreseeable because it was the purpose of the amendment. Additionally, the State stated that it could not file earlier because there was no immediate harm impending. This argument, which is unaccompanied by a citation to authority, is not persuasive. A stay may be granted when a feared action is foreseeable and need not wait for the wrecker's ball to be in motion.[2] *Morales v. Transworld Airlines, Inc.* 112 S. Ct. 2031, 119 L. Ed. 2d 157, 60 USLW 4444 (1992). (A general announcement by states' attorneys general about the intent to enforce a law constitutes the irreparable injury required for the issuance of an injunction.)

The State of Utah also argues that there is a rational foundation for the Presiding Officer to exercise his discretion to consider the stay timely. However, the State is in error in believing that its argument is supported by *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 373 n.196 (1989) and *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 138 [159?] (1986). Those decisions indicate the broad discretion of licensing boards over the timing of answers to motions even though the regulations do provide deadlines for answers. Changing deadlines for answers to motions traditionally falls within the management discretion of licensing boards and presiding officers. 10 C.F.R. § 2.1209(a). Furthermore, this discretion is acknowledged explicitly in 10 C.F.R. § 2.730(c). These cases do not stand for the proposition that a presiding officer may disregard the explicit words of 10 C.F.R. § 2.1263, which contains mandatory language (''must be filed'').

This Memorandum and Order does not determine the merit of the concerns of the State of Utah. These may be considered in this case should the State of Utah be admitted as a party.

Utah's Request Supplement was marked ''Proprietary Pleading.'' Generally, all materials become part of the public record. A participant seeking to have this material treated as proprietary should serve a motion on the members of the

[2] IUSA also is correct, in its Amended Opposition at page 2, in arguing that the State of Utah is incorrect in relying on *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320-21 (1998). That case did not involve an untimely request for a stay.

service list by August 19, 1998, pursuant to 10 C.F.R. § 2.790(b). The Request Supplement shall be considered proprietary until further order.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 13th day of August 1998, ORDERED that:

1. The State of Utah's Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay, August 6, 1998 (Request), is *denied.*

2. The filing of a petition for review by the Commission is mandatory for a participant to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.1253.

3. Within 15 days of the service of this Decision, a petition for review may be filed with the Commission. The petition may be no longer than ten pages and must address specific points set forth in the regulations. Answers may be filed within 10 days of service of a petition for review and also must address prescribed points. 10 C.F.R. § 2.786(b).[3]

4. The State of Utah's Supplement to Its Motion for a Stay and Request for a Temporary Stay After Review of Information Provided by the Licensee shall be treated, until further ordered, as proprietary. A participant seeking to maintain the allegedly proprietary nature of this material should serve on the members of the service list by August 19, 1998, a motion pursuant to 10 C.F.R. § 2.790(b).

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

[3] The appeal is a request for interlocutory review. Petitioners need to demonstrate that they are threatened with ''immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision.'' 10 C.F.R. § 2.786(g)(1).

Cite as 48 NRC 87 (1998) **LBP-98-20**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of **Docket No. 50-423-LA**
(ASLBP No. 98-740-02-LA)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 3) **August 25, 1998**

In this proceeding on the license amendment application of Northeast Nuclear Energy Company, the Licensing Board concludes that the Petitioner, Citizens Regulatory Commission, has standing to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

In assessing whether a petitioner has set forth a sufficient ''interest'' to intervene in the licensing proceeding under the Atomic Energy Act and the agency's regulations, the Commission has for over two decades applied contemporaneous judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

RULES OF PRACTICE: STANDING TO INTERVENE

As the Commission has reiterated, ''[t]o demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to

the challenged action and is likely to be redressed by a favorable decision.'' *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1983).

RULES OF PRACTICE: STANDING TO INTERVENE

Additionally, ''[t]his injury must be to an interest arguably within the zone of interests protected by the governing statute,'' i.e., the Atomic Energy Act or the National Environmental Policy Act of 1969. *Perry,* CLI-93-21, 38 NRC at 92.

RULES OF PRACTICE: STANDING TO INTERVENE

When an organization seeks to intervene as the authorized representative of its members, the organization must demonstrate that at least one of its members has standing and has authorized the organization to represent him. The organization also must show that the interests it seeks to protect are germane to the purpose of the organization and that neither the claim asserted nor the relief sought requires the participation of an individual member in the proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31(1998).

RULES OF PRACTICE: STANDING TO INTERVENE

In evaluating petitioner's standing to intervene, Commission precedent directs that we construe the petition in favor of the petitioner. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

MEMORANDUM AND ORDER
(Resolving Standing Issue)

Petitioner, Citizens Regulatory Commission (''CRC''), seeks to intervene in this proceeding to oppose the license amendment request of the Applicant, Northeast Nuclear Energy Company, for its Millstone Unit No. 3. As described in the Commission hearing notice, the amendment request ''to the Millstone Unit 3 licensing basis would eliminate the requirement to have the recirculation spray system [''RSS''] directly inject into the reactor coolant system following a design basis accident.'' 63 Fed. Reg. 14,482, 14,487 (1998). According to the Applicant's no significant hazard consideration analysis set out in the hearing notice, the amendment involves the elimination of the direct injection flow path

from the design basis of the system but involves no physical modifications to the system itself. The analysis further states that operability of the affected valves within the direct injection alignments remains unchanged and these paths are still available for contingencies beyond the design basis. *Id.* The Applicant and the NRC Staff challenge the standing of CRC to intervene in the proceeding.

For the reasons set forth below, we find CRC has the requisite standing.

I. BACKGROUND

As explained in the Applicant's license amendment application, the need for the amendment arose from a recent restart review. The review revealed that the change in the function of the RSS that is the subject of the instant amendment originally had been made in 1986 pursuant to 10 C.F.R. § 50.59. It found that the 1986 change modifying the system description in the Millstone Unit No. 3 Final Safety Analysis Report (''FSAR'') to reflect the elimination of RSS direct injection into the reactor coolant system should not have been made without a license amendment because the change involved an unreviewed safety question. Hence, the Applicant filed the license amendment application to correct its previous error.

The amendment application states that the RSS, along with the quench spray system, is designed to provide long-term cooling of the containment and the core after a design basis accident. The original 1986 change was made because during preoperational testing in 1985 excessive tube vibration in the RSS heat exchangers occurred during certain modes of operation. The Applicant determined that excessive tube vibration could occur when heat exchanger flows exceeded 4600 gallons per minute. Because its system analysis demonstrated that direct injection was not required for the recirculation phase to ensure minimum flow for core cooling, the Applicant eliminated RSS direct injection thereby reducing RSS heat exchanger flow and tube vibration. The Applicant also revised its emergency operating procedures to reflect the functional change in the RSS, although direct injection procedures were retained as a contingency action.

The amendment application safety assessment indicates that the 1986 change to the design basis to eliminate the direct injection function by the RSS was a significant modification of system operation that changed the RSS direct core cooling safety function from a redundant safety function to a contingent safety function in the event of failures of the primary injection flow paths. The Applicant's evaluation concluded that the change was safe because its analysis verified that the modified alignment delivered sufficient flow to meet long-term cooling requirements after a loss of coolant accident and that the design basis of maintaining subatmospheric containment pressure was unchanged. Further,

the Applicant's evaluation found that the increase in probability of malfunction of equipment due to the increased use of operator actions was acceptable.

As set forth in the Petitioner's intervention petition, a supplemental petition, and several accompanying affidavits of its members, CRC is an organization of citizens residing in southeastern Connecticut that is concerned about the safety of the Millstone Nuclear Power Station. The organization includes families with young children such as those of affiants Clarence O. Reynolds and Susan Perry Luxton who live within the 5-mile priority emergency evacuation zone of Millstone. They both have authorized CRC to represent them in this proceeding. Another affiant who also has authorized the organization to represent him, Joseph H. Besade, lives with his family within 2 miles of the Applicant's facility — an area he states could be directly impacted by a Millstone accident with offsite consequences and an area where the Applicant is required to provide protective actions in the event of an accident.

The CRC petition asserts that the instant license amendment application involves issues that are critical to the safe operation of Millstone Unit 3 and therefore directly impacts the health and safety of CRC members. Specifically, CRC states that the RSS is a critical safety system and that its failure could be catastrophic. It claims that for the past 2 years the Applicant has regularly permitted the use of faulty calculations with respect to facility systems at Millstone and, in particular, that the Applicant has employed inadequate procedures, methods, and analyses of safety systems. CRC further asserts that the Applicant has long been aware of problems associated with the facility RSS and that the NRC has acknowledged that Millstone has been allowed to operate with an inoperable RSS. According to CRC, the failure of the Applicant and the NRC to ensure complete operability of the RSS in the past has needlessly and recklessly jeopardized the health, safety, and welfare of CRC's members. CRC also claims that, in March 1998, when the Applicant tested another modification to the safety critical RSS, the test resulted in serious damage to the pump systems needed in the event of a loss of coolant accident because the modification was poorly designed and inadequately reviewed. Finally, CRC asserts that for the past 2 years the Applicant has compromised safety at Millstone in the interest of schedule driven efforts to obtain restart approval and that the Applicant continues to harass and intimidate, and retaliate and discriminate against employees raising safety issues.

In light of all these circumstances, CRC claims that it has no confidence that the Applicant has properly and adequately analyzed the RSS at Millstone. It asserts, therefore, that approval of the proposed license amendment will adversely impact the health and safety of CRC members. In amplification of these claims, the affidavits of the CRC members accompanying the supplement to the intervention petition state that the proposed license amendment involves untested modifications to the safety critical RSS and that approval of the

amendment, without adequate and appropriate testing, will have the effect of reducing safety margins at Millstone. Each of the affidavits concludes that the license amendment will impact them in the event an accident results from reduced safety margins.

II. ANALYSIS

Section 189a of the Atomic Energy Act provides, in pertinent part, that in any proceeding for the amending of a reactor license ''the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.'' 42 U.S.C § 2239(a)(1)(A). The Commission's regulations, in turn, state that ''[a]ny person whose interest may be affected by the proceeding . . . shall file a written petition for leave to intervene.'' 10 C.F.R. § 2.714(a)(1). The regulations further provide that ''[t]he petition shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene.'' 10 C.F.R. § 2.714(a)(2). In assessing whether a petitioner has set forth a sufficient ''interest'' to intervene in the licensing proceeding under the Atomic Energy Act and the agency's regulations, the Commission has for over two decades applied contemporaneous judicial concepts of standing. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). *Accord Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998).

As the Commission frequently has reiterated, ''[t]o demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.'' *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). Additionally, ''[t]his injury must be to an interest arguably within the zone of interests protected by the governing statute,'' i.e., the Atomic Energy Act or the National Environmental Policy Act of 1969. *Id.* This same showing is necessary regardless of whether the petitioner is an individual or an organization seeking to intervene in its own right. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991). When an organization seeks to intervene as the authorized representative of its members, however, the organization must demonstrate that at least one of its members has standing and has authorized the organization to represent him. The organization also must show that the interests it seeks to protect are germane to the purpose of the organization and that neither the claim asserted nor the relief

sought requires the participation of an individual member in the proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998).

In its intervention petition, CRC does not claim any harm to its organizational interests; rather, it seeks only to represent the interests of its members in challenging the license amendment. The Applicant and the Staff both argue, however, that CRC has failed to demonstrate the requisite standing of any of its individual members. Although conceding that several of its members have authorized the organization to represent them in this proceeding, the Applicant and the Staff claim that CRC has asserted no injury in fact to the interests of CRC members that is fairly traceable to the license amendment request. Contrary to the arguments of the Applicant and the Staff, however, we find CRC's intervention filings satisfy threshold standing requirements.

Initially, we note that in evaluating CRC's standing to intervene, Commission precedent directs that we construe the petition in favor of the petitioner. *Georgia Tech,* CLI-95-12, 42 NRC at 115. Here, fairly read, CRC's intervention filings assert harm in the event of an accidental release of radioactive fission products to the health and safety of several CRC members and their families who reside in reasonably close proximity to the Millstone facility. In the case of CRC member Joseph Besade, his affidavit states that he and his family live about 2 miles from the facility within the area that would be directly impacted by an accident with offsite consequences and where the Applicant is required to provide protective actions. This assertion of injury to the health and safety of CRC members and their families is a sufficient allegation of harm to meet the injury in fact element of the test for standing. *See Perry,* CLI-93-21, 38 NRC at 94-95.

CRC also adequately alleges that the harm to its members is fairly traceable to the license amendment at issue. As the Commission has stated, ''[s]uch a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the claim of causation is plausible.'' *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). In this regard, CRC states that the instant license amendment involves the RSS, a critical safety system, the failure of which could be catastrophic. It claims, in effect, that implementation of the proposed license amendment changes to the RSS will reduce safety margins, thereby impacting the organization's members should an accident occur.[1] CRC also asserts that the approval of these changes to the RSS, without first appropriately testing them,

[1] The affidavits accompanying CRC's supplement to its intervention petition all state that the license amendment will reduce safety margins at Millstone, thereby impacting the affiants should an accident result from the reduced safety margins. Because the RSS is itself an accident mitigation system, it is clear, in context, that the affiants are referring to a more severe accident resulting from the reduced safety margins.

similarly impacts its members because of what CRC claims is the Applicant's past poor safety record involving the critical RSS.

With respect to the other factors that govern standing, a decision favorable to CRC that either denies the license amendment or, alternatively, requires appropriate testing as CRC apparently requests, would redress the injury asserted by the organization on behalf of its members. Similarly, the health and safety interest asserted by CRC in its intervention filings is the same health and safety interest underlying the Atomic Energy Act, so the assertion of harm to the health and safety of CRC members is obviously within the zone of interests protected by the NRC's governing statute. At the same time, the health and safety interests of the CRC members that the organization seeks to protect are germane to the purpose of CRC — a citizens organization in the area of the Millstone facility concerned about the safety of the Applicant's nuclear plants. Finally, CRC's participation in the proceeding as the representative of its members does not require any individual member also to participate in order for CRC to pursue its contentions or obtain relief. Indeed, the Applicant and the Staff do not contest any of these latter elements of the test for CRC's standing.

In challenging CRC's standing to intervene, the Applicant and the Staff rely, in part, on the decision in *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989), where the Commission discussed the presumption applicable in construction permit, operating license, and significant license amendment proceedings that residence near a nuclear power plant is enough to confer standing on a petitioner. In *St. Lucie,* the Commission held that ''[a]bsent situations involving . . . obvious potential for offsite consequences, a petitioner must allege some specific ''injury in fact'' that will result from the action taken.'' 30 NRC at 329-30. According to the Applicant and the Staff, the instant license amendment presents no obvious potential for offsite consequences so CRC cannot rely on the residence of its members in close proximity to Millstone to establish standing. Rather, they argue CRC must show a specific injury to its members resulting from the license amendment and CRC's intervention petition fails in this regard.

The arguments of the Applicant and the Staff put too fine a point on what is required of CRC to establish its standing to intervene as the representative of its members. CRC asserts that the RSS, the subject of the license amendment, is a critical safety system. That description is borne out by the Applicant's own safety assessment in the license amendment application indicating that, after a design basis loss of coolant accident, the RSS functions to mitigate the accident by ensuring long-term cooling for the reactor core. CRC also asserts that the failure of the RSS system could be catastrophic and it indicates that adoption of the amendment will have the effect of reducing safety margins to the system. Again the Applicant's license application seemingly supports this claim, describing the change made by the instant amendment as a significant

modification of system operation and one that increases the probability of malfunction of equipment due to the increased use of operator actions. Certainly, in this light, the potential for offsite consequences from the instant amendment is at least on par with the removal of the schedule for the withdrawal of reactor vessel material specimens from the technical specifications that the Commission in *Perry* found adequate to conclude that there was an obvious potential for offsite consequences. CLI-93-21, 38 NRC at 95-96. Hence, CRC properly may rely upon the proximity of its members to Millstone to establish its standing.

Moreover, even assuming the instant license amendment presented no obvious potential for offsite consequences, CRC's assertion of injury is adequate to confer standing. As previously indicated, CRC asserts harm to the health and safety of its members from an accident with offsite consequences, i.e., the release of radiological fission products into the environment, because the CRC members live between 2 and 5 miles from Millstone. This assertion of injury is the same harm accepted by the Commission in the *Perry* license amendment proceeding as an adequate expression of the required underlying concrete injury in fact to which the petitioner's alleged procedural injury was linked in circumstances where the petitioner lived 15 miles from the facility. CLI-93-21, 38 NRC at 94.

Our conclusion in this regard is not obviated by the Staff's additional arguments that the instant license amendment will result in no physical changes to the plant and that it will have no effect on the operation of the facility because the functional change to the RSS actually was made in 1986. According to the Staff, the instant amendment merely permits the Applicant to revise the FSAR so that it includes an analysis supporting the elimination of the RSS direct injection path of cooling water in the event of a loss of coolant accident. This being so, the Staff argues CRC has made no showing of any injury to its members resulting from the revision of the FSAR. As should be self-evident, however, the fact that the Applicant erred in 1986 in not applying for a license amendment for the change in the operational use of the RSS cannot now be used to bootstrap the Staff's novel argument that the current amendment is merely an exercise in editing the FSAR.

Finally, as previously explained, CRC has adequately presented the causal link between the health and safety interests of its members and the instant amendment. Construing the intervention filings most favorably for CRC, the gist of CRC's assertion is that the amendment modifies the design of the critical RSS safety system, the failure of which could be catastrophic and, in the event of an accident, the change reduces safety margins thereby putting CRC members living near Millstone at greater risk. The causal chain asserted by CRC is more specific than the link accepted by the Commission in *Perry* where the intervention filings expressed petitioner's interest in the ''safe operation'' of the facility due to petitioner's proximity to the plant and referred to the removal of ''safety-significant'' material from the operating license that could lead to

radiological harm for those living near the plant. *Perry,* CLI-93-21, 38 NRC at 95.

III. CONCLUSION

Clearly, CRC is not required, as the Applicant and the Staff would have it, to detail more precisely the exact mechanism for an accident at Millstone or the offsite consequences of such an accident. Accordingly, we conclude that CRC has standing to intervene in this license amendment proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 25, 1998

Cite as 48 NRC 97 (1998) **DD-98-7**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of **Docket No. 030-14526**
(License No. 37-00062-07)

DEPARTMENT OF VETERANS ADMINISTRATION MEDICAL CENTER
(Philadelphia, Pennsylvania) **August 28, 1998**

The Director, Office of Nuclear Materials Safety and Safeguards, has denied a petition filed by Ann Lovell requesting that the Commission take immediate action to suspend or revoke the NRC license issued to the Department of Veterans Administration Medical Center, Philadelphia, Pennsylvania. As grounds for her request, the Petitioner asserted that executive management is operating in a manner that has the potential to present a significant danger to public health and safety. Specifically, the Petitioner asserted that: The Licensee consistently violated NRC requirements and failed to take corrective action; the Licensee has a history of supplying false information to the NRC; Petitioner and others became contaminated as a result of what she believed was an intentional incident; and that employees are fearful of raising safety concerns. The Petitioner also asserted that the NRC may have withdrawn a civil penalty because it was not ''cost-effective'' to pursue the issue against the Department of Veterans Affairs. The Director denied the petition based upon his determination that the Petitioner did not provide a sufficient basis for taking any action to suspend or revoke the Licensee's license.

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

I. INTRODUCTION

By a petition addressed to the Director, Division of Nuclear Materials Safety, U.S. Nuclear Regulatory Commission (NRC), Region I, dated January 28, 1998, Ann Lovell (Petitioner), requested that NRC take immediate action to suspend or revoke the NRC license issued to the Department of Veterans Administration Medical Center, Philadelphia, Pennsylvania (PVAMC or Licensee). As grounds for her request, the Petitioner asserts that executive management is operating in a manner that has the potential to present a significant danger to PVAMC patients, staff, and the general public. Specifically, the Petitioner asserts that: (1) There has been a consistent pattern of NRC violations occurring within the medical center for which PVAMC has failed to take corrective action; (2) PVAMC has a history of supplying false information to NRC; (3) individuals, including the Petitioner, became contaminated with radioactive material in the nuclear medicine department as a result of what the Petitioner believes was an intentional incident; and (4) PVAMC employees are fearful of bringing safety concerns to the Licensee, for fear of retaliation, and to NRC, because of NRC's ''history of inaction'' regarding the PVAMC. Additionally, the Petitioner claims that NRC withdrew a civil penalty after a change in NRC Region I management, which may have been withdrawn because it was not ''cost-effective'' to pursue the issue against the Department of Veterans Affairs.

On February 27, 1998, the receipt of the petition was acknowledged and the Petitioner was informed that the petition had been referred to the Office of Nuclear Material Safety and Safeguards pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. The Petitioner was also informed that her request that NRC immediately suspend or revoke the PVAMC's license was denied, and that other action on her request would be completed within a reasonable time, as provided by 10 C.F.R. § 2.206.

II. BACKGROUND

The circumstances surrounding the issues raised in the petition can be summarized as follows. From 1994 until Spring 1998, the Petitioner was employed by PVAMC as the Radiation Safety Officer (RSO). In November 1995, the Petitioner raised concerns to NRC regarding the safety of the Licensee's operations in connection with a potential furlough of federal government employees. As a result, NRC conducted a special inspection of the Licensee's facility on November 17, 1995 (Inspection Report No. 030-14526/95-002). During the inspection, the inspector discovered that the Licensee had replaced the RSO before NRC

approval and had held a Radiation Safety Committee (RSC) meeting without a quorum, in that the RSO and half of the RSC membership were not present. Based on these violations, a Notice of Violation (NOV) was issued to PVAMC on January 4, 1996.

The Licensee responded to the NOV by letter dated February 23, 1996. In its response, the Licensee stated that it replaced the RSO with a nuclear physician, to ensure continuous coverage of the radiation safety program during a federal government furlough, and that the full complement of the RSC could not be assembled to formalize the decision, because of the furlough of personnel, including the RSO.

On February 5, 1996, the Petitioner filed a discrimination complaint with the United States Department of Labor (DOL), asserting that she had been discriminated against for contacting NRC. In a decision issued on March 6, 1996, the Acting District Director of the DOL Wage and Hour Division determined that discrimination was a factor in the actions that comprised the complaint, in violation of section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988 and Supp. V 1993). The Licensee did not appeal the findings of the Acting District Director, so that the decision of the Acting District Director became the final DOL decision.

NRC held an Enforcement Conference with PVAMC on August 26, 1996, regarding this matter. On September 18, 1996, NRC issued an NOV and Proposed Imposition of Civil Penalty to PVAMC based on the DOL Acting District Director's decision and information provided by PVAMC during the conference, for a violation of the Commission's Employee Protection regulations, 10 C.F.R. § 30.7 (EA 96-182). Specifically, the Licensee was cited for discriminating against the Petitioner in that her supervisor had chastised her for contacting NRC. The violation was categorized, in accordance with the Commission's Enforcement Policy, NUREG-1600, ''General Statement of Policy and Procedures for NRC Enforcement Actions'' (hereafter, Enforcement Policy), as a Severity Level II violation, and a civil penalty of $8000 was proposed.

On November 15, 1996, PVAMC submitted a ''Response to Notice of Violation and Proposed Imposition of Civil Penalty'' and ''Answer to a Notice of Violation.'' In these documents, it admitted the violation, but requested reconsideration of the determination that the violation constituted a Severity Level II violation warranting a civil penalty of $8000. In support of its request, PVAMC stated that the supervisor had chastised the Petitioner not just for contacting NRC, but for failing to notify him of certain information of which she was aware; that the chastisement was an isolated occurrence; that other employees were not ''chilled'' from raising safety concerns as a result of this event; and that a Severity Level II violation was for the most severe violations involving actual or high potential impact on the public, which had not been the case here. Following a review of the Licensee's response and the findings of

an investigation conducted by NRC's Office of Investigations (OI) that there had been no continued discrimination against the Petitioner, NRC informed the Licensee, by letter dated September 25, 1997, that it had concluded that the violation would be more appropriately classified as a Severity Level III violation and that enforcement discretion should be exercised to not issue a civil penalty, in accordance with section VII.B.6 of the Enforcement Policy.[1]

NRC conducted an inspection of the Licensee's facility from July 9 through October 20, 1997 (Inspection Report 030-14526/97-001). On approximately July 24, 1997, a contamination incident occurred in the Licensee's Nuclear Medicine Department, in which the hands of the RSO and the Chief Nuclear Medicine Technologist (CNMT) became contaminated. The inspector determined that a radiation survey instrument may have become contaminated during surveys of the Nuclear Medicine Department, and that the two individuals' hands became contaminated as a result of handling the instrument. The inspection results indicated that the incident may have been caused by a weakness in the Licensee's contamination control techniques, including not using contamination control precautions during the use of radioactive material, and, in some cases, failing to wear gloves. In addition, NRC determined that significant weaknesses existed in the Licensee's program in such areas as the functioning and effectiveness of the RSC, training, teamwork, communications, leadership, and conflict resolution. NRC issued a Confirmatory Action Letter (CAL) to PVAMC on December 19, 1997 (with corrected copy issued December 31, 1997), confirming the Licensee's commitments to conduct a comprehensive review and assessment of its radiation safety program; to provide training to staff, including among other things, instruction regarding employees' rights to raise safety concerns to management and NRC; and to develop a formal program audit system to continuously identify and correct program deficiencies.

III. DISCUSSION

As stated above, the Petitioner has raised numerous issues in support of her assertion that executive management of PVAMC is operating in a manner that has the potential to present a significant danger to medical center patients, staff, and the general public. These issues, and NRC's evaluation of these issues, are set forth below.

[1] Section VII.B.6 of the Enforcement Policy (63 Fed. Reg. 26,630 (May 13, 1998)) provides that NRC may refrain from issuing a civil penalty if the outcome of the normal process described in the Enforcement Policy does not result in a sanction consistent with an appropriate regulatory message. The Enforcement Policy further provides that NRC may reduce, or refrain from issuing, a civil penalty, for a Severity Level II, III, or IV violation based on the merits of the case.

A. Petitioner's Assertion of Consistent Pattern of Violations for Which PVAMC Failed to Take Corrective Action

Among other things, the Petitioner maintains that there has been a consistent pattern of NRC violations occurring within the medical center for which PVAMC has failed to take corrective action. In support of this assertion, the Petitioner has submitted an attachment to her petition, entitled ''Chronology of PVAMC/NRC Interaction Since Whistle Blower Incident of November 17, 1995,'' that she purports ''attests'' to such a consistent pattern of violations within the facility.

NRC inspections conducted at PVAMC's facilities from 1995 through 1997 identified several violations. However, none of these violations was of high safety significance, and, with the exception of the enforcement action discussed above, involving discrimination against the Petitioner for raising safety concerns (EA 96-182), all the violations were categorized as Severity Level IV violations in accordance with the Commission's Enforcement Policy.[2] The Severity Level IV violations are described in Inspection Reports 030-14526/96-002 and 030-14526/97-001, issued on September 11, 1997, and December 10, 1997, respectively. The Licensee responded to the violations identified in Inspection Report 030-14526/96-002 by letter dated November 4, 1997, and to the violations identified in Inspection Report 030-14526-001, by letter dated January 9, 1998. In its responses, the Licensee described its corrective actions for the violations.

In addition, as noted above, during these inspections, certain programmatic weaknesses were identified by NRC, including conflicts between management, the RSO, the RSC, and the Licensee's staff. NRC determined that weaknesses existed in such areas as the functioning and effectiveness of the RSC, training, teamwork, communications, leadership, and conflict resolution. NRC also was concerned that PVAMC employees may have been reluctant to raise safety concerns because of these communication problems. As a result of these findings, NRC management toured the facilities on December 15, 1997, and met with representatives of the Licensee on December 18, 1997, to discuss these program weaknesses. Subsequently, on December 19, 1997 (with corrected copy issued December 31, 1997), a CAL was issued to PVAMC, documenting the Licensee's commitment to: (1) have the RSO and the RSC Chairman conduct a comprehensive review and assessment of the radiation safety program; (2) provide training, conducted by the RSO and the RSC Chairman, to all nuclear medicine staff, researchers using radioactive material, RSC members, and the facility management, on all applicable NRC regulatory requirements, on management expectations, and on the policy on bringing forth identified program deficiencies; and (3) establish a formal program audit system to identify, report,

[2] As described in the Enforcement Policy, Severity Level IV violations are less serious violations, but of more than minor safety concerns, in that, if left uncorrected, they could lead to a more serious concern.

and correct program deficiencies. The Licensee completed these actions by May 30, 1998. Additionally, the CAL provided that the Licensee was to notify NRC, after completing all items in the CAL, so as to arrange for a meeting between NRC and PVAMC senior management, to discuss the program status and achievements. This meeting was held as part of the exit meeting on June 3, 1998, at the conclusion of the inspection conducted by NRC at the Licensee's facilities from June 1 to 3, 1998 (Inspection Report 030-14526/98-001, issued July 23, 1998).[3]

By letters dated February 20, April 6 (with revisions to audit report dated April 10), April 13, and May 28, 1998, PVAMC responded to the CAL, and submitted the results of its audit. In its responses, it stated that it had made numerous improvements to its program. Among these were the implementation of an ''Open-Door Policy'' of encouraging staff to identify and report program deficiencies. A notice from executive management, the RSC, and the RSO was sent to employees and posted in numerous, visible locations. The notice encouraged all staff to report apparent radiation safety problems, violations, and potential misadministrations. It explained that management, the RSC, and the RSO encouraged all staff to report problems without fear of reprisal, indicating that it was management's responsibility to ensure a safe working environment. The notice stated that the goal was to create a secure, friendly environment that fosters self-identification of problems. A list of whom to contact, including the RSO, executive management, and the members of the RSC, and their phone numbers, was included in the notice. PVAMC staff has received training in this policy. PVAMC hired an Interim RSO while the previous RSO (the Petitioner) was out on medical leave,[4] and also informed NRC of the new Interim Director of the PVAMC. The Interim RSO was mandated to evaluate the radiation safety program and to recommend any needed changes. PVAMC provided NRC with a copy of its assessment and audit of the radiation safety program, in which it evaluated its program, identified certain program deficiencies, and specified its corrective actions. PVAMC also indicated that training would be provided, by March 15, 1998, to staff who use radioactive material. The training would include, as a minimum, instruction regarding all applicable NRC regulatory requirements, management expectations, and the policy on bringing forth identified program deficiencies. PVAMC also submitted its formal radiation safety audit program.

NRC has verified that the Licensee has taken the actions required by the CAL. NRC has reviewed PVAMC's audit report and found that the Licensee's audit demonstrated that PVAMC had taken corrective actions and implemented its commitments in the CAL to improve its oversight of the radiation safety program

[3] This inspection is discussed later in Section III.D of this Decision.
[4] The Petitioner has subsequently resigned from PVAMC.

and to improve its problems related to communication, teamwork, and conflict resolution. PVAMC has conducted a comprehensive review and assessment of the radiation safety program. NRC has determined that PVAMC's audit was thorough in its assessment of the problems with communication, teamwork, and conflict resolution, as well as its evaluation of program deficiencies. In the audit report, PVAMC recognized the problems, and indicated that it had made progress in those areas. PVAMC noted that it had been concentrating on refocusing attention on issues rather than past interpersonal conflicts, and is working on reestablishing trust and teamwork. PVAMC also stated that staff was beginning to feel more comfortable with admitting mistakes and initiating corrective actions. To clarify responsibilities, and to prevent the RSO from auditing its own activity, the Interim RSO recommended that the authorized users and their staff perform their own routine monitoring duties, with radiation safety staff auditing these duties. Staff has received training on all applicable NRC regulatory requirements, on management expectations, and on the policy on bringing forth identified program deficiencies. Additionally, PVAMC has established a formal system for conducting radiation safety program audits.

NRC conducted an inspection from June 1 to 3, 1998, at the Licensee's facility (Inspection Report 030-14526/98-001, issued July 23, 1998). The inspection focused on the Licensee's responses, dated November 4, 1997, and January 8, 1998, to the violations identified in Inspection Reports 030-14526/96-002 and 030-14526/97-001, respectively; Licensee actions to assess and improve the radiation safety program; and implementation of management commitments addressed in the CAL. Within the scope of this inspection, no violations were identified. The inspectors verified that PVAMC's submitted corrective actions, as described previously, had been implemented for the violations identified in Inspection Reports 030-14526/96-002 and 030-14526/97-001.

The NRC inspectors, through a review of records, discussions with the Licensee's staff, and observation of onsite activities, noted that major staff changes have occurred in areas that affect radiation safety and communication of management's message to staff concerning the significance of bringing forth any safety concerns. A new chairman of the RSC was appointed in September 1997, and a new RSO was appointed in December 1997. The Chief Operating Officer currently has direct oversight of the radiation safety program, and the RSO is reporting to this individual. When the new Chief of Staff (COS) is appointed, the RSO will report directly to the COS. The inspectors noted that these staff changes, and their initiatives, significantly improved personnel's understanding of the importance of radiation safety and the importance of a work environment in which staff is encouraged to bring forth issues relating to radiation safety without fear of retaliation. The Licensee's Interim Director (appointed March 1998), the new RSC chairman, and the new RSO, in cooperation with the facility staff, have initiated and implemented specific actions that enhanced and

improved management oversight of the radiation safety program. These actions included establishing a formal audit program and providing training to staff on all applicable NRC regulatory requirements and the importance of reporting any program deficiencies. Additionally, management has worked to build teamwork and improve communication, and has made a commitment to increase program oversight.

In summary, although the Petitioner is correct that certain violations and programmatic weaknesses have been identified in the past at PVAMC, as discussed above, the violations were not of major safety significance, and the Licensee has undertaken extensive corrective actions for such deficiencies. In addition, NRC will continue to inspect the Licensee's radiation safety program on an accelerated inspection schedule, in accordance with NRC's Inspection Manual Chapter 2800, so as to closely monitor the Licensee's progress in improving its radiation safety program and communication among its RSO, RSC, management, and staff. In sum, the NRC has not substantiated the Petitioner's assertion that there has been a consistent pattern of violations occurring at the Licensee's facilities for which the Licensee has failed to take corrective action, and has found no basis for taking the action requested by the Petitioner.

B. Petitioner's Assertions of Altered Records and Licensee's ''History'' of Providing Inaccurate Information

The Petitioner also asserts that the inspector to whom she had provided information concerning problems at PVAMC had ''copies of records which appeared to have been deliberately altered by medical center personnel.'' In addition, she asserts that PVAMC has a ''history of supplying information inconsistent with reality to the NRC.'' Finally, in her attachment to the petition, the Petitioner refers to a letter from PVAMC to NRC, dated February 23, 1996, which she asserts contained inaccurate information.

The Petitioner has not specified the records that were allegedly altered by PVAMC personnel, and NRC has not identified any alterations of records required to be provided or maintained by NRC requirements. Therefore, this portion of the Petitioner's assertion has not been substantiated.

The Petitioner also asserts that her attached ''chronological summary'' of correspondence between PVAMC and NRC will ''attest'' to the fact that there had been a ''consistent pattern of NRC violations occurring within the medical center'' and that the Licensee has a ''history of supplying information inconsistent with reality to the NRC, and taking minimal, if any effort to correct cited violations.'' The attachment to the petition references, among other documents: (a) an NOV issued to the Licensee dated January 4, 1996; (b) a letter from PVAMC responding to the NOV, dated February 23, 1996, in which PVAMC allegedly supplied NRC with inaccurate information; (c) a letter from NRC to the

Licensee dated April 19, 1996, which noted ''inconsistencies'' in the Licensee's letter, dated February 23, 1996; (d) a letter from the Licensee dated May 6, 1996, in which the Licensee acknowledged that there were inconsistencies in its letter dated February 23, 1996; and (e) a letter from NRC, dated June 27, 1996, accepting the Licensee's statements in its letter, dated May 6, 1996, and approving the Licensee's corrective actions to the violations cited in the NOV dated January 4, 1996.

The Licensee's letter, dated February 23, 1996, responded to the NOV issued on January 4, 1996, citing it, among other things, for violating 10 C.F.R. § 35.13(c) by replacing the RSO without receiving a license amendment, and for violating 10 C.F.R. §§ 35.21(a) and 35.22(a)(3) by conducting a meeting of the RSC without half of the RSC membership or the RSO being present. In its response to the violations, by letter dated February 23, 1996, the Licensee stated that an amendment request had been filed during the government-wide furlough, as the RSO was furloughed but, in order to ensure uninterrupted coverage of the radiation safety program, a nuclear physician was assigned as RSO until the shutdown terminated. The Licensee also stated that the full RSC could not be assembled because its members, including the RSO, had been furloughed.

This information initially appeared to the NRC Staff to be inconsistent with its understanding of the events surrounding the furlough. Among other things, the NRC determined that, contrary to the Licensee's statement, the RSO had never been furloughed. By letter dated April 19, 1996, the Licensee was requested to provide clarification of the facts surrounding its understanding of these events. By letter dated May 6, 1996, the Licensee submitted its response to this letter. In its response, it apologized for any inconsistency. The Licensee stated that the RSO had been scheduled to be furloughed and the redesignation request filed with the NRC was to ensure radiation safety compliance in preparation for the contingency of the furlough. The Licensee admitted, however, that the RSO was never officially furloughed and had not been contacted to attend the meeting.

NRC evaluated the information submitted by the Licensee and determined that the information it had submitted in its letter dated February 23, 1996, was inaccurate. Nonetheless, the NRC concluded that the inaccuracy was not a deliberate attempt by the Licensee to deceive the NRC, and that the Licensee admitted to, and clarified, its error. The Petitioner's ''chronological summary'' that she submits as an attachment to her petition does not provide any additional examples of the Licensee's failure to submit accurate information. Therefore, this single incident of supplying inaccurate information does not support the Petitioner's assertion that PVAMC has a ''history of supplying information inconsistent with reality to the NRC and taking minimal, if any, effort to correct cited violations.'' In addition, as described above, the Licensee has taken considerable corrective action with regard to other identified violations

and problems. Therefore, this matter does not provide a sufficient basis for taking the action the Petitioner has requested.

C. Petitioner's Assertion Regarding Contamination Incident

The Petitioner also asserts that individuals at PVAMC have become contaminated in what the Petitioner believes was an intentional incident. As noted above, NRC conducted an inspection of PVAMC during the period of July 9 through October 20, 1997, during which the inspectors examined the circumstances surrounding a contamination incident that occurred in the Nuclear Medicine Department around July 24, 1997 (Inspection Report 030-14526/97-001, dated December 5, 1997). The incident involved the contamination of the hands of the RSO and the CNMT and contamination of a survey instrument.

The cause of the contamination was not definitively identified; however, NRC Staff believes that the instrument may have been contaminated during routine surveys of the Nuclear Medicine Department. The Licensee later determined that the survey instrument was contaminated with indium-111, a radionuclide that is not regulated by NRC. However, during the course of NRC's investigation of the contamination incident, NRC found violations of procedures related to the use of byproduct material. The inspector noted that the incident may have been caused by a weakness in the Licensee's contamination control techniques, including not using contamination control precautions during the use of radioactive material, and, in some cases, failing to wear gloves. The inspector determined that the RSO and CNMT hand contamination was most likely caused by handling the contaminated instrument. The PVAMC was cited for four violations, three of which were related to NRC program deficiencies found as a result of NRC's review of the contamination incident, in an NOV dated December 10, 1997 (Inspection Report 030-14526/97-001): (1) failure to provide training to personnel who work in or frequent an area where radioactive materials are used or stored; (2) performing inadequate surveys in an area where radiopharmaceuticals were prepared for use and administered, in that an instrument with a faulty cable that rendered the instrument inoperable was used; and (3) failure to use an extremity monitor by a nuclear medicine technologist.[5]

Notwithstanding the above, the results of urinalyses performed on the Licensee personnel involved in the incident indicated that there had been no intake of radioactive material by any of these individuals, including the Petitioner. In addition, the results of thyroid counts taken of these individuals indicated

[5] The Licensee committed, in its response to the NOV by letter dated January 9, 1998, to providing training to staff, to ensure that appropriate techniques will be used by its personnel so as to minimize contamination and avoid such incidents in the future. It also committed to provide training in the requirement to use personnel monitors and proper survey techniques.

that the Petitioner did not exhibit any counts above background in any of the radioactive iodine channels.[6]

The Petitioner also asserted in her petition that she was fearful for her personal safety as well as that of her then unborn child, that certain NRC Staff shared these concerns, and that she believed that the contamination was intentional. In support of her claim, she stated that ''two senior NRC physicists telephoned, and cautioned me to remove all consumable items from my office and not to eat or drink anything over which I did not have positive control.'' Although the NRC inspector did caution the Petitioner as she stated, this was advice given following the contamination incident as a reasonable precautionary health physics recommendation, based on the circumstances of the individual situation and the Petitioner's expressed concern for her personal safety.

Additionally, the Petitioner stated that ''I received a visit in my office by two NRC inspectors, one of whom came to caution me that he believed my physical safety was in jeopardy due to the allegations I had made regarding violations involving human uses of radioactive materials.'' The Petitioner has not provided specific information as to who the inspector was who made this statement, and NRC has been unable to identify any individual as having made this statement. Nonetheless, NRC is aware that the Petitioner had raised a concern about her personal safety during 1997 following her raising allegations to NRC. However, NRC also was aware that the PVAMC security force was contacted by the parties involved. Therefore, the Petitioner has not raised any new information of which the NRC was not aware. As discussed above, NRC investigated the contamination incident, and did not find any evidence that the contamination incident was intentional and that the Petitioner was in any physical danger as a result of this incident.

Furthermore, as explained above, the Licensee has since made numerous changes to its program and organizational structure, and has developed a program to encourage employees to raise nuclear safety concerns without fear of retaliation. In addition, as is also explained above, NRC will continue to closely monitor the Licensee's program on an accelerated inspection schedule to ensure that PVAMC's corrective actions for past problems continue to be effective. Therefore, notwithstanding the seriousness of the situation that occurred during 1997, the Petitioner has not provided any information that would provide a basis for the NRC to take additional action such as she requested at this time.

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[6] The CNMT did have an uptake of $1.5 \times 10^{--3}$ Bq (40 nanocuries) of iodine-123, which is indicative of a minor intake of iodine-123 (a radionuclide not regulated by NRC, but regulated by the State of Pennsylvania). The Licensee indicated that training will be given to this individual to ensure that appropriate techniques are used to minimize contamination in the future.

D. Petitioner's Assertion of Employees' Fear of Raising Safety Concerns

The Petitioner also asserts that PVAMC employees are fearful of bringing safety concerns to the Licensee for fear of retaliation, and to NRC due to NRC's ''history of inaction'' regarding the medical center.[7] With regard to the Petitioner's assertion that PVAMC employees are fearful of bringing forth safety concerns, as described above, during NRC inspections conducted at the Licensee's facility from 1995 through 1997, certain programmatic weaknesses were identified, including communication problems among PVAMC staff, management, the prior RSO, and the previous RSC chairman. Furthermore, NRC became aware that, as a result of these problems, some PVAMC employees may have been reluctant to inform management or NRC about safety concerns. However, as described above, NRC Region I and Headquarters management met with the Licensee on December 18, 1997, to discuss these program deficiencies, and subsequently issued a CAL, in which the Licensee made several commitments to improve its oversight of the radiation safety program and to provide training to all nuclear medicine staff, researchers using radioactive material, RSC members, and the facility management, on all applicable NRC regulatory requirements, on management expectations, and on the policy on encouraging employees to bring identified program deficiencies to management's attention. The Licensee committed to complete these items by May 30, 1998. As discussed above, NRC inspected the facility June 1-3, 1998, and confirmed that the Licensee completed these items. Additionally, the Licensee is on an accelerated inspection schedule so that NRC can closely monitor PVAMC's progress in improving communication among the facility staff and program performance.

The Licensee has conducted a comprehensive review and assessment of its radiation safety program and provided a copy of the report to NRC by letters dated April 6 (with revised copy of report dated April 10) and April 13, 1998. NRC has determined that the assessment was of an adequate depth and breadth and covered not only technical radiation safety program issues but was expanded to include interpersonal communications, cooperation, and conflict resolution among the facility staff, as well. An audit was also performed by the Department of Veteran's Affairs' National Health Physics office manager.

NRC has found, through a review of the audit report and during its inspection performed June 1-3, 1998, that PVAMC has provided comprehensive training to all nuclear medicine staff, researchers using radioactive materials, RSC members, and facility management. The training focused on, among other

[7] The Petitioner's assertion of NRC's history of inaction regarding the PVAMC was referred to the Office of the Inspector General on February 12, 1998.

things, the right and duty of employees to raise any nuclear safety concerns to management, or directly to NRC.

The inspectors also reviewed the implementation of PVAMC's actions documented in its responses to the CAL. The inspectors, through a review of records, discussions with the Licensee's staff, and observation of onsite activities, noted that major staff changes have occurred in areas that affect communication of management's message to staff concerning the improved communications at all levels and the significance of bringing forth any safety concerns. The inspectors noted that these staff changes, as well as the implementations of their directives, significantly improved personnel's understanding of the importance of radiation safety and the importance of a work environment in which staff is encouraged to bring forth issues relating to radiation safety without fear of retaliation. The Licensee's new senior management, the new RSC chairman, and the new RSO, in cooperation with the facility staff, have initiated and implemented specific actions, including providing training to staff on the importance of reporting any program deficiencies and safety concerns. Additionally, management has worked to build teamwork and improve communication, and has made a commitment to increase program oversight. During the June 1998 inspection, the inspectors found that the Licensee's corrective actions to date have been effective. The new RSO and management team are making a concerted effort to create a favorable work environment which fosters an open flow of communication. The inspectors interviewed staff and found that individuals appear to be ''more comfortable'' raising safety concerns without fear of retaliation.

In sum, although, as a result of a general weakness in communications at the Licensee's facility, there may have been, in the past, a reluctance among employees to raise safety concerns, NRC has found that the Licensee has taken numerous effective corrective actions to ensure that employees are encouraged to raise nuclear safety concerns. Additionally, as stated earlier, PVAMC is on an accelerated inspection schedule, and this issue will be reviewed during future inspections. Therefore, the Petitioner's assertions regarding this issue do not provide a basis that would warrant the action she has requested.

The Petitioner also asserts that NRC withdrew a civil penalty after a change in NRC Region I management, possibly because it was not ''cost-effective'' to pursue the issue. She states that NRC's withdrawal of a civil penalty involving a violation of protected activities sent a ''chilling'' effect to individuals both within and external to the PVAMC who may have thought of raising a safety concern.

NRC Staff assumes that the Petitioner is referring to the NOV dated September 18, 1996 (EA 96-182). As discussed earlier, NRC issued an NOV and Proposed Imposition of Civil Penalty of $8000 to PVAMC as a result of concluding that PVAMC had discriminated against the Petitioner for raising safety concerns in November 1995, related to then-impending federal government fur-

loughs. NRC had identified this violation based on the determination of the DOL Acting District Director of the Wage and Hour Division that the Petitioner had been chastised by her immediate supervisor, the Chief of Engineering, for raising safety concerns. However, as explained previously, after its review of all of the available information, including the results of the OI investigation and PVAMC's responses to the NOV, NRC concluded, in a letter dated September 27, 1997, that the violation would be more appropriately classified as a Severity Level III violation and that enforcement discretion would be exercised to withdraw the civil penalty, pursuant to section VII.B.6 of the Enforcement Policy. In this case, the determination to withdraw the civil penalty was made based on the fact that the chastisement of the Petitioner did not substantially affect the conditions of her employment; an apology was issued; she remained the RSO; DOL had concluded that it found that PVAMC had met the terms and conditions of remedies it had outlined concerning the violation; and investigations conducted by DOL and OI failed to substantiate that there had been any continued discrimination against the Petitioner. Nonetheless, while NRC believes that there is no merit to the Petitioner's assertion that the decision to withdraw the civil penalty resulted from the fact that it was not ''cost-effective'' to pursue the issue against PVAMC, the petition was forwarded to the Office of the Inspector General for its review on February 12, 1998.

IV. CONCLUSION

NRC has determined that, for the reasons discussed above, the Petitioner has not provided a sufficient basis for taking any action to suspend or revoke PVAMC's license, as requested in the petition. Accordingly, the petition is denied.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance unless

the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 28th day of August 1998.

Cite as 48 NRC 112 (1998) **DD-98-8**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of	**Docket Nos. STN 50-456**
	STN 50-457
	STN 50-454
	STN 50-455
	50-237
	50-249
	50-373
	50-374
	50-254
	50-265
	50-295
	50-304

COMMONWEALTH EDISON COMPANY
(Braidwood Nuclear Power Station,
Units 1 and 2;
Byron Nuclear Power Station,
Units 1 and 2;
Dresden Nuclear Power Station,
Units 2 and 3;
LaSalle County Station, Units 1 and 2;
Quad Cities Nuclear Power Station,
Units 1 and 2;
Zion Nuclear Power Station, Units 1 and 2) **August 31, 1998**

The Director, Office of Nuclear Reactor Regulation, has taken action regarding a petition filed by the National Whistleblower Legal Defense and Education Fund requesting that the NRC take action with regard to Commonwealth Edison Company (ComEd). Specifically, the Petitioner requested that the NRC take

immediate ‘‘corrective’’ action and impose civil penalties against ComEd based upon ComEd’s ‘‘interference’’ with the willingness of employees to file Problem Identification Forms, and ‘‘intentional prohibition’’ of employees from directly communicating with the NRC. For the reasons explained in the Director’s Decision, the petition has been denied.

ENERGY REORGANIZATION ACT: RESTRICTIVE AGREEMENTS

The United States Department of Labor has in the past assured that agreements reached by parties in proceedings before it under section 211 of the Energy Reorganization Act do not contain provisions that unlawfully interfere with an individual’s right to engage in protected activity.

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

I. INTRODUCTION

On March 25, 1998, the National Whistleblower Legal Defense and Education Fund and Mr. Randy Robarge filed a petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). (Although Mr. Randy Robarge was also initially named as a Petitioner, the NRC was notified by counsel for Mr. Robarge by written submittal dated June 26, 1998, that Mr. Robarge was withdrawing his petition). The petition requested that the NRC take certain immediate ‘‘corrective’’ action and impose civil penalties against Commonwealth Edison Company (ComEd) based upon ComEd’s: (1) ‘‘interference’’ with the willingness of employees to file Problem Identification Forms (PIFs); and (2) ‘‘intentional prohibition’’ of employees from directly communicating information to the NRC. The Petitioner raised two issues. Specifically, the Petitioner asserted, first, that ComEd’s assertion in a pleading in a case before the U.S. Department of Labor (DOL),[1] 98-ERA-2, that the filing of a PIF does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested the NRC to: (1) immediately issue a Show-Cause Order requiring ComEd to explain why the filing of a PIF does not constitute protected activity under section 211 of the Energy Reorganization Act of 1974, as amended, 42

[1] The case involved an assertion by Mr. Robarge that he had been discriminated against by ComEd for raising nuclear safety concerns in violation of section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988 and Supp. V 1993).

U.S.C. § 5851 (1988 and Supp. V 1993) (ERA); (2) issue a Severity Level I violation and appropriate civil penalty for taking action that ComEd knew or should have known would prevent employees from filing PIFs; and (3) require the Licensee to post a public apology for claiming that the filing of a PIF does not constitute a protected activity.

In addition, the Petitioner asserted that ComEd intentionally imposed restrictive confidentiality provisions in a discovery agreement in a pending DOL proceeding aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested that the NRC: (1) issue a Show-Cause Order to ComEd requiring it to explain under oath why the imposition of restrictive confidentiality clauses prohibiting employees from directly communicating information to the NRC should not be prohibited; (2) impose a Severity Level I violation and appropriate civil penalty against ComEd for the intentional violation of 10 C.F.R. § 50.7(f); (3) require ComEd to transmit to all individuals under similar restrictive confidentiality terms notice that they are now free to communicate information to the NRC; and (4) require the Licensee to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and any subcontractors employed by ComEd since March 21, 1990 (the date the *Federal Register* notice of 10 C.F.R. § 50.7(f) was published).

By letter dated April 29, 1998, I informed the Petitioner that the petition had been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. I further informed the Petitioner that the issues raised in the petition did not constitute an immediate safety concern at ComEd's nuclear facilities and that the information provided did not warrant the immediate action that was requested, but that action would be taken upon the petition within a reasonable time.

On May 20, 1998, the NRC forwarded a copy of the petition to the Licensee with a request to respond to the issues raised in the petition. The Licensee responded to the NRC's request by letter dated June 19, 1998.

II. BACKGROUND

Mr. Randy Robarge, a former health physics supervisor at the Zion Nuclear Power Station, filed a complaint with the U.S. Department of Labor (DOL) under section 211 of the ERA (98-ERA-2) claiming that he was discriminated against and subjected to a retaliatory discharge for filing PIFs. On November 26, 1997, during discovery in connection with the pending litigation before the DOL Administrative Law Judge, Mr. Robarge filed through his counsel a ''Request for Production of Documents, Admissions, and Interrogatory Questions'' (Complainant's Request). On February 5, 1998, ComEd filed through its coun-

sel its ''Respondent's Response and Objections'' (Respondent's Response). In addition, during discovery, counsel for Mr. Robarge and ComEd entered into a joint agreement to provide for the confidentiality of certain documents. The agreement was embodied in an Order signed by counsel for both parties on March 23, 1998, entitled, ''Stipulation and Order Governing Confidentiality of Document and Information'' (Confidentiality Order).[2]

III. DISCUSSION

The Petitioner makes two assertions in support of the request that the NRC take the action requested. These assertions arise from statements made by ComEd in the discovery documents described above.

First, the Petitioner claims that ComEd's response in its Respondent's Response to a request made by Mr. Robarge in his Complainant's Request (Request Number 3) amounts to an assertion that the filing of PIFs is not a protected activity and, as such, will ''chill'' the reporting of safety concerns in violation of 10 C.F.R. § 50.7. Request Number 3 requested that ComEd admit or deny the following statement: ''The complainant engaged in protected activity under section 211 when he filed 'PIFs' with the Respondent.'' In its Respondent's Response, ComEd stated the following: ''Respondent objects to the Request as being overly broad, vague and ambiguous in referring generally to 'PIFs' and for calling for a legal conclusion and, therefore, this Request is denied.''

The Petitioner asserts that this ''cavalier attitude and recalcitrance to admit that the filing of PIFs is protected activity'' by the Licensee will ''chill'' the willingness of employees to file PIFs and, as such, warrants that the NRC issue a Show-Cause Order to the Licensee, issue a Severity Level I violation and civil penalty, and require the Licensee to post a public apology. In support of this assertion, the Petitioner submitted as an attachment to the petition an affidavit by a ComEd employee that stated that ComEd's denial that the filing of a PIF constitutes protected activity ''chills'' the willingness of employees to file PIFs.

In construing ComEd's response to Request Number 3 in such a manner, the Petitioner appears to have misconstrued the statement by taking it out of context and misstating the Licensee's position. In making this statement, the

[2] On June 8, 1998, the parties submitted to the DOL Administrative Law Judge a joint motion seeking approval of a settlement agreement and to protect its confidentiality and to dismiss the claim. Attached to the motion was the settlement and release agreement signed by counsel for both parties, as well as Mr. Robarge. On June 10, 1998, the Administrative Law Judge issued a Recommended Decision and Order recommending that the joint motion to approve settlement agreement and for order of dismissal be granted, and noted that the Recommended Decision and Order would become the final order of the Secretary of Labor absent a petition for review being received by the Administrative Review Board within 10 business days. We have been informed that the DOL has no record of an appeal being filed.

Licensee does not appear to be taking the position that the filing of all PIFs was not a protected activity. Rather, the Licensee was objecting specifically to a request for admission as being an inappropriate discovery request as a litigative technique. Nothing in its response suggests that ComEd did not recognize that the actual filing of a PIF could constitute protected activity. In fact, in its response to the petition, dated June 19, 1998, ComEd specifically stated that it recognizes that the preparation of internal nuclear safety-related documents, such as PIFs, could give rise to protected activity.[3] Thus, there is no merit to this assertion, nor does it warrant the action requested by the Petitioner.

The Petitioner's second assertion is that ComEd intentionally imposed a restrictive provision upon Mr. Robarge aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. To ''correct'' this practice, the Petitioner requests that the NRC issue a Show-Cause Order to ComEd, impose a Severity Level I violation and civil penalty against ComEd, require ComEd to transmit to all individuals under similar confidentiality terms notice that they are now free to communicate information to the NRC, and require ComEd to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and its subcontractors since March 21, 1990.

The provision that the Petitioner asserts was intended to prohibit Mr. Robarge from providing information to the NRC in violation of NRC requirements is section 3(g) of the Confidentiality Order. Section 3(g) of the Confidentiality Order states that confidential information may be disclosed to governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that: (1) the subpoenaed party give counsel for the designating party written notice of the subpoena and, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating party's rights; and (2) the subpoenaed party proceed in good faith to seek to obtain confidential treatment of the subpoenaed documents from the relevant governmental body. The Confidentiality Order also contains a provision (Provision 6) that would allow either party to challenge the applicability of this stipulation to any document designated as confidential.

The Petitioner alleges that Mr. Robarge objected through his counsel to the wording of section 3(g) and requested that the provision include an additional paragraph stating the following:

[3] With regard to the attached affidavit (Exhibit 5 to the Petition), the affiant indicates that he viewed the Licensee's response to request number 3 in its Respondent's Response to represent ComEd's ''official legal position.'' It thus appears that the affiant misunderstood the purpose of the response and its limited significance as a litigation technique and the fact that this statement did not constitute an ''official legal position'' about whether the filing of PIFs could constitute protected activity.

> Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as ‘‘confidential’’ by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as ‘‘confidential’’ and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

The Petitioner asserts that ComEd’s counsel responded in a letter dated March 19, 1998, that ‘‘the language in your addendum is not something that ComEd will stipulate to end a confidentiality order (or an addendum to such an order). On the merits, this section goes directly against the purpose for having a confidentiality order in the first place.’’ The Petitioner also states that ComEd’s counsel acknowledged to counsel for Mr. Robarge that ‘‘the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd.’’ The Petitioner asserts that these statements demonstrate that the prohibition in communication with the NRC was intentional rather than inadvertent, and that identical restrictive language is routinely incorporated into ComEd agreements.

The language of which the Petitioner complains is reflected in the Confidentiality Order executed by counsel for *both* parties as well as the Administrative Law Judge (ALJ) presiding in the DOL proceeding regarding Mr. Robarge’s section 211 complaint. Indeed, it appears that the Confidentiality Order was executed by counsel for both parties on March 23, 1998, and entered by the DOL ALJ on March 24, 1998; both dates are after the exchange of correspondence alluded to by counsel for Mr. Robarge with respect to his complaints about the possible restrictive nature of the provision. To the extent that Mr. Robarge had such concerns, they should have been raised in the first instance, before the DOL ALJ. That agency has, in the past, expressed no hesitation in ensuring that agreements reached by parties to proceedings before it under section 211 do not contain provisions that unlawfully interfere with an individual’s right to engage in protected activity, *Polizzi v. Gibbs & Hill, Inc.,* 87-ERA-38 (Secretary of Labor, July 18, 1989). There is no indication that Mr. Robarge requested that the ALJ consider this matter in the first instance, or sought reconsideration by DOL. In the absence of consideration of this matter by the ALJ, NRC does not intend to take action.

IV. CONCLUSION

For the reasons discussed in the preceding section, no basis exists for taking the actions requested by the Petitioner. Accordingly, the petition is denied.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission’s review. The Decision will become the final action of the

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

FOR THE NUCLEAR
REGULATORY COMMISSION

(signed by) Frank J. Miraglia for
Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of August 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120) **September 15, 1998**

The Commission exercises its inherent supervisory authority over the conduct of adjudicatory proceedings to reverse the Presiding Officer's ruling in LBP-98-9, 47 NRC 281 (1998), to admit an area of concern on the Navajo nation's permitting.

NUCLEAR REGULATORY COMMISSION: PERMITTING BY OTHER REGULATORY AUTHORITIES

Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, the Navajo nation, or state and local authorities. To find otherwise would result in duplicate regulation.

NUCLEAR REGULATORY COMMISSION: PERMITTING BY OTHER REGULATORY AUTHORITIES

Pursuant to 10 C.F.R. § 20.2007, an applicant may not rely on its license from the NRC as a waiver of its obligation to obtain permits required by other agencies. However, section 20.2007 is ''advisory and is not intended to imply that the NRC will take enforcement action for violations of other environmental protection regulations issued under statutes other than the Atomic Energy Act.''

Standards for Protection Against Radiation: Final Rule, 56 Fed. Reg. 23,360, 23,382 (May 21, 1991).

MEMORANDUM AND ORDER

In this proceeding, various intervenors challenge Hydro Resources, Inc.'s NRC license to conduct an *in situ* leach mining project in McKinley County, New Mexico. The Commission already has issued two decisions in this proceeding[1] and is continuing to monitor it to ''ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration.'' *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). We have identified one area that requires immediate Commission guidance. In issuing this guidance, the Commission is exercising its inherent supervisory authority over the conduct of adjudicatory proceedings. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998).

In LBP-98-9, the Presiding Officer admitted as an area of concern ''failure to obtain proper permits from the Navajo nation.'' 47 NRC 261, 281 (1998). The Presiding Officer gave only the following explanation for admitting this area of concern: ''[p]roper local permits must be obtained. 10 C.F.R. § 20.2007; Materials License § 9.14.'' For the reasons discussed below, we find that neither section 20.2007 nor condition 9.14 supports admissibility of an area of concern on the Navajo nation's permitting authority and we reverse the Presiding Officer's decision in LBP-98-9 to admit it.

Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, the Navajo nation, or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside its domain. Nothing in our statute or rules contemplates such a role for the Commission.

Interpreting section 20.2007 to require the Commission to ensure that NRC licensees obtain required permits from other agencies goes well beyond that provision's plain meaning. Section 20.2007 states:

[1] CLI-98-4, 47 NRC 111 (1998); CLI-98-8, 47 NRC 314 (1998).

> Nothing in this subpart relieves the licensee from complying with other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of under this subpart.

The statement that ''nothing in this subpart relieves the licensee from complying with other . . . regulations'' cannot be reasonably interpreted to mean that the Commission intended to take affirmative action to determine whether other agencies' permits are required or to enforce other agencies' requirements. Instead, the language in our rule suggests only that an applicant may not rely on its license from the NRC as a waiver of its obligation to obtain permits required by other agencies. This reading of section 20.2007 is consistent with the Commission's discussion of this provision in the Statement of Consideration accompanying the rule. There, the Commission stated that section 20.2007 is ''advisory and is not intended to imply that the NRC will take enforcement action for violations of other environmental protection regulations issued under statutes other than the Atomic Energy Act.'' Standards for Protection Against Radiation: Final Rule, 56 Fed. Reg. 23,360, 23,382 (May 21, 1991).

Condition 9.14 of the license at issue here also does not contemplate NRC enforcement of permitting requirements established and administered by other regulatory bodies. The condition states that ''[p]rior to injection of lixiviant, the licensee shall obtain all necessary permits and licenses from the appropriate regulatory authorities.'' In our view, the condition serves simply to reinforce the basic principle underlying section 20.2007 — namely, that an NRC license does not preempt other environmental agencies' regulatory jurisdiction. Notably, condition 9.14 does not suggest that the *NRC* will determine what permits are ''necessary'' or what regulatory authorities are ''appropriate.'' Congress granted us authority merely to regulate radiological and related environmental concerns. It gave our agency no roving mandate to determine other agencies' permit authority. Our regulation and our license condition show due respect to our sister agencies' responsibilities but do not add to our own regulatory jurisdiction.

In short, we do not think it necessary or proper to decide in an NRC adjudication whether Hydro Resources must obtain a permit from the Navajo nation or from any other body.[2] In view of our understanding of 10 C.F.R. § 20.2007 and condition 9.14, we direct the Presiding Officer not to adjudicate questions of Navajo, EPA, or state and local regulatory jurisdiction. Those bodies are responsible for determining whether to require a permit under their own law and for initiating appropriate enforcement action. As for other areas of concern that the Presiding Officer found admissible in LBP-98-9, the

[2] Apparently, Hydro Resources is planning to file for an Underground Injection Control permit ''to cooperate fully with EPA and to insure that the current jurisdictional dispute [over the Navajo nation's authority] does not frustrate its [Hydro's] development plans.'' *See* HRI's [Hydro's] Response to Petitions to Intervene at 37 (Feb. 19, 1998).

Presiding Officer should narrowly construe their scope to avoid where possible the litigation of issues that are the primary responsibility of other agencies and whose resolution is not necessary to meet our statutory responsibilities.[3]

In conclusion, the Commission determines that the Presiding Officer erred in admitting as an area of concern ‘‘failure to obtain proper permits from the Navajo nation.’’ Accordingly, we reverse the finding in LBP-98-9 on that issue.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of September 1998.

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[3] *Cf. Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702 (1978). We add a cautionary note. Our decision today is a narrow one and addresses one area of concern. We intimate no views on any other issue in the case. In addition, our decision ought not be understood to mean that environmental or other permits issued by other regulatory bodies have no bearing on NRC licensing decisions. *See, e.g.,* 10 C.F.R. § 51.45(d) (licensee environmental report required to list other required approvals and status of compliance). We hold simply that our adjudicatory tribunal is not the proper forum for litigation and resolution of controversies about other agencies' permitting authority.

Cite as 48 NRC 123 (1998) **CLI-98-17**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-269**
50-270
50-287
(License Renewal)

DUKE ENERGY CORPORATION
(Oconee Nuclear Station, Units 1, 2, and 3) **September 15, 1998***

The Commission refers to the Atomic Safety and Licensing Board panel, for assignment of a Licensing Board to rule on, a petition to intervene and a request for hearing filed in the matter of the Licensee's application for renewal of its operating licenses for Oconee Nuclear Station, Units 1, 2, and 3. The Commission provides the Licensing Board with guidance for the conduct of the proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

The scope of a proceeding on an operating license renewal is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4.

*Originally served September 15, but re-served September 16, 1998, because page 6 was replaced.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

Review of environmental issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c).

ORDER

REFERRING PETITION FOR INTERVENTION AND REQUEST FOR HEARING TO ATOMIC SAFETY AND LICENSING BOARD PANEL

I. INTRODUCTION

On July 6, 1998, Duke Energy Corporation (''the Applicant'') submitted an application to renew the operating licenses for its Oconee Nuclear Station, Units 1, 2, and 3, located in Oconee County, South Carolina. The notice of receipt of application was published in the *Federal Register* on July 14, 1998. Duke Energy Corporation; Oconee Nuclear Station Units 1, 2, & 3; Notice of Receipt of Application for Renewal of Facility Operating Licenses Nos. DPR-38, DPR-47, and DPR-55 for an Additional 20-Year Period, 63 Fed. Reg. 37,909 (1998). A notice of acceptance for docketing of the application for renewal of the facility operating licenses was published in the *Federal Register* on August 11, 1998. Duke Energy Corporation; Oconee Nuclear Station Units 1, 2, and 3; Notice of Acceptance for Docketing of the Application for Renewal of Facility Operating Licenses Nos. DPR-38, DPR-47, and DPR-55 for an Additional 20-Year Period, 63 Fed. Reg. 42,885 (1998). On August 11, 1998, the Staff of the Nuclear Regulatory Commission (Staff) issued a Notice of Opportunity for a Hearing, 63 Fed. Reg. 42,885 (1998).

On September 10, 1998, three individuals who are members of the Chattooga River Watershed Coalition filed a ''Petition to Intervene and Request for Hearing'' (''Petition'') in accordance with 10 C.F.R. § 2.714, on behalf of themselves and their organization. This Order refers the petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to rule on this and any additional requests for a hearing and petitions for leave to intervene and, if a hearing is granted, to conduct the proceeding. We also provide the Licensing Board with guidance for the conduct of any proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

II. COMMISSION GUIDANCE

A. Scope of Proceeding

The scope of this proceeding is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). *See* NUREG-1437, ''Generic Environmental Impact Statement (GEIS) for License Renewal of Plant;'' Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), *amended by* 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding. If rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy questions, the Licensing Board should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission itself is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists. Such consideration should be exercised only in extraordinary circumstances. If the Licensing Board decides to raise a matter on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and General Counsel. The Licensing Board should not proceed to consider such *sua sponte* issues unless the Commission approves the Licensing Board's proposal to do so.

B. Discovery Management

Similar to the practice under current Rule 26 of the Federal Rules of Civil Procedure, if a hearing is granted, the Licensing Board should order the parties to provide certain information to the other parties without waiting for discovery requests. This information will include the names and addresses of individuals likely to have discoverable information relevant to the admitted contentions, the

names of individuals likely to be witnesses in this proceeding, the identification and production of documents (not already publicly available) that will likely contain discoverable information, and any other information relevant to the admitted contentions that the Licensing Board may require in its discretion.

Within *30 days* of any Licensing Board order granting a request for a hearing, the Staff shall file in the docket, present to the Licensing Board, and make available a case file to the Applicant and any other party to the proceeding. The Staff will have a continuing obligation to keep the case file up to date, as documents become available. The case file will consist of the application and any amendments thereto, the Final Environmental Impact Statement (in the form of a plant-specific supplement to the GEIS), any Staff safety evaluation reports relevant to the application, and any correspondence between the Applicant and the NRC that is relevant to the application. Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h), 2.740, 2.742, and 2.744, regarding the Safety Evaluation Report (SER) and the Final Supplemental Environmental Impact Statement (FES) will be suspended until after issuance of these documents.[1]

The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round each for original and late-filed contentions.

C. Proposed Schedule

The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about 2½ years from the date that the application was received. In addition, if the Licensing Board grants a hearing, once the Licensing Board has ruled on any petition for intervention and request for a hearing, formal discovery against the Staff should be suspended until after the Staff completes its final SER and FES, subject to the discretion of the Licensing Board to proceed with discovery on either the FES or final SER as discussed in note 1, *supra*. The evidentiary hearing should not commence until after completion of the final SER and FES.

The Commission believes that the goal of issuing a decision on the pending application in about 2½ years may be reasonably achieved under the current rules of practice and the enhancements directed by this Order and by our understanding of the Staff's current schedule for review of the application. We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite

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[1] The above discussion is based on the Staff's review schedule for the Duke application, which indicates that the final SER and FES will be issued fairly close in time. If this is not the case, the Board, in its discretion, may allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the FES or on environmental issues if the FES is issued before the final SER.

any hearing granted on this application. We do expect, however, the Licensing Board to use the techniques specified in this Order and in the Commission's policy statement on the conduct of adjudicatory proceedings to ensure prompt and efficient resolution of contested issues. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998). *See also Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452 (1981).

If a hearing is granted, in developing a schedule, the Licensing Board should adopt the following milestones for conclusion of significant steps in the adjudicatory proceeding:

• Within *90 days* of the date of this Order:	Decision on intervention petitions and contentions. Start of discovery on admitted contentions, except against the Staff.
• Within *30 days* of the issuance of SER and FES:	Completion of discovery against the Staff on admitted contentions. Late-filed contentions to be filed.
• Within *40 days* of the issuance of SER and FES:	Responses to late-filed contentions to be filed.
• Within *50 days* of the issuance of SER and FES:	ASLB decision on late-filed contentions.
• Within *80 days* of the issuance of SER and FES:	Completion of discovery on late-filed contentions.
• Within *90 days* of the issuance of SER and FES:	Prefiled testimony to be submitted.
• Within *125 days* of the issuance of SER and FES:	Completion of evidentiary hearing.
• Within *220 days* of the issuance of SER and FES:	ASLB initial decision on application.

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date (''in-hand''). If pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in our regulations for

responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.710. In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. The Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.749, unless the Licensing Board finds that such motions are likely to substantially narrow the issues for which an evidentiary hearing is necessary or will otherwise expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

In addition, parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

If a hearing is granted on this application, the Commission directs the Licensing Board to promptly inform the Commission, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board should include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

III. CONCLUSION

The Commission directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this Order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of September 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 50-443-LA**

NORTH ATLANTIC ENERGY SERVICE CORPORATION
(Seabrook Station, Unit 1) **September 17, 1998**

The Commission exercises its inherent supervisory authority over the conduct of proceedings to take *sua sponte* review of the Atomic Safety and Licensing Board's Memorandum and Order, LBP-98-23, 48 NRC 157 (1998), in this proceeding on an application by North Atlantic Energy Service Corporation to amend its operating license for the Seabrook Station, Unit 1 nuclear reactor. The Board granted intervention to the Seacoast Anti-Pollution League (SAPL), denied intervention to the New England Coalition on Nuclear Pollution, and addressed SAPL's argument against ''segmentation,'' i.e., that license applicants should not be permitted to effectuate a major operational change requiring several license amendments through separate amendment requests rather than through a single request.

ORDER

The Atomic Safety and Licensing Board recently ruled on two petitions to intervene in this proceeding on an application by North Atlantic Energy Service Corporation (NAESCO) to amend its operating license for the Seabrook Station, Unit 1 nuclear reactor. LBP-98-23, 48 NRC 157 (1998). The Board granted intervention to the Seacoast Anti-Pollution League (SAPL) and denied intervention to the New England Coalition on Nuclear Pollution (NECNP).

The Board's order also requested the parties to provide further information on SAPL's argument against ''segmentation,'' i.e., that license applicants should not be permitted to effectuate a major operational change requiring several license amendments through separate amendment requests rather than through a single request. SAPL reasons that, without reviewing the change as a whole, the NRC may be unable to accurately assess the actual safety implications of the overall change. 48 NRC at 168.

The ''segmentation'' issue is novel and has broad implications for this and other proceedings. It is the type of issue that we discussed in our *Statement of Policy on Conduct of Adjudicatory Proceedings* that ''could benefit from early Commission review.'' CLI-98-12, 48 NRC 18, 23 (1998). Therefore, we exercise our inherent supervisory authority over the conduct of proceedings to take *sua sponte* review of the ''segmentation'' issue. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998). Our decision to take review overtakes the Board's request in LBP-98-23 for the parties to provide it additional information on the segmentation issue. *See* LBP-98-23, 48 NRC at 169-70. We direct the Board to halt all proceedings before it pending further Commission order. Additionally, in the interest of expedition and economy of effort, rather than await any appeal of the Board's rulings granting and denying intervention pursuant to 10 C.F.R. § 2.714a, the Commission also takes *sua sponte* review of the Board's intervention rulings. In sum, the parties are free to file briefs supporting or opposing any aspect of the Board's ruling in LBP-98-23, and to address, as they deem necessary, any of the questions posed by the Board on pp. 169-70 of its order.

In addition to any issue of concern to the parties, their briefs should address the following Board statements:

1. ''Except perhaps for egregious pleading defects, it is not good policy to dismiss contentions merely for procedural reasons, especially where, as here, the challenged activities potentially could affect public health and safety.'' LBP-98-23, 48 NRC at 166.
2. ''Federal agencies should not allow an applicant to present licensing actions separately if such separate actions are part of a common action that has greater adverse consequences when viewed as a whole.'' LBP-98-23, 48 NRC at 169.

To expedite our review, we have decided to order simultaneous rather than sequential briefs. All briefs filed before the Commission in accordance with this Order shall be served in a manner to ensure receipt by midnight Eastern Time, on their due date. The Commission sets the following briefing schedule:

1. All parties, including NECNP (if it desires), may file a brief no later than October 7, 1998. The briefs shall not exceed 30 pages.

2. Each party, including NECNP, may file a single responsive brief addressing all issues in the other parties' briefs on which it wishes to be heard, no later than October 14, 1998. The responses may not exceed 20 pages.

After receiving these responses, the Commission may schedule oral argument to discuss these issues if it deems such argument necessary.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of September 1998.

Cite as 48 NRC 132 (1998) **CLI-98-19**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-317-LR**
50-318-LR

BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2) **September 17, 1998**

The Commission grants the National Whistleblower Center's petition for discretionary interlocutory review and gives Petitioner additional time, until September 30, 1998, to file contentions in this proceeding.

RULES OF PRACTICE: EXTENSIONS OF TIME

INTERVENTION: REQUEST FOR ADDITIONAL TIME

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW; INTERLOCUTORY APPEALS

The Commission does not ordinarily review interlocutory Board orders denying extensions of time.

NRC: ADJUDICATORY RESPONSIBILITIES; SUPERVISORY AUTHORITY

RULES OF PRACTICE: COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS; DISCRETIONARY INTERLOCUTORY REVIEW; INTERLOCUTORY APPEALS

The Commission may review interlocutory orders pursuant to its general supervisory jurisdiction over agency adjudications.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

To be admissible, contentions must satisfy the standards set forth in 10 C.F.R. § 2.714.

LICENSING BOARDS: AUTHORITY; DISCRETION IN MANAGING PROCEEDINGS; EXPEDITION

ADJUDICATORY BOARDS: CONDUCT OF PROCEEDINGS

ADMINISTRATIVE TRIBUNALS: AUTHORITY

RULES OF PRACTICE: EXPEDITED PROCEEDINGS; LICENSING BOARDS; SCHEDULING

The Licensing Board possesses considerable authority to modify the general deadlines set out in the Commission's rules, and the Commission expects it to continue to exercise that authority when appropriate.

MEMORANDUM AND ORDER

This proceeding involves an application by Baltimore Gas & Electric Company (''BG&E'') to renew its operating license for both units of its Calvert Cliffs Nuclear Power Plant — an action opposed by the National Whistleblower Center (''NWC''). On August 19, 1998, the Commission issued CLI-98-14, 48 NRC 39, referring NWC's petition for intervention and hearing to the Atomic Safety and Licensing Board and setting out a suggested expedited procedural schedule for the case. On August 20th, the Board issued a Memorandum and Order (unpublished) scheduling further filings in this proceeding. In that order, the Board established a September 11th deadline for the filing of contentions (slip op. at 3). On August 21st, NWC asked the Board for an enlargement of time until December 1st within which to file its contentions. On August 27th, the Licens-

ing Board issued an order (unpublished) denying NWC's request. NWC failed to submit contentions by September 11th. Instead, it filed with the Commission a petition for review of the Board's August 27th order.

We ordinarily do not review interlocutory Board orders denying extensions of time, but we do so here as an exercise of our general supervisory jurisdiction over agency adjudications. On consideration of NWC's petition for review, we conclude that at the time it requested a hearing in early August, it might not have anticipated that the Board would set a date as early as September 11th as the deadline for filing contentions, perhaps in part because the agency's Notice of an Opportunity for a Hearing stated, somewhat ambiguously, that a petitioner had to file contentions ''not later than'' 15 days prior to the first prehearing conference (63 Fed. Reg. 36,966 (July 8, 1998)). In addition, NWC has represented that its experts were unable to complete their review of the Calvert Cliffs application by the September 11th deadline. To ensure that NWC has an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding, we have decided to grant NWC until September 30th to file contentions. However, NWC's contentions, to be admissible, must satisfy the Commission's standards for acceptability of contentions set forth in 10 C.F.R. § 2.714 and, after September 30th, our late-filed criteria will come into play. The Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions.[1]

We recognize that our grant of an extension of time to NWC may require the Board to postpone, by two weeks or so, the issuance of its initial decision on standing and on the admissibility of contentions. Given the threshold stage of this proceeding, however, this short delay will not compromise the Commission's ultimate goal to resolve all license renewal issues within 30 months of our initial hearing notice.

Our decision today to relax the Board's September 11 deadline by no means suggests any dissatisfaction with the Board's handling of the matter. The Board acted entirely reasonably both in establishing the September 11 deadline and, in the absence of Commission guidance, in refusing to extend it, particularly in refusing to extend it until November, as NWC originally requested. We urge the Board to continue its effort to move this proceeding forward expeditiously. Our decision today also reflects no agreement with NWC's position that the Commission's initial decision to expedite this case and to provide the Board scheduling milestones is somehow unlawful. We recently

[1] We note that, by September 30th, NWC will have had 134 days since the NRC published its May 19, 1998 notice of acceptance for docketing of BG&E's application (63 Fed. Reg. 27,601), 112 days since the NRC announced the beginning of the public scoping process under the National Environmental Policy Act (63 Fed. Reg. 31,813 (June 10, 1998)), and 84 days since the NRC published the Notice of Opportunity for Hearing (63 Fed. Reg. 36,966 (July 8, 1998)). Both the docketed application and detailed information about the license renewal process have been available publicly since at least the May 19th notice.

set out the Commission's views on these matters in CLI-98-15, 48 NRC 45 (1998), and reaffirm them here. Finally, for the reasons given by the Board itself in its August 27th order, it possesses considerable authority to modify general deadlines set out in our rules and we expect it to continue to exercise that authority when appropriate.

For the foregoing reasons, we grant NWC's petition for review and give NWC additional time, until September 30, 1998, to file contentions in this proceeding.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of September 1998.

Cite as 48 NRC 137 (1998) **LBP-98-21**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of

Docket No. 40-8681-MLA-4
(ASLBP No. 98-748-03-MLA)
(Re: Materials License Amendment)

INTERNATIONAL URANIUM (USA) CORPORATION
(Receipt of Material from Tonawanda, New York)

September 1, 1998

A state may protect the interests of its citizens or its lands, waters, wildlife, and other natural resources, providing that it demonstrates that the proposed licensing action will cause its citizens or natural resources to be likely to suffer injury that is ‘‘distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical.’’ Applying this standard, a state may have standing to challenge whether the NRC has improperly granted a license amendment to allow the receipt and processing of uranium-bearing material that allegedly contains hazardous waste.

RULES OF PRACTICE: SUBPART L; SETTLEMENT

The Presiding Officer will attempt to facilitate negotiations between parties when they are seeking to resolve some or all of the pending issues.

RULES OF PRACTICE: SUBPART L; STANDING

Once a party is determined to have standing, it may raise any concern that is found to be germane to the proceeding.

MEMORANDUM AND ORDER
(Grant of Petition for a Hearing)

On July 23, 1998, the State of Utah petitioned for leave to intervene in the proceeding concerning a license amendment (License No. SUA-1358) issued on that same day, July 23, to International Uranium (USA) Corporation (''IUSA'') to allow the receipt and processing of uranium-bearing material (i.e., alternate feed material — material other than natural uranium ore) at its White Mesa Mill near Blanding, Utah.[1] IUSA initially opposed the petition.[2] In a subsequent response, IUSA conceded that the State has standing to litigate ''the limited issue of whether or not and to what extent the State may have jurisdiction over whether or not the Ashland 2 materials contain listed hazardous wastes that are regulated under the Resource Conservation and Recovery Act (''RCRA'').[3] *See* Final Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores, 60 Fed. Reg. 49,296 (Sept. 22, 1995).

IUSA emphasizes in its pleading that it has ''no interest whatsoever in accepting any materials that contain *listed* hazardous wastes.''[4] IUSA acknowledges that it agrees with the State of Utah that it should not receive hazardous wastes and it states its willingness ''to negotiate with the State to develop reasonable procedures to ensure that the Ashland 2 materials to be processed at the Mill do not contain any listed hazardous wastes.''

The Presiding Officer is encouraged by IUSA's willingness to negotiate and is willing to support negotiations, which may result in a complete or a partial resolution of pending issues or, at least, an agreement on an efficient way to proceed with this case. IUSA 2nd Response at 2-3. I encourage the Staff, which is participating as a party in this case, to seek to facilitate this negotiation process, and I am personally willing to facilitate the process, either in public discussions or (with explicit advance approval from the Commission) in private sessions. 10 C.F.R. § 2.1241.

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[1] Previously, IUSA had submitted a March 3, 1998 application to amend its license by adding a performance-based licensing condition that would allow it to accept alternate feed material at the White Mesa Mill, subject to operating procedures approved by the NRC, without prior NRC approval on a case-by-case basis. A ''Notice of Receipt of License Amendment Application; Notice of Opportunity for Hearing'' (''Notice'') was published in the *Federal Register* concerning that separate application, which is not the subject of this proceeding. *See* 63 Fed. Reg. 18,236 (Apr. 14, 1998). No request for hearing has been filed in response to that notice and the period for a timely hearing request on that action expired on May 14, 1998. This amendment application is still pending before the NRC.

[2] Opposition of [IUSA] to State of Utah's request for Hearing, dated August 3, 1998 (IUSA Response).

[3] Response to State of Utah's Amended Request for a Hearing and Petition for Leave to Intervene, August 25, 1998, at 2-3 (IUSA 2nd Response).

[4] IUSA 2nd Response at 3.

I. CONCLUSIONS CONCERNING LEGAL REQUIREMENTS FOR STANDING AND PARTICIPATION

A. Standing

1. Timeliness

Since the State of Utah filed its petition on the same day as the amendment was issued to IUSA, it appears to be timely. The State's application does not indicate when the State first became aware (''got actual notice'') of the pending application; however, neither of the parties has challenged its standing on this basis so I have decided not to raise the matter on my own.

Pursuant to 10 C.F.R. § 2.1205, interested persons may request a hearing on the grant of an amendment to a source or byproduct materials license under the Commission's informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L. If a *Federal Register* notice providing an opportunity for hearing has not been published, an intervention petition must be filed the *earliest of* (a) *30 days after the requester receives actual notic*e of a pending application, (b) 30 days after the requester receives actual notice of an agency action granting the application in whole or in part, or (c) 180 days after agency action granting an application in whole or in part. (Emphasis added.) 10 C.F.R. § 2.1205(d).

2. Substantive Standing Requirements

Any person who wishes to request a hearing or to intervene in a Commission proceeding must demonstrate the standing to do so. Section 189a(1) of the Atomic Energy Act (''AEA''), 42 U.S.C. § 2239(a), provides that:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . , the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding,* and shall admit any such person as a party to such proceeding.[5]

Id. (Emphasis added.)

In addition, pursuant to 10 C.F.R. § 2.1205(e), where a request for hearing is filed by any person other than the applicant in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

[5] Standing is granted for a proceeding. Once a party is granted standing, the party generally may litigate any areas of concern that are germane to the proceeding.

> (1) The interest of the requestor in the proceeding;
>
> (2) How [that] interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in [§ 2.1205(h)];
>
> (3) The requestor's area[ ] of concern about the licensing activity that is the subject matter of the proceeding; and
>
> (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(d)].

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the presiding officer is to determine ''that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely.'' The rule further provides as follows:

> The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors ---
>
> (1) The nature of the requestor's right under the [AEA] to be made a party to the proceeding;
>
> (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
>
> (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

In order to determine whether a petitioner has met these standards and is entitled to a hearing as a matter of right under section 189a of the Act, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); *Envirocare of Utah, Inc.,* LBP-92-8, 35 NRC 167, 172 (1992).

The United States Supreme Court has recently said that the ''irreducible constitutional minimum'' requirements for standing are that the litigant suffer an ''injury-in-fact'' that is ''concrete and particularized and . . . actual or imminent, not conjectural or hypothetical,'' that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear,* 520 U.S. ___, 117 S. Ct. 1154, 1163 (1997). *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1991). In addition to this constitutional aspect of standing, there are ''prudential'' (i.e., judicially imposed) standing requirements, one of which is that the litigant's asserted

interests must arguably fall within the ''zone of interests'' of the governing law. *See Bennett,* 117 S. Ct. at 1167. *See also Port of Astoria v. Hodel,* 595 F.2d 467, 474 (9th Cir. 1979).

The Commission applies constitutional and prudential aspects of the standing doctrine. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993) (to show an interest in the proceeding sufficient to establish standing, a petitioner must show that the proposed action will cause ''injury in fact'' to its interest and that its interest is arguably within the ''zone of interests'' protected by the statutes governing the proceeding); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (*citing Three Mile Island, supra,* 18 NRC at 332).

Requirements for standing have been applied to requests for hearing in numerous informal Commission proceedings held under Subpart L. *See, e.g., Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 66-67 (1994); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 49 (1994); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993); *UMETCO Minerals Corp.,* LBP-92-20, 36 NRC 112, 115 (1992); *Sequoyah Fuels Corp.,* LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989).

Further, it has been held that in order to establish standing, the Petitioner must establish (a) that he has suffered or will suffer a ''distinct and palpable'' harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding.[6] *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra,* 38 NRC at 32; *Babcock and Wilcox, supra,* LBP-93-4, 37 NRC at 81; *Envirocare, supra,* 35 NRC at 173.

A petitioner must have a ''real stake'' in the outcome of the proceeding to establish injury in fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd,* ALAB-549, 9 NRC 644 (1979). While the petitioner's stake need not be a ''substantial'' one, it must be ''actual,'' ''direct,'' or ''genuine.'' *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied-General Nuclear Services* (Barnwell Fuel

[6] A presiding officer has the authority to approve, deny, or condition any licensing action that comes under his or her jurisdiction. *See, e.g., Sequoyah Fuels Corp.,* LBP-96-12, 43 NRC 290, 306 (1996).

Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *id.,* LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds,* CLI-92-11, 36 NRC 47 (1992).

In ruling on affidavits with respect to standing, a decisionmaker should ''avoid 'the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits,' '' *Sequoyah Fuels Corp., supra,* 39 NRC at 68, *citing City of Los Angeles v. National Highway Traffic Safety Administration,* 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), *aff'd,* CLI-94-12, 40 NRC 64 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 n.10 (1993) (standing requires more than general interests in the cultural, historical, and economic resources of a geographic area), *citing Sierra Club v. Morton,* 405 U.S. 727, 734-35 (1972).

In cases without obvious offsite implications, a petitioner must allege some specific ''injury in fact'' resulting from the action taken. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989). However, petitioners need not set forth all of their concerns until they have been given access to a hearing file. *Babcock & Wilcox,* 39 NRC at 52.

a. Areas of Concern

Pursuant to 10 C.F.R. § 2.1205(h), areas of concern identified by a petitioner must be ''germane to the subject matter of the proceeding.''[7] The threshold showing at the intervention stage of a Subpart L proceeding is low. An area of concern must be specific enough to allow the presiding officer to ascertain whether or not the matter sought to be litigated is relevant to the subject matter of the proceeding. *Sequoyah Fuels Corp.,* LBP-94-39, 40 NRC 314, 316 (1994); Informal Hearing Procedures for Materials Licensing Adjudication, 54 Fed. Reg. 8269, 8273 (Feb. 28, 1989) (inequitable to require intervenor to file written presentations setting forth all of its concerns without access to the hearing file).[8]

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[7] A simple reference to a large number of documents is not enough to put the parties on notice as to the basis for intervention; rather, a petitioner must clearly identify and summarize the facts being relied on the specific portions of the documents cited. *See Public Service Co. of New Hampshir*e (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41(1989); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976) (no incorporation of massive document by reference as basis for, or a statement of, contentions); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985) (must identify, summarize, and append specific portions of documents), *rev'd and remanded on other grounds,* CLI-86-8, 23 NRC 241 (1986).

[8] Pursuant to 10 C.F.R. § 2.1233(c), after a hearing is granted and the hearing file is made available in accordance with section 2.1231, written presentations by interveners must describe in detail any deficiency or omission in the license application, why any particular portion is deficient or why the omission is material, and what relief is sought.

Only those concerns that fall within the scope of the proposed action set forth in the *Federal Register* notice of opportunity for hearing may be admitted for hearing. *See, e.g., Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980).[9]

When proffering concerns to be admitted in a proceeding, an intervention petitioner may rely on Staff guidance to allege that an application is deficient, but guidance cannot prescribe requirements. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-95-41, 34 NRC 332, 338-39, 347, 354 (1991); *Curators of the University of Missouri,* CLI-95-1, 41 NRC 71, 98, 100 (1995). In addition, because licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews, *Carolina Power and Light Co* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); *Rockwell International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-11 (1989), *aff'd,* CLI-90-5, 31 NRC 337 (1990), and the Applicant/Licensee has the burden of proof in this proceeding, the adequacy of the Staff's review is not determinative of whether an action should be approved. *Curators of the University of Missouri,* CLI-95-1, *supra*, 41 NRC at 121.

b. Scope of the Proposed/Authorized Materials Licensing Action

Before addressing the intervention petition, a brief summary of the proposed project is helpful to place the claims made in context.

Operation of the White Mesa Mill is authorized by an NRC source material license issued under 10 C.F.R. Part 40, which allows IUSA to process natural uranium ore and certain materials other than that for their uranium content, and to possess the waste generated from such milling operations. The NRC originally issued the license for the White Mesa Mill in 1979, and renewed this license in 1985 and again in 1997.[10]

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[9] In *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), it was held that a contention must be rejected where:

> (1) it constitutes an attack on applicable statutory requirements;
>
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
>
> (3) it nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
>
> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question;or
>
> (5) it seeks to raise an issue which is not concrete or litigable.

A merits determination is not required at the pleading stage. *Id.* at 20.

[10] Letter form R. Scarano, NRC, to R. Adams, Energy Fuels Nuclear, Inc., dated August 7, 1979 (transmitting Source Materials License SUA-1358); Letter from R. Smith, NRC, to UMETCO Minerals Corporation, dated September 26, 1985; Letter from J. Holonich, NRC, to H. Roberts, IUSA, dated March 14, 1997.

Wastes generated by operations at the White Mesa Mill are disposed on-site in impoundments that are designed and constructed to minimize seepage of tailing fluids into the subsurface soil, surface water, and groundwater. These impoundment designs incorporate natural and synthetic liners and a leak detection system that is monitored daily. Environmental Assessment for Renewal of Source Material License No. SUA-1358, Energy Fuels Nuclear, Inc., White Mesa Uranium Mill, dated February 1997 (Renewal EA), at 15, 18 (attached).

The amendment at issue in this proceeding authorizes IUSA to receive and process uranium-bearing material from the Ashland 2 FUSRAP (Formerly Utilized Sites Remedial Action Program) site near Tonawanda, New York. The Staff reviewed the request using the guidance entitled Final Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores, 60 Fed. Reg. 49,296 (Sept. 22, 1995).[11] In addition to determining whether the processing of alternate feed material complies with Appendix A of 10 C.F.R. Part 40,[12] the Staff has determined that the material proposed for processing as ore does not contain hazardous waste and that it is being processed primarily for its source material content. 60 Fed. Reg. 49,296-97.[13] ''Feed material exhibiting only a characteristic of hazardous waste (ignitable, corrosive, reactive, toxic) would not be regulated as hazardous waste and could therefore be approved for recycling and extraction of source material.'' *Id.* at 49,297.

In its ''Technical Evaluation Report: Request to Receive and Process Ashland 2 FUSRAP Material'' (TER), the Staff concluded that (1) the feed material

[11] With the passage of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 *et seq.* (UMTRCA), the AEA was amended to provide an additional definition of byproduct material (11e(2)) to include ''tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.''

[12] Appendix A to Part 40, ''Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailing of Wastes Produced by the Extraction or Concentration of Source Material from Ores Processed Primarily for Their Source Material Content,'' sets forth technical, financial, ownership, and long-term site surveillance criteria relating to the siting operation and decontamination, decommissioning, and reclamation of mills and tailings or waste systems and sites at which such mills and systems are located.

[13] The guidance was intended to present an expanded interpretation of the term ''ore'' as used in the section 11e(2) of the AEA, thus permitting feed material other than natural ore to be used by licensed mills to extract source material, avoiding possible dual regulation by the Environmental Protection Agency (EPA) and enabling transfer of other material to the Department of Energy. *See* ''Uranium Mill Facilities, Request for Public Comments on Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments and Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores,'' 57 Fed. Reg. 20,525, 20,530-31 (May 13, 1992) (Draft Guidance).

The State previously challenged application of the Draft Guidance with respect to an amendment authorizing the testing of a process to be used to extract uranium from feed material at the White Mesa Mill. *See generally UMETCO Minerals Corp.,* LBP-93-7, 37 NRC 267, 268-69 (1993). The State claimed (1) the new definition of ''ore'' was too broad, (2) the NRC had unduly relied on the certification that the material contained no hazardous waste, and (3) the licensee's certification as to the primary purpose for receipt of the material was suspect due to the payment for receipt of the material and the potential unprofitability of processing the uranium. *Id.* at 270-71. The Commission did not object to the UMETCO amendment, provided that the criteria had been met and the amendment was issued. *Id.* at 269. In the instant proceeding, the State does not dispute that the Ashland 2 material falls with the NRC's definition of ore but again disputes whether material is being processed for its source material content and whether it contains hazardous waste. *See* State Petition at 17.

qualified as ''ore''; (2) Department of Energy (DOE) remedial investigations have not identified any hazardous waste on the Ashland 2 property and confirmatory measures would be taken to guard against the presence of listed hazardous waste prior to shipment to, and upon receipt at, the White Mesa Mill; and (3) the Licensee had provided an adequate certification that the uranium-bearing material is being processed primarily for recovery of uranium. TER at 4-6.[14]

The Staff further concluded that processing of the material will not result in (1) a significant change or increase in the types or amounts of effluents that may be released offsite, (2) a significant increase in individual or cumulative occupational exposures, (3) a significant construction impact, or (4) a significant increase in the potential for or consequences from radiological accidents. TER at 6. The bases for these conclusions include that (a) the annual yellowcake production limit would not be exceeded, (b) tailings from the processed material would be disposed of onsite in an existing impoundment (Cell 3), (c) disposal of the tailings would increase the total amount of tailings in the cell by only 1%, and (d) the Ashland 2 material is similar in composition to mill tailings currently in the Cell 3 impoundment. TER at 6-7.

3. Conclusion: The State Has Shown Standing to Intervene

Application of the standards for intervention to the request for hearing leads me to conclude that the State has shown cognizable interests and standing to request a hearing in this matter.

The State may protect the interests of its citizens or its lands, waters, wildlife, and other natural resources. *See* Amended State Petition at 5; State Petition at 9-13. The State has previously been afforded standing to intervene with respect to a similar amendment at White Mesa. *See UMETCO Minerals Corp.,* 36 NRC at 115. However, such standing should not be automatic in this proceeding as the State, like any other intervenor, must demonstrate that, as a result of the amendment, its citizens or natural resources will likely suffer injury that is ''distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical.'' *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998), *citing Steel Co. v. Citizens for a Better Environment,* 118 S. Ct. 1003, 1016 (1998); *Warth v. Seldin,* 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Harm should be distinct and apart from that

[14] In addition, the Staff noted that the DOE had determined that the Ashland 2 material met the definition of 11e(2) material under the AEA, and thus the material could be disposed of directly in the White Mesa tailings impoundments. The ultimate transfer of the material to the DOE is required by section 84 of the AEA. 42 U.S.C. § 2113(a)(2), (b)(2).

caused by the initial licensing and continued operation of the facility. *See Energy Fuels Nuclear, Inc.,* LBP-94-33, 40 NRC 151, 153-54 (1994).

The need to show injury in fact is particularly important where the action has no obvious potential for offsite impacts, given that the amount of material to be processed and disposed of onsite is only a small fraction of that already authorized at the site. *See* TER at 6. The State merely alleges, without pointing to specific citizens or describing a mechanism of injury, that the amendment will harm citizens who live, work, or travel near the milling facility and tailings impoundment or who depend on groundwater and surface water for drinking, irrigation, and watering of livestock. *See* State Petition at 12-13; Amended State Petition at 5.

The State claims (1) that the Ashland 2 material may contain listed hazardous wastes and that excavation, storage, processing, and disposal of the material could violate applicable law and NRC guidance, Amended Petition at 6-9; and (2) that the material potentially included listed hazardous wastes and ''releases from [IUSA's] tailings'' could harm its wildlife and natural resources, including ground and surface water, Amended Petition at 9-15. Appended to the Amended Petition is the ''Affidavit of Loren Morton,'' dated August 18, 1998 (Morton Affidavit).

The bare assertion that its stay filings demonstrate the likelihood that Ashland 2 material contains listed hazardous waste, Amended Petition at 6-7, without textual discussion, does not provide evidentiary support for the State's claim that its citizenry and natural resources would be harmed. Nevertheless, I conclude that the State's challenge to the adequacy of testing for hazardous waste is an adequate basis for standing. The State asserts that inadequate testing could lead to the transport and disposal of hazardous waste, contrary to federal and state requirements. This assertion of an area of concern is sufficient to show standing. Under NRC practice, standing is general and permits a party to raise other concerns that are germane to the proceeding.

The State is concerned (1) that the composition of the Ashland 2 material is dissimilar to material already at White Mesa, (2) that there is a potential that material authorized by the amendment may leak from the White Mesa tailings impoundment, and (3) that the amendment may be contrary to hazardous waste laws and NRC guidance on alternate feed materials. *See* Amended Petition at 15-17. These concerns generally are germane to this proceeding because they raise issues that have a nexus to the subject amendment. These concerns also do not appear to have been decided in prior litigation brought by the State of Utah. Although both IUSA and the Staff have attempted to show that the

State's concerns are without merit,[15] the merits of these concerns are not within my jurisdiction at this point in the proceeding.

The State's assertion that the amendment is contrary to laws governing transportation and disposal of hazardous wastes under the Resource Conservation and Recovery Act program that the U.S. Environmental Protection Agency delegated to the State of Utah, *see, e.g.,* Petition at 6, establishes its standing to challenge whether applicable regulatory requirements or guidance have been met. *See UMETCO Minerals Corp.,* 36 NRC at 115 (standing where, among other things, a state asserts jurisdiction over the materials involved); *Energy Fuels Nuclear, Inc.* (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429, 431 (1997) (injury may be presumed if it can be shown that the action is contrary to law).

I understand that these challenges to the adequacy of the testing of the Ashland 2 material for listed hazardous wastes are limited to hazardous waste already present when this material is brought to the White Mesa site.[16] Since this proceeding involves an amendment permitting the use of the Ashland 2 materials, the State of Utah will need to raise doubts concerning the safety or environmental effects of utilizing these particular materials.

II. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this first day of September 1998, ORDERED that:

1. The parties shall inform the Presiding Officer within 1 week concerning the status of settlement negotiations and any agreements that they may reach.

2. Unless the Presiding Officer determines that serious settlement negotiations require delay, a prehearing conference will be held by telephone at 2:00 p.m. EDT precisely 28 working days after the Hearing File is made available. The parties are required to notify the Presiding Officer in advance of the telephone number to use in reaching them and they are required to attend. At this conference the parties shall present proposed schedules for filings, leading to a fair and efficient resolution of this case pursuant to 10 C.F.R. Subpart L.

3. Rulings on Areas of Concern, set forth beginning on p. 146, are adopted.

4. The Staff shall make the Hearing File available pursuant to 10 C.F.R. § 2.1231(a).

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[15] IUSA's 2nd Response at 4-7; Staff Response at 15-16 n.16; *see also* p. 143 (merits not to be decided by Presiding Officer).

[16] In stating that whether the conformity of the amendment with Staff guidance is a germane concern, the Staff does not concede that the State has properly characterized the contents of such guidance in its filings.

5. Within 10 days of the service of this Order, appeals may be filed by parties that object to the granting of a petition to intervene pursuant to 10 C.F.R. §§ 2.1205(o).

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

Cite as 48 NRC 149 (1998) **LBP-98-22**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of **Docket No. 50-423-LA-2**
(ASLBP No. 98-743-03-LA)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 3) **September 2, 1998**

In this proceeding on the license amendment application of Northeast Nuclear Energy Company to add a new sump pump subsystem at Millstone Unit 3, the Licensing Board concludes that the Petitioner, Citizens Regulatory Commission, lacks standing to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether a petitioner has set forth a sufficient ''interest'' within the meaning of the Atomic Energy Act and the agency's regulations to intervene as of right in an NRC licensing proceeding, the Commission long ago held that contemporaneous judicial concepts of standing are to be used. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, the petitioner must assert an actual or threatened, concrete and particularized injury, i.e., an injury in fact, that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

RULES OF PRACTICE: STANDING TO INTERVENE

The injury also must be to an interest arguably within the zone of interests protected by the statute governing NRC proceedings, the Atomic Energy Act and the National Environmental Policy Act of 1969. *Quivira,* CLI-98-11, 48 NRC at 6; *Perry,* CLI-93-21, 38 NRC at 92.

RULES OF PRACTICE: STANDING TO INTERVENE

When a membership organization requests intervention as the representative of its members, the organization must show that an individual member has standing to participate and has authorized the organization to represent him. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC at 26, 30-31 (1998).

RULES OF PRACTICE: STANDING TO INTERVENE

An organization also must demonstrate that the interests it seeks to protect are germane to the purpose of the organization and neither the claim alleged nor the relief sought necessitate the participation of an individual member in the proceeding. *Private Fuel Storage,* CLI-98-13, 48 NRC at 30-31.

RULES OF PRACTICE: STANDING TO INTERVENE

In order for a petitioner to avail itself of the presumption found in agency precedents that nearby residence to a nuclear power plant confers standing, the license amendment at issue in the proceeding must present an ''obvious potential for offsite consequences.'' *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989).

RULES OF PRACTICE: STANDING TO INTERVENE

The determination whether a petitioner's asserted injury is fairly traceable to the proposed action ''is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible.'' *Sequoyah Fuels,* CLI-94-12, 40 NRC at 75.

MEMORANDUM AND ORDER
(Resolving Standing Issue)

In response to the Commission's hearing notice, the Petitioner, Citizens Regulatory Commission (''CRC''), filed an intervention petition to oppose the application of Northeast Nuclear Energy Company (''Applicant''), for an operating license amendment for Millstone Unit 3 to ''add a new sump pump subsystem to address groundwater inleakage through the containment basement,'' 63 Fed. Reg. 19,974 (1998). The Applicant and the NRC Staff challenge CRC's standing to intervene.

The same Petitioner previously filed another intervention petition in response to an earlier hearing notice regarding the Applicant's amendment request for a design change to the recirculation spray system (''RSS'') at the same facility. In LBP-98-20, 48 NRC 87, 92-95 (1998), we found CRC had standing to intervene in that license amendment proceeding. CRC's intervention petition in the instant proceeding is essentially identical to its earlier petition even though the current proceeding involves a completely different license amendment. For the reasons set forth below, we conclude that CRC has failed to establish its standing to intervene in this proceeding.

I. BACKGROUND

As explained in the Applicant's no significant hazard analysis set out in the hearing notice and in the license amendment application, the Millstone containment substructure is encased within a waterproof rubber membrane that is connected to sumps located in the building housing the Engineered Safety Features (''ESF''). The original plant design relied upon the waterproof membrane to ensure that groundwater inleakage was minimal and would not impact safety-related structures and components. Millstone, therefore, had only nonsafety-related sump pumps to pump groundwater from the sumps in the ESF building. As nonsafety-related equipment, the sump pumps were not powered from the emergency busses and were not accessible to plant personnel during a

design basis loss of coolant accident. Thus, the pumps could not be assumed to be available for mitigating such a design basis accident.

According to the amendment application, a recent restart review revealed that the waterproof membrane has degraded, allowing groundwater inleakage. The leakage has the potential to flood the ESF building sumps if the existing nonsafety-related sump pumps fail to operate. Further, if the sumps are not pumped out, the groundwater leakage eventually could affect both trains of the RSS. In a filing providing supplemental information to the amendment application, the Applicant indicates that RSS pump operability could be affected in 138 days from ESF building sump overflow. Because the existing nonsafety-related sump pumps cannot be credited to operate during accident and post-accident conditions, the Applicant has installed two independent, safety-related, air driven sump pumps in the ESF building to eliminate the potential for groundwater inleakage that could affect the RSS pumps. Each air driven motor pump is powered by a portable nonsafety-related air compressor using permanent connections located outside the ESF building so the connections are accessible during post-accident conditions. The compressors are housed in designated locations, maintained and periodically tested to ensure their availability, and will be connected subsequent to an accident when sump pump operation is required. The current license amendment seeks to revise the Millstone Unit 3 licensing basis to add to the existing sump pump system this new sump pump subsystem in the Final Safety Analysis Report.

As in the case of the earlier intervention petition in LBP-98-20, 48 NRC at 90, CRC's petition here reiterates that it is an organization of citizens residing in southeastern Connecticut whose members are concerned about the safety of Millstone. Along with a supplement to the intervention petition containing its contentions, CRC filed another affidavit of its member Joseph H. Besade, who has authorized CRC to represent him in this proceeding. According to the affidavit, the affiant lives with his family about 2 miles from the Applicant's facility within the area where the Applicant is required to provide protective actions in the event of an accident with offsite consequences. The affidavit states that the affiant could be impacted directly by such an accident.

In its petition, CRC once again asserts that the instant license amendment involves issues that are critical to the safe operation of Millstone Unit 3 and, therefore, directly impact the health and safety of its members. It repeats that the RSS at Millstone is a critical safety system and that the failure of the RSS could be catastrophic. CRC also restates its claim that for the past 2 years the Applicant regularly has permitted the use of faulty calculations with respect to systems at Millstone and that the Applicant has used inadequate procedures, methods, and analyses of safety systems. The petition again claims that the Applicant has long been aware of problems associated with the Millstone RSS and that the NRC has acknowledged that the facility has been permitted to operate with an

inoperable RSS. CRC's petition recounts as well that the failure of the Applicant and the NRC to ensure complete operability of the Millstone RSS in the past has jeopardized the health, safety, and welfare of the organization's members. The instant CRC petition repeats the account from its earlier petition of the March 1998 test by the Applicant of a modification to the RSS that resulted in serious damage to the system's pumps because of the poor design and review of the planned modification. Finally, the petition reprints the same claims from its previous petition that over the past 2 years the Applicant has compromised safety at the facility in the interest of schedule driven efforts to obtain restart approval and that the Applicant continues to harass and intimidate as well as retaliate and discriminate against employees raising safety concerns.

CRC draws the same conclusion from the recited circumstances in the instant petition as it did from those in its earlier petition in LBP-98-20, 47 NRC at 90, except here CRC substitutes the words ''Engineered Safety Features'' in place of ''RSS.'' Thus, CRC asserts that it has no confidence that the Applicant has properly and adequately analyzed the ESF at Millstone and, therefore, approval of the license amendment will adversely impact the health and safety of its members. In support of this claim, the affidavit of the CRC member accompanying the CRC intervention filings states that the proposed license amendment involves modifications crucial to the operation of the safety critical RSS as well as modifications that concern the integrity of the containment basemat. The affiant asserts that the appropriateness and sufficiency of these modifications has not been fully determined so that approval of the amendment, without adequate and appropriate analysis, will have the effect of reducing safety margins. He claims, therefore, that the amendment will impact him in the event an accident results from the reduced safety margins.

II. ANALYSIS

Pursuant to section 189a of the Atomic Energy Act and section 2.714(a)(1) of the NRC's regulations, the Commission must grant a hearing in a proceeding to amend a reactor operating license upon the request of any person ''whose interest may be affected.'' 42 U.S.C. § 2239(a)(1)(A); 10 C.F.R. § 2.714(a)(1). The Commission's regulations further provide that an intervention petition ''shall set forth with particularity the interest of the petitioner in the proceeding [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene.'' 10 C.F.R. § 2.714(a)(2). In determining whether a petitioner has set forth a sufficient ''interest'' within the meaning of the Atomic Energy Act and the agency's regulation to intervene as of right in an NRC licensing proceeding, the Commission long ago held that contemporaneous judicial concepts of standing

are to be used. *Portland General Electric Co.* (Pebble Spring Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

To establish standing, the petitioner must assert an actual or threatened, concrete and particularized injury, i.e., an injury in fact, that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). The injury also must be to an interest arguably within the zone of interests protected by the statutes governing NRC proceedings, the Atomic Energy Act and the National Environmental Policy Act of 1969. *Quivira,* CLI-98-11, 48 NRC at 6; *Perry,* CLI-93-21, 38 NRC at 92. This same showing is required to demonstrate standing regardless of whether the petitioner is an individual or a membership organization seeking to intervene in its own right. *Georgia Tech,* CLI-95-12, 42 NRC at 115. But when a membership organization requests intervention as the representative of its members, the organization must show that an individual member has standing to participate and has authorized the organization to represent him. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998); *Georgia Tech,* CLI-95-12, 42 NRC at 115. Further, the organization must demonstrate that the interests it seeks to protect are germane to the purpose of the organization and neither the claim alleged nor the relief sought necessitate the participation of an individual member in the proceeding. *Private Fuel Storage,* CLI-98-13, 48 NRC at 30-31.

As in its intervention filing in LBP-98-20, 48 NRC at 92, CRC does not seek to intervene in the instant proceeding in its own right but only as the representative of its members. CRC, therefore, has proffered the affidavit of one of its members authorizing it to represent him in this proceeding. In challenging CRC's standing to intervene, the Applicant and the Staff argue that the organization has failed to demonstrate any harm or injury to any CRC member resulting from the license amendment at issue. Further, they argue that CRC may not rely upon the presumption that the residence of one of its members in close proximity to the Millstone facility confers standing upon the organization because the challenged license amendment in this proceeding presents no obvious potential for offsite consequences to the environment and CRC has made no showing to the contrary.

The Applicant and the Staff are correct that CRC's assertion regarding the residence of one of its members in the immediate vicinity of Millstone is insufficient, by itself, to confer standing on the organization. In order for a petitioner to avail itself of the presumption found in agency precedents

that nearby residence to a nuclear power plant confers standing, the license amendment at issue in the proceeding must present an ''obvious potential for offsite consequences.'' *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). *See Perry,* CLI-93-21, 38 NRC at 95. Here, even assuming the instant amendment to add a safety-related sump pump subsystem to the existing sump pump system in the ESF building at Millstone somehow presents the potential for offsite environmental consequences, that potential is anything but obvious.

Because the residence presumption is unavailable to CRC to establish its standing, CRC must ''allege some specific 'injury in fact' that will result from the action taken.'' *St. Lucie,* CLI-89-21, 30 NRC at 330. Even construing CRC's intervention petition in a light most favorable to the petitioner as Commission precedent directs, *Georgia Tech,* CLI-95-12, 42 NRC at 115, CRC has failed to demonstrate how the injury it asserts is caused by the license amendment at issue. As in its earlier petition in LBP-98-20, 48 NRC at 92, CRC alleges harm in the event of an accident with offsite consequences to the health and safety of its members residing near the Applicant's facility. And, as in the case of its earlier petition, an injury to the health and safety of its members is an adequate allegation of harm to meet the injury in fact element of the test for standing. But the assertion of an injury without also establishing the causal link to the challenged license amendment is insufficient to establish CRC's standing to intervene.

As the Commission has stated, the determination whether a petitioner's asserted injury is fairly traceable to the proposed action ''is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible.'' *Sequoyah Fuels,* CLI-94-12, 40 NRC at 75. Here, CRC has asserted no plausible link between its member's health and safety and the challenged amendment. CRC has made no showing of an offsite injury that plausibly results from the installation of new safety-related sump pumps in the ESF building sumps. Rather, the instant CRC petition, because it merely repeats the contents of CRC's earlier petition, is aimed primarily at the Millstone recirculation spray system, the subject of the license amendment in LBP-90-20, 48 NRC at 90. The CRC petition is not focused, as it should be, on the sump pump subsystem that is the subject of the license amendment in this proceeding.

The recitation in CRC's petition of the Applicant's general lack of management and engineering competence and unsatisfactory past history in dealing with the Millstone RSS is insufficient to demonstrate that an accident with off-site consequences is likely to be caused by the installation of a safety-related sump pump subsystem at Millstone. Similarly, the claims in the affidavit of Joseph H. Besade that the license amendment involves modifications critical to the operation of the RSS as well as modifications regarding the integrity of the

containment basemat that have not been analyzed adequately does not demonstrate, without a great deal more, how an accident with offsite consequences results from the installation of a new sump pump subsystem designed to prevent any failure of the RSS. At a bare minimum, CRC must show how the installation of the new safety-related sump pump subsystem fails to address or improperly addresses the problem of groundwater inleakage and how that deficiency will lead to offsite consequences. CRC's intervention filings make no such showing.

III. CONCLUSION

For the foregoing reasons, we find that Petitioner, CRC, lacks sufficient interest within the meaning of section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), and section 2.714(a) of the Commission's regulations, 10 C.F.R. § 2.714(a), to intervene in this license amendment proceeding. Accordingly, CRC's intervention petition is denied and the proceeding is terminated.

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

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 2, 1998

Cite as 48 NRC 157 (1998) **LBP-98-23**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Charles N. Kelber
Dr. Linda W. Little

In the Matter of **Docket No. 50-443-LA**
(ASLBP No. 98-746-05-LA)

NORTH ATLANTIC ENERGY SERVICE CORPORATION
(Seabrook Station, Unit 1) **September 3, 1998**

In this Decision, the Licensing Board grants a petition to intervene and request for a hearing by the Seacoast Anti-Pollution League (SAPL) and rejects the petition of New England Coalition on Nuclear Pollution (NECNP) for failure to establish standing. SAPL's Contention 1 regarding potential risk due to steam generator tube failure is accepted. A decision on SAPL's other three proposed contentions is postponed pending receipt of additional information from the parties.

STANDING: INJURY IN FACT

Commission case law establishes that potential injury sufficient to confer standing to people residing near a nuclear facility occurs when a licensing action has obvious potential for offsite consequences.

STANDING: PROOF NECESSARY TO ESTABLISH STANDING

A full-blown analysis is not required to demonstrate standing since petitioners are not required to establish the existence of potential injury with certainty ''at the threshold [standing phase].'' Moreover, at this threshold standing stage, petitioners' arguments will be viewed in their favor, and even the potential for minor radiological exposure will be enough to create the requisite injury in fact.

SIGNIFICANT HAZARDS CONSIDERATIONS

Licensing boards have no jurisdiction to determine whether license amendments should be made immediately effective since Commission rules make clear that these decisions can only be made by Staff.

PLEADING DEFECTS

Except perhaps for egregious pleading defects, it is not good policy to dismiss contentions merely for procedural reasons, especially where the challenged activities potentially could affect public health and safety.

SEGMENTATION OF LICENSING ACTIONS

Federal agencies arguably should not allow an applicant to present licensing actions separately if such separate actions are part of a common action that has greater adverse consequences when viewed as a whole.

MEMORANDUM AND ORDER
(Ruling on Petitions to Intervene)

I. INTRODUCTION

The Seacoast Anti-Pollution League (SAPL) and the New England Coalition on Nuclear Pollution (NECNP) have petitioned to intervene in North Atlantic Energy Service Corporation's (NAESCO) application to amend its operating license for the Seabrook Station, Unit 1 nuclear reactor. The amendment authorizes NAESCO to change the surveillance requirements for Seabrook's steam generator tube inspections from 18 to 24 months. SAPL and NECNP oppose the amendment on the basis that it would cause increased risk of an accident that could have adverse offsite consequences to persons within the 10-mile Seabrook emergency planning zone. Both Petitioners additionally argue

that the NRC Staff's determination that the request involves ''no significant hazards'' is inconsistent with the requirements of 10 C.F.R. § 50.92(c) (1998). SAPL and NECNP subsequently submitted four contentions as issues to be litigated in this proceeding.

For the reasons stated herein, SAPL's petition to intervene is granted and NECNP's petition is denied. SAPL's Contention 1 is accepted for litigation in this proceeding. A ruling on Contentions 2, 3, and 4 is deferred pending receipt of additional information from the parties.

II. REQUIREMENTS FOR INTERVENTION

As a threshold matter, before Petitioners may be granted a hearing and allowed to intervene in NRC proceedings, they must satisfy this agency's requirements for intervention set forth at 10 C.F.R. § 2.714(a)(1)-(2). These include the requirements that petitioners have standing to intervene and that their intervention requests are timely. Petitions that are filed out of time will not be entertained absent a determination that the Petitioners meet the balancing test set out in 10 C.F.R. § 2.714 (a)(1). Factors included in this test are: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Judicial tests to establish standing are applied in NRC proceedings to determine whether a petitioner has a sufficient interest to be entitled to intervene. These tests require a petitioner to show that: (1) the proposed action will cause ''injury in fact'' to the petitioner; (2) the injury is arguably within the zone of interests to be protected by the statutes governing the proceeding; and (3) the asserted injury must be capable of redress in the instant proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993).

Organizations as well as individuals may intervene in NRC proceedings. An organization may attempt to show standing through one of its individual members, but to do so the organization must provide some ''concrete indication'' that the member wishes to be represented by the organization and that he or she will be in close enough physical proximity to the action in question to be adversely affected. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); *Pacific Gas and*

Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 199 (1992).

III. THE SAPL AND NECNP INTERVENTION

In determining whether SAPL and NECNP have established their right to intervene, we first analyze whether their petitions were timely filed. SAPL's petition is timely because it was filed on June 5, 1998, the last day permitted by the *Federal Register* to request a hearing for the Seabrook proceeding. 63 Fed. Reg. 25,101, 25,113 (May 6, 1998). *See also* June 5, 1998 Letter from Robert A. Backus to Chairman Shirley Jackson. NECNP, on the other hand, did not submit a timely request. The June 5, 1998 hearing request by SAPL said nothing about NECNP participation. NECNP's intent to intervene first became known on June 18, 1998 — 13 days after the intervention period had expired — when SAPL, joined by NECNP, filed an amended, supplemental petition to intervene. Supplemental and Amended Petition for Institution of Proceeding and for Intervention Pursuant to 10 C.F.R. 2.714 on Behalf of the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (June 18, 1998) (hereinafter referred to as ''SAPL and NECNP June 18, 1998 Supplemental Petition''). In a July 9, 1998 filing, NECNP subsequently argued that its petition is not untimely because it is merely joining the earlier petition of SAPL which it asserts it is entitled to do under Rule 20 of the Federal Rules of Civil Procedure (FRCP). NECNP asserts joinder is appropriate in this instance since ''NECNP is not raising any new contentions, bringing forth any matters not addressed in the June 5th filing, or using separate counsel.'' They also argue that the Federal Rules apply here since the NRC has no rules on joinder. *See* Cover Letter to a SAPL/NECNP July 9, 1998 joint document submittal furnishing affidavits and contentions (hereinafter referred to as the ''SAPL July 9, 1998 Submittal'').

Putting aside the question of whether the NRC is obliged to follow the Federal Rules of Civil Procedure,[1] we do not agree that those rules allow nontimely petitioners to intervene in NRC proceedings. To obtain intervention, NECNP relies on FRCP Rule 20 which allows joinder of plaintiffs with causes of action arising from occurrences with common questions of law or fact. However, NECNP's reliance is misplaced since the issue here is not whether joinder of parties or causes of action at the NRC is permissible, but whether out-of-time requests by potential parties (whether or not they involve joinder

[1] The Federal Rules of Civil Procedure may serve as guidance in applying NRC rules of procedure, but they are not required to be used in NRC proceedings. *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 780 n.18 (1979).

requests) should be allowed. Both the NRC rules of practice and the Federal Rules of Civil Procedure make clear that petitioners seeking intervention in a federal agency proceeding must adhere to time requirements set down by the agency. The NRC requirements in 10 C.F.R. § 2.714(a)(1) set out above require late petitioners to demonstrate that their participation is justified or be excluded from the proceeding. To allow otherwise, could result in delayed proceedings and unfair prejudice to other parties. The Federal Rules are in agreement with this requirement since FRCP 24(a) and (b) specifically require that intervention in federal judicial proceedings will be allowed only ''upon timely application.'' NECNP has not attempted to furnish information required by 10 C.F.R. § 2.714(a)(1), and, having failed to do so, its petition to intervene is denied.

Because SAPL's petition was timely filed, we now turn to whether SAPL has standing to intervene. The first test in determining SAPL's standing is whether SAPL has standing in its own right to intervene as an organization in this proceeding or whether it obtains this right through potential injury to one of its members. SAPL has elected to obtain standing through its individual members by furnishing affidavits from four members stating that SAPL is authorized to represent them. Based on these affidavits, the Board is satisfied that SAPL is duly authorized to represent these members. Neither NAESCO nor Staff attempts to contradict this authorization.

The next question regarding SAPL's standing is whether at least one of these four SAPL members comes within close enough contact with the Seabrook reactor to be potentially adversely affected by the contested license amendment. Their affidavits establish that one resides less than 2 miles from the facility, one resides less than 3 miles, and two reside less than 10 miles. In addition, one of them, Kristie Conrad, has a daughter who attends school less than 2 miles from the facility. *See* SAPL July 9, 1998 Submittal. SAPL contends that the risk of an accident at Seabrook with offsite consequences affecting these members could be increased should the amendment be allowed because a 24-month instead of an 18-month fuel cycle will result in: (1) increased risk of steam generator tube failure (by failing to detect and remedy early failure) that will increase the risk that radiation will bypass the containment and enter the atmosphere; (2) increased stress to the fuel cladding, the first of three primary barriers against radioactive release at Seabrook due to required use of more highly enriched fuel (with higher fuel burnup); (3) increased use of online maintenance (a procedure requiring the intentional disablement of systems, structures, and components important to safety) that will increase the danger that an accident will not be mitigated as planned; and (4) decreased opportunity for timely inspection of valves or other control components in the high-radiation area that will increase potential for offsite consequences if a transient is initiated. *See* SAPL and NECNP June 18, 1998 Supplemental and Amended Petition.

The NRC Staff takes the position that SAPL's steam generator tubes allegation, item 1, above, represents sufficient potential injury to establish SAPL's standing because steam generator tube inspections, if not performed adequately, can lead to release of radioactivity with ''obvious potential for offsite consequences.'' NRC Staff's Response to July 9, 1998 Submittal by Seacoast Anti-Pollution League and New England Coalition on Nuclear Pollution (July 27, 1998) (hereinafter referred to as Staff's July 27, 1998 Response) at 6-7. NAESCO, on the other hand, disagrees that SAPL has established standing, arguing that SAPL has not identified what safety margins are impacted by the amendment, how those margins will be reduced, or how any such reductions could lead to offsite releases of radioactivity. NAESCO further argues that SAPL can only derive standing from the steam generator issue and not the three other issues it has listed (i.e., fuel cladding, online maintenance, and surveillance) since the steam generator tube issue is the only matter relating to the license amendment giving rise to SAPL's petition to intervene. North Atlantic Energy Service Corporations's Supplemental Answer RE: Standing Issues (July 27, 1998) (hereinafter referred to as NAESCO's July 27, 1998 Supplemental Answer) at 5-7.

We agree with Staff that SAPL's allegation of potential injury stemming from reduced generator tube surveillance establishes SAPL's standing in this case. Commission case law establishes that potential injury sufficient to confer standing to people residing near a nuclear facility occurs when a licensing action has obvious potential for offsite consequences. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995). A full-blown analysis is not required to demonstrate standing since Petitioners are not required to establish the existence of potential injury with certainty ''at the threshold [standing] phase'' (*Sequoyah Fuels,* 40 NRC at 74; *Perry,* 38 NRC at 95-96). Moreover, at the threshold standing stage of a proceeding, Petitioners' arguments will be viewed in their favor. *Georgia Tech Research Reactor,* 42 NRC at 115.[2] Relative to a threshold standing determination, even minor radiological exposures resulting from a proposed activity can be enough to create the requisite injury in fact. *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996).

[2] In this regard, in *Kelley v. Selin,* 42 F.3d 1501, 1508 (1995) (a case challenging the NRC's dry cask storage regulations for the Palisades facility), the Sixth Circuit Court of Appeals went so far as to state that for purposes of determining whether petitioners have standing, it will not only construe the complaint in favor of the complaining party, but it also will ''accept as true all material allegations of the complaint.''

To establish potential offsite consequences caused by decreased steam generator tube inspection, SAPL asserts that generator tubes are much more likely to fail and go undetected if the interval between inspections is increased by 25% as will occur under the new license amendment. These failed tubes, according to SAPL, will allow radioactive materials to bypass the containment and escape into the environment from the tubes. SAPL and NECNP June 18, 1998 Supplemental Petition and SAPL's July 8, 1998 Contention Submittal at 1. Although these SAPL claims are subject to challenge at a hearing, the Board finds that the scenario presented by SAPL, at this threshold stage of the proceeding, has obvious potential for offsite consequences. Moreover, the potential for SAPL's scenario is enhanced by the fact that the NRC's Standard Review Plan contemplates the danger of radiation exposure from failed generator tubes. *See* Standard Review Plan, NUREG-0800 (Rev. 2, 1981). Compare the holdings in the *Oyster Creek* and two *Millstone* spent fuel cases where boards found in each case a clear potential for offsite consequences. *Oyster Creek,* 44 NRC at 157-58; *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 212-13 (1992) and *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 26 (1996). The potential here for offsite consequences appears significantly greater.

Under these circumstances, we conclude that sufficient potential injury in fact to SAPL members has been amply established in this case to establish SAPL standing. It is also clear that the potential injury alleged by SAPL is within the zone of interests protected by the Atomic Energy Act. Thus, SAPL should be allowed intervention subject to the submission of one acceptable contention for litigation.

IV. SAPL'S CONTENTIONS

To be admitted as a party in this proceeding, SAPL must not only establish standing, but also must proffer at least one admissible contention. The standards for admissible contentions are set out in 10 C.F.R. § 2.174(b)(2) and (d)(2) (1998). These regulations require that SAPL's contentions include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases for the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996). In addition, section 2.714(b)(2)(iii) requires that SAPL present sufficient information to show that a genuine dispute exists on a material issue of law or fact. A contention that fails to meet these standards must be dismissed, as must a contention that, even

if proven, would be of no consequence because it would not entitle a petitioner to any relief. 10 C.F.R. § 2.714(d)(2).

SAPL's four contentions for litigation in this proceeding set out in SAPL's July 9, 1998 Contention Submittal at 1-17, are as follows:

Contention 1 The staff erred in its May 6 finding of no significant hazards consideration in regard to the request of NAESCO to change the Technical Specifications for Seabrook Station to accommodate fuel cycles of up to 24 months with respect to the allowed time between steam generator in service inspections. Contrary to the staff's conclusion, the proposed changes may cause a significant increase in the probability or consequences of an accident previously evaluated, and may involve a significant reduction in the margin of safety, contrary to the requirements of 10 CFR 50.92.

Contention 2 The staff erred in its May 6 finding of no significant hazards consideration in regard to the request to change the Technical Specification for Seabrook Station to accommodate a 24 month fuel cycle because the staff failed to analyze the impact of a 25% longer operational run on fuel rod failure, and because the result of a longer run will be to increase fuel rod failure, thereby breaching the first line of defense against offsite radioactive releases. Therefore, the finding is contrary to the requirements of 10 C.F.R. 50.92 in that analyzed consequences of an increased risk of fuel failure would involve a significant increase in the probability or consequences of a previously analyzed accident and involves a significant reduction in the margin of safety.

Contention 3 The staff erred in its May 6 finding of no significant hazards consideration in regard to the request of NAESCO request [sic] to change the Technical Specifications for Seabrook Station to accommodate a 24 month fuel cycle because the staff failed to analyze the effect of increasing the operational run by 25% with a resulting requirement for an increased reliance on on line maintenance, which may cause an increase in the probability or consequences of an accident previously analyzed, or may cause an accident not previously analyzed, and which may cause a significant reduction in the margin of safety, contrary to the requirements of 50.92.

Contention 4 The staff erred in its May 6 finding of no significant hazards consideration in regard to the request of NAESCO to change the Technical Specifications for Seabrook Station to accommodate fuel cycles up to 24 months because the decreased opportunity to conduct surveillance within the areas of the plant inaccessible during normal operations may create an increased hazard as the result of the failure to timely detect abnormal or improper conditions (such as misaligned or mispositioned valves), which may result in an increased probability of a previously analyzed accident and which may result in a significant reduction in the margin of safety, contrary to the requirements of 10 C.F.R. 50.92.

Staff and NAESCO oppose the admission of all four contentions. Both assert that the contentions are invalid because they contest the Staff's proposed no significant hazards consideration determination. Staff's August 10, 1998 Answer

to Contentions at 4 and NAESCO's August 10, 1998 Response to Contentions at 10-11. Staff and NAESCO also oppose Contentions 2, 3, and 4 (addressing fuel, on-line maintenance practices, and other surveillance) because the contested license amendment only pertains to steam generator surveillance schedules. Staff's August 10, 1998 Answer to Contentions at 4-6 and NAESCO's August 10, 1998 Response to Contentions at 11-14. NAESCO also claims Contention 1 lacks adequate basis. *Id.* at 7-9.

A. NAESCO's and Staff's Immediate Effectiveness Argument

Staff and NAESCO take the position that because Contentions 1-4 are a challenge to Staff's no significant hazards consideration, these contentions must be rejected since immediate effectiveness is not a matter that is properly before this Board and is not a permissible issue for litigation in any hearing that might be held on the proposed license amendment. SAPL later contended in response to these arguments that it is not seeking a hearing prior to any issuance or effectiveness of the license amendment, but only a hearing on the underlying safety concerns presented by the four contentions. SAPL/NECNP August 1, 1998 Reply to Staff Answer to Contentions at 3 and SAPL/NECNP August 19, 1998 Reply to NAESCO Response to Proposed Contentions at 1-2.

In considering Staff and NAESCO's no significant hazard arguments, we acknowledge that this Board has no jurisdiction to determine whether the Seabrook license amendment should be made immediately effective. The Commission's rules make clear that immediate effectiveness decisions can only be made at the discretion of Staff, following Staff's determination that there are no significant hazards considerations involved. *See* 10 C.F.R. § 50.58(b)(6) and *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990). Nevertheless, we do not agree that SAPL's contentions should be totally rejected because SAPL may have mistakenly believed it could have a hearing before this Board regarding the immediate effectiveness process. SAPL arguably may have been misled by the May 6, 1998 *Federal Register* Notice for this proceeding which offers both an opportunity for a hearing and an opportunity to comment on the Staff's immediate effectiveness determination. The language in the immediate effectiveness portion of the notice includes a statement that:

> The final determination [on immediate effectiveness] will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the *Federal Register* a notice of issuance and provide for opportunity for a hearing after issuance.

63 Fed. Reg. at 25,101. Although subject to different interpretations, this statement could be understood to mean that a hearing will be offered to contest immediate effectiveness. That interpretation is reinforced in the next paragraph where the notice offers a hearing opportunity for those petitioning by June 15, 1998. The fact that the hearing opportunity immediately follows the immediate effectiveness section encourages the assumption that this opportunity refers to the immediate effectiveness of the license amendment. Significantly, no clarifying statement is found in either paragraph that hearings to contest immediate effectiveness are not permissible.

However, even if SAPL was not misled by the language in the *Federal Register* Notice, we do not find that this technical defect in its pleading should result in SAPL's expulsion from this proceeding. It is clear that SAPL opposes the immediate effectiveness of the license amendment, but it is also obvious that SAPL wants a hearing to oppose the amendment regardless of the immediate effectiveness determination. *See* SAPL/NECNP Reply to NAESCO Response to Proposed Contentions (August 18, 1998) at 1-2. Except perhaps for egregious pleading defects, it is not good policy to dismiss contentions merely for procedural reasons, especially where, as here, the challenged activities potentially could affect public health and safety. As noted in *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979):

> It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.

See also Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 119-29 (1994).

For all these reasons, we conclude that SAPL's pleading defect with respect to immediate effectiveness is not fatal to its intervention. Accordingly, SAPL's opposition to the immediate effectiveness of issuing the license amendment shall be deleted from its petition requesting a hearing in this proceeding.

B. Analysis of Contention 1

SAPL's claim in this contention is that changing the surveillance requirements for Seabrook's steam generator tube inspections from 18 to 24 months will cause increased risk of an accident. SAPL offers four bases for Contention 1:

1. That steam generator tubes develop cracks and other defects during service, and, if the tube becomes thin enough, they are likely to rupture. This event provides a pathway for radioactive material in the primary coolant to escape into the environment, bypassing containment.

According to SAPL, a wall loss of 40% or more defines a defective tube. Tubes are inspected at regular intervals, and tubes that have defects that might lead to a 75% reduction in tube wall during the next interval are either taken out of service (plugged) or repaired.

2. That increasing the interval between inspections increases the likelihood that a defect will grow deep enough to lead to a steam generator tube rupture (SGTR). It makes two major arguments to support this claim. Its first argument is that the number of defects expected in the Seabrook steam generator tubes is expected to grow with increasing length of service of the steam generator. It bases this theory on NRC Inspection Report 97-03 which states that thirty-six tubes had been plugged at the date of that report. The report also states that ''[m]ost steam generator degradation problems have been found only after longer [than 7 years] periods of operation.'' This leads SAPL to hypothesize that the population of defects will increase in the years to come.

   Its second argument is that SGTR events show no statistical trend toward lesser frequency over past years. It bases this argument on a conclusion drawn in INEL/EXT-98-00401, ''Rates of Initiating Events at U.S. Commercial Nuclear Power Plants — 1987 through 1995'' (Draft dated April 1998), that ''further trend analysis of SGTR frequency using the 1985 through 1997 operating experience showed no statistical evidence of a decreasing trend in the frequency of SGTR.''

3. (a) That a Licensee letter dated June 18, 1997 entitled ''Steam Generator Tubes Plugged During the Fifth In-Service Inspection,'' discloses that, of the thirteen tubes plugged, one had a wall loss indication of 45%, one of 55%, and one of 56%;

   (b) that the Seabrook Individual Plant Examination (IPE) uses nonconservative data consisting of generic SGTR data;

   (c) that NAESCO has ''apparently redefined 'defective tube' . . .'';

   (d) that an NRC Differing Professional Opinion states that the use of eddy current voltage signals to predict failure lacks sufficient field data to be considered valid; and

4. That the Staff's proposal to offset the decreased frequency of inspection by tightening the allowed leakage rate from 500 gallons per day to 100 gallons per day lacks an explicit rationale. It further contends that the detection of leakage of primary coolant into secondary coolant is a standard form of on-line protection against major tube ruptures and that there is a lack of showing by Staff that the suggested measure counterbalances the increase in risk from lengthening the interval between inspections.

We find these bases adequate to satisfy the contention requirements for this proceeding. SAPL, of course, is not obliged to prove its entire case at this time.

In its opposition to Contention 1, NAESCO argues that ''there is simply nothing in the proposed amendment that would redefine the present criteria for steam generator tube repairs.'' NAESCO also argues that there is no merit to SAPL's argument that increased risk of tube rupture will result from increased intervals of service since, regardless of the length of the next planned cycle, tubes exhibiting less than 40% wall loss at a surveillance (and that are not plugged) will have been demonstrated to be sufficient to meet the 75% through-wall structural limit for the duration of the next operating cycle. Although there may be merit to these NAESCO arguments, they cannot, on their face, defeat SAPL's contention because a petitioner is not required to try the factual merits of its case at this preliminary stage of the proceeding. Moreover, NAESCO arguments, among other things, involve factual disputes regarding Inspection Report 97-03; INEL/EXT-98-00401 (draft dated April 1998); and a Licensee letter dated June 18, 1997, titled ''Steam Generator Tubes Plugged During Fifth In-Service Inspection'' which should not be resolved at this preliminary pleading stage.

C. Analysis of Contentions 2, 3, and 4

These three contentions concern SAPL's allegation that there will be increased risk of offsite radiation exposure caused by fuel cladding rupture (Contention 2), increased online maintenance (Contention 3), and decreased inspection in high radiation areas (Contention 4) if the Seabrook fuel cycle is changed from 18 to 24 months. Both NAESCO and Staff oppose all three on the basis that they do not pertain to the license amendment application for generator tube inspection that is the subject matter of this proceeding. Both also contend that they are all inadmissible since NRC case law requires that proposed contentions must fall within the scope of the issues set forth in the notice of hearing. NAESCO's August 10, 1998 Response to Contentions at 5-6, 11-12, and Staff's August 10, 1998 Answer to Contentions at 4-6.

SAPL responds that Contention 2, 3, and 4 should be admitted since, like the steam generator tube contention, they deal with changing Seabrook's modes of operation to accommodate increasing the fuel cycle from 18 to 24 months. SAPL contends that

> [t]o permit the licensee to do this in small incremental requests, without ever affording the NRC an opportunity to evaluate the overall change from 18 month to 24 month fueling would be a classic example of segmentation, and would impair the NRC's ability (and to avoid responsibility) to provide necessary safety analysis and review of a major operational change.

SAPL claims that this type of ''segmentation'' of licensing actions to accommodate a 24-month fuel cycle is contrary to a series of NEPA cases holding that a federal agency may not avoid an overall review of a project by dealing with the project in ''segments.'' *See* Memorandum of Law Submitted by SAPL and NECNP in Support of Jointly Filed Contentions 2 Through 4 (July 9, 1998) and SAPL/NECNP Reply to NAESCO Response to Proposed Contentions (August 19, 1998).

SAPL's ''segmentation'' argument may have merit. Federal agencies should not allow an applicant to present licensing actions separately if such separate actions are part of a common action that has greater adverse consequences when viewed as a whole. Federal courts have recognized this principle in a number of cases involving the National Environmental Policy Act (NEPA). *See City of Rochester v. United States Postal Service,* 541 F.2d 967, 972 (2d Cir. 1976); *Fritioson v. Alexander,* 772 F.2d 1225 1242-1243 (5th Cir. 1985). Although this proceeding involves safety issues under the Atomic Energy Act (AEA) rather than environmental issues under NEPA, arguably the principle of ''segmentation'' should be equally applicable to AEA safety-related cases since protection of public health and safety can be considered as at least as important as protection of the environment.

However, before we decide this question, we request that the parties brief this issue in greater detail, and specifically address the public policy questions: (1) why the ''segmentation'' theory should not equally apply to the AEA; and (2) if the answer to question (1) is ''yes,'' why the notice of hearing for this proceeding should not be interpreted as including all safety-significant activities that are affected by the increased duration of the fuel cycle. The parties also should address SAPL's recent offer to file a NEPA contention that ''Staff not only failed to perform the necessary safety analysis under the AEA; they also offered no environmental assessment under NEPA.'' *See* SAPL/NECNP August 18, 1998 Reply to Staff Answer to Contentions at 5.

In addition, the parties should: (a) identify whether the changes required by the increased fuel cycle for Contentions 2, 3, and 4 will require license amendments for which hearing opportunities will be offered; and (b) comment on whether this licensing Board has jurisdiction to consider regulatory issues that are not subject to hearings. This response should include answers to the following questions:

1. With respect to Contentions 2 through 4:
    a. Why is NAESCO asking for a permanent change to a 24-month cycle if it is going to return to an 18-month cycle?
    b. If NAESCO intends to return to an 18-month cycle from a 24-month fuel cycle, when will this occur and will further license amendments be needed to authorize that action?

2. With respect to Contention 2:
   a. Will a license amendment be required for Seabrook fuel rods if Seabrook goes to a 24-month fuel cycle? If so, when will this occur?
3. With respect to Contention 3:
   a. Will changes to on-line maintenance require license amendments? If so, when will this occur?
   b. What are the more significant examples of increased unavailability of redundant or diverse safety systems removed from service for on-line maintenance? How does this unavailability differ between an 18-month and a 24-month fuel cycle?
4. With respect to Contention 4:
   a. Does decreasing the opportunity for surveillance described in Contention 4 require license amendments?
   b. Is Contention 4 covered by license amendment matters discussed in Mr. Robert Backus' letter of August 18, 1998 or will there also be additional license amendments required for surveillance?[3]

After receiving these responses, the Board may schedule a prehearing conference to discuss these issues if it deems one is necessary.

V. CONCLUSION

For the reasons set forth above, we find that SAPL has established standing to intervene and has set forth at least one litigable contention so as to be entitled to be admitted as a party in this proceeding. NECNP's petition to intervene is rejected for failure to establish standing.

SAPL's Contention 1 regarding potential risk due to steam generator tube failure is accepted. A decision on SAPL proposed Contentions 2, 3, and 4 is postponed pending receipt of additional information from the parties. This information should be received by the Board on or before October 7, 1998.

[3] Mr. Backus also has stated in this letter that SAPL and NECNP request that this letter be considered a new request for a hearing as to the changes specified in the amendment request in the August 12, 1998 *Federal Register* Notice. Pursuant to this request, the Board is forwarding a copy of this letter to the Office of the Secretary for appropriate disposition.

VI. DISCOVERY AND SCHEDULING

Discovery with respect to SAPL's Contention 1 shall begin immediately. The parties shall commence discussions concerning appropriate trial schedules and file a joint report with a suggested scheduling 15 days following the Board's decision on SAPL's Contentions 2, 3, and 4.

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Dr. Linda W. Little
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 3, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of	**Docket No. 40-8989**
	(License No. SUA-1559)
ENVIROCARE OF UTAH, INC.	
(Salt Lake City, Utah)	**September 14, 1998**

The Director of the Office of Nuclear Material Safety and Safeguards denies a petition dated December 12,1997, filed with the Nuclear Regulatory Commission (NRC) by Dr. Thomas B. Cochran on behalf of the National Resources Defense Council (NRDC), and supplemented on May 6, 1998 (petition). The NRDC requested that the NRC immediately suspend all licenses held by Envirocare of Utah, Inc. (Envirocare). Specifically, NRDC requested that the NRC (1) conduct an immediate investigation of issues raised in the petition and immediately suspend Envirocare's NRC license; (2) conduct an investigation of possible criminal violations of section 223 of the Atomic Energy Act of 1954, as amended (the Act); (3) immediately suspend Envirocare's license with the State of Utah, under section 274j(2) of the Act; (4) investigate the adequacy of the State of Utah agreement state program to protect whistleblowers; (5) contact each current and former Envirocare employee personally on a confidential basis, to advise them of their rights to inform the NRC of unsafe practices and violations, to inform them of the protections available to them, and to ask them if they have any information that they wish to disclose, on a confidential basis or otherwise; and (6) order a special independent review of Envirocare's relationships with its employees, along the lines of the review ordered by the NRC for the Millstone site.

On May 6, 1998, NRDC supplemented the petition and requested that the NRC (1) suspend all licenses Envirocare has with the NRC; (2) request the State of Utah to suspend all licenses that Envirocare holds with the State of Utah under the purview of the Utah Division of Radiation Control; (3) the license suspensions indicated in (1) and (2) above are to be enforced until such

time as NRC and the State of Utah have completed the actions under (4) and (5) below; (4) undertake a program, in cooperation with the State of Utah and the Environmental Protection Agency (EPA) to contact each and every current and past employee on an individual basis and obtain a sworn statement from each, indicating (i) whether they were intimidated by the unlawful Envirocare Employee Agreement, (ii) whether they withheld or altered any health, safety, or environmental information in any Envirocare report, or in any written or oral communication with any official of the State of Utah, EPA or NRC, and (iii) whether they failed to report any health, safety, or environmental information to appropriate authorities, and in cases where there was information withheld, altered, or not reported, identify fully what the information said; and (5) investigate the extent to which such information, revealed under (4) above, has affected existing and past licenses held by Envirocare issued by NRC or the State of Utah, under the purview of the Utah Division of Radiation Control.

After an evaluation of the petition, the Director concludes that the Petitioner did not raise any issues that would warrant granting the requested actions.

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

I. INTRODUCTION

On December 12, 1997, and May 6, 1998, Dr. Thomas B. Cochran, Director of Nuclear Programs, Natural Resources Defense Council (NRDC), filed petitions with the U.S. Nuclear Regulatory Commission (NRC) pursuant to Title 10 of the *Code of Federal Regulations,* section 2.206 (10 C.F.R. § 2.206). In these petitions, NRDC requested that NRC take action to immediately suspend all licenses held by Envirocare of Utah, Inc. (Envirocare). Specifically, NRDC requested that NRC take the following actions:

Petition of December 12, 1997

(1) Conduct an immediate investigation of issues raised in the petition and immediately suspend Envirocare's NRC license.

(2) Conduct an investigation of possible criminal violations of section 223 of the Atomic Energy Act of 1954, as amended (the Act).

(3) Immediately suspend Envirocare's license with the State of Utah, under section 274j(2) of the Act.

(4) Investigate the adequacy of the State of Utah agreement state program to protect whistleblowers.

(5) Contact each current and former Envirocare employee personally, on a confidential basis, to advise them of their rights to inform the NRC of unsafe practices and violations, to inform them of the protections available to them, and to ask them if they have any information which they wish to disclose, on a confidential basis or otherwise.

(6) Order a special independent review of Envirocare's relationships with its employees, along the lines of the review ordered by the NRC for the Millstone site.

NRDC asserts, as basis for the December 12, 1997 request, that Envirocare's employee-related practices and contractual provisions constitute a violation of 42 U.S.C. § 5851 (section 211 (''Employee Protection'') of the Energy Reorganization Act of 1974 (ERA)) and the NRC's whistleblower protection regulations under Parts 19 and 40 of Title 10 of the *Code of Federal Regulations* (i.e., 10 C.F.R. §§ 19.16, 19.20, and 40.7). Specifically, NRDC asserts that current and former Envirocare employees, who have provided to governmental authorities information adverse to Envirocare's interests, fear for their lives and the lives of their families should their identities become known to Envirocare. NRDC also states that certain provisions in Envirocare's standard employment contract prevent its employees from disclosing to the NRC information concerning unsafe practices and violations under the NRC license and threaten them with severe financial penalties in the event of a disclosure. By letter dated January 16, 1998, I acknowledged receipt of NRDC's December 12, 1997 petition.

Petition of May 6, 1998

(1) Suspend all licenses Envirocare has with the NRC.

(2) Request the State of Utah to suspend all licenses that Envirocare holds with the State of Utah under the purview of the Utah Division of Radiation Control.

(3) The license suspensions indicated in (1) and (2) above are to be enforced until such time as NRC and the State of Utah have completed the actions under (4) and (5) below.

(4) Undertake a program, in cooperation with the State of Utah and the Environmental Protection Agency (EPA), to contact each and every current and past employee on an individual basis and obtain a sworn statement from each, indicating: (i) whether they were intimidated by the unlawful Envirocare Employee Agreement; (ii) whether they withheld or altered any health, safety, or environmental information in any Envirocare report, or in any written or oral communication with any official of the State of Utah, EPA or NRC; and, (iii) whether they failed to report any health, safety, or environmental information to appropriate authorities; and in cases where there was information withheld, altered, or not reported, identify fully what the information was.

(5) Investigate the extent to which such information, revealed under (4) above, has affected existing and past licenses held by Envirocare issued by NRC or the State of Utah, under the purview of the Utah Division of Radiation Control.

In support of NRDC's request in this petition, NRDC asserted that NRC now has before it new information that it did not have at the time that NRDC's earlier petition, dated January 8, 1997, requesting enforcement action against Envirocare that was denied by NRC on February 5, 1997. NRDC's petition dated January 8, 1997, was addressed in DD-97-2, 45 NRC 63 (1997). NRDC stated that this new information consists of NRC's letter of December 8, 1997, to Charles A. Judd, indicating that Envirocare's employee protection policies were in violation of NRC's whistleblower protection regulations.

NRC's letter dated June 9, 1998, acknowledged receipt of the May 6, 1998 petition and indicated that, because of the similarity of requested actions with those of the December 12, 1997 petition, the May 6, 1998 petition would be considered as a supplement to the December 12, 1997 petition.

As was indicated in the NRC's acknowledgment letters dated January 16, 1998, and June 9, 1998, NRDC's requests for action concerning Envirocare's license with the State of Utah and the Utah Agreement State Programs concern matters that do not fall within the scope of matters ordinarily considered under section 2.206. As indicated in the June 9, 1998 acknowledgment letter, these matters were addressed by Richard L. Bangart, Director of the Office of State Programs, in his February 18, 1998 letter to NRDC. Accordingly, this Director's Decision will only address the NRDC requests for action that relate to the license to receive, store, and dispose of certain byproduct material issued to Envirocare by NRC, pursuant to Section 11e(2) of the Act.[1] Allegations of possible criminal violations of section 223 of the Act have been referred to the Federal Bureau of Investigation (FBI). Although matters of federal criminal violation clearly fall under the jurisdiction of the FBI, the NRC Staff has, in the course of its investigations into NRC-related matters, reviewed and examined documents bearing on these matters. NRC's evaluation of this information, which has been acquired either directly or examined under condition of confidentiality, will be discussed briefly, to the extent possible, in Section III of this Decision.

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[1] In its petition of May 6, 1998, NRDC requests the NRC to suspend all licenses Envirocare has with NRC. The only license that has been issued to Envirocare by the NRC is the NRC license to receive, store, and dispose of uranium and thorium byproduct material, issued November 19, 1993, pursuant to section 11e(2) of the Act.

II. BACKGROUND

Envirocare operates a radioactive waste disposal facility in Clive, Utah, 128 kilometers (80 miles) west of Salt Lake City in western Tooele County. Radioactive wastes are disposed of by modified shallow land burial techniques. Envirocare submitted its license application to the NRC in November 1989 for commercial disposal of byproduct material, as defined in section 11e(2) of the Act (11e(2) byproduct material). On November 19, 1993, NRC completed its licensing review and issued Envirocare an NRC license to receive, store, and dispose of uranium and thorium byproduct material. Envirocare began receiving 11e(2) byproduct material in September 1994 and has been in continuous operation since.

To ensure that the facility is operated safely and in compliance with NRC requirements, the Staff conducts routine, announced inspections of the site. Areas examined during the inspections include management organization and controls, operations review, radiation protection, radioactive waste management, transportation, construction work, groundwater activities, and environmental monitoring. The NRC has conducted ten inspections of the Envirocare facilities between April 14, 1994, and June 25, 1998, in conjunction with the 11e(2) byproduct material license and has cited the licensee for ten violations. None of the violations are related to concerns raised in the NRDC petitions. All violations were categorized in accordance with the guidance in NUREG-1600, ''General Statement of Policy and Procedures for NRC Enforcement Actions'' (Enforcement Policy) at a Severity Level IV.[2] The most recent inspection, conducted June 22-25, 1998, resulted in the issuance of two citations. The first violation relates to failure to follow procedures; the second violation results from failure to perform confirmatory groundwater sampling. The results of the June 1998 inspection are documented in Inspection Report 40-8989/98-01 which was issued on July 24, 1998.

In addition to the routine, announced site inspections described above, the Staff has, since January 1997, conducted many investigations, interviews, and telephone conversations with numerous individuals into aspects of Envirocare's operations, including matters relating to concerns raised in NRDC's section 2.206 petitions. The Staff's investigations included interviews with former Envirocare employees.

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[2] As explained in Section IV of the Enforcement Policy, violations are normally categorized in terms of four levels of severity (Severity Level I being the most significant). A Severity Level IV violation is defined as a violation of more than minor concern which, if left uncorrected, could lead to a more serious concern.

III. DISCUSSION

NRDC asserts two bases in support of its requested actions: (1) Envirocare's employment contract nondisclosure covenant threatens the financial well being of employees who want to provide information regarding Envirocare operations, and (2) current and former Envirocare employees fear for their lives and lives of their families. NRDC states that it is apparent from sworn affidavits, compiled in the State of Utah Legislative Auditor General Investigation of Envirocare, that current and former employees of Envirocare fear for their lives and for the lives of their families. NRDC further states that Envirocare has required employees to enter into an employment agreement with onerous provisions that impose significant monetary penalties for disclosing safety-related information. NRDC, furthermore, asserts that such threatening practices constitute a violation of section 211 of the ERA, 10 C.F.R. §§ 19.16, 19.20, and 40.7. The NRC has evaluated these matters and found no basis to take the requested actions.

As an initial matter, NRDC requests that the NRC immediately suspend Envirocare's NRC licenses. The NRC's Enforcement Policy describes the various enforcement sanctions available to the Commission once it determines that a violation of its requirements has occurred. In accordance with the guidance of Section VI.C.2 of the Enforcement Policy, Suspension Orders may be used: (a) to remove a threat to the public health and safety, common defense and security, or the environment; (b) to stop facility construction when (i) further work could preclude or significantly hinder the identification or correction of an improperly constructed safety-related system or component or (ii) the licensee's quality assurance program implementation is not adequate to provide confidence that construction activities are being properly carried out; (c) when the licensee has not responded adequately to other enforcement action; (d) when the licensee interferes with the conduct of an inspection or investigation; or (e) for any reason not mentioned above for which license revocation is legally authorized. Furthermore, in accordance with the guidance in Section VI.C.3. of the Enforcement Policy, Revocation Orders may be used: (a) when a licensee is unable or unwilling to comply with NRC requirements; (b) when a licensee refuses to correct a violation; (c) when a licensee does not respond to a Notice of Violation where a response was required; (d) when a licensee refuses to pay an application fee under the Commission's regulations; or (e) for any other reason for which revocation is authorized under section 186 of the Act (e.g., any condition that would warrant refusal of a license on an original application). Pursuant to 10 C.F.R. § 2.202(a)(5), the Commission may issue an immediately effective order to modify, suspend, or revoke a license if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation was willful.

In this case the NRDC has not provided the NRC with substantiated information supporting the existence of circumstances that would provide a basis for immediate suspension of the Envirocare license. Furthermore, neither the investigations conducted by the NRC nor by the FBI have revealed evidence providing a basis for suspension of the license.

Assertion 1: Envirocare's Employment Contract Nondisclosure Covenant Threatens Financial Well Being of Employees Who Want to Provide Information Regarding Envirocare Operations

Prior to the filing of NRDC's petition dated December 12, 1997, the NRC reviewed Envirocare's Whistleblower Protection Policy; its Environmental Compliance Program; and its Employment Agreement. By letter dated December 8, 1997 (the letter referenced by NRDC in support of its May 6, 1998 petition), the NRC notified Envirocare that its written company policies were inconsistent with section 211 of the ERA, 42 U.S.C. § 5851, and 10 C.F.R. § 40.7. More specifically, the NRC Staff found that while Envirocare's Whistleblower Protection Policy and Environmental Compliance Program encouraged employees to report suspected legal violations of state or federal environmental laws and violations of the ERA and the Act, they did not incorporate all of the protections afforded in section 211 of the ERA and 10 C.F.R. § 40.7. Further, the policies established an incorrect standard with respect to the nature of safety hazards that would trigger employees' reports to appropriate governmental authorities. In addition, the NRC notified Envirocare that its Employment Agreement could be interpreted to preclude the disclosure to the NRC or another government agency of data in support of a nuclear safety concern.

As a result of its review, the NRC requested Envirocare to modify its Whistleblower Protection Policy, Environmental Compliance Program, and Employment Agreement to ensure compliance with NRC requirements. By correspondence dated January 21, 1998, Envirocare responded to the NRC's December 8, 1997 letter. Among other things, Envirocare amended its Whistleblower Protection Policy, Environmental Compliance Program, and Employment Agreement in an effort to bring those documents into compliance with NRC requirements. NRC reviewed Envirocare's modifications to its corporate policies and employment agreement and concluded that they satisfied NRC requirements. By letter dated February 9, 1998, the NRC Staff informed Envirocare that it found the modifications acceptable.

Moreover, by letter dated December 31, 1997, the NRC required Envirocare to respond to the allegations raised in the December 12, 1997 petition. That letter requested Envirocare to indicate whether it intended to enforce its Employment Agreement against current and former employees who have engaged, or do engage, in protected activities cognizable under section 211 of the ERA and 10

C.F.R. § 40.7. It also requested that Envirocare indicate what actions it would take to notify current and former employees that the Employment Agreement will not be applied to protected activities. In its January 21, 1998 response, Envirocare asserted that it has not in the past, nor does it intend to claim or assert in the future, that any current or former employee who has engaged in protected activities is in violation of Envirocare's Employment Agreement. Additionally, Envirocare has made reasonable efforts to notify by letter all current and former employees that the Employment Agreement in effect at the time of their employment does not prevent them from raising nuclear safety concerns or otherwise discourage them from engaging in protected activities.

With respect to asserted violations by Envirocare of section 211 of the ERA and 10 C.F.R. § 40.7 against its employees, the NRC has investigated these and other Envirocare-related matters extensively over a period of approximately 19 months (January 1997 through August 1998). These investigations included: (1) conversations and interviews (both in person and telephonically), (2) acquisition of and evaluation of many documents acquired from several sources during the course of the investigation, and (3) frequent contact with the FBI. The conversations and interviews were conducted with many individuals, including many present and former employees of Envirocare as well as present employees of the State of Utah. Additionally, NRC's investigations included interviews and meetings with individuals including representatives of the organizations (law firms and the State of Utah, Office of Legislative Research and General Counsel) identified in NRDC's letter of January 21, 1998.[3] It was suggested by NRDC that the individuals identified in its January 21, 1998 letter may possess information relating to the asserted violations of NRC's whistleblower regulations by Envirocare. The FBI, although focusing on alleged criminal activities (bribery and extortion) associated with Envirocare's then-President Khosrow Semnani, did, in the course of these investigations, also acquire information bearing on the above NRC-related matters. This information was investigated by the NRC and revealed no evidence that any current or former Envirocare employee has received threats of financial harm or has felt threatened by Envirocare's employment nondisclosure covenant.

[3] In its acknowledgment letter dated January 16, 1998, the NRC requested the NRDC to provide the NRC the names of ''unidentified individuals (and attendant background information) referenced in the petition,'' indicating that confidentiality consistent with the NRC allegation program would be provided. The NRDC's letter of January 21, 1998, responded to that request.

Assertion 2: Current and Former Envirocare Employees Fear for Their Lives and Lives of Their Families

Allegations of possible criminal violations of the Act had been referred to the FBI as indicated in my letter of January 16, 1998. Nonetheless, in the course of its various investigations, the NRC Staff acquired information bearing on the matter of death threats. The scope of NRC's investigations conducted for Assertion 2 was identical to that conducted for Assertion 1 and is described above.

In addition, the Utah Attorney General's Office had initiated a criminal investigation in early 1997 into the matter of the relationship (alleged bribery/extortion) between Mr. Larry F. Anderson, former Director of the Utah Division of Radiation Control and Mr. Khosrow B. Semnami, former President of Envirocare. This alleged bribery/extortion investigation was later assumed by the FBI. The FBI's investigation into this matter has resulted in a July 22, 1998 filing of a Cooperation Agreement between Mr. Semnani and the U.S. Attorney's Office. No information surfaced during the FBI investigation indicating that death threats had been made against either present or former employees by Mr. Semnani or other officers of Envirocare.

Based on the investigations of Envirocare that have been conducted by the NRC and the FBI, there has been no evidence uncovered indicating that any current or former Envirocare employee: (1) has received threats of financial harm or has felt threatened by Envirocare's employment contract nondisclosure covenant, or (2) fears for his/her life or the lives of his/her family as a result of threats received, either directly or indirectly, from any officer of Envirocare.

IV. CONCLUSION

On the basis of the above assessment, I have concluded that no substantial health and safety issues have been raised regarding Envirocare that would require initiation of the action requested by the NRDC. As explained above, the NRDC has not provided any specific information that would provide a basis for suspension of the Envirocare license. Furthermore, neither the investigations conducted independently by the NRC nor by the FBI have revealed the existence

of circumstances that would warrant immediate suspension of the Envirocare license. Accordingly, the Petitioner's request for action is denied.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 14th day of September 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 3) **October 23, 1998**

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

MEMORANDUM AND ORDER

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

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

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

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

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

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

Cite as 48 NRC 185 (1998) **CLI-98-21**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (DISMISSAL)

COMMISSION PROCEEDINGS: APPELLATE REVIEW

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

RULES OF PRACTICE: SCOPE OF PROCEEDING

LICENSE TERMINATION PLAN

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

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

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

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

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

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

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

RULES OF PRACTICE: APPELLATE REVIEW

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

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

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

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

LICENSE TERMINATION PLAN

RULES OF PRACTICE: SCOPE OF PROCEEDING

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

LICENSE TERMINATION PLAN

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

LICENSE TERMINATION PLAN

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

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

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

LICENSE TERMINATION PLAN

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

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

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

LICENSE TERMINATION PLAN

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

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

LICENSE TERMINATION PLAN

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

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

LICENSE TERMINATION PLAN

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

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

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

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

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

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

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

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

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

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

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

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

EVIDENCE: DUTY TO PROVIDE; EXPERT WITNESSES

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

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

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

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

TECHNICAL ISSUES DISCUSSED: ISFSI

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

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTIONS

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

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

MEMORANDUM AND ORDER

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

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

I. CRITERIA FOR STANDING AND PARTICIPATION

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

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

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

and also

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

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

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

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

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

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

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

II. BACKGROUND

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

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

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

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

(ii) The license termination plan must include ---

(A) A site characterization;

(B) Identification of remaining dismantlement activities;

(C) Plans for site remediation;

(D) Detailed plans for the final radiation survey;

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

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

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

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

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

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

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

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

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

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

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

III. THE BOARD'S ORDER DENYING STANDING AND PARTICIPATION

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

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

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

A. NECNP

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

B. CAN

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

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

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

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

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

C. FRPB

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

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

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

IV. ANALYSIS OF ARGUMENTS ON STANDING AND PARTICIPATION

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

A. FRPB

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

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

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

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

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

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

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

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

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

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

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

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

B. NECNP and CAN

1. Scope of This Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued)

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

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

2. NECNP's Standing

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

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

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

and *id.* at 37,377,

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *CAN's Standing*

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

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

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

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

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

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

4. Relief Requested by CAN and NECNP

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION AND ORDER

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

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

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

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

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

RULES OF PRACTICE: INTERLOCUTORY REVIEW

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

RULES OF PRACTICE: INTERLOCUTORY REVIEW

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

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

RULES OF PRACTICE: INTERLOCUTORY REVIEW

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

MEMORANDUM AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

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

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

Cite as 48 NRC 219 (1998) **LBP-98-24**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of **Docket Nos. 50-295-LA-2**
50-304-LA-2
(ASLBP No. 98-750-06-LA)

COMMONWEALTH EDISON COMPANY
(Zion Nuclear Power Station,
Units 1 and 2) **October 5, 1998**

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

RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS)

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

RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS)

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

MEMORANDUM AND ORDER
(Dismissing Intervention Petition)

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

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

I. BACKGROUND

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

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

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

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

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

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

II. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

10 C.F.R. § 2.105(a)(4)(i).

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

III. CONCLUSION

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

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

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 5, 1998

Cite as 48 NRC 226(1998) **LBP-98-25**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

October 8, 1998

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

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

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

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

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

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

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

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

It is therefore ORDERED:

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

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

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

3. This proceeding is hereby *terminated.*

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

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

Rockville, Maryland
October 8, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

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

SETTLEMENT AGREEMENT

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

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

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

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

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

The parties hereby agree to the following terms and conditions:

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

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

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

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

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

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

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

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

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

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

FOR MAGDY ELAMIR, M.D.	FOR THE NRC STAFF:
Thomas H. Lee, II, Esquire Counsel for Magdy Elamir, M.D.	Catherine L. Marco, Esquire Counsel for the NRC Staff
Magdy Elamir, M.D.	James Lieberman Director, Office of Enforcement Nuclear Regulatory Commission
Newark Medical Associates, Inc. by Dr. Magdy Elamir, President	

Dated this 1st day of October, 1998

Cite as 48 NRC 232 (1998) **LBP-98-26**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of **Docket Nos. 50-317-LR**
50-318-LR
(ASLBP No. 98-749-01-LR)

BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2) **October 16, 1998**

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

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

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

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

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

RULES OF PRACTICE: SCHEDULING (FILING OF CONTENTIONS)

LICENSING BOARD/PRESIDING OFFICER: AUTHORITY TO REGULATE PROCEEDINGS

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

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTION

LICENSING BOARD/PRESIDING OFFICER: REVIEW OF NRC STAFF ACTIONS

RULES OF PRACTICE: STAFF AUTHORITY

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

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

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

RULES OF PRACTICE: EXTENSIONS OF TIME (FILING CONTENTIONS)

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

ATOMIC ENERGY ACT: LICENSE REVIEW

LICENSE APPLICATION: AMENDMENT OR MODIFICATION

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

RULES OF PRACTICE: SCHEDULING (FILING OF CONTENTIONS)

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

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

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

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

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ANALYSIS

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

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

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

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

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

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

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

(Continued)

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

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

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

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

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

THE ATOMIC SAFETY AND
LICENSING BOARD[12]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 16, 1998

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

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

Cite as 48 NRC 245 (1998) **DD-98-10**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

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

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

I. INTRODUCTION

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

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

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

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

II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

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

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 40-8681-MLA-4**

INTERNATIONAL URANIUM (USA) CORPORATION
(Receipt of Material from Tonawanda, New York) **November 24, 1998**

The Commission reviews an Atomic Safety and Licensing Board decision that denied a request for hearing and leave to challenge a materials license amendment. The Commission affirms the Board's finding that the Petitioner lacks standing to intervene. The Petitioner's alleged economic interest as a ''competitor'' in the marketplace — an interest unrelated to any radiological harm — did not fall within the zone of interests of the Atomic Energy Act, the Commission found.

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTERESTS)

Merely because one may be injured by a particular agency action does not necessarily mean one is within the zone of interests to be protected by a given statute. ''Competitive'' harm, by itself, is not enough to satisfy both the ''injury-in-fact'' and ''zone of interests'' tests of standing.

RULES OF PRACTICE: STANDING TO INTERVENE (NEPA)

It is well established that a petitioner who suffers only economic injury lacks standing to bring a NEPA-based challenge to agency action.

RULES OF PRACTICE: STANDING TO INTERVENE

In the end, our analysis of judicial standing cases seeks simply to determine whether a petitioner's particular asserted ''interest'' provides an appropriate basis under section 189a of the AEA for triggering an adjudicatory hearing and permitting a petitioner to intervene as a party to such a hearing. The NRC is not an article III court, and thus, although we customarily look to and apply judicial concepts of standing, we are not bound to do so. Our principal concern is to ensure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA, our governing statute.

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTERESTS)

It has long been our practice as an agency to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm. Competitors, whose only ''interest'' is lost business opportunities, could readily burden our adjudicatory process with open-ended allegations designed not to advance public health and safety, but as a dilatory tactic to interfere with and impose costs upon a competitor.

MEMORANDUM AND ORDER

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205, Envirocare of Utah, Inc., has appealed an August 19, 1998, Presiding Officer's decision (unpublished), which rejected Envirocare's request for a hearing and leave to intervene in this license amendment proceeding. The Presiding Officer found that Envirocare lacked standing to challenge the license amendment. International Uranium (USA) Corporation (''IUSA'') and the NRC Staff support the Presiding Officer's decision. We affirm the decision.

II. BACKGROUND

For the second time in recent months, Envirocare is before the Commission seeking to challenge a license amendment that will allow a competitor, IUSA in this instance, to process radioactive waste. Envirocare argues that it will suffer a significant disadvantage in the marketplace from the NRC's licensing of IUSA because the NRC Staff is imposing more lenient and less costly regulatory requirements on IUSA than it imposed on Envirocare. According to Envirocare, its potential economic loss from competition with IUSA gives it an ''interest [that] may be affected by the proceeding'' and thus triggers its right to demand a hearing under section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a), on safety and environmental issues. It makes no difference, according to Envirocare, that its only harm is economic and that it alleges no radiological or environmental harm to itself.

Envirocare raised the same ''competitor injury'' arguments in a recent materials license amendment proceeding involving the Quivira Mining Company. *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998). There, both the Presiding Officer and, on review, the Commission, found that neither the National Environmental Policy Act (NEPA) nor the AEA provides statutory protection for purely economic harms unrelated to the potential radiological or environmental effects of the licensing action. The Commission first pointed to longstanding judicial precedent under NEPA and concluded that ''[a]n interest in 'economic well-being vis-a-vis [ ] competitors is clearly not within the zone of interests' of NEPA, which was 'not designed to prevent the loss of profits.' '' 48 NRC at 8 (citations omitted); *see also generally id.* at 8-10 (discussing standing under NEPA). The Commission next turned to the AEA. While acknowledging that the question whether pecuniary ''competitor'' injuries fall within the AEA zone of interests presented a more difficult issue, indeed one of first impression, the Commission ultimately held that a ''mere claim of 'competitor' injury, unlinked to a claim of radiological injury, is not among those interests arguably protected or regulated under the Atomic Energy Act.'' *Id.* at 10.

In this proceeding, the Presiding Officer found Envirocare's claims of standing ''on all fours'' with its unsuccessful standing claims in the earlier *Quivira* proceeding, and thus summarily dismissed Envirocare's request for hearing. To accord Envirocare standing, the Presiding Officer stated, ''would give nuclear facility or materials competitors a vastly expanded right to sue even for alleged harms that fall outside the 'zone of interests' of either the National Environmental Policy Act or the Atomic Energy Act.'' Presiding Officer's Memorandum and Order (Aug. 19, 1998) at 2 (unpublished).

III. ANALYSIS

On appeal, Envirocare's principal argument is that the Presiding Officer improperly relied upon the Commission's decision in *Quivira*. Envirocare submits that in *Quivira* the Commission ''failed to recognize the significance'' of the Supreme Court's recent ''competitor standing'' ruling in *National Credit Union Administration v. National Bank & Trust Co.,* 118 S. Ct. 927 (1998), ''and thus erred in concluding that Envirocare's interests do not fall within the zone of interests of either NEPA or the AEA.'' Envirocare Appeal Brief at 2. We cannot agree. When we decided *Quivira* we were fully aware of *National Credit Union* — indeed our decision discusses it at length (48 NRC at 10-12) — and concluded nonetheless that Envirocare did not allege the kind of ''interest'' necessary to satisfy the judicial ''zone of interests'' test or to gain admission into our proceedings. For the reasons given in *Quivira*, and for the reasons below, we adhere to our original view.

Envirocare's comparison of our case to *National Credit Union* does not survive scrutiny. Envirocare correctly points out that *National Credit Union* recognized the standing of banks — competitors of credit unions — to challenge an interpretation of the Federal Credit Union Act, even though there was no evidence of specific congressional intent to protect banks or their ''competitor'' interests. But the Court did not hold that the banks had standing simply on account of their status as ''competitors'' of credit unions. Significantly, the Court required the banks to be ''more than merely incidental beneficiaries'' of the statute's ''effects on competition.'' 118 S. Ct. at 936 n.6. Standing, the Court emphasized, requires more than ''merely . . . an interest in enforcing the statute in question.'' *Id.*

National Credit Union explicitly hinged upon the Court's conclusion that the banks ''possess[ed] an interest that is 'arguably . . . to be protected' '' by the credit union statute. *Id.* at 938. That statute ''expressly'' sought to keep credit unions from an unlimited expansion of their customer base, an interest the Court deemed ''unmistakab[ly] link[ed]'' to the banks' competitor interest. *Id.* at 935-36. Thus, the banks' particular ''interest in limiting the markets that credit unions can serve [fell] 'arguably within the zone of interests to be protected' '' by the statute. *Id.* at 938. In short, the Court found that one of the statute's cognizable interests — keeping federal credit union membership restricted — was ''precisely'' the interest of the competitor banks that competed with credit unions for customers. *Id.* at 936.

Envirocare argues that ''just as the Banks ha[d] an interest in limiting the markets that credit unions can serve, so does Envirocare have an interest in limiting the markets that *Quivira* [and presumably, IUSA], can serve.'' Envirocare's Amendment to Its Request for Hearing (Aug. 4, 1998) at 7. This argument focuses on the claimed analogy between Envirocare's ''competitor''

interest and the ''competitor'' interest of the banks. But Envirocare overlooks the crucial point that the *statute* in *National Credit Union* explicitly *sought to limit the credit union market* by restricting the credit unions' available customer base. It was this statutory limitation on customer base that underpinned the banks' standing, not simply their obvious economic interest in limiting their competitors' market.

National Credit Union thus falls directly in line with prior Supreme Court cases finding ''competitor'' standing, all of which ''have been rooted in some applicable statutory provision whose clear intent or effect is to restrict competition.'' *Quivira*, 48 NRC at 12; *see also Bennett v. Spear,* 117 S. Ct. 1154, 1167 (1997). The same is true of the few courts of appeals cases on ''competitor standing'' decided thus far in the wake of *National Credit Union*. In *MOVA Pharmaceutical Corp. v. Shalala,* for instance, the court found that a pioneer drug company's interest in limiting additional competition was '' 'by its very nature' linked with the [applicable] statute's goal of limiting competition.'' 140 F.3d 1060, 1076 (D.C. Cir. 1998) (citing and following *National Credit Union,* 118 S. Ct. at 935 n.6). *See also Louisiana Energy & Power Authority v. FERC,* 141 F.3d 364, 367-68 n.5 (D.C. Cir. 1998). In our case, by contrast, neither NEPA nor the AEA contains a remotely similar market limitation provision upon which competitor standing may rest.[1]

Envirocare urges us to read *National Credit Union* broadly to hold that the banks had standing simply because their competitive interests were ''affected'' by the credit union statute and the National Credit Union Administration's interpretation of it. *See* Envirocare Appeal Brief at 8; Envirocare's Amended Request for Hearing (Aug. 4, 1998) at 10. We find no support, however, for the view that petitioners — be they competitors or not — must be accorded standing and permitted to challenge agency licensing decisions simply because they might be ''affected.'' Merely because one may be injured by a particular agency action ''does not necessarily mean one is within the zone of *interests to be protected by a given statute.*'' *Air Courier Conference of America v. American Postal Workers Union,* 498 U.S. 517, 524 (1991) (emphasis added).

[1] Envirocare maintains that its intervention in our proceeding would generally promote the goals of NEPA and the AEA because the NRC's ''licensing requirements . . . constitute a classic example of a regulatory scheme for limiting entry into a market,'' a scheme that, in Envirocare's view, would only benefit by having competitors participate in and oversee NRC determinations of who may ''enter'' the market. *See* Envirocare Appeal Brief at 10-11. In *Hazardous Waste Treatment Council v. EPA,* 861 F.2d 277, 284 (D.C. Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989), however, the D.C. Circuit rejected virtually the same argument. There, plaintiffs contended that an environmental protection statute (RCRA) amounted to an ''entry-restricting'' statute by acting to ''exclud[e] from the market providers of less excellent treatment services,'' a goal that the competitor firms claimed they would help further by their lawsuit. But ''any pecuniary beneficiary of a regulatory program could so characterize it,'' said the court, adding that ''to accept [such a] characterization for standing would eliminate the prudential standing requirement.'' 861 F.2d at 284. Like RCRA, the AEA and NEPA have nothing to do with limiting markets or customer access and cannot be viewed as ''entry-restricting'' statutes — else all meaning be drained from the concept.

It is well established, for example, that a petitioner who suffers only economic injury lacks standing to bring a NEPA-based challenge to agency action. 48 NRC at 8-10 (referencing cases). NEPA's purpose, the courts have said, is to protect the environment, ''not the economic interests of those adversely affected by agency decisions.'' *Id.* at 8. NEPA's ''rather sweeping list of interests . . . do not include purely monetary interests, such as the competitive effect that a . . . project might have on plaintiff's commercial enterprise.'' *Mountain States Legal Foundation v. Glickman,* 92 F.3d 1228, 1236 (D.C. Cir. 1996).

If NEPA's ''sweeping'' list of interests cannot be understood to include purely monetary concerns, neither should the AEA's interests, which focus not on economics or markets (except in limited areas not pertinent here), but on the public's radiological health and safety, an area closely akin to NEPA's environmental concerns. Environmental litigants whose sole motivation is ''economic self-interest and welfare are *singularly inappropriate* parties to be entrusted with the responsibility of asserting the public's environmental interest.'' *Churchill Truck Lines, Inc. v. United States,* 533 F.2d 411, 416 (8th Cir. 1976) (emphasis added). *See also Quivira,* 48 NRC at 13 (discussing cases rejecting standing of parties seeking to impose higher costs on competitors under RCRA).

Envirocare does not purport to claim any injury other than competitive harm, but argues such injury is enough to satisfy both the ''injury-in-fact'' and the ''zone-of-interests'' tests. Indeed, like Justice O'Connor in dissent, Envirocare suggests that *National Credit Union* did away with or ''all but eviscerate[d] the zone of interests' requirement.'' Envirocare Appeal Brief at 9, citing 118 S. Ct. at 940 (O'Connor, J. dissenting). On that view, actual injury from agency action automatically falls within the zone of interests of the agency's enabling legislation. This seems an unlikely result to us. Indeed, the *National Credit Union* majority explicitly rejected Justice O'Connor's view that it had eliminated the zone-of-interests inquiry altogether. *See* 118 S. Ct. at 936 n.7. To hold otherwise would conflate two standing tests historically understood as separate — ''injury-in-fact'' and ''zone of interests'' — and would render the zone-of-interests inquiry entirely meaningless. *Liquid Carbonic Industries v. FERC,* 29 F.3d 697, 704 (D.C. Cir. 1994).

In the end, of course, our analysis of judicial standing cases seeks simply to determine whether a petitioner's particular asserted ''interest'' provides an appropriate basis under section 189a of the AEA for triggering an adjudicatory hearing and permitting a petitioner to intervene as a party to such a hearing. As the Commission pointed out in *Quivira*, the NRC is not an article III court, and thus, although we customarily look to and apply judicial concepts of standing, we are not bound to do so. 48 NRC at 6 n.2.

Our principal concern is to ensure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA, our governing statute. Thus, even if we have misapprehended the judicial zone-of-interests

inquiry, and Envirocare and Justice O'Connor prove correct in their assessment that the zone-of-interests test as applied has been so diluted as to be virtually insignificant, our understanding of the AEA requires us to insist that a competitor's pecuniary aim of imposing additional regulatory restrictions or burdens on fellow market participants does not fall within those ''interests'' that trigger a right to hearing and intervention under section 189a. Quite apart from judicial standing concepts, therefore, we would not recognize purely economic concerns like Envirocare's as comprehended by section 189a's ''interest'' requirement.

The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. The appropriate party to raise safety objections about a specific licensing action is the party who, because of the licensing, may face some radiological harm (or the party who seeks the license). As such, it has long been our practice as an agency to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm. *See, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). Competitors, though, whose only ''interest'' is lost business opportunities, could readily burden our adjudicatory process with open-ended allegations designed not to advance public health and safety but as a dilatory tactic to interfere with and impose costs upon a competitor. Such an abuse of our hearing process would significantly divert limited agency resources, which ought to be squarely — genuinely — focused upon health and security concerns.

In our view, Envirocare's interests closely parallel those found insufficient for judicial standing in *Hazardous Waste* (*see* note 1, supra):

> Petitioner wants to increase the regulatory burden on others. Its interest lies in the competitive advantage that its membership might secure if the government imposed higher costs on other firms. . . . [W]e see no special reason to suppose that Congress might have thought them suitable advocates of the environmental interests underlying the statute.

861 F.2d at 285. We think *Hazardous Waste*'s view of judicial ''zone of interests'' standing remains sound even after *National Credit Union*. But we also see in *Hazardous Waste* a useful test for applying section 189a's ''interest'' requirement, even if our understanding of judicial standing proves wrong.

By rejecting Envirocare's intervention petition, we are not simply turning a blind eye to any possibility that the IUSA license amendment may, on the merits, have some safety or environmentally oriented deficiency. Indeed, we have an ongoing adjudicatory proceeding on the IUSA license amendment. The intervenor is the State of Utah, a party whose combined radiological, environmental, and economic interests render it a suitable petitioner to challenge the licensing action. For those individuals who have legitimate safety concerns, but who either do not wish an adjudicatory hearing or do not meet section 189a

standards for intervention, the Commission makes available the 10 C.F.R. § 2.206 petition process. Accordingly, Envirocare may and should utilize the petition process to detail any of its safety concerns about the IUSA amendment. Where appropriate, Envirocare also is free to participate in the ongoing adjudication as *amicus curiae.*

IV. CONCLUSION AND ORDER

For the reasons stated in this Decision, the Commission hereby *affirms* the Presiding Officer's August 19, 1998 order.

It is so ORDERED.

For the Commission[2]

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of November 1998.

[2] Commissioner Diaz was not available for the affirmation of this Order. Had he been present, he would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-443-LA**
50-443-LA-2

NORTH ATLANTIC ENERGY SERVICE CORPORATION
(Seabrook Station, Unit 1) **November 24, 1998**

The Commission grants North Atlantic Energy Service Corporation's motion to withdraw its proposed amendments for the Seabrook Station and dismisses the related adjudicatory proceedings as moot. We also vacate the Atomic Safety and Licensing Board's Memorandum and Order, LBP-98-23, 48 NRC 157 (1998), which had not been reviewed at the time the case became moot.

RULES OF PRACTICE: VACATUR

The Commission's customary practice is to vacate board decisions that have not been reviewed at the time the case becomes moot. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996).

MEMORANDUM AND ORDER

The North Atlantic Energy Services Corporation (NAESCO) has filed a motion to withdraw two license amendment applications and to terminate related

adjudicatory proceedings. The amendment applications were part of a series of proposed amendments to change the Technical Specifications for the Seabrook Nuclear Station to accommodate an extended fuel cycle. NAESCO is requesting withdrawal of the applications because it has revised its schedule to conduct its next refueling outage at the Seabrook Station consistent with the schedule in the existing Technical Specifications.

The adjudicatory proceedings were initiated by two intervention Petitioners, the Seacoast Anti-Pollution League (SAPL) and the New England Coalition on Nuclear Pollution (NECNP). In one proceeding, the Atomic Safety and Licensing Board granted intervention to SAPL and denied intervention to NECNP. LBP-98-23, 48 NRC 157 (1998). The Board also requested the parties to provide further information on SAPL's argument against ''segmentation,'' i.e., its claim that license amendment applicants should not be permitted to effectuate a major operational change requiring several license amendments through separate amendment requests rather than through a single request. SAPL reasoned that without reviewing the change as a whole, the NRC may be unable to assess accurately the safety implications of the overall change. *Id.* at 168. The Board ordered the second Seabrook amendment proceeding held in abeyance pending resolution of the ''segmentation'' question.

Before the Board reached a decision on the admissibility of the ''segmentation'' issue, the Commission exercised its inherent supervisory authority over the conduct of adjudicatory proceedings to take *sua sponte* review. *See* CLI-98-18, 48 NRC 129 (1998). The Commission stated that the segmentation issue is ''novel and has broad implications for this and other proceedings.'' The Commission set a briefing schedule and held all further proceedings before the Board in abeyance. Subsequently, at the parties' joint request, the Commission deferred the briefing schedule to accommodate settlement negotiations. However, no settlement was reached. Instead, NAESCO filed the present motion to withdraw its amendment applications and to terminate adjudicatory proceedings.

SAPL and NECNP acknowledge that NAESCO's decision to withdraw the applications would ''appear to moot the need for any further proceeding.'' Response to Motion by NAESCO to Withdraw Applications and to Terminate Proceeding at 2 (Oct. 26, 1998).[1] Nevertheless, they ''oppose mooting the proceeding,'' unless the Commission institutes a process to resolve the ''segmentation'' issue on a generic basis and affords meaningful public participation. *Id.* at 3.

[1] On October 30, 1998, NAESCO filed a Motion for Leave to File Reply to SAPL and NECNP's Response. That motion is hereby granted.

A moot adjudicatory proceeding is clearly not the forum to decide a novel issue like ''segmentation.''[2] As SAPL and NECNP themselves recognize, NAESCO's abandonment of its amendment requests has rendered the current adjudications moot. Based on the present record, we are disinclined to commit scarce Commission resources to the initiation of a public process to consider the segmentation issue on a generic basis outside the adjudicatory setting. Although a final adjudicatory decision on segmentation might have proved a significant adjudicatory precedent, the legal questions surrounding segmentation remain inchoate. The parties had not yet briefed the issue before the Commission at the time NAESCO decided to abandon its amendment requests, and neither the Board nor the Commission had considered whether ''segmentation'' was even an appropriate matter for litigation. We see no harm to SAPL or NECNP from our decision to terminate formal consideration of the segmentation issue. They remain free to challenge any future licensing action that they deem to involve segmentation, just as they did here.

In conclusion, we grant NAESCO's motion to withdraw its proposed amendments and dismiss the related adjudicatory proceedings as moot. We also follow our customary practice and ''wipe the slate clean'' by vacating the Board decision, LBP-98-23, that we had not yet reviewed at the time the case became moot. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996).

The proceedings are hereby terminated.

IT IS SO ORDERED.

For the Commission[3]

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of November 1998.

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[2] Among other policy factors, we are reluctant to ask parties to a moot proceeding to incur the expense and inconvenience of preparing briefs and arguments.

[3] Commissioner Diaz was not available for the affirmation of this Order. Had he been present, he would have affirmed the Order.

Cite as 48 NRC 271 (1998) **LBP-98-27**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of **Docket Nos. 50-295-LA**
50-304-LA
(ASLBP No. 98-744-04-LA)

COMMONWEALTH EDISON COMPANY
(Zion Nuclear Power Station,
Units 1 and 2) **November 5, 1998**

In this proceeding on the license amendment application of Commonwealth Edison Company, the Licensing Board concludes that the Petitioner, Edwin D. Dienethal, lacks standing to intervene.

RULES OF PRACTICE: STANDING TO INTERVENE

In ascertaining whether a petitioner has pled a sufficient ''interest'' within the meaning of the Atomic Energy Act and the Commission's regulations to intervene as of right in a licensing proceeding, the Commission years ago held that contemporaneous judicial concepts of standing are to be applied. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing the petitioner must state a concrete and particularized injury, i.e., an injury in fact, that is fairly traceable to the challenged licensing

action and likely to be redressed by a favorable decision. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998).

RULES OF PRACTICE: STANDING TO INTERVENE

The asserted injury may be either an actual one or harm that is threatened in the future, but the injury must be to an interest that is arguably within the zone of interests protected by the statutes governing NRC proceedings — the Atomic Energy Act or the National Environmental Policy Act of 1969. *Yankee Atomic,* CLI-98-21, 48 NRC at 195-96. *Quivira,* CLI-98-11, 48 NRC at 6.

RULES OF PRACTICE: STANDING TO INTERVENE

In Commission license amendment proceedings — in contrast to proceedings for reactor construction permits or operating licenses — the presumption found in agency precedents that confers standing, without more, on a petitioner who resides or otherwise conducts activities in the vicinity of a nuclear power plant applies only if the challenged license amendments present an ''obvious potential for offsite consequences.'' *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989).

MEMORANDUM AND ORDER
(Resolving Standing Issue)

The Petitioner, Edwin D. Dienethal, seeks to intervene in this proceeding involving the license amendment application of the Commonwealth Edison Company (''Applicant'') for its Zion Nuclear Power Station, Units 1 and 2, in Lake County, Illinois. In response to the Commission's notice of opportunity for hearing, *see* 63 Fed. Reg. 25,101, 25,105-06 (1998), the Petitioner timely filed a petition to intervene and an amended petition opposing the requested license amendments. The Applicant and the NRC Staff both challenge Mr. Dienethal's standing to intervene.

For the reasons set forth below, we conclude that the Petitioner has failed to establish his standing to intervene in this license amendment proceeding.

I. BACKGROUND

In early 1998, the Commonwealth Edison Company decided to close the Zion Nuclear Power Station. Thus, both Zion units are now defueled and permanently shut down, although neither unit has yet been decommissioned. The Applicant seeks the requested license amendments in order to facilitate activities at the now shutdown facility. According to the Commission's hearing notice, ''[t]he proposed amendments would restore the Zion Custom Technical Specifications (CTS) that had been replaced with Improved Technical Specification[s] [(ITS)] by a previous amendment and would reinstate License Conditions that were deleted by that previous amendment.'' *Id.* at 25,105. The Applicant's no significant hazards consideration analysis included in the Commission's hearing notice states that the ITS were never implemented at the facility so the CTS have remained as the binding technical specifications at Zion. Further, that analysis explains that the requested amendments also would restore to the Zion operating licenses the five license conditions that previously had been transferred in the form of requirements to other licensing documents as part of the amendment process for adopting the never-implemented ITS. *Id.*

Additionally, the Commission's hearing notice states that ''[t]he proposed amendment[s] would also modify the CTS to allow the use of Certified Fuel Handlers to satisfy shift staffing requirements and would change management titles and responsibilities to reflect the permanently shutdown organization.'' *Id.* In this regard, the Applicant's analysis indicates that the changes to the CTS would reduce shift staffing numbers and crew composition as well as modify language implying the units were operational. *Id.* at 25,106.

In his intervention petition opposing the Commonwealth Edison Company's license amendment application, Mr. Dienethal asserts that he resides in Kenosha, Wisconsin, within 50 miles of the Zion Nuclear Station and that the Applicant's facility directly impacts his health and safety and the health and safety of his family. Mr. Dienethal's amended petition and an accompanying affidavit explain that he resides with his wife and two minor children 10.4 driving miles, or 8.5 to 9 miles as the crow flies, from the Zion plant. The pleadings state that the Petitioner and his family boat, fish, swim, and play water sports in Lake Michigan where the Applicant's facility discharges effluents and wastes. The amended petition and affidavit also state that the Dienethal family frequently uses a bike trail that passes directly in front of the plant in the town of Zion, Illinois, where the Applicant's facility is located and that the Petitioner also plays golf and frequents a park in the town. In the amended pleadings, Mr. Dienethal further asserts that his children play soccer once a week, 6 months of the year just 9 miles from the Zion plant and that he and his wife attend each of their children's soccer matches.

In further cataloguing his activities near the Zion plant, the intervention pleadings indicate that the school the Dienethal children attend is located 12 miles from the Applicant's facility and the Petitioner and his wife share the task of driving their children to and from school. The amended petition states that the Petitioner and his wife also travel within 1 mile of the nuclear plant three or four times a week to shop, buy gasoline, visit the post office, or attend movies and that Mr. Dienethal visits on a regular basis an essential business supplier located 1 mile from the plant. Additionally, the pleadings assert that many of the roads used by the Petitioner in his business travel are the same ones used by the Applicant to transport radioactive waste from the Zion plant. Finally, the intervention filings claim that the food and water the Petitioner and his family consume are affected by the Zion plant because Mr. Dienethal purchases food from farms located within 10 miles of the plant and that his drinking water, as well as the fish he catches and eats, comes from Lake Michigan where the Applicant dumps waste from the Zion facility.

According to the amended petition and accompanying affidavit, the various activities of the Petitioner and his family in the vicinity of the Zion plant place them at risk of future negative health effects directly traceable to the Applicant's facility. Specifically, paragraphs 19 and 20 of Mr. Dienethal's affidavit state:

> 19. I have specific concerns about the injuries that could result to my family and the local communities that derive from the proposed amendments by Commonwealth Edison. . . . I believe that the proposed amendment presents many threats to the public health and safety, harm to the environment, and harm to the health of employees at Plant Zion. These injuries would result from the structural and functional changes in Plant Zion proposed by the amendment or if any mishap should occur while Plant Zion is functioning under the proposed changes of the amendment.
>
> 20. [I]f Plant Zion functions under the proposed amendments, the potential injuries to me and my family, Plant Zion workers, the community, and the local environment include, but are not limited to: 1. LOCA (Los[s] of Coolant Accident), 2. radiological concerns, 3. unsafe levels of radiation for the employees at the plant and the general public, 4. undetectable radiation contamination by employees, 5. contamination of the local community and the environment, 6. increase risk of accident at plant Zion, and 7. contamination of Lake Michigan.

Finally, the amended petition asserts that the challenged amendments pose a risk to the value of Mr. Dienethal's real property as well as to the property values of the surrounding community.

II. ANALYSIS

A petitioner's right to participate in a Commission reactor operating license amendment proceeding flows from section 189a of the Atomic Energy Act,

as amended. In pertinent part, that section provides that ''[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license. . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.'' 42 U.S.C. § 2239(a)(1)(A). Parroting the language of section 189a, the Commission's regulations provide that ''[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene.'' 10 C.F.R. § 2.714(a)(1). The regulations further specify that ''[t]he petition shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene.'' 10 C.F.R. § 2.714(a)(2). In ascertaining whether a petitioner has pled a sufficient ''interest'' within the meaning of the Atomic Energy Act and the Commission's regulations to intervene as of right in a licensing proceeding, the Commission years ago held that contemporaneous judicial concepts of standing are to be applied. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

According to the Commission, those judicial principles require that to establish standing the petitioner must state a concrete and particularized injury, i.e., an injury in fact, that is fairly traceable to the challenged licensing action and likely to be redressed by a favorable decision. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). The asserted injury may be either an actual one or harm that is threatened in the future, but the injury must be to an interest that is arguably within the zone of interests protected by the statutes governing NRC proceedings — the Atomic Energy Act or the National Environmental Policy Act of 1969. *Yankee Atomic,* CLI-98-21, 48 NRC at 195-96; *Quivira,* CLI-98-11, 48 NRC at 6.

In both his initial intervention petition and his amended petition, Mr. Dienethal explicitly states that he seeks to intervene in the license amendment proceeding and his intervention petitions only refer to a singular petitioner seeking intervention. Therefore, even though he also asserts various injuries to his wife, family, employees at the Applicant's facility, and the community at large, Mr. Dienethal is the sole petitioner before us. Thus, it is only Mr. Dienethal's standing that is determinative of his right to intervene in this proceeding.

The gist of the Petitioner's standing claim is that his many activities in the vicinity of the Zion plant place him within a zone of harm of possible future negative health effects from the Applicant's facility. The intervention pleadings nowhere explicitly state that a release of radioactive fission products from the two-unit Zion Nuclear Power Station into the environment where the Petitioner's

activities take place will negatively impact his health, safety, and property values, but that fact is clearly implicit in the pleadings. Thus, the Petitioner's long list of activities that, inter alia, regularly place him as close as 1 mile to the Zion plant throughout the year provides an adequate statement of future harm from the Applicant's facility to meet the standing requirement of pleading a threatened injury in fact.

The pleading of an injury in fact, however, is only one element of the requirements for establishing the Petitioner's standing. Mr. Dienethal must also demonstrate that the claimed negative health effects and property value diminution from the offsite release of radioactive fission products at the Zion plants is fairly traceable to the amendments that the Applicant seeks. Stated otherwise, the Petitioner must show the causal link between his asserted harm and the proposed license amendments. In this regard, the Commission has indicated that ''[s]uch a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible.'' *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Here, as the Applicant and the Staff correctly argue in opposing the Petitioner's standing, Mr. Dienethal has failed to establish a plausible chain of causation between his alleged injury and the Applicant's proposed license amendments.

Contrary to Mr. Dienethal's apparent belief, in Commission license amendment proceedings — in contrast to proceedings for reactor construction permits or operating licenses — the presumption found in agency precedents that confers standing, without more, on a petitioner who resides or otherwise conducts activities in the vicinity of a nuclear power plant applies only if the challenged license amendments present an ''obvious potential for offsite consequences.'' *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). When, as here, the Zion reactors are permanently shut down and defueled, it cannot reasonably be concluded that the license amendments of the type at issue in this proceeding create an obvious potential for offsite consequences. Therefore, the Petitioner ''must allege some specific 'injury in fact' that will result from the action taken.'' *Id.* Yet, even construing the intervention pleadings most favorably for the Petitioner, as Commission precedent requires, *Georgia Tech,* CLI-95-12, 42 NRC at 115, Mr. Dienethal's pleadings fall far short of this required demonstration of causation.

The challenged amendments restore the Zion CTS that had been replaced by the never-implemented ITS and reinstate, as part of the CTS, five license conditions that had been changed to requirements and added to other licensing documents as part of the amendment process adopting the ITS. Because the ITS had never been implemented at the time the Applicant permanently shut down and defueled the Zion plants, the instant license amendments merely restore the Applicant's facility to the status it had while operating. In other words

with respect to the technical specifications for the facility, these amendments do nothing more that restore the status quo to the Zion plants. Nowhere in his intervention pleadings, however, does the Petitioner explain, as he must in order to establish his standing to intervene, how these amendments could plausibly lead to the offsite release of radioactive fission products from either of the shutdown and defueled Zion reactors.

The challenged amendments also modify the Zion CTS to allow the use of Certified Fuel Handlers to satisfy shift staffing requirements, change management titles and responsibilities to reflect the permanently shutdown organization, and alter certain language in the technical specifications to remove any implication that the Zion units are operational. Once again, however, the Petitioner's pleadings fail to explain adequately how these amendments could plausibly lead to the offsite release of radioactivity from reactors that are permanently shut down and defueled so that the spectrum of accidents with offsite consequences is vastly diminished.

Rather than explain the process by which the proposed license amendments could cause him future negative health effects and diminish the value of his property, the Petitioner in his amended petition and accompanying affidavit merely lists seven items that he claims increase his risk of injury should the amendments be adopted. First, the Petitioner states that his risk of injury from the proposed amendments is increased because of loss of coolant accidents. Yet loss of coolant accidents can only occur in operating reactors, not reactors that are permanently shut down, defueled, and depressurized. The Petitioner also claims the challenged amendments increase the risk of accidents at the Zion plants. But the type of accident that credibly could occur in permanently shutdown and defueled reactors from these license amendments is anything but self-evident. Nowhere does the Petitioner set forth a plausible or credible causal chain for any such accident or explain how the risk of such an accident is increased by the Applicant's proposed amendments. Similarly, the Petitioner lists radiological concerns and various on- and offsite radioactive contamination as increasing his risk of injury from these amendments. But the Petitioner's pleadings are silent with respect to any plausible chain of causation for such radioactive contamination resulting from the challenged amendments.

In short, the Petitioner's unsubstantiated allegations simply fail to demonstrate a plausible nexus between the challenged license amendments and Mr. Dienethal's asserted harm. Because Mr. Dienethal's intervention pleadings fail to establish the causation element essential to establish standing, his petition

fails to demonstrate that the Petitioner has standing to intervene in this license amendment proceeding.[1]

III. CONCLUSION

For the foregoing reasons, we find that the Petitioner, Edwin D. Dienethal, lacks sufficient interest within the meaning of section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), and section 2.714(a) of the Commission's regulations, 10 C.F.R. § 2.714(a), to intervene in this license amendment proceeding. Accordingly, the Petitioner's intervention petition is denied and the proceeding is terminated.

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

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 5, 1998

[1] Mr. Dienethal's argument that he has standing to intervene based upon his allegations that the Applicant lacks the necessary character and competence to manage the Zion facility also is without merit. Contrary to the Petitioner's assertions, this license amendment proceeding does not concern the Applicant's failure to manage properly the Zion plants. Rather, the scope of the proceeding is defined by the substance of the license amendments on which the notice for opportunity for hearing is based. Here, the challenged license amendments do not implicate the Applicant's character and competence and the Petitioner's various allegations about the Applicant's past management practices are wholly outside the scope of the proceeding. Moreover, in order to benefit from the presumption that residency and activities near a nuclear power plant, without more, confer standing upon a petitioner, the challenged license amendments must present an obvious potential for offsite consequences. *St. Lucie,* CLI-89-21, 30 NRC at 329-30. It is not, as Mr. Dienethal would have it, the Petitioner's own allegations about the offsite consequences of the Applicant's conduct that makes the presumption applicable.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of **Docket No. 50-423-LA**
(ASLBP No. 98-740-02-LA)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 3) **November 12, 1998**

In this license amendment proceeding, the Licensing Board finds that none of the proffered contentions of the Petitioner, Citizens Regulatory Commission, meet the regulatory requirements for admission so the Petitioner's intervention petition must be denied.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A proffered contention that, even if proven, would be of no consequence because it would not entitle the petitioner to any relief must also be dismissed. 10 C.F.R. § 2.714(d)(2)(ii).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A petitioner's proffered contentions must be confined to the subjects delineated by the hearing notice and contentions concerning matters outside that defined scope cannot be admitted. *Public Service Co. of Indiana* (Marble Hill

Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

MEMORANDUM AND ORDER
(Ruling on Contentions)

The Licensing Board held in LBP-98-20, 48 NRC 87 (1998), that the Petitioner, Citizens Regulatory Commission (''CRC''), had standing to intervene in this license amendment proceeding. The Commission's Rules of Practice also require, however, that in order to be admitted as a party to the proceeding CRC must file at least one admissible contention. *See* 10 C.F.R. § 2.714(b)(1). In a timely filed supplement to its intervention petition, CRC has proffered two contentions seeking to satisfy the Commission's contention requirement.

The Applicant, Northeast Nuclear Energy Company, and the NRC Staff oppose the admission of CRC's contentions. Because we find that CRC's proffered contentions do not satisfy the regulatory requirements for admission, we must deny CRC's intervention petition.

I. BACKGROUND

The background of this license amendment proceeding, in which the NRC Staff has made a final no significant hazards consideration determination, is detailed in LBP-98-20 and need not be repeated fully here. It suffices to note that the Applicant seeks an amendment to the licensing design basis of its Millstone Unit 3 to eliminate the requirement that the recirculation spray system (''RSS'') inject directly into the reactor coolant system following a design basis accident. The elimination of the design basis direct injection flow path involves no physical modifications of the RSS. Also, the operability of the affected valves for the direct injection alignments remains unchanged and these paths are still available for contingencies beyond the design basis.

The change in function of the RSS that is the subject of the instant license amendment application was actually made by the Applicant in 1986 pursuant to 10 C.F.R. § 50.59. That provision permits a licensee to make such a change without an amendment if it does not involve a revision of the facility's technical specifications or an unreviewed safety question. A recent restart review revealed, however, that the change should not have been made under section 50.59 because it in fact involved an unreviewed safety question. The Applicant seeks the license amendment to rectify its earlier error.

As stated in LBP-98-20, 48 NRC at 89:

> The original 1986 change was made because during preoperational testing in 1985 excessive tube vibration in the RSS heat exchangers occurred during certain modes of operation. The Applicant determined that excessive tube vibration could occur when heat exchanger flows exceeded 4600 gallons per minute. Because its system analysis demonstrated that direct injection was not required for the recirculation phase to ensure minimum flow for core cooling, the Applicant eliminated RSS direct injection thereby reducing heat exchanger flow and tube vibration. The Applicant also revised its emergency operating procedures to reflect the functional change in the RSS, although direct injection procedures were retained as a contingency action.

II. CRC'S CONTENTIONS

CRC's first contention states:

> The license amendment assumes a certain proportion of the recirculation spray system (RSS) coolant will supply the containment spray ring during the LOCA [loss of coolant accident] design basis accident; however, since the systems have not been tested, it has not been determined that they will be functional, that is, that the flow will be divided as postulated.

As part of the basis for the first contention, CRC initially asserts that the Applicant submitted only a computer analysis to support its postulation that a certain proportion of the RSS coolant will be supplied to the containment spray ring and the emergency core cooling system (''ECCS'') so that the RSS will function as intended during the LOCA design basis accident. The second paragraph of CRC's basis then states that ''[t]he amendment entails a physical reduction of the flow within the system by half, modifications of piping, a reduction in the number of spray ring holes; the remaining system flow is to supply the ECCS, including direct injection to the coolant loops.'' Next, referencing the Applicant's February 16, 1998 integrated safety analysis for the Millstone Unit 3 RSS, CRC claims the analysis shows that the Applicant has made eighteen modifications to the RSS since the Applicant's system flow testing in 1985.[1] CRC's basis then lists the eight modifications made prior to the 1996 Unit 3 shutdown and the ten modifications that were to be completed prior to restart.

Further, CRC's basis alleges that the Applicant has a history and propensity for supplying incorrect calculations and information for computer modeling. It

[1] CRC did not include the RSS integrated safety analysis as an exhibit to its contentions. Because the Applicant similarly referenced the integrated safety analysis but did not include it as an exhibit in answering CRC's contentions, we directed the Applicant during the telephone prehearing conference to file a copy with the Licensing Board. That analysis evaluates, both individually and on an integrated basis, the various modifications to the current RSS that have been implemented since the Staff's Safety Evaluation Report for Millstone Unit 3.

claims that, in the past, faulty calculations and incorrect information supplied to Westinghouse and Stone and Webster contributed to problems with the RSS and that such deficiencies contributed significantly to the well-known March 1998 incident in which severe vibrations damaged expansion joints and cooling pumps. According to CRC, the Independent Corrective Action Verification Program for Millstone identified programmatic problems in these same areas. The basis then declares that if the calculations and information for computer simulation are incorrect, the simulation is inadequate and fails to take into account the potential harm to the containment, including structure fracture because of an insufficient reduction in pressure. In conclusion, the basis states that the Applicant has submitted no documentation establishing it has conducted actual testing of the system, other than pump flow tests, or that any of its contractors have conducted actual testing or modeling of the system in place. In contrast to the lack of testing of the RSS system, CRC asserts that the Applicant hired contractors to conduct simulations on two models when air-binding issues were discovered in the charging system.

CRC's second contention states:

> Reduction by half in the RSS flow results in a major change in capacity which requires actual testing.

As the basis for this contention, CRC alleges that the Applicant concluded it was necessary to reduce the number of spray holes in the containment spray ring to create the estimated flow requirements. According to CRC, the flow requirements must ensure adequate reduction in containment pressure within the prescribed time and remove airborne contaminants from the containment atmosphere. CRC's basis then concludes by once again asserting the Applicant has submitted no documentation establishing that either it or its contractors conducted actual testing or modeling of the system.

III. ANALYSIS

In order to be admissible, the Commission's Rules of Practice provide that a proffered contention ''must consist of a specific statement of the issue of law or fact to be raised or controverted.'' 10 C.F.R. § 2.714(b)(2). The rules further require that the petitioner provide ''[a] brief explanation of the bases of the contention'' and ''[a] concise statement of the alleged facts or expert opinion which support the contention . . . together with references to those specific sources and documents . . . on which the petitioner intends to rely to establish those facts or expert opinion.'' 10 C.F.R. § 2.714(b)(2)(i) & (ii). The regulations also obligate the petitioner to set forth ''[s]ufficient information . . . to show

that a genuine dispute exists with the applicant on a material issue of law or fact.'' 10 C.F.R. § 2.714(b)(2)(iii). In this regard, the petitioner's

> showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Id. A contention that fails to meet any one of these requirements must be rejected. 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Similarly, a proffered contention that, even if proven, would be of no consequence because it would not entitle the petitioner to any relief must also be dismissed. 10 C.F.R. § 2.714(d)(2)(ii).

In addition to the specific regulatory requirements that a proffered contention must meet, a corollary to an overarching principle of Commission adjudication adds another stricture on contention admissibility. In all agency licensing proceedings, the scope of the matters the Licensing Board is empowered to hear is set forth in the hearing notice initiating the proceeding. Consequently, a petitioner's proffered contentions must be confined to the subjects delineated by the hearing notice and contentions concerning matters outside that defined scope cannot be admitted. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

In opposing the admission of the CRC's proffered contentions, the Applicant and the Staff argue that both contentions are beyond the scope of the proceeding and are therefore inadmissible. Further, they assert that CRC's contentions fail to meet the Commission's regulatory requirements for contentions. In assessing these arguments, because both contentions purport to address the adequacy of the spray ring function of the RSS due to the Applicant's failure to test the system, we treat them together and need not differentiate between the two. Indeed, there is no real difference between the proffered contentions; CRC's second contention essentially is subsumed by the first.

The Applicant and the Staff are correct that CRC's contentions are outside the scope of this license amendment proceeding. Although exceedingly brief, the Commission's hearing notice initiating this proceeding leaves no doubt that the design basis function change in the RSS system is the sole subject of this license amendment proceeding. Contrary to the unsupported assertions in the bases of CRC's contentions, that change involved no physical modifications to the RSS. Thus, only contentions addressing the narrow subject of the design basis functional change can be admitted. Here, the CRC contentions address a number of physical changes and components of the RSS system but not the

change in the design basis function of the RSS. Accordingly, CRC's contentions are inadmissible.

To be sure the line for permitted challenges to the requested amendment in this proceeding is blurred by the fact that (1) the Applicant erroneously made the change in the design basis function of the RSS in 1986 without obtaining a license amendment; and (2) the Applicant has made a large number of other changes, including physical modifications, to the RSS system since that time. Notwithstanding the Applicant's absolutist position that all subsequent changes to the RSS are out of bounds, those changes to the RSS could play a part in contentions challenging the instant amendment if the functional change in the design basis was shown to be degraded or otherwise negatively affected by one or more of those changes. Here, however, CRC's contentions and supporting bases do not make the essential connection between the instant license amendment and any of the Applicant's other changes to the RSS system. Thus, even though the subsequent changes to the RSS system are not entirely out of bounds (as the Applicant would have it), none of those changes are properly invoked by CRC's contentions.

Moreover, even assuming the Petitioner's contentions could be found to fall within the scope of this license amendment proceeding, the proffered contentions still would have to be rejected for failing to meet the contention pleading requirements of the Commission's Rules of Practice. For example, the CRC contentions fail to identify what portion or portions of the Applicant's license amendment application are deficient as required by 10 C.F.R. § 2.714(b)(2)(iii). Similarly, the contentions do not provide an adequate explanation of the Petitioner's reasons for disputing these deficiencies.

The same conclusion must be reached if the Petitioner's contentions are viewed as challenging the completeness of the Applicant's amendment application for failing to include the results of tests of the RSS. The CRC contentions fail to identify the specific tests that the Petitioner claims should be performed and the reasons each test should be performed. In this regard, CRC's contentions nowhere mention much less challenge the sufficiency of that portion of the Applicant's license amendment application dealing with testing. Likewise, even though the Petitioner seemingly relies upon the Applicant's integrated safety analysis of the Millstone Unit 3 RSS, CRC fails to address the purported inadequacy of the test results contained in that analysis.[2]

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[2] The integrated safety analysis contains a section setting forth the Applicant's conclusions on the effect the various modifications to the RSS have had on the continuing validity of the initial preoperational testing of the Millstone Unit 3 RSS. For the modifications that were still in the process of being completed at the time the integrated safety analysis was issued, the Applicant committed to a testing program for them prior to restart. As previously discussed, the Petitioner's proffered contentions fail to detail the specific tests it believes should be performed on the RSS in contravention of the pleading requirements of the Commission's regulations. Nevertheless, it appears that the testing the Petitioner seeks may already have been performed so CRC's proffered contentions, even if proven, would not entitle the Petitioner to any relief. *See* 10 C.F.R. § 2.714(d)(2)(ii).

Moreover, the Petitioner's broad challenge to the effect that the Millstone RSS is inadequate because it has not been tested is also plainly deficient. Nowhere does the Petitioner provide any expert opinion that the asserted testing is necessary. Without expert support, CRC's recitation of past instances of alleged Applicant mistakes in connection with calculations and computer modeling is an insufficient basis to support its contention. Thus, the CRC contentions also fail to meet the admissibility requirements of the Commission's regulations.

IV. CONCLUSION

For the foregoing reasons, the proffered contentions of the Petitioner, Citizens Regulatory Commission, are outside the scope of the instant amendment proceeding and, in addition, fail to meet the regulatory requirements for admissibility. Accordingly, the Petitioner's contentions must be rejected. Because the Petitioner has no admissible contentions, pursuant to 10 C.F.R. § 2.714(b)(1) CRC is precluded from participating as a party in the license amendment proceeding. CRC's intervention petition is, therefore, dismissed and the proceeding is terminated.

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

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 12, 1998

Cite as 48 NRC 286 (1998) **LBP-98-29**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of **Docket No. 72-22-ISFSI**
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation) **November 30, 1998**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board denies Intervenor requests to accept late-filed contentions concerning a revised proposal to construct a rail spur that would be used to transport spent fuel shipping casks to the PFS facility.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

In considering whether under factor one of the 10 C.F.R. § 2.714(a)(1) standards there is good cause for late-filing based on the time it took an intervenor to prepare and file its contentions regarding the application amendment, such a finding depends in each instance on the scope and complexity of the ''new'' information the intervenor relies upon as the basis for late-filing.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

In instances in which a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Among the five late-filing standards of 10 C.F.R. § 2.714(a)(1), the good cause factor has been accorded a preeminent role such that the moving party's failure to satisfy this requirement mandates a compelling showing in connection with the other four factors. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Among the four remaining late-filing standards of 10 C.F.R. § 2.714(a)(1), factors two and four — availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties — are accorded less weight than factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding. *See Braidwood,* CLI-86-8, 23 NRC at 245.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (SOUND RECORD DEVELOPMENT)

Relative to factor three — assistance in developing a sound record — for a contention that is essentially a legal question, an intervenor failure to specify witnesses or testimony does not count as heavily against admissibility as it otherwise might have. At the same time, in line with the Commission's *Braidwood* reasoning, *see* CLI-86-8, 23 NRC at 246, a strong showing under this factor for a legal contention may require a more detailed description of the authority for the intervenor's legal claim.

ATOMIC ENERGY ACT: LICENSE REVIEW

LICENSE APPLICATION: AMENDMENT OR MODIFICATION

RULES OF PRACTICE: CONTENTIONS (LICENSE REVIEW-RELATED ACTIVITIES

The agency's licensing review procedures contemplate a dynamic process in which an application may be modified or improved without ''renoticing'' the application. At the same time, an intervenor is free to mount an adjudicatory challenge to any application revisions proffered after the deadline for filing contentions, at least so long as the new or amended contentions meet the late-filing criteria of section 2.714(a)(1). *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 243 (1998), *appeal pending*.

MEMORANDUM AND ORDER

(Ruling on Late-Filed Contentions Regarding August 1998 Low, Utah Rail Spur License Application Amendment)

In filings dated September 29, October 14, and November 2, 1998, respectively, Intervenors State of Utah (State or Utah), the Confederated Tribes of the Goshute Reservation (Confederated Tribes), and Ohngo Gaudadeh Devia (OGD) submitted late-filed contentions relating to an August 28, 1998 amendment to the pending 10 C.F.R. Part 72 application of Private Fuel Storage, L.L.C. (PFS). In its license request, PFS seeks authorization under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band). The August 28 license application amendment, among other things, outlines a revised proposal to construct a rail spur off the existing Union Pacific rail mainline that would be used to transport flatbed rail cars holding spent fuel shipping casks to the PFS facility approximately 30 miles to the south. In responses to these Intervenor filings, Applicant PFS and the Staff assert that none of the State, Confederated Tribes, or OGD contentions are admissible.

For the reasons set forth below, we find these parties' late-filed contentions relating to the August 1998 application amendment are not litigable.

I. BACKGROUND

As originally submitted in June 1997, the PFS application proposed that shipping casks containing nuclear reactor spent fuel rods would be moved into the Skull Valley area via a Union Pacific rail mainline that runs along the southern shore of the Great Salt Lake. It further stated that ''shipping casks are shipped from the railroad mainline to the [Private Fuel Storage Facility (PFSF)] either by rail on a railroad spur or by highway.'' [PFS], Safety Analysis Report [for PFSF] at 4.5-1 (rev. 0 June 1997) [hereinafter SAR]. The application then went on to detail the ''highway shipment'' alternative. First, the shipping casks would be offloaded from rail cars onto heavy haul tractor/trailers at an intermodal transfer point (ITP) located near Rowley Junction, Utah. Rowley Junction is a highway interchange at the intersection of Interstate 80 (I-80), which runs east and west along the Great Salt Lake's southern shore, and the Skull Valley Road (also known as Federal Aid Secondary Road 108), which goes south toward the Skull Valley Band reservation. From the Rowley Junction ITP, the truck trailers would transport the shipping casks some 24 miles south down the Skull Valley Road, then west via an access road onto the Skull Valley Band reservation and into the PFSF. *See id.* at 4.5-1 to -4. In addition, the application described the rail option, stating that ''[t]he railroad will consist of a single track installed parallel to the existing Skull Valley Road.'' [PFS], Environmental Report [for PFSF] at 4.4-1 (rev. 0 June 1997) [hereinafter ER]; *see also* SAR at 4.5-4 (rev 0 June 1997). The application description further indicated that while a feasibility study would be done to determine on which side of the Skull Valley Road the rail spur would run, the spur would be located ''adjacent to the edge of the existing road pavement.'' ER at 4.4-1 (rev. 0 June 1997).

The August 1998 application amendment makes several changes to this transportation scheme. First, it makes clear the preferred transportation method for shipping spent fuel casks to the PFSF is by rail. *See* SAR at 3.1-3 (rev. 2 Aug. 1998); ER at 2.1-3, 3.2-6 (rev. 1 Aug. 1998). Also, it relocates the beginning of the proposed rail spur from Rowley Junction 17 miles west to a point on the Union Pacific mainline near Low Junction, another I-80 interchange. From there, using a 200-foot-wide public lands corridor for which PFS has applied to the United States Bureau of Land Management (BLM) for a right of way, the spur runs 32 miles to the PFSF. Specifically, from a Low Junction siding the spur would backtrack southeast approximately 3 miles along the south side of I-80; then turn due south for some 26 miles along the eastern edge of the Cedar Mountains that form the western boundary of Skull Valley; and finally go east 3 miles into the PFSF located on the Skull Valley Band reservation. *See* ER at 3.2-6 (rev. 1 Aug. 1998). In addition, the amendment moves the ITP for the train/truck transportation alternative 1.8 miles to the west of its original location at Rowley Junction. *See id.* at 3.2-5; SAR at 3.1-3 (rev. 2 Aug. 1998).

Three Intervenors responded to this amendment with late-filed contentions. On September 29, the State filed two new contentions, Utah HH and Utah II, and a revised contention, Utah B-1. *See* [State] Contentions Relating to the Low Rail Transportation License Amendment (Sept. 29, 1998) [hereinafter State Low Rail Contentions]. Approximately 2 weeks later, asserting that it had not been served with the August 28 amendment until September 29, Intervenor Confederated Tribes sought admission of six new contentions, Confederated Tribes I through Confederated Tribes N. *See* Contentions of [Confederated Tribes] Relating to the Low Rail License Amendment (Oct. 14, 1998) [hereinafter Confederated Tribes Low Rail Contentions]. Then, some 2 weeks after that, Intervenor OGD submitted ten new contentions, OGD Q through OGD Z. *See* [OGD] Contentions Relating to the Low Rail Transportation License Amendment (Nov. 2, 1998) [hereinafter OGD Low Rail Contentions]. In their initial filings, the State and the Confederated Tribes asserted their contentions merit admission under the five criteria for late-filing set forth in 10 C.F.R. § 2.714(a)(1), while all three Intervenors maintained their contentions meet the standards for admissibility outlined in section 2.714(b)(2).

In response, PFS declared that none of the contentions filed by the State, the Confederated Tribes, or OGD meets either the section 2.714(a)(1) late filing standards or the section 2.714(b)(2) admissibility standards. *See* Applicant's Answer to [State] Contentions Relating to the Low Rail Transportation License Amendment (Oct. 14, 1998) [hereinafter PFS State Low Rail Contentions Response]; Applicant's Answer to Confederated Tribes' Contentions Relating to the Low Rail Transportation License Amendment (Oct. 26, 1998) [hereinafter PFS Confederated Tribes Low Rail Contentions Response]; Applicant's Answer to OGD's Contentions Relating to the Low Rail Transportation License Amendment (Nov. 12, 1998) [hereinafter PFS OGD Low Rail Contentions Response]. The Staff took a similar, albeit not identical approach. It declared that (1) with the exception of contentions Utah II and Utah B-1, the State, Confederated Tribes, and OGD contentions fail to meet the section 2.714(a)(1) late-filing criteria; and (2) with the exception of portions of Utah HH and Utah B-1 as it seeks to amend the basis for admitted contention Utah B, the State, Confederated Tribes, and OGD contentions do not satisfy the admissibility standards of section 2.714(b)(2). *See* NRC Staff's Response to [State] Contentions Relating to the Low Rail Transportation License Amendment (Oct. 14, 1998) [hereinafter Staff State Low Rail Contentions Response]; NRC Staff's Response to Contentions of [Confederated Tribes] Relating to the Low Rail License Amendment (Oct. 26, 1998) [hereinafter Staff Confederated Tribes Low Rail Contentions Response]; NRC Staff's Response to ''[OGD] Contentions Relating to the Low Rail Transportation License Amendment'' (Nov. 12, 1998) [hereinafter Staff OGD Low Rail Contentions Response].

Subsequently, in a reply filing submitted with leave of the Board, the State continued to maintain its contentions are admissible under both the criteria of section 2.714(a)(1) and section 2.714(b)(2). *See* [State] Reply to Applicant's and Staff's Responses to Low Rail Contentions (Oct. 26, 1998) [hereinafter State Low Rail Contentions Reply]. On October 30, PFS countered with a pleading, also filed with leave of the Board, addressing the State's reply argument that its challenge to the Low rail spur was not untimely because the use of rail transportation was only presented as a limited option in the original application. *See* Applicant's Surreply to [State] Reply to Applicant's and Staff's Responses to Low Rail Contentions (Oct. 30, 1998) [hereinafter PFS State Low Rail Contentions Surreply]. Thereafter, with leave of the Board OGD lodged a reply filing, likewise asserting its late-filed contentions are admissible under both the criteria of section 2.714(a)(1) and section 2.714(b)(2). *See* [OGD] Reply to the Applicant's and Staff's Responses to Low Rail Contentions (Nov. 23, 1998) [hereinafter OGD Low Rail Contentions Reply].

II. ANALYSIS

A. Standards Governing Admissibility of Late-Filed Contentions

The deadline for filing timely contentions in this proceeding has long passed. *See* LBP-98-12, 47 NRC 343, 363 (1998). Accordingly, the contentions now before us, as well as any that might be proffered in the future, must meet the five late-filing criteria of 10 C.F.R. § 2.714(a)(1). And, even if they meet these specifications, they also must pass muster under the admissibility standards set forth in section 2.714(b)(2), (d), and (e).

We have discussed both the general standards for contention admissibility and the late-filing criteria in previous decisions in this case, and thus will not repeat those here. *See* LBP-98-7, 47 NRC 142, 178-83 (general admissibility and late-filing criteria), *as modified,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998); LBP-98-13, 47 NRC 360, 365 (1998) (general admissibility criteria). An assessment of each of the intervenors' contentions relative to those standards follows.

B. State Contentions[1]

UTAH HH — The Low Rail Corridor and Fire Hazards

The Applicant's Environmental Report (''ER'') fails to give adequate consideration to the potential for fire hazards and the impediment to response to wild fires associated with constructing and operating the Applicant's proposed rail line in the Low corridor, in that:

1. The ER fails to recognize that the Applicant's proposed movement of casks by locomotive in the Low rail line corridor presents a new wildfire ignition source in an area prone to wildfires, such as (a) the ''welding, grinding of rail and the presence of fuel for the operation of machinery'' associated with rail construction, (b) sparks from friction or train exhaust, and (c) the shearing off of a hot brake shoe during rail operation.

2. The ER fails to evaluate the increased risk of wildfires caused by an increase of human activity near the railroad.

3. The ER fails to address how the Applicant's proposed rail line and the spent fuel transported on it will create an impediment to fighting wildfires.

DISCUSSION regarding Late-Filing Standards: State Low Rail Contentions at 18-19; PFS State Low Rail Contentions Response at 2-4; Staff State Low Rail Contentions Response at 3-8; State Low Rail Contentions Reply at 2-3; PFS State Low Rail Contentions Surreply at 1-4.

RULING: Concerning the first late-filing criterion — good cause for filing late — in instances such as this one in which a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996). In this instance, there are differences between the original application and the August 1998 amendment that might provide material for new issues. For example, besides following a route that physically is 10 or more miles to the west of the passageway previously proposed, the Low rail spur is to be built on open rangeland rather than immediately adjacent to, and within the right of way of, an existing highway.

The State, however, does not utilize this or any other information to show what is different about the revised rail route that establishes the wildfire ignition source, human activity, and firefighting impediment issues in contention Utah

[1] The wording of contentions Utah HH and Utah II reflect the Applicant's suggested revisions as adopted and further revised (with PFS's acquiescence) by the State. *See* PFS Low Rail Contentions Response App. A at 1-2; State Low Rail Contentions Reply at 1-2.

HH could not have been specified previously.[2] Instead, the State asserts the rail line alternative as outlined in the original application was not a sufficiently concrete possibility to warrant its effort in formulating any contentions regarding that option. *See* State Low Rail Contentions Reply at 2-3. The State's protests to the contrary notwithstanding, the rail option was specified in the original PFS application in a manner that made it clear rail-only transportation was on an equal footing with the rail/truck option.[3] *See* [PFS] License Application for [PFSF] at 1-1 (rev. 0 June 1997). Consequently, that the State may have chosen, for whatever reason, not to address the rail line option in its original contentions does not provide good cause for its failure to answer the central issue of what difference exists between the rail option as set forth in the original application and the option as described in the August 1998 amendment so as to show there is ''good cause'' for filing contention Utah HH late.

Because the State has failed to demonstrate the information upon which it places substantial reliance as the basis for contention Utah HH was not available in November 1997 when its contentions on the nonphysical security plan portions of the PFS application were due, we conclude the State lacks good cause for filing this contention late.[4]

Among the five late-filing standards of section 2.714(a)(1), the good cause factor has been accorded a preeminent role such that the moving party's failure to satisfy this requirement mandates a compelling showing in connection with the other four factors. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Reviewing

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[2] An affidavit accompanying the State's contention filing does state the ''area'' in which the Low rail spur will run is ''prone'' to wildfires. *See* State Low Rail Contentions Exh. 1, at 3 (affidavit of David C. Schen). *But see* PFS Low Rail Contentions Response at 3 n.3 (contesting Schen affidavit on this point). In explaining this conclusion, however, the affidavit states that such fires frequently are the result of fires that originate to the west in the Cedar Mountains and then spread to the east to cover the western part of Skull Valley. It is not apparent how this bears any relationship to the possibility of fires originating from the proposed Low rail spur. In fact, the more relevant consideration is the local vegetation, which the affidavit describes as being essentially uniform across Skull Valley. As a consequence, nothing presented by the State suggests there is anything unique about the Low rail spur, in contrast to the Skull Valley Road rail spur, that would make its wildfire ignition, human activity, or firefighter impediment concerns peculiar to the Low rail spur.

[3] An argument like the State's might have more resonance if an application set out a number of vaguely described options that suggested the Applicant was simply trying to ''keep all its options open.'' We do not see this as being the case here, however.

[4] The State's Low rail spur late-filed contentions, as well as those of the Confederated Tribes and OGD, were filed within approximately 30 days of the date the August 1998 application amendment was provided to them. Neither PFS nor the Staff has argued a lack of good cause for late filing based on the time it took the Intervenors to prepare and file their contentions regarding the application amendment.

Given the nature of the August 1998 amendment, we do not base our various findings concerning a lack of good cause under late-filing factor one on the timeliness of the actual submission of the Intervenors' contentions. We note, however, that such a finding depends in each instance on the scope and complexity of the ''new'' information the Intervenor relies upon as the basis for late-filing. Further, as this proceeding moves forward, the time involved in preparing and submitting late-filed contentions may well become an element in determinations regarding factor five — broadening or delaying the proceeding.

the remaining four factors, however, we are unable to conclude they support such a showing here.

The State correctly declares that factors two and four — availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties — favor late admission of this contention. On the other hand, factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding — provide little, if any, support for its admission. Relative to factor three, the State has submitted an affidavit from a forestry ecosystem manager in support of the contention and asserts that other, unnamed experts will be available to support its position on the contention. *See* State Low Rail Contentions at 18-19. But this proffer falls considerably short of the specificity regarding witness identification and testimony summaries the Commission has indicated is needed if this factor is to provide strong support for admissibility.[5] *See* LBP-98-7, 47 NRC at 208-09. As for factor five, it is true (as it is for most of the Intervenors' Low rail spur contentions) the fact formal discovery has not yet commenced means prompt admission of this contention likely will not result in a protracted delay in this proceeding. Nonetheless, this is offset by the fact this contention will broaden the issues because the admitted wildfire-related contention — Utah R — concerns onsite rather than offsite fire protection.

Bearing in mind that factors two and four are accorded less weight than factors three and five, *see Braidwood,* CLI-86-8, 23 NRC at 245, despite the fact the former factors support the admission of this contention, a balancing of all four criteria clearly does not provide the requisite compelling showing needed to overcome the lack of good cause for its late filing.[6]

UTAH II — Costs and effects associated with the Low Rail Corridor

> The Low Corridor License Amendment does not comply with 10 C.F.R. § 72.100(b) or NEPA, including 10 C.F.R. § 51.45(c), and 40 C.F.R. § 1508.25 because it fails to evaluate, quantify, and analyze the costs and cumulative impacts associated with constructing and operating the rail line on the regional environment, in that:
>
> 1. The ER fails to quantify the costs and evaluate the cumulative impacts associated with fires potentially ignited as a result of activities occurring in the rail corridor.

[5] At best, the affidavit accompanying the State's filing provides very weak support in the admissibility balance.

[6] At the same time, while we need not reach the question of its admissibility under section 2.714(b), based on our review of the parties' filings, we would have admitted only the portion of paragraph three of this contention dealing with impediments to four-wheel drive vehicle firefighting activities as being supported by a basis establishing a genuine material dispute adequate to warrant further inquiry. The other portions of this contention and their supporting bases would be inadmissible as impermissibly challenging the Commission's regulations or generic rulemaking-associated determinations (paragraph three as it relates to firefighter response hesitation); and/or lacking adequate factual or expert opinion support (paragraphs one and two). *See* LBP-98-7, 47 NRC at 179, 180-81.

2. The ER fails to quantify the costs and sufficiently analyze the impacts of the construction and operation of the rail line on species in the rail corridor, including species habitat, food base, mating and breeding habits, noise levels, and barriers to migration.

3. The ER fails to take account of the visual impact the railroad will have on the BLM Cedar Mountains Wilderness Study Area or other locations in Skull Valley.

4. The ER fails to quantify the costs associated with noise levels from the construction and operation of the railroad on the surrounding wilderness and recreational areas.

5. The ER fails to demonstrate how the Applicant plans to carry out the revegetation of the rail corridor and fails to show where and how the Applicant will obtain access to needed water.

6. The ER does not quantify or otherwise evaluate the loss of historical resources that may occur where the rail line crosses the Hastings Trail and the Donner-Reed Trail.

7. The ER fails to quantify the costs or evaluate the cumulative impacts associated with the rail line's impeding recreational users' and ranchers' crossing of Skull Valley from east to west.

1. Late-Filing Standards

DISCUSSION: State Low Rail Contentions at 18-19; PFS State Low Rail Contentions Response at 9, 11, 13-14; Staff State Low Rail Contentions Response at 3-8; State Low Rail Contentions Reply at 2-3; PFS State Low Rail Contentions Surreply at 1-4.

RULING: Applicant PFS asserts that paragraphs one, two, and five of this contention should be dismissed because application of the five-factor test in section 2.714(a) does not weigh in favor of admissibility. Repeating its principal argument regarding Utah HH, PFS maintains that each of these paragraphs is not dependent on information new to the August 1998 application amendment and, accordingly, each lacks ''good cause'' under factor one. The Staff is in accord for that portion of the contention footed in Utah HH, which the State references as a basis for paragraph one.

We conclude the State has not met its burden to establish good cause for the late-filing of paragraph one by showing it was based on significant new data first revealed in the application amendment. Further, for the reasons set forth in connection with contention Utah HH, we find an analysis of the other four factors is insufficient to offset this lack of good cause in the admissibility

balance.[7] *See supra* pp. 293-94. The first portion of this contention thus is not admissible as late-filed.

The remainder of the contention, including paragraphs two and five, appears to be based on significant new data that was first revealed in the application amendment, so as to provide the requisite good cause under late-filing factor one. Placing this factor one support for admission into the balance with the other four factors as described above, *see supra* pp. 293-94, we conclude relative to paragraphs two through seven that the admission of the contention is not precluded by the fact it was late-filed.

2. Admissibility

DISCUSSION: State Low Rail Contentions at 7-12; PFS State Low Rail Contentions Response at 9-17; Staff State Low Rail Contentions Response at 12-18; State Low Rail Contentions Reply at 6-7.

RULING: In connection with paragraphs two through seven, these portions of the contention are inadmissible because these parts of the contention and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations (paragraphs two, four, six, and seven);[8] lack adequate factual or expert opinion support (paragraphs two, four, five, six, and seven); and/or fail properly to challenge the PFS application, as amended (paragraphs three, four, six, and seven).[9] *See* LBP-98-7, 47 NRC at 179-81.

UTAH B-1 — License Needed for Intermodal Transfer Facility

> CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point (''ITP''), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

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[7] In this regard, we note that for each paragraph, admission of the contention would broaden the issues in the proceeding. Further, in connection with factor three we observe there is even less provided concerning identification of witnesses and testimony than there was for contention Utah HH.

[8] Although agency regulations implementing the National Environmental Policy Act of 1969 (NEPA) mandate cost quantification of environmental impacts as practicable in an environmental report, they impose a burden on the applicant to provide a quantification discussion only ''to the fullest extent practicable.'' *See* 10 C.F.R. § 51.45(c).

[9] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings, the first paragraph of the contention also would be inadmissible as impermissibly challenging the Commission's regulations or rulemaking-related generic determinations; and/or as lacking adequate factual or expert opinion support. *See* LBP-98-7, 47 NRC at 179-80.

DISCUSSION: State Low Rail Contentions at 12-17; PFS State Low Rail Contentions Response at 17-20; Staff State Low Rail Contentions Response at 18-20; State Low Rail Contentions Reply at 7-8.

RULING: With this ''contention,'' the State seeks to amend the basis for already admitted contention Utah B to ''account for proposed changes at the ITP'' resulting from the August 1998 amendment. State Low Rail Contentions at 13 n.2. The Applicant opposes this request, asserting the contention should remain as originally admitted except to note that the Rowley Junction ITP is now 1.8 miles west of its original location. The Staff takes a somewhat more expansive view. Declaring that in addition to the location change, factual statements in the State's revised basis concerning the viability of the ITP pending completion of the BLM approval process and a revised description of the Rowley Junction facility, equipment, and expected shipping volume could be admitted, the Staff opposes any basis revisions that would expand the contention beyond the scope established in the Board's original admission ruling or that are speculative and unsupported.

Although we see no need to adopt a renumbered contention Utah B as proposed by the State, bearing in mind the admonition that ''[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases,'' *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), we will deem the bases of that contention amended to incorporate: (1) the new location of the proposed Rowley Junction ITP, *see* State Low Rail Contentions at 13; (2) the assertion about the continuing viability of the ITP proposal pending BLM approval of the right of way for the Low rail spur, *see id.* at 13 n.3; and (3) the description of the ITP facility and equipment, per statements in the August 1998 PFS application amendment, *see id.* at 14. In so doing, however, we intend no change in the scope of our original ruling admitting this contention on a limited basis. *See* LBP-98-7, 47 NRC at 184-85.

C. Confederated Tribes Contentions

CONFEDERATED TRIBES I

> The Goshute Tribe hereby adopts and restates as though set forth in full herein the additional Contentions and Supporting Bases of the State of Utah filed with the Board on September 29, 1998, relating to the Low Rail Transportation License Amendment.

DISCUSSION: Confederated Tribes Low Rail Contentions at 1, 6; PFS Confederated Tribes Low Rail Contentions Response at 1-2; Staff Confederated Tribes Low Rail Contentions Response at 6.

RULING: As we have held previously, a contention that seeks to adopt another intervenor's contention by reference is inadmissible. *See* LBP-98-7, 47 NRC at 236-37. Although we would permit the Confederated Tribes

to incorporate these State contentions, *see id.,* none of them has been found admissible.[10] *See* section II.B above.

CONFEDERATED TRIBES J

> The Applicant's Environmental Report fails to provide adequate consideration to the potential fire hazards and the impediment to response to wild fires associated with constructing and operating the proposed rail line in the Low corridor.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 3-5; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: Relative to the first factor, the Confederated Tribes has failed to demonstrate the information upon which it places significant reliance as the basis for this contention was not available relative to the original application. *See supra* pp. 292-93. The Confederated Tribes thus lacks good cause for filing this contention late.

Nor has the Confederated Tribes made the compelling showing in connection with the other four factors that is needed to overcome a lack of good cause for late filing. As with the State's late-filed contentions, factor two — availability of other means to protect the petitioner's interests — favors late admission of this contention. But unlike the State's late-filed issues, factor four — extent of representation of petitioner's interests by existing parties — does not. This contention essentially tracks Utah HH, and, based on our previous experience, we have no difficulty in concluding the State is well able to represent the interests of the Confederated Tribes (or any other intervenor) relative to such an issue. *See* Licensing Board Memorandum and Order (Memoralizing Prehearing Conference Rulings) (May 20, 1998) at 2 (approving request to change lead party for consolidated contention from Confederated Tribes to State) (unpublished).

So too, factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding — do not support admission. In connection with factor three, the Confederated Tribes has not provided any information regarding witnesses or testimony that it would proffer in order to develop a record in support of this contention. And relative to factor five, although the fact formal discovery has not yet commenced means prompt admission of this contention likely will not result in a protracted delay in this proceeding, admission of this contention will broaden the issues because the admitted wildfire-related contention — Utah R — concerns onsite rather than offsite fire protection.

[10] We previously permitted Confederated Tribes to incorporate contention Utah B. *See* LBP-98-7, 47 NRC at 237. Our ruling regarding the revised basis for that contention, *see supra* p. 297, would reach that incorporation ruling as well.

A balancing of the other four factors thus clearly does not provide the requisite compelling showing needed to overcome the lack of good cause for the contention's late filing.[11]

CONFEDERATED TRIBES K

> The ''Amended'' Application fails to account for the costs associated with the construction, maintenance, operation, and decommissioning of the rail line and the costs associated with the ultimate removal of the stored fuel at the end of the lease.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 7; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes has not met its burden to establish good cause for the late-filing by showing that significant new data were first revealed in the application amendment. Further, for the reasons set forth in connection with contention Confederated Tribes J, we find that an analysis of the other four factors is insufficient to offset this lack of good cause in the admissibility balance.[12] *See supra* p. 298. This contention thus is not admissible as late-filed.[13]

CONFEDERATED TRIBES L

> The intermodal transfer point (ITP), under the proposed ''Amendment,'' becomes a temporary storage facility which requires a separate and additional license. 10 CFR § 72.6(c)(1).

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 9; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes again has not met its burden to establish good cause for the late-filing by showing that significant new data were first revealed in the application amendment. Further, for the reasons set forth in connection with contention Confederated Tribes J, we find that an analysis of

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[11] While we need not reach the question of its admissibility under section 2.714(b), based on our review of the parties' filings, we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Part 71; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. *See* LBP-98-7, 47 NRC at 179, 180-81.

[12] In this regard, relative to factors four and five we note that this contention essentially tracks contention State II and that admission of the contention would broaden the issues in the proceeding.

[13] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible because the contention and its supporting basis lack adequate factual or expert opinion support; fail properly to challenge the PFS application, as amended; and/or seek to litigate issues already rejected by the Board relative to contention Confederated Tribes A. *See* LBP-98-7, 47 NRC at 180-81, 234.

the other four factors is insufficient to offset this lack of good cause in the admissibility balance.[14] *See supra* p. 298. This late-filed contention thus is not admissible.[15]

CONFEDERATED TRIBES M

The proposed rail line will increase hazards to the public.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 11-12; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes once again has not met its burden to establish good cause for the late-filing by showing that significant new data were first revealed in the application amendment. Factor two and, in contrast to contentions Confederated Tribes J through L, factor four — extent of representation of petitioner's interests by existing parties — support admission of this contention. As we have already noted, however, factors two and four are accorded less weight than factors three and five. *See supra* p. 294. Consequently, when considered with factors three and five that, for the reasons set forth in connection with contention Confederated Tribes J, do not support admission, *see supra* p. 298, we are unable to conclude the combined weight of these four factors is sufficient to offset the lack of good cause in the admissibility balance.[16] This late-filed contention is not admissible as well.[17]

CONFEDERATED TRIBES N

The ''Amendment'' fails to provide adequate notice to the public of the changes, which are substantial.

[14] In this regard, relative to factors four and five we note that this contention essentially tracks contention State B-1 and that admission of this contention would broaden the issues in the proceeding.

[15] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible because the contention and its supporting basis impermissibly challenge agency regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71; lack adequate factual or expert opinion support; fail properly to challenge the PFS application; and/or seek to litigate issues already rejected by the Board relative to contention Utah B. *See* LBP-98-7, 47 NRC at 179-81, 184.

[16] In this regard, relative to factor five we note that admission of the contention would broaden the issues in the proceeding.

[17] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible in that the contention and its supporting basis impermissibly challenge agency regulations or rulemaking-associated generic determinations, including 10 C.F.R. Parts 71 and 73; lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention OGD C. *See* LBP-98-7, 47 NRC at 179-80, 227-28.

1. *Late-Filing Standards*

DISCUSSION: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 12-13; Staff Confederated Tribes Low Rail Contentions Response at 4-6.

RULING: Challenging, as it does, the adequacy of the procedures under which the August 1998 application amendment is being considered by the agency, the contention raises a concern that could not have been proffered prior to that amendment. There thus is the requisite good cause under factor one. Notwithstanding the fact that factors three and five do not support admission of this contention as described in connection with contention Confederated Tribes J,[18] *see supra* p. 298, placing the factor one support for admission into the balance along with the support accorded by factors two and four as described above relative to contention Confederated Tribes M, *see supra* p. 300, we conclude that the admission of the contention is not precluded by the fact it was late-filed.

2. *Admissibility*

DISCUSSION: Confederated Tribes Low Rail Contentions at 5-6; PFS Confederated Tribes Low Rail Contentions Response at 12-13; Staff Confederated Tribes Low Rail Contentions Response at 12-13.

RULING: This is essentially a legal contention; nonetheless, it must have a basis sufficient to warrant its admission. Assuming that changes in a license application of sufficient magnitude could provide cause for renoticing the application, compare *Rochester Gas & Electric Corp.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233-36 (1983) (delay in proceeding of 5 years pending Staff application review renders original notice of hearing sufficiently stale to require renoticing of proceeding), the Confederated Tribes conclusory assertions that ‘‘changes on virtually every page’’ of the application as a result of the August 1998 amendment indicate ‘‘substantial changes in the nature of the license’’ being sought, Confederated Tribes Low Rail Contentions at 5, are wholly inadequate to support admission of this contention.

[18] In this regard, relative to factor five we note that admission of the contention would broaden the issues in the proceeding. We also note relative to factor three that because this is essentially a legal question, the Confederated Tribes failure to specify witnesses or testimony does not count as heavily against admissibility as it otherwise might have. At the same time, in line with the Commission’s *Braidwood* reasoning, *see* CLI-86-8, 23 NRC at 246, a strong showing under this factor for a legal contention may require a more detailed description of the authority for the intervenor’s legal claim then has been provided here.

D. OGD Contentions

OGD Q

> In acting on the proposed license and amendments prior to completing an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA), the NRC has made irretrievable commitments of resources resulting in severe prejudice to the EIS process. In particular, the present procedure employed for the PFS license and license amendments prejudices the NRC's ability to fairly assess alternatives to the proposed PFS facility and the transportation of high level spent fuel.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: As we noted above, consistent with longstanding agency practice, all contentions filed subsequent to November 1997 (other than those physical security plan contentions for which the Board granted a filing extension, *see* LBP-98-13, 47 NRC at 363) are late-filed. Consequently, OGD's arguments to the contrary notwithstanding,[19] this contention (and all its other Low rail spur-related contentions) cannot be accepted unless a balancing of the five factors set forth in section 2.714(a) supports its admission.

Concerning factor one — good cause for late filing — while this issue statement is predominately a legal contention, OGD nonetheless has failed to demonstrate the information upon which it places significant reliance as the basis for this contention was not available relative to the original application. *See supra* pp. 292-93. It thus lacks good cause for filing this contention late.

OGD also failed to make a compelling showing in connection with the other four factors so as to counterbalance the lack of good cause for late filing. Factors two and four — availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties — do favor late admission of this contention. As we have noted, however, they are given significantly less weight in the balance as compared to factors three and five. *See supra* p. 294. Although, in the context of this legal contention, OGD's lack of a witness and testimony proffer means that factor three — assistance in developing a sound record — does not necessarily weigh as heavily as it might against late admission, *see supra* note 18, this is certainly not the case with factor five — broadening the issues/delaying the proceeding — which

[19] OGD asserts its Low rail spur-related contentions are not late-filed because there was no new hearing notice issued about the amendment and, therefore, its contentions need not meet the section 2.714(a)(1) late-filing criteria. *See* OGD Low Rail Contentions Reply at 1-2. The agency's licensing review procedures contemplate a dynamic process in which an application may be modified or improved without ''renoticing'' the application. At the same time, an intervenor is free to mount an adjudicatory challenge to any application revisions proffered after the deadline for filing contentions, at least so long as the new or amended contentions meet the late-filing criteria of section 2.714(a)(1). *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 243 (1998), *appeal pending*.

does not support admission given the significant new element this contention would introduce into the proceeding. Even with factors two and four on the admissibility side of the balance, there is not sufficient support to overcome the lack of good cause, rendering this contention inadmissible.[20]

OGD R

> OGD and its members will be adversely impacted by the routine operation of the Low rail spur and will be seriously impacted by any transportation-related accidents.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: Because OGD has failed to show the information upon which it places significant reliance as the basis for this contention was not available relative to the original application, we find it lacks good cause for late submission of this contention. And lacking factor one support, OGD also has failed to make the compelling showing regarding the other four factors that is necessary to gain this contention's admission. While factors two and four — availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties — once again favor late admission of this contention, in this instance both factors three and five do not. Relative to factor three — assistance in developing a sound record — OGD has not provided any information regarding witnesses or testimony that it would proffer in order to develop a record in support of this contention. Further, concerning factor five — broadening the issues/delaying the proceeding — although the fact formal discovery has not yet commenced means prompt admission of this contention likely will not result in a protracted delay in this proceeding, admission of this contention (and indeed any of OGD's remaining contentions) will broaden the issues. With factors three and five thus weighing against admission, the support provided by the less important factors two and four clearly is insufficient to provide sufficient support for admitting this contention.[21]

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[20] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the basic structure of the Commission's regulatory process; lack adequate factual or expert opinion support; and/or fail to establish with specificity any genuine dispute. *See* LBP-98-7, 47 NRC at 178-81.

[21] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; fail properly to challenge the PFS application, as amended; and/or seek to litigate issues already rejected by the Board relative to contention OGD P. *See* LBP-98-7, 47 NRC at 180-81, 233-34.

OGD S

OGD and its members are adversely affected by the potential sabotage of spent nuclear fuel during transportation along the proposed rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[22] *See supra* p. 303.

OGD T

OGD and its members are adversely affected by the failure of PFS and/or the NRC to fully evaluate the potential failure of the flat bed rail cars that will transport the spent nuclear fuel along the rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[23] *See supra* p. 303.

OGD U

OGD and its members are adversely affected by potential fires caused by or enhanced by rail activities.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

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[22] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71 and 73; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention OGD C. *See* LBP-98-7, 47 NRC at 179-81, 227-28.

[23] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71 and 73; raise issues outside the scope of the proceeding; and/or lack adequate factual or expert opinion support. *See* LBP-98-7, 47 NRC at 179-81.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[24] *See supra* p. 303.

OGD V

> OGD and its members are adversely affected by the potential human health and environmental safety problems associated with any type of failure of the casks that may be used to ship spent nuclear fuel to the proposed PFS facility along the proposed rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible. [25] *See supra* p. 303.

OGD W

> OGD and its members are adversely affected by potential human errors, accidents, and/or other malfunctions involving the 1) loading of shipping casks, 2) transportation of shipping casks to a railhead, and 3) transportation of shipping casks via rail, including the proposed rail spur to the proposed PFS facility.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[26] *See supra* p. 303.

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[24] In doing so, we note that to the degree this contention attempts to raise some of the same issues as were put forth in contention Utah HH, this weakens the OGD showing relative to factor four — extent of representation of petitioner's interests by existing parties — given the State is fully qualified to represent its interest relative to these issues. *See supra* p. 298.

Further, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. *See* LBP-98-7, 47 NRC at 180-81.

[25] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4); lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contentions OGD C and OGD I. *See* LBP-98-7, 47 NRC at 179-81, 227-28, 230.

[26] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4); lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention Utah V. *See* LBP-98-7, 47 NRC at 179-81; 200-01.

OGD X

OGD and its members are adversely affected by the failure of PFS and/or the NRC to assess environmental justice issues caused by the proposed amendment to transport high level spent nuclear fuel into the Skull Valley area via rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[27] *See supra* p. 303.

OGD Y

OGD and its members are adversely affected by the taking and use of lands proposed for the construction and operation of the proposed rail spur because they will be deprived of the opportunity to utilize these lands for grazing animals.

DISCUSSION regarding Late-filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[28] *See supra* p. 303.

OGD Z

The construction and operation of the proposed rail spur will permanently damage the historically and culturally significant trail used by the Goshute and others who used the area planned for the Low Corridor Rail Spur to travel through the Skull Valley region.

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[27] Because there already is an admitted contention, OGD O, concerning environmental justice, factor five — broadening the issues/delaying the proceeding — seemingly would provide somewhat less support on the ''inadmissibility'' side of the balance than for contention OGD R, albeit not enough to provide the compelling showing needed to overcome the lack of good cause relative to factor one.

Additionally, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis raise issues outside the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. *See* CLI-98-13, 48 NRC at 36; LBP-98-7, 47 NRC at 179-81.

[28] OGD maintains good cause exists for late-filing this contention because one of its members' use of grazing land is limited to a part of the Skull Valley Band reservation on which the relocated rail spur will run. *See* OGD Low Rail Contention Reply at 14. The cited affidavit does not, however, support this assertion.

Also in this regard, we observe relative to factor three that the affidavit accompanying the OGD filing provides, at best, very weak support in the admissibility balance that clearly is inadequate, even in combination with factors two and four, to provide the compelling support needed to overcome the lack of good cause.

Additionally, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. *See* LBP-98-7, 47 NRC at 180-81.

1. Late-Filing Standards

DISCUSSION: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: Because OGD has made a showing that, by reason of the rail spur's relocation, there are now historical or cultural concerns that previously would not have been implicated, we find there is good cause for filing this particular contention late. Notwithstanding the fact that factors three and five provide little, if any support for admission of this contention as described in connection with contention OGD Y, *see supra* p. 306 & n.28, placing the factor one support for admission into the balance along with the support accorded by factors two and four as described above relative to contention OGD R, *see supra* p. 303, we conclude that the admission of the contention is not precluded by the fact it was late-filed.

2. Admissibility

Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine material dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. *See* LBP-98-7, 47 NRC at 179-81.

III. CONCLUSION

For the reasons set forth above, we find that the late-filed contentions submitted by the State, the Confederated Tribes, and OGD regarding an August 1998 amendment to the PFS application that proposes, among other things, to construct and operate a rail spur between Low Junction, Utah, and its Skull Valley ISFSI are not subject to consideration in this proceeding either because these Intervenors have failed to establish (1) a balancing of the five factors in 10 C.F.R. § 2.714(a)(1) governing late-filing supports admitting the contentions; or (2) the standards in section 2.714(b)(2) support admission of the contentions. Further, although we find contention Utah B-1 inadmissible, we permit the basis for admitted contention Utah B to be amended to incorporate certain information about the proposed Rowley Junction ITP that arises from the August 1998 application amendment.

For the foregoing reasons, it is, this thirtieth day of November 1998, ORDERED that

1. The basis for admitted contention Utah B is *amended* as specified in section II.B, above.

2. The following late-filed contentions submitted by the State, the Confederated Tribes, and OGD in filings dated September 29, 1998, October 14, 1998, and November 2, 1998, respectively, are *rejected* as inadmissible: Utah HH, Utah II, Utah B-1, Confederated Tribes I, Confederated Tribes J, Confederated Tribes K, Confederated Tribes L, Confederated Tribes M, Confederated Tribes N, OGD Q, OGD R, OGD S, OGD T, OGD U, OGD V, OGD W, OGD X, OGD Y, and OGD Z.

THE ATOMIC SAFETY AND
LICENSING BOARD[29]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 30, 1998

[29] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, OGD, Confederated Tribes, Castle Rock Land and Livestock, L.C./Skull Valley Company, Ltd., and the State; (3) Petitioner Southern Utah Wilderness Alliance; and (4) the Staff.

Cite as 48 NRC 309 (1998) **DD-98-11**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of **Docket No. 030-16055**
(License No. 34-19089-01)

ADVANCED MEDICAL SYSTEMS, INC.
(Cleveland, Ohio) **November 4, 1998**

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

I. INTRODUCTION

By letter dated August 19, 1994, addressed to Mr. James M. Taylor, former Executive Director for Operations, U.S. Nuclear Regulatory Commission (NRC), William B. Schatz, Esq., on behalf of the Northeast Ohio Regional Sewer District (District), requested that the NRC take action with respect to Advanced Medical Systems, Inc. (AMS), of Cleveland, OH, an NRC licensee.[1] The District requested, pursuant to 10 C.F.R. § 2.206, that the NRC amend License No. 34-19089-01, to require AMS to install, maintain, and operate a radiation alarm

[1] Northeast Ohio Regional Sewer District submitted two previous petitions for action against AMS under 10 C.F.R. § 2.206. In a petition dated March 3, 1993, and supplemented by letters dated September 13, 1994, October 13, 1994, and April 29, 1996, the Petitioner requested that NRC: (1) modify AMS's License No. 34-19089-01 to require that AMS assume all costs resulting from the offsite release of cobalt-60 that has been deposited at the Petitioner's Southerly Wastewater Treatment Center; (2) order AMS to decontaminate the sewer connecting its facility with the public sewer at London Road, and continue downstream with such decontamination to the extent that sampling indicates is necessary; (3) commence enforcement action against AMS for violation of 10 C.F.R. §§ 20.303(a), 20.401(c)(3), and 20.2003; and (4) take action on the AMS license to safely, immediately, and reasonably decontaminate the London Road interceptor (the sewer). The second request had been partially granted when the NRC amended the AMS license to require remediation of the sewer line connecting the AMS facility with the public sewer, and the petition was denied in all other respects. DD-97-13, 45 NRC 460 (1997). In a second petition dated August 3, 1993, the Petitioner requested that the NRC take action to require AMS to provide adequate financial assurance to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended. The second petition was denied. DD-94-6, 39 NRC 373 (1994).

system on all drains at 1020 London Road, Cleveland, OH (AMS facility), that lead to either sanitary or storm sewers.

The District asserts two major reasons as the bases for the request. First, it views the quantity of cobalt-60 waste in the AMS facility's basement as a major threat based on the following: (a) the NRC has admitted that the existing contamination at the AMS facility continues to pose a risk; (b) the contamination that exists at the AMS facility is estimated to include 393 curies, as of 1988, of loose, ''talcum-like'' cobalt-60 scattered on the floor of the basement waste holdup room; (c) cobalt-60 contamination was found in the sewer line connecting the AMS facility to the public sewer, and was found directly under the AMS discharge; (d) the District has already incurred costs of nearly $2 million to address loose cobalt-60 contamination at the Easterly and Southerly Wastewater Treatment Plants; (e) the NRC has been unable or unwilling to explain the source of the cobalt-60 on the District's property, and unable to identify any likely sources for the cobalt-60 other than the AMS facility; and (f) the quantity of cobalt-60 at the Southerly Plant exceeds that which the AMS records show was released by AMS into the sewer system. Secondly, the original license for this site, issued to Picker in 1959, contained a requirement for an alarm system to detect unmonitored discharges. The District states that such an alarm system was not a condition of the subsequent AMS license, despite a recommendation from Oak Ridge Associated Universities that such an alarm system be installed, along with control valves, to shut off flow to the sewer if the alarm sounds.

By letter dated September 7, 1994, the NRC formally acknowledged receipt of the District's letter, and informed the District that its request was being treated pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. A notice of the receipt of the petition was published in the *Federal Register* on September 19, 1994 (59 Fed. Reg. 47,959). The NRC Staff sent a copy of its acknowledgment letter, with a copy of the petition, to AMS. By letter dated November 9, 1995, the NRC informed the District that further action on its request was being deferred until completion of an ongoing proceeding on AMS's November 29, 1994 application to renew its license. While that proceeding has not been terminated, the NRC Staff has decided to deny the renewal application. *See* Letter from C. Paperiello, NRC, to S. Stein, AMS, dated September 28, 1998. Accordingly, it is now appropriate for the Staff to consider the action requested by the District.

I have completed my evaluation of the matter raised by the District and have determined that, for the reasons stated below, the petition should be denied.

II. BACKGROUND

In 1959, the Atomic Energy Commission (AEC) (predecessor to the NRC) issued License No. 34-07225-09 to Picker X-Ray Corporation (Picker) for operation of a sealed-source manufacturing facility located at 1020 London Road. The license authorized Picker to receive, store, and encapsulate cobalt-60 for the purpose of installing these encapsulated sources in approved devices and distributing the sources to customers having valid licenses. The facility at 1020 London Road had been built specifically for the intended purpose of handling and encapsulating large quantities of cobalt-60 (in the kilocurie range); the building included a hot cell for encapsulating the cobalt-60, and various support areas, including a heavily shielded room that contained two stainless steel tanks to collect liquid radioactive waste (waste holdup tanks (WHUT)). During the manufacturing of encapsulated sources, it was not uncommon that the hot cell would become contaminated with oxidized cobalt-60. To maintain control of contamination and radiation levels, the cell would be cleaned periodically, with the liquid waste generated by the cleanup diverted to the WHUT room, which had a combined holding capacity of 600 gallons. The stored liquid radioactive waste was then discharged to the sanitary sewer at irregular intervals, depending on the volume of liquid waste generated during normal operations. In a manual entitled ''Radiation Safety Procedures for the Picker X-Ray Corporation, Waite Manufacturing Division, Inc.,'' dated December 1959, a procedure outlined the equipment and steps followed to discharge the liquid waste to the sewer. The liquid radioactive waste was pumped directly from the WHUT into the sanitary sewer system through a drain in the basement floor. The hose from the WHUT to the sewer drain was continuously monitored during discharge, with the liquid passing through a solenoid valve, an in-line monitor consisting of a G-M tube with a rate meter and a strip-chart recorder, and a water meter. The solenoid valve opened only during intentional discharge from the WHUT, and only when the monitoring system detected count rates below a preset level, ensuring that only authorized concentration levels were being discharged. A record of the total discharge would be indicated by the total volume of liquid discharged and the count rate information from the monitor, calculating the average concentration and the total activity. The description of the monitoring process did not have the detection system operating continuously, but only while discharging from the holdup tanks to the sanitary sewer drain.

In a letter submitted to the AEC dated January 25, 1974, Picker submitted a manual entitled ''Radiation Safety Procedures for the Picker Corporation, Isotope Operations,'' requesting it supersede the then-effective manual, ''Radiation Safety Procedures for the Picker X-Ray Corporation, Waite Manufacturing Division, Inc.,'' mentioned above. This new manual modified the facility's liquid waste disposal method and system, and was later revised in September 1976.

See Inspection Report No. 030-16055/93003 (DRSS) at 13. The AEC, and later the NRC, did not incorporate the January 1974 letter, the manual, and the subsequent September 1976 revision, into Picker's license. In February 1974 (OR Inspection Report No. 74-01 for License No. 34-07225-09 at 6), Picker modified its liquid radioactive waste discharge procedure from the in-line continuous monitor, to a batch disposal method. This batch disposal system consisted of a 55-gallon drum located outside the room housing the WHUT, atop a stand pipe connected to a floor drain leading to the sanitary sewer line. Wastewater was pumped from the WHUT to the 55-gallon drum, the drum liquid was then agitated by an electrically driven trolling motor, and, after agitation, the liquid was sampled to determine its radioactive concentration. After determining radioactivity concentration and the volume in the 55-gallon drum, for recording concentration and total quantity of radioactive material, the plug at the bottom of the drum was removed to discharge the contents to the sanitary sewer. This batch method of disposal was continued until Picker terminated this license in November 1979.

In 1979, Picker sold the facility and operation at 1020 London Road to AMS. The provisions of the AMS license application were similar to the previous Picker license, with many of the procedures carried forward to the AMS license, including the batch method for liquid radioactive waste release described above. AMS used the same batch method for disposal of liquid radioactive waste as Picker, from the time that AMS's initial license (License No. 34-19089-01) was issued on November 2, 1979, until April 1986. In 1986, AMS installed a 200-gallon plastic tank to collect waste from the drain leading from decontamination showers, the laundry, and sinks, and discontinued use of the 55-gallon drum for discharge. One of the two tanks in the WHUT room, a 500-gallon tank, was no longer receiving liquid waste when the 200-gallon tank was installed in 1986, and the use of the other tank in the WHUT room (100-gallon capacity) was discontinued in 1988, when the WHUT room was isolated. The batch method of determining concentration and total volume of the liquid discharge from the 200-gallon tank, to show compliance, continued until May 1989, when discharge to the sanitary sewer (via floor drains) was discontinued completely.

III. DISCUSSION

The District's petition requests the NRC to require AMS to install, maintain, and operate a radiation alarm system on all drains at the AMS facility that lead to either sanitary or storm sewers. The request to modify the license by having alarms installed appears to be an effort to put in place a mechanism that would indicate when cobalt-60 is entering the District's sanitary sewer system, and, in

turn, to stop the entry of the cobalt-60 into the sanitary sewer system on positive indication of material.

Most of the bases for the petition are restatements of facts, or existing information in previously published documents, that are associated with the facility at 1020 London Road. Since 1989, when AMS changed its decontamination process to a dry method, AMS's records indicate that AMS has not disposed of any radioactive waste into the sanitary sewer drain.

The District has incurred costs of nearly $2 million addressing the cobalt-60 contamination at its Easterly and Southerly wastewater treatment plants. The District's apparent concern in this petition is the threat that the London Road facility poses to the District's treatment facilities, primarily pertaining to the imposition of additional costs through release of cobalt-60 from the AMS facility into the District's system. As described below, however, neither the nature or activity of the contamination in the WHUT room, in light of the condition of the WHUT room, nor the requirements formally applicable to Picker establish any basis to take the requested action. This cobalt-60 contamination is in a dry state, and the WHUT room is completely isolated from the sewer system and from accidental access. There are no floor drains in the WHUT room, and there is no water supply into or out of the room. Accordingly, the existence of contamination of 393 curies (14.5 terabecquerels) of loose, ''talcum-like'' cobalt-60 in the WHUT room in the basement does not warrant granting of the District's request.

The District indicated there had been an alarm and control system that had once been in place when Picker operated the facility, up to November of 1979. In connection with this type of system, the District states that the system had not been a required condition of the license after Picker terminated work at the facility, and operations continued under the AMS license. In its original license application to show compliance with the regulations at that time, Picker included conditions requiring a water-monitoring system that detected concentration levels in a drainpipe. The system that Picker described in the Informational Memorandum No. 6, ''Calibration and Evaluation of Water Monitor System,'' submitted by Picker to the NRC on December 2, 1959, was used as both a control system, to prevent discharge above a preset limiting concentration, and as a method of showing compliance with then-applicable regulations. However, this documentation does not indicate that there had been any alarm as part of the system — nor is it documented, from that time, why the in-line system was discontinued, and a batch method used in its stead, in 1974. *See* OR Inspection Report 74-01, License No. 34-07225-09, transmittal dated May 3, 1974. Two interviewees questioned during a 1993 inspection indicated that the in-line system was discontinued because the in-line G-M detector needed to be replaced, but was no longer manufactured or available. *See* Report No. 030-16055/93003 (DRSS) at 11. Both procedures, the in-line monitoring method and

the batch method, at the time they were being used, satisfied the requirement to show compliance independently, and, therefore, either procedure was considered acceptable at the time of the request.

The Oak Ridge Associated Universities report that recommended monitoring the discharge to the sanitary sewer and placing a servo-valve mechanism on the drains was part of a larger report. *See* ''Evaluation of the Operational Radiation Safety and Fire Protection Programs of the Advanced Medical Systems, Inc., London Road facility, Cleveland, Ohio,'' December 1985. This method was given as an alternative for developing a contingency plan for controlling release to the sanitary sewer system in case of a major spill into the basement. The other alternative offered in this report was to seal the drains in the basement floor, so that any release could be monitored before releasing to the sewer system. AMS chose this latter alternative as a means of preventing an unmonitored release. The method of sealing the drains was determined to be appropriate to ensure compliance with 10 C.F.R. § 20.303 (1985). A continuous monitor could be used for the purpose of detecting a major unintended release, but might be relatively insensitive for normal operations.

In October 1994, the District issued an Executive Director's Order to AMS terminating all sewer service effective October 24, 1994. In November 1994, the District placed a compression plug in the AMS lateral sewer line that connects the AMS facility to the District's sewer system under London Road. Thus, in effect, the District isolated the AMS facility's sanitary and storm drain lines from the sanitary sewerage treatment system. In mid-1995, AMS grouted shut the entire lateral line, to immobilize any residual cobalt-60 that remained in the lateral. AMS's grouting of the lateral line blocked release, through the lateral, from the AMS facility to the District's sewer system. At some point following the grouting operation, the District removed the compression plug on AMS's lateral sewer line. Currently, there are drains at the AMS facility that lead from the rooftop (for rainwater) to the main sewer system in London Road, but there are no other drains from the facility that are connected to the sewer system. The lateral connector, which connects all drains originating from within the AMS facility to the District's sewer line, remains grouted. Also, in a settlement agreement between the District and AMS, executed on December 20, 1996, the District indicated that it would allow reconnection of the AMS facility to its London Road Interceptor pursuant to procedures set forth in the agreement, provided that several conditions were first satisfied. As of the date of this Director's Decision, AMS has not executed all the conditions in the agreement. The December 1996 settlement agreement states that reconnection shall be in full accordance with several criteria and requirements, with one of the requirements being that AMS must agree not to discharge any cobalt-60 into the sanitary sewer system, directly or indirectly. *See* Settlement Agreement dated December 20, 1996, at 10, forwarded by a letter from Dwight Miller, Stavole

& Miller, Attorneys and Counsellors at Law, to John Madera, Chief, Materials Inspection Branch 1, Region III, dated January 6, 1997. With this agreement for reconnection in place, and with the only connection between the interior of the AMS facility and the District's sewer system grouted, until AMS satisfies the condition of the settlement agreement, the requested requirement for an alarm system is not necessary at this time.

The existence of unsealed cobalt-60 at the AMS facility does represent a potential risk. As the NRC Staff has previously stated, the possibility remains that the contamination existing on site might be spread to areas off site or that future operations could result in offsite contamination. Such offsite contamination would not necessarily spread to the District's system, however. In addition, the likelihood of accidental release of cobalt-60 from the Licensee's facility has diminished and continues to do so. DD-94-6, 39 NRC at 379. Since 1994, the amount of cobalt-60 that could be released in an accident at the Licensee's facility has been greatly diminished because of disposals to a licensed disposal site. *See* NRC Inspection Report No. 030-16055/97001 (DNMS) (March 7, 1997). Moreover, NRC inspection and review of records have not revealed any documentation at AMS or other evidence that would indicate that discharges into the sanitary sewer system have been in excess of authorized limits. DD-97-13, 45 NRC at 465. As the situation exists today, the NRC Staff concludes that neither the contamination at the facility nor the Licensee's drainage system present an immediate health and safety hazard to the public, and that the requested action is not warranted.

IV. CONCLUSION

The Staff has carefully considered the request of the Petitioner. In addition, the Staff has evaluated the bases for the Petitioner's request. For the reasons discussed above, the District's request for action pursuant to section 2.206 is denied, and no action pursuant to section 2.206 is being taken in this matter.

As provided by 10 C.F.R. § 2.206, a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance, unless

the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 4th day of November 1998.

Cite as 48 NRC 317 (1998) **DD-98-12**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of **Docket No. 50-213**

CONNECTICUT YANKEE ATOMIC POWER COMPANY
(Haddam Neck Plant) **November 16, 1998**

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

I. INTRODUCTION

On March 13, 1998, Mr. Jonathan M. Block submitted a petition pursuant to Title 10 of the *Code of Federal Regulations*, section 2.206 (10 C.F.R. § 2.206), on behalf of the Citizens Awareness Network (Petitioner) requesting that NRC (1) take immediate action to suspend Connecticut Yankee Atomic Power Company's (CYAPCO's) license to operate the Haddam Neck reactor and (2) investigate CYAPCO's intention to use an air cooling method as a backup cooling method for spent fuel.

In support of his request, the Petitioner offers the following five bases: (1) CYAPCO has not resolved longstanding failures to exercise adequate radiological controls, (2) the nitrogen intrusion event of August 1996 demonstrates that CYAPCO is unable to maintain operations in a shutdown condition, (3) CYAPCO's plan to use air cooling of the spent fuel pool (SFP) as a backup cooling method would constitute an unmonitored, unplanned release into the environment, (4) the proposal to use the air cooling method is a violation of CYAPCO's license, and (5) the proposal to use the air cooling method reveals CYAPCO's lack of comprehension of the defense-in-depth approach to safety systems.

II. BACKGROUND

Connecticut Yankee Atomic Power Company is the holder of Facility Operating License No. DPR-61, which authorizes the Licensee to possess the Haddam Neck Plant (HNP). The license states, among other things, that the facility is subject to all the rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (the Commission or NRC) now or hereafter in effect. The facility consists of a pressurized-water reactor located at the Licensee's site in Middlesex County, Connecticut. On December 5, 1996, CYAPCO submitted written certifications of permanent cessation of operation and that all nuclear fuel had been permanently removed from the reactor vessel. The certifications were docketed on December 11, 1996, and therefore, in accordance with 10 C.F.R. § 50.82(a)(2), the facility is permanently shut down and defueled and is no longer authorized to operate or place fuel in the reactor.

Additional background relevant to the five bases offered by the Petitioner to support its requests is outlined below.

The Petitioner's first basis regarding the adequacy of HNP's radiological controls program has been evaluated by the NRC. The Petitioner notes that (1) in November 1996, the Licensee allowed two workers to become contaminated during an entry into the fuel transfer canal; (2) in February 1997, the Licensee released contaminated equipment to an unlicensed facility; and (3) on numerous occasions during the operating phase of the HNP, the Licensee released contaminated materials to unrestricted areas. The first two items noted were included in the basis for issuing a confirmatory action letter (CAL) to the Licensee on March 4, 1997, which documented the Licensee's commitments to improve its radiation controls program. Subsequently, on May 5, 1998, the NRC issued the results of an inspection of the changes to the Licensee's radiation controls program and concluded that the Licensee had met the commitments listed in the CAL. The third item noted was addressed by the NRC in the Haddam Neck Historical Review Team Report, dated March 1998. The report concluded that, based on dose assessments completed thus far, radiation exposure to members of the public from the release of contaminated materials to offsite locations did not exceed the regulatory limits of 10 C.F.R. Part 20.

The Petitioner's second basis, that CYAPCO is unable to maintain operations in the shutdown condition, is based on an August 1996 event. At that time, the reactor was shut down with the head in place and contained a full core of fuel. However, operators allowed nitrogen to collect in the reactor vessel, displacing water contained in the top of the reactor vessel head. The NRC conducted an augmented inspection team (AIT) review of the event and concluded that the event, in combination with other events that took place at the same time, was safety significant. However, there were no actual public health and safety consequences. The AIT issued its report on October 30, 1996. A ''Notice of

Violation and Proposed Imposition of Civil Penalties — $650,000'' was issued to the Licensee by NRC on May 5, 1997, due, in part, to the nitrogen intrusion event.

The Petitioner's third, fourth, and fifth bases pertain to modifications to the HNP spent fuel cooling system. CYAPCO submitted its Post Shutdown Decommissioning Activities Report (PSDAR) on August 22, 1997. The Licensee plans to keep its spent fuel in wet storage in the SFP until it can be transferred to the Department of Energy (DOE). In the interim period, the spent fuel building and systems necessary to accomplish fuel cooling will remain on site, separate from the rest of the site's mechanical and electrical systems. This arrangement is referred to as the ''spent fuel pool island.'' On March 11, 1998, at a public meeting at the Haddam Neck site, the Licensee reported on the status of establishing the SFP island, among other items. The Licensee stated that two trains of water cooling will be installed to cool the SFP. Heat rejection will be changed from the existing service water system to two new spray coolers to be mounted on the roof of the spent fuel building. During the discussion, the Licensee stated that a backup cooling method, created by opening the building's doors and roof hatch to establish natural-circulation air flow through the building, could be used to cool the spent fuel in the event that all other cooling systems became unavailable. The Licensee did not present an evaluation of the dose consequences of radiological releases through the roof hatch, if the air cooling method was actually used. However, the Licensee had not used the air cooling method and considered it highly unlikely that conditions would arise that would require its use.

In order to respond to the petition, the NRC requested information from the Licensee with respect to its plans to air cool the SFP if other cooling methods were unavailable. The Licensee responded by letters dated June 29 and October 14, 1998.

III. DISCUSSION OF PETITIONER'S REQUESTS

Each of the Petitioner's requests is discussed below. The five bases presented by the Petitioner are considered for each request, and determinations are made as to whether the bases support the request.

The Petitioner's first request is to immediately suspend CYAPCO's operating license.

The first basis presented by the Petitioner, that the Licensee has not resolved failures to exercise adequate radiological controls, no longer pertains to the first request, since the Licensee has implemented improvements, and the NRC has found them acceptable.

The second basis presented was the nitrogen intrusion event of August 1996. Although the NRC took enforcement action in response to the event, the basis no

longer pertains to the first request since the reactor vessel has been permanently defueled and no reactor accident is, or ever will be, possible at HNP.

The third basis presented to support the request to suspend HNP's operating license is that air cooling the spent fuel through the spent fuel building roof hatch would constitute an unplanned, unmonitored release of radioactivity to the environment. The Commission's regulations require a licensee to monitor and control radioactive releases. The Commission places a licensee under the authority of the regulations by issuing a license with appropriate conditions. For example, the HNP operating license imposes the requirements of 10 C.F.R. Part 20, ''Standards for Protection Against Radiation,'' and 10 C.F.R. Part 50, ''Domestic Licensing of Production and Utilization Facilities,'' among others, on the Licensee. Part 20 limits the radiation exposure a licensee may allow a person to receive and requires the licensee to demonstrate that it has controlled exposures to levels less than the limits. Part 50 governs the operation and decommissioning of a reactor facility, and, perhaps most significantly in view of the third basis presented, requires a licensee to limit the release of radioactive materials in effluents to ''as low as reasonably achievable'' (ALARA). Suspending the HNP license would not relieve the Licensee of its responsibility to adequately control the use of radioactive materials in its possession, but could impede the NRC's ability to enforce regulatory requirements. Since the license is a mechanism through which the NRC holds the Licensee to its responsibility, the third basis presented does not support suspension of the license.

The fourth basis presented to support the request to suspend the license is that the Licensee's proposal to air cool the SFP using a flow path through the spent fuel building doors and roof hatch constitutes a violation of the license conditions. However, the license does not prohibit making proposals for alternative methods of operation of a reactor facility. Since making a proposal to air cool the SFP does not violate the license, the fourth basis does not support suspension of the license.

The fifth basis presented to support the request to suspend the license is that the air cooling proposal reveals that CYAPCO does not understand the defense-in-depth approach to backing up safety systems. Defense in depth, as applied at the system level, can be achieved by providing redundant and diverse methods to accomplish a function. The Licensee described the normal and alternate SFP cooling systems. The normal system consists of redundant components for the SFP cooling system, the intermediate cooling loop, and the roof-mounted spray coolers. These are closed loops and do not require outside water to remain in operation, except for makeup water to the sprayers in hot weather. The redundancy provided in the normal cooling system allows several configurations to remove SFP heat. In addition, the SFP cooling pumps are backed up by alternate pumps that can be used to circulate river water through the normal system heat exchangers, which provides a diverse heat sink for the

normal system. The pumps may be powered from offsite or onsite electrical power sources, and there is an engine-powered pump available that does not require electrical power. Thus, there are redundant and diverse sources of power for pumping. In the event no heat exchange systems are available, makeup water could be added to the SFP, and the cooling could be accomplished through evaporation. The heat would then be removed by the building exhaust fan, which is the normal release path. As evidenced by the components and alternates listed above, redundant and diverse methods are available to provide defense in depth for the SFP cooling function. The air cooling method is not required. Thus, the fifth basis does not support the request to suspend the license.

For the reasons stated above, the Petitioner's request to suspend the Licensee's operating license is denied.

The Petitioner's second request is to investigate CYAPCO's proposal to air cool the SFP by opening the spent fuel building's doors and roof hatch.

The first basis presented by the Petitioner, that the Licensee has not resolved failures to exercise adequate radiological controls, no longer pertains to the second request, since the Licensee has implemented improvements, and the NRC has found them acceptable.

The second basis presented was the nitrogen intrusion event of August 1996. Although the NRC took enforcement action in response to the event, the basis does not pertain to the second request since the reactor vessel has been permanently defueled and no reactor accident is, or ever will be, possible at HNP.

The third basis presented by the Petitioner to support the request to investigate the Licensee's air cooling proposal is that the Licensee's plan to air cool the SFP by opening the spent fuel building's doors and roof hatch would constitute an unplanned, unmonitored release into the environment. The third basis concerns actions that have not occurred, and that the Licensee does not expect to take. However, because the Licensee plans to use the air cooling method under certain circumstances, the NRC considers the Petitioner's basis to be sufficient to grant the second request. A review of the Licensee's regulatory responsibilities is presented in Section IV, below.

The fourth basis presented to support the request for an investigation is that the Licensee's proposal to air cool the SFP using a flow path through the spent fuel building doors and roof hatch constitutes a violation of the license conditions. However, the license does not prohibit making proposals for alternative methods of operation of a reactor facility. Since making a proposal to air cool the SFP does not violate the license, the fourth basis does not support the request.

The fifth basis presented to support the request to investigate the Licensee's proposal is that the air cooling proposal reveals that CYAPCO does not understand the defense-in-depth approach to backing up safety systems. As

noted above, the system proposed by the Licensee achieves defense in depth by installing redundant and diverse components, power supplies, and heat sinks. The air cooling method is not required for defense in depth. Thus, the fifth basis does not support the request.

The NRC has determined that the third basis presented by the Petitioner is sufficient to grant the Petitioner's request to investigate the Licensee's proposal to air cool the SFP. The Staff's evaluation of the Licensee's proposal is presented in Section IV, below.

IV. REVIEW OF THE LICENSEE'S PROPOSAL

The NRC requested information from the Licensee with respect to its plans to air cool the SFP if other cooling methods become unavailable. The Licensee responded by letters dated June 29 and October 14, 1998. The NRC also reviewed the Licensee's operating license, Updated Final Safety Analysis Report (UFSAR), and Offsite Dose Calculation Manual (ODCM).

By letter dated October 14, 1998, the Licensee stated that the dose consequence to an offsite member of the public from an airborne release from the SFP if the doors and roof hatch were opened to cool the spent fuel would be 0.254 mrem. The dose was calculated assuming that the air cooling method would be in use for 2 weeks before returning to a water cooling method and closing the doors and roof hatch. The dose is within regulatory limits. The Licensee stated that procedures are in place to monitor a radioactive release from the roof hatch.

The Licensee's October 14 letter contained a commitment to develop procedural guidance regarding when to open and subsequently close the spent fuel building (SFB) doors and roof hatch, in the event air cooling becomes necessary. The procedure will also direct operators to request airborne radioactivity surveys when the SFB doors and roof hatch are opened.

The Facility Operating License limits gaseous effluents in accordance with Technical Specification (TS) 3/4.11.2. That TS also requires that if a dose rate exceeds the limit, the Licensee must decrease the release rate within 15 minutes to comply with the limits.

The UFSAR, section 9.1.3, describes the SFP cooling system. Under the provisions of 10 C.F.R. § 50.59, a change to a system described in the UFSAR requires the Licensee to perform a safety evaluation and, if necessary, obtain NRC approval before implementing the change. Using the air cooling method would fall within the scope of section 50.59. Therefore, when the Licensee revises its procedure to permit use of the air cooling method, it must perform a safety evaluation.

The ODCM provides the parameters and methodology to be used to calculate offsite doses and effluent monitor setpoints. Each effluent pathway used by the

Licensee must be accounted for in the ODCM. The Licensee has procedures to monitor and quantify airborne releases, although, at the time of this review, the ODCM did not contain parameters or a methodology for a release path from the SFB roof hatch. However, there is no requirement to develop that information until the release path is used.

In summary, a release from the SFB doors and roof hatch from air cooling the SFP is required to be within regulatory limits. Before the air cooling method could be used, the Licensee would have to perform a safety evaluation in accordance with section 50.59 and revise its ODCM. In the event that the SFB doors and roof hatch are actually used for cooling the SFP, the release path must be monitored and actions taken to meet regulatory limits. However, there is no requirement to revise the ODCM unless the Licensee, in fact, uses the air cooling method.

V. DECISION

For the reasons stated above, the petition is denied in part and granted in part. The request to suspend the operating license is denied. The request to investigate the Licensee's proposal to air cool the SFP is granted. The investigation is presented as the review in Section IV, above. The decision and the documents cited in the decision are available for public inspection in the Commission's Public Document Room, the Gelman Building, 2210 L Street, NW, Washington, D.C., and at the Local Public Document Room for the Haddam Neck Plant at the Russell Library, 123 Broad Street, Middletown, Connecticut.

In accordance with 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 16th day of November 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan
Greta J. Dicus
Jeffrey S. Merrifield

In the Matter of **Docket Nos. 50-317-LR**
50-318-LR

BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2) **December 23, 1998**

In this reactor license renewal proceeding (the first of its kind), the Commission justifies its decision to treat license renewal applications expeditiously and then upholds the Board's rejection of a Petitioner on grounds that it neither submitted timely contentions nor met the late-filing standards for its two untimely contentions. The Commission also explains why it has the authority to modify its procedures either by Policy Statement or on a case-by-case basis.

RULES OF PRACTICE: RENEWAL OF LICENSES; REACTOR OPERATING LICENSE RENEWAL PROCEEDINGS

NRC: STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

One of the Commission's leading considerations in issuing the *Policy Statement on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998), was the need to deal with license renewal in a fair and efficient way.

RULES OF PRACTICE: RENEWAL OF LICENSES; REACTOR OPERATING LICENSE RENEWAL PROCEEDINGS

NRC: STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

The Commission has long understood that the potential was there for a large number of utilities to seek license renewal soon, and that the renewal process would have to be both fair and efficient. The Commission has likewise long understood the need for a predictable and stable license renewal process. With an eye on achieving a prompt and fair resolution of proceedings, the Policy Statement sought ''to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration.'' *Policy Statement,* CLI-98-12, 48 NRC at 18.

NRC: ADJUDICATORY RESPONSIBILITIES

RULES OF PRACTICE: COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS

The Commission remains mindful of its ''broad regulatory latitude'' under the Atomic Energy Act to establish its '' 'own rules of procedure . . . and methods of inquiry.' '' *Nuclear Information Resource Service v. NRC,* 969 F.2d 1169, 1177 (D.C. Cir. 1992) (en banc), *quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 543 (1978); *see Union of Concerned Scientists v. NRC,* 920 F.2d 50, 53-54 (D.C. Cir. 1990). Only if the Commission were convinced that the efficiency measures it and the Board have taken were unlawful or unjust would the Commission backtrack from them.

ADMINISTRATIVE PROCEDURE ACT: NOTICE AND COMMENT PROCEDURES

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS; AUTHORITY TO REGULATE PROCEEDINGS

LICENSING DECISIONS: EXPEDITION AND THOROUGHNESS

NRC: STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

POLICY STATEMENT ON CONDUCT OF ADJUDICATORY PROCEEDINGS

RULES OF PRACTICE: COMMISSION GUIDANCE; COMMISSION POLICY STATEMENTS

The Commission rejects the argument that the *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998), amounts to an unlawful rule because it was issued without the prior notice and opportunity for comment required under the Administrative Procedure Act. The Policy Statement reduced no one's substantive rights and changed no basic procedures. It simply updated the Commission's prior procedural guidance to the boards (issued in 1981) and suggested various procedural devices designed to foster more efficient and expeditious proceedings. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 51 (1998). It continued the Commission's policy of giving the boards sufficient discretion to handle cases in a way that ensures fair and accurate decisionmaking. *See Policy Statement,* CLI-98-12, 48 NRC at 20. In sum, CLI-98-12 is no more than it purports to be, a policy statement on adjudicatory procedures, and therefore it did not require notice-and-comment in advance of issuance. *See* 5 U.S.C. § 553 (''statements of policy'' and ''rules of agency organization, procedure, or practice'' exempt from notice-and-comment requirement); *see generally Troy Corp. v. Browner,* 120 F.3d 277, 287 (D.C. Cir. 1997); *American Hospital Association v. Bowen,* 834 F.2d 1037, 1046-47 (D.C. Cir. 1987).

LICENSING DECISIONS: EXPEDITION AND THOROUGHNESS

OPERATING LICENSE RENEWAL PROCEEDINGS: RESPONSIBILITIES OF LICENSING BOARDS

RULES OF PRACTICE: EXTENSIONS OF TIME

In considering motions for extensions of time, the Commission's construction of ''good cause'' to require a showing of ''unavoidable and extreme circumstances'' constitutes a reasonable means of avoiding undue delay in this

important license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Policy Statement and the APA.

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

NRC: STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

RULES OF PRACTICE: EXTENSIONS OF TIME

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

The Board's application of the ''unavoidable and extreme circumstances'' test to Petitioner's request for an extension of time was consistent with not only the Commission's own directive in CLI-98-14 and *Policy Statement* (CLI-98-12, 48 NRC at 21) but also with the Board's own extensive authority under 10 C.F.R. § 2.718 to schedule and regulate proceedings.

ADMINISTRATIVE PROCEDURE ACT

NRC: ADJUDICATORY RESPONSIBILITIES

The Commission's position, reiterated several times in recent years, is that NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications, except in particular situations where Congress has so mandated. *See, e.g.,* Final Rule, ''Streamlined Hearing Process for NRC Approval of License Transfers,'' 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998), *referring to* 5 U.S.C. § 554(a).

LICENSING DECISIONS: EXPEDITION AND SCOPE

NRC: ADJUDICATORY RESPONSIBILITIES

OPERATING LICENSING RENEWAL PROCEEDING: ROLE OF COMMISSION

RULES OF PRACTICE: ADMINISTRATIVE FAIRNESS; SCHEDULING

The Commission does not doubt its obligation to treat all parties to our proceedings fairly — indeed, the Commission's original scheduling order in this proceeding could hardly have been clearer on the Commission's commitment to

fairness (CLI-98-14, 48 NRC at 42-43) — but the Commission cannot see how its effort to expedite the Calvert Cliffs proceeding prejudiced Petitioner's right to participate meaningfully in it.

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 2.3, 2.711(a), 2.718)

RULES OF PRACTICE: EXTENSIONS OF TIME; CONFLICTS; SCHEDULING

The Commission rejects Petitioner's argument that 10 C.F.R. § 2.3 requires the Commission and the Board to apply the ''specific rule'' of section 2.711(a) setting forth the ''good cause'' standard rather than the ''general rule'' of section 2.718 permitting the Board to establish the proceeding's schedule. The Commission sees no conflict between the two rules. In any event, section 2.3 applies only to conflicts between rules within Part 2, Subpart G, and rules outside that subpart. It is irrelevant to purported conflicts between rules within Subpart G.

RULES OF PRACTICE: EXTENSIONS OF TIME; SCHEDULING

Petitioner's complete failure to provide specific information about its concerns precluded any finding that ''good cause,'' in a meaningful sense, justified NWC's requested extensions of time prior to that date.

RULES OF PRACTICE: PRECEDENTIAL EFFECT OF BOARD DECISIONS

Unreviewed board rulings do not constitute precedent or binding law at this agency. *See, e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)).

NRC: AUTHORITY

RULES OF PRACTICE: ADMINISTRATIVE FAIRNESS; SCHEDULING

In CLI-98-15 (an earlier order in this proceeding), the Commission rejected Petitioner's attack against the Commission's ''milestones'' approach and pointed out that the suggested milestones were neither inflexible nor bereft of mechanisms for taking unexpected developments into account. *See* CLI-98-15, 48

NRC at 51-52, 55-56. The Commission adheres to the views it expressed in CLI-98-15.

NRC: SUPERVISORY AUTHORITY

RULES OF PRACTICE: COMMISSION DISCRETION TO DIRECT PUBLIC PROCEEDINGS; SCHEDULING

As the Commission explained in CLI-98-15 (an earlier order in this proceeding), ''10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit.'' CLI-98-15, 48 NRC at 53. The Commission also stressed that it ''has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules).'' *Id.*

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

RULES OF PRACTICE: CONTENTIONS; SCHEDULING

It has long been the practice at this agency that boards may change the deadline for filing contentions to allow sufficient time for responses prior to the prehearing conference — a practice that our Appeal Board explicitly approved at least twice, in situations all but identical to ours. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 & n.15 (1980); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). As the Appeal Board commented in *Allens Creek,* ''it makes a good deal of sense to structure the proceeding so that all participants know, before they arrive at the conference, what position the proponents of the plant are taking on the various contentions.'' 10 NRC at 523.

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

RULES OF PRACTICE: CONTENTIONS; SCHEDULING

The regulation governing the filing period for proposed contentions states simply that they must be filed ''*not later than* . . . fifteen . . . days prior

to the holding of the first prehearing conference.'' 10 C.F.R. § 2.714(b)(1) (emphasis added). By its very terms, this regulation establishes only the *latest* time for filing proposed contentions; it nowhere precludes either the Board or the Commission from shortening that time frame. Indeed, section 2.718(e) provides the Board with broad authority to ''[r]egulate the course of the hearing'' and section 2.711(a) permits the Commission or Board to ''shorten[]'' regulatory time frames ''for good cause.'' The Board here had ''good cause'' in that the alteration of the time frame would permit the Board and Petitioner to consider the Staff's answer to the proposed contentions prior to the scheduled date of the prehearing conference (pursuant to 10 C.F.R. § 2.714(c), the Staff's answer would otherwise be due the day of the prehearing conference).

NRC: SUPERVISORY AUTHORITY

OPERATING LICENSE RENEWAL HEARING: *SUA SPONTE* ISSUES

RULES OF PRACTICE: *SUA SPONTE* ISSUES

The extent of the Board's authority to raise contentions *sua sponte* is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory staff — a question of resources and expertise peculiarly within the Commission's province to decide.

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

OPERATING LICENSE RENEWAL HEARING: *SUA SPONTE* ISSUES

RULES OF PRACTICE: *SUA SPONTE* ISSUES

Given Petitioner's failure to raise any admissible contentions itself, the Board had no occasion to raise contentions *sua sponte* and, indeed, lacked authority to do so. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188-89 (1991).

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 2.714(a), 2.718)

RULES OF PRACTICE: CONFLICT; CONTENTIONS; SCHEDULING

We do not consider sections 2.714(b)(1) and 2.718 to be at odds with each other. The former establishes a ''default'' filing deadline for contentions in proceedings in cases where the Board issues no order under sections 2.711 and 2.718(e) setting such a deadline.

RULES OF PRACTICE: BURDEN OF PROOF; CONTENTIONS (UNTIMELY FILING); NONTIMELY SUBMISSION OF CONTENTIONS

Longstanding NRC practice obliges *Petitioner* to show that its untimely contentions satisfy the Commission's late-filing requirements. Moreover, given that Petitioner is in essence (though not in form) seeking an order permitting it to raise late-filed contentions, our conclusion in the text is also consistent with 10 C.F.R. § 2.732 that ''the applicant or the proponent of an order has the burden of proof.''

RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING); NONTIMELY SUBMISSION OF CONTENTIONS

The Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993). *See also Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) (''given its failure even to address the section 2.714 lateness factors, [the] intervention petition was correctly denied because it was untimely'').

RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING); NONTIMELY SUBMISSION OF CONTENTIONS

Petitioner's failure to address the required standards for late-filed contentions in its written October 13th submission prevents it from now complaining that it was denied an opportunity to do so, orally, at a prehearing conference.

RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING); NONTIMELY SUBMISSION OF CONTENTIONS

The most important of the late-filing criteria by far is ''good cause.''

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS; CONTENTIONS (ADMISSIBILITY; GERMANENESS)

Petitioner provides no explanation how or why the RAIs are germane to either of its two contentions. This omission contravenes our regulatory requirements that a contention be accompanied by ''[a] concise statement of the *alleged facts or expert opinion* which support the contention . . . , together with *references to those specific sources and documents* . . . on which the petitioner intends to rely [and also] . . . [*s*]*ufficient information* . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact . . . *includ*[*ing*] *references to the specific portions of the application* . . . that the petitioner disputes and the supporting reasons for each dispute.'' 10 C.F.R. § 2.714(b)(2)(ii)-(iii) (emphasis added). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). Mere reference to documents does not provide an adequate basis for a contention. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). This absence of specificity and support is, without more, a sufficient ground for rejecting the two contentions. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144 (1993).

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS; CONTENTIONS (ADMISSIBILITY; SPECIFICITY)

''Neither Section 189a of the Atomic Energy Act nor § 2.714 . . . permits the filing of a vague, unparticularized contention.'' *See* Final Rule, ''Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,'' 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

Regulations do not require the Staff to submit RAIs to the Board or to serve them on petitioners. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152-53 (1993). Under our longstanding practice, contentions must rest on the *license application,* not on

NRC Staff reviews. Contrary to Petitioner's view, the NRC Staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions, and Petitioner has cited no language in the RAIs suggesting otherwise.

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

The NRC Staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions. RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory Staff simply indicate that the Staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The Staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns. The Commission considers many applications sufficiently complete for purposes of docketing, and for starting the adjudicatory process, even though the Staff subsequently poses questions to the applicants regarding those applications.

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

A petitioner can trigger a separate adjudicatory review only if it comes forward with timely and concrete concerns of its own. Mere reference to the Staff's requests for additional information is insufficient.

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

This is not to say that RAIs are always irrelevant to the adjudicatory process. If a petitioner concludes that a Staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a). *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC at 243 (1998). *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-39 (1991). Indeed, one reason for having a generic late-filed contention provision in the regulations is to have a logical, prenoticed method for intervenors to raise concerns in proceedings that relate to newly developed information.

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

If the Commission were to take Petitioner's preferred approach, and allow petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited proceedings, such as the Commission contemplated for license renewal, would prove impossible.

RULES OF PRACTICE: DISCOVERY; EXTENSIONS OF TIME (CONDUCTING DISCOVERY)

The Commission rejects Petitioner's assertion that the Board erred in denying Petitioner's motion to delay the prehearing conference and the contention deadline until Petitioner had been given the opportunity to conduct discovery of the Staff pursuant to 10 C.F.R. §§ 2.740(b) & (c), 2.752. This assertion contravenes the terms of the cited regulation, as well as longstanding NRC case law. Sections 2.740 and 2.752 apply only to ''parties'' — a status Petitioner does not have in this proceeding. Moreover, other regulations applicable to obtaining discovery from the Staff likewise apply only to ''parties.'' *See* 10 C.F.R. §§ 2.720(h)(2)(ii), 2.744(a)-(e). Finally, as the Board correctly pointed out in its September 21st order (slip op. at 2), ''longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions.''

MEMORANDUM AND ORDER

This proceeding involves an April 8, 1998 application by Baltimore Gas & Electric Company (''BG&E'') to renew its operating licenses for Units 1 and 2 of its Calvert Cliffs Nuclear Power Plant. The National Whistleblower Center (''NWC'' or ''Petitioner'') filed a timely intervention petition opposing the application. On October 16, 1998, the Licensing Board issued LBP-98-26, 48 NRC 232, dismissing the proceeding on the ground that NWC had failed to submit contentions by the October 1, 1998 deadline prescribed by the Board.

NWC appeals LBP-98-26 pursuant to 10 C.F.R. § 2.714a.[1] For the reasons given by the Board in LBP-98-26, and for the reasons below, we affirm.

I. PROCEDURAL BACKGROUND

NWC's essential grievance is the Commission's alleged failure to provide sufficient information and time to develop contentions adequate to trigger a hearing under our rules. *See* 10 C.F.R. § 2.714. NWC challenges an array of procedural rulings by the Board and by the Commission itself. We therefore set out in some detail the chronology of the Calvert Cliffs proceeding and the series of orders and decisions leading ultimately to the Board's rejection of NWC's petition to intervene.

This proceeding began on April 27, 1998, when the Commission published in the *Federal Register* a notice that BG&E's April 8th application was then available for public inspection at the NRC Public Document Room. *See* 63 Fed. Reg. 20,633. On May 19th, the NRC published another notice, this one announcing its Staff's determination that the application was sufficiently ''complete'' to be ''acceptable for docketing.'' *See* 63 Fed. Reg. 27,601. This second notice also indicated that the docketing of the application ''does not preclude requesting additional information as the [Staff's] review proceeds, nor does it predict whether the Commission will grant or deny the application.'' *Id.* On July 8th, the Commission published a notice of opportunity for hearing, permitting interested persons to file petitions for intervention by August 7th. *See* 63 Fed. Reg. 36,966. The notice specified that petitioners must submit their contentions ''not later than fifteen . . . days prior to the first prehearing conference.'' *Id.* The notice, however, did not preclude the Board from establishing an earlier deadline for contentions.

On July 28th, the Commission issued a *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998), 63 Fed. Reg. 41,872 (Aug. 5, 1998) (''Policy Statement''), providing guidance for all adjudications. The Policy Statement was not part of the Calvert Cliffs proceeding, but expressed the Commission's general expectation that licensing boards would establish schedules for promptly deciding issues and specifically reminded the boards

[1] NWC not only has challenged LBP-98-26 on appeal to the Commission, but also recently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging the same Board order. NWC cannot simultaneously challenge the same order before both the Commission and the court of appeals. *See, e.g., Melcher v. FCC,* 134 F.3d 1143, 1163 (D.C. Cir. 1998); *Accura of Bellevue v. Reich,* 90 F.3d 1403, 1407-08 (9th Cir. 1996). Nonetheless, as NWC's appeal to the Commission came first and has not been withdrawn, we proceed to decide it. NWC's premature lawsuit apparently results from a misunderstanding of our rules. Although petitions seeking discretionary Commission review are ''deemed denied'' if not acted on in 30 days (10 C.F.R. § 2.786(c)), no comparable provision governs appeals as of right, such as NWC's (*see* 10 C.F.R. § 2.714a). In the latter case, the final agency action is a Commission decision disposing of the appeal.

of their authority under various provisions of 10 C.F.R. Part 2 to shorten filing and response periods to the extent practical in specific proceedings. The Policy Statement also addressed such subjects as establishing milestones in an adjudication, granting extensions of time, and staying discovery against the NRC Staff.

On August 7th, NWC filed a petition for intervention and hearing with the Commission in the Calvert Cliffs license renewal proceeding. On August 19th, the Commission issued CLI-98-14, 48 NRC 39, referring NWC's petition to the Atomic Safety and Licensing Board, offering guidance on some of the matters that it had recently addressed in its policy statement, and setting out a suggested expedited procedural schedule for the case, with a goal of resolving the Calvert Cliffs proceeding within 30 months. On August 20th, the Board issued an unnumbered Memorandum and Order scheduling further filings in this proceeding. In that order, the Board scheduled the prehearing conference for the week of October 13th, established a September 11th deadline for the filing of contentions, and stated that contentions submitted after that date would be considered untimely and would therefore have to satisfy the ''late filing'' requirements of 10 C.F.R. § 2.714(a)(1)(i)-(v).

NWC responded to these two orders on August 21st by asking the Commission to vacate the scheduling and guidance portions of CLI-98-14 and by asking the Board both to postpone the prehearing conference until December 1st and to grant NWC a postponement of the deadline for contentions until 15 days prior to the prehearing conference. On August 26th, the Commission issued CLI-98-15, 48 NRC 45, denying NWC's motion to vacate. On August 27th, the Board issued an unnumbered order denying NWC's request for an enlargement of time. In that order, the Board noted that the application was far more limited in scope than an initial license application, that NWC had not shown why — given that NWC had had access to the application since April — it would be unable to formulate contentions by September 11th, and that NWC had provided no examples of complex or novel issues warranting delay. *Id.* at 2-3.

Instead of submitting contentions by September 11th, as required by the Board's August 20th and 27th orders, NWC again came to the Commission, this time with a petition for review of the Board's refusal to modify its schedule. On September 17th, we issued CLI-98-19, 48 NRC 132, indicating that the Board had ''acted entirely reasonably . . . in refusing to extend [the deadline for filing contentions] until November'' and we further ''urge[d] the Board to continue its effort to move this proceeding forward expeditiously.'' 48 NRC at 134. Notwithstanding these statements and with the intention of giving NWC every reasonable opportunity to participate in this proceeding, we granted NWC an extension of nearly 3 weeks (until September 30th, one of several dates suggested by NWC) within which to file its contentions.

Subsequent to our issuance of CLI-98-19, the Board denied a motion filed by NWC (on September 18th) for ''partial discovery'' but granted an alternative motion for a second extension (for one day) within which to file contentions. The Board also set the Staff's and BG&E's response deadline at November 2d and scheduled the prehearing conference for the week of November 9th. *See* Unnumbered Memorandum and Order, dated September 21, 1998, slip op. at 2-3. On September 29th, the Board set the prehearing conference for November 12th.

Despite NWC's two extensions of time, the October 1st deadline passed without NWC submitting contentions to the Board. Instead, it filed four pleadings on that date. In one of these (styled ''Status Report''), NWC listed the experts from whom it had obtained commitments of assistance and also the ''areas of concern'' that those experts had raised as possible contentions or bases for contentions. NWC stated explicitly that, in listing these ''areas of concern,'' it was not thereby filing contentions. In another October 1st filing (entitled ''Motion to Vacate and Reschedule Prehearing Conference''), NWC brought to the Board's attention a request by the Staff to BG&E for additional technical information (''request for additional information'' or ''RAI'') regarding the license renewal application. NWC complained that the RAI had not been placed in the Public Docket Room until September 22d, nearly a month after its August 28th issuance, that neither the Staff nor BG&E had informed Petitioner or the Board of the existence of the RAI, and that BG&E is not expected to respond to the RAI until November 21st, nine days after the then-scheduled November 12th prehearing conference. NWC went on to assert that, if BG&E needs more than 100 days [*sic,* actually 85] to ''complete [its] renewal application'' by responding to the August 28th RAI, then NWC should have 115 days within which to respond with contentions prior to the prehearing conference (i.e., until March 16, 1999). *See* NWC Motion to Vacate at 6. Finally, in its October 1st ''Reply to NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing,'' NWC set forth two arguments in support of its claim of standing — arguments that NWC later characterized on appeal as ''contentions.'' Motion at 11.

Later, on October 7th and 16th, NWC provided the Board with copies of thirty-four more Staff RAIs, the existence of which purportedly ''impacts this proceeding [and] provides a basis for the Board's dismissal of the . . . BGE . . . license renewal application . . . or in the alternative, for the Board's vacating and rescheduling of the pre-hearing conference that is scheduled to take place on November 12, 1998.'' NWC's Notice of Filing, dated Oct. 16, 1998, at 1. NWC considered the RAIs to be proof that BG&E had failed to file a ''complete and acceptable'' application.

On October 13th, relying solely upon the existence of Staff's RAIs, Petitioner filed two contentions: one claimed that BG&E's application was incomplete

as a matter of law and must be either withdrawn or dismissed, and the other claimed in general terms that the application fails to meet aging and other safety-related requirements. Thus, as of the October 16th issuance date of LBP-98-26, the Board had pending before it these two contentions and NWC's request to reschedule the prehearing conference. The Board in LBP-98-26 determined that NWC had failed to submit any contentions by the Board's October 1st deadline or to show that the October 13th contentions had met the Commission's standards for late-filed contentions. Based on these conclusions, the Board denied NWC's petition to intervene and terminated the proceeding. The Board's order rendered moot NWC's motion to reschedule.

On October 26th, Petitioner appealed LBP-98-26 to the Commission, challenged the *Policy Statement* (CLI-98-12) as constituting an improper rulemaking, and essentially sought reconsideration of all prior Commission decisions in this proceeding (CLI-98-14, CLI-98-15, and CLI-98-19). Further, it sought review of the Board's September 21st Memorandum and Order denying NWC's request to delay the prehearing conference and also the Board's August 20th and September 29th orders declining to postpone the contention filing deadline. Both BG&E and the Staff submitted briefs opposing NWC's appeal.

II. DISCUSSION

Last summer the Commission reexamined its hearing process and issued a policy statement (described above) designed to streamline it. Several considerations prompted the Commission's action, among them the potential number of hearings the agency was facing and recent experience with innovative adjudicatory techniques. At the beginning of its policy statement, the Commission said,

> With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals.

CLI-98-12, 48 NRC at 18. Clearly, one of the Commission's leading considerations was the need to deal with license renewal in a fair and efficient way.

The Commission has long understood that the potential was there for a large number of utilities to seek license renewal soon, and that the renewal process would have to be both fair and efficient. Over the next 20 years, a little more than

half the licenses for operating power reactors will expire (USNRC Information Digest, NUREG-1350, Vol. 10 (1998) at 49). There are already fifty-five units at thirty-eight sites eligible to apply for renewal licenses (*id.*). As the Commission said in 1991 when it first issued regulations on license renewal:

> In proposing the earliest date of application, the Commission considered the time necessary to plan for replacement of retired nuclear plants. Industry studies estimate that the lead time necessary for utilities to build a new electric generation plant is 10 to 12 years for fossil fuels and 12 to 14 years for nuclear or other new technologies. When the staff review is factored into the decision process, the Commission concludes that applications 18-20 years before expiration are not unreasonable. For these reasons, the final rule permits application for a renewed license to be filed 20 years before expiration of the existing operating license.

Final Rule, ''Nuclear Power Plant License Renewal,'' 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991).

Similarly, decisions to invest in major replacements, such as steam generators, must be made early in a licensee's consideration of a renewal decision (NRC, ''The Price-Anderson Act . . . A Report to Congress,'' NUREG/CR-6617 (Oct. 1998) at 26-27). Several sites have already announced that they will not seek renewal. After adding to the 10 to 14 years the 3 or more years the Commission was predicting in 1991 it would take the agency to review and reach a decision on an application for renewal, the Commission concluded that it would be reasonable to expect applications to come in as early as 20 years before their expirations, and so allowed in Part 54 of its regulations. 56 Fed. Reg. 64,963.

In light of these factors, the Commission has long understood the need for a predictable and stable license renewal process. In publishing revisions to the license renewal rule in 1995, the Commission noted that, as early as 1993, it had informed the Staff that:

> it is essential to have a predictable and stable regulatory process clearly and unequivocally defining the Commission's expectations for license renewal. This process would permit licensees to make decisions about license renewal without being influenced by a regulatory process that is perceived as uncertain, unstable, or not clearly defined.

Final Rule, ''Nuclear Power Plant License Renewal; Revisions,'' 60 Fed. Reg. 22,461, 22,462 (May 8, 1995).

With an eye on achieving ''a prompt and fair resolution of proceedings,'' the *Policy Statement* sought ''to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration.'' *Policy Statement,* CLI-98-12, 48 NRC at 18. Commission and Board scheduling orders in the current case reflect the concerns set out in the *Policy Statement. See* CLI-98-15, 48 NRC at 50.

NWC maintains that efforts by the Commission and the Board to expedite the Calvert Cliffs proceeding have resulted in a process that denies NWC a

fair opportunity to make its case against license renewal. NWC's appeal raises numerous, often overlapping, procedural questions. Rather than address the same arguments repeatedly in different contexts, we break them below into several broad categories. Much of NWC's appellate brief simply recapitulates what NWC has argued to the Commission twice previously, both when it asked the Commission to vacate its original order referring this proceeding to the Licensing Board and when it sought Commission review of the Board's original scheduling orders. We continue to find NWC's claims unpersuasive, largely for the same reasons we have given before. *See* CLI-98-19, 48 NRC 132 (1998); CLI-98-15, 48 NRC 45 (1998).

In considering NWC's procedural arguments one more time, we remain mindful of our ''broad regulatory latitude'' under the Atomic Energy Act to establish our '' 'own rules of procedure . . . and methods of inquiry.' '' *Nuclear Information Resource Service v. NRC,* 969 F.2d 1169, 1177 (D.C. Cir. 1992) (en banc), *quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 543 (1978); *see Union of Concerned Scientists v. NRC,* 920 F.2d 50, 53-54 (D.C. Cir. 1990). Only if we were convinced that the efficiency measures we and the Board have taken were unlawful or unjust would we backtrack from them. We are not so convinced.

A. Commission Authority to Modify Its Procedures by Policy Statement

NWC asserts that our *Policy Statement,* CLI-98-12, amounts to an unlawful rule because it was issued without the prior notice and opportunity for comment required under the Administrative Procedure Act (''APA''). *See* Appeal at 8-9. We disagree. The *Policy Statement* reduced no one's substantive rights and changed no basic procedures. It simply updated the Commission's prior procedural guidance to the boards (issued in 1981) and suggested various procedural devices designed to foster more efficient and expeditious proceedings. *See* CLI-98-15, 48 NRC at 51. It continued the Commission's policy of giving the boards sufficient discretion to handle cases in a way that ensures fair and accurate decisionmaking. *See Policy Statement,* CLI-98-12, 48 NRC at 20. In sum, CLI-98-12 is no more than it purports to be, a policy statement on adjudicatory procedures, and therefore it did not require notice-and-comment in advance of issuance. *See* 5 U.S.C. § 553 (''statements of policy'' and ''rules of agency organization, procedure, or practice'' exempt from notice-and-comment requirement); *see generally Troy Corp. v. Browner,* 120 F.3d 277, 287 (D.C. Cir. 1997); *American Hospital Association v. Bowen,* 834 F.2d 1037, 1046-47 (D.C. Cir. 1987).

B. Commission Authority to Modify Its Procedures on a Case-by-Case Basis

1. Extensions of Time

NWC asserts, as it has before, that the Commission inappropriately changed the standard for granting extensions of time by establishing an ''unavoidable and extreme circumstances'' test (set forth both in the *Policy Statement,* CLI-98-12, 48 NRC at 21, and in CLI-98-14, 48 NRC at 44) in lieu of the ''good cause'' test set forth in 10 C.F.R. § 2.711(a). NWC argues that the Commission imposed this new standard without reference to the record in this proceeding, without support of substantial evidence, and in violation of both the APA and the Commission's own regulations (section 2.711(a)). *See* Appeal at 6, 10, 17. Earlier in this proceeding, we considered and rejected this very argument. *See* CLI-98-15, 48 NRC at 53 & n.5. NWC in its appeal has given us no reason to depart from that ruling. We continue to believe that our construction of ''good cause'' to require a showing of ''unavoidable and extreme circumstances'' constitutes a reasonable means of avoiding undue delay in this important license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the *Policy Statement* and the APA.[2]

In any event, throughout this proceeding, NWC has provided the Board and the Commission only the scantiest of details regarding its health-and-safety or environmental concerns. Prior to its October 1st deadline for filing contentions, NWC had more than 5 months within which to prepare contentions, yet it offered no meaningful explanation of the grounds for its opposition to BG&E's application. It merely stated, in the most general terms possible, that it doubts the plant ''can safely operate past [its] original specified lifetime'' and that license renewal ''poses an unacceptable health and safety risk to the public.'' *See* Petition for Intervention, dated Aug. 7, 1998, at 4. Prior to October 1st, NWC's pleadings never expanded on either of these conclusory statements. NWC's complete failure to provide specific information about its concerns precluded any finding that ''good cause,'' in a meaningful sense, justified NWC's requested extensions of time prior to that date. (Later in this Order, we find that NWC's October 1st

[2] The Board's application of the ''unavoidable and extreme circumstances'' test to Petitioner was consistent with not only the Commission's own directive in CLI-98-14 and the *Policy Statement* (CLI-98-12, 48 NRC at 21) but also with the Board's own extensive authority under 10 C.F.R. § 2.718 to schedule and regulate proceedings. Petitioner argues that 10 C.F.R. § 2.3 requires the Commission and the Board to apply the ''specific rule'' of section 2.711(a) setting forth the ''good cause'' standard rather than the ''general rule'' of section 2.718 permitting the Board to establish the proceeding's schedule. We see no conflict between the two rules. In any event, section 2.3 applies only to conflicts between rules within Part 2, Subpart G and rules outside that subpart. It is irrelevant to purported conflicts between rules within Subpart G.

and 13th filings offer similarly insufficient explanation of its health-and-safety and environmental concerns.)[3]

2. *Milestones*

NWC complains generally that CLI-98-14 inappropriately established an unalterable 30-month schedule for this proceeding. *See* Appeal at 8, 10, 15. More specifically, NWC asserts that the Commission exceeded its authority when it instructed the Board to provide written explanations for any departures from the Commission's proposed timetable and then to restore the proceeding to the proposed timetable. *Id.* at 8. Therefore, it asserts, the Board erred in following the Commission's milestones. *Id.* at 7. In CLI-98-15, the Commission rejected NWC's attack against our ''milestones'' approach and pointed out that our suggested milestones were neither inflexible nor bereft of mechanisms for taking unexpected developments into account. *See* 48 NRC at 51-52, 55-56.[4] We adhere to the views we expressed there.

3. *Authority to Shorten Period for Filing Contentions*

NWC argues that the Commission and the Board unlawfully shortened the period for filing proposed contentions by establishing a deadline earlier than 15 days prior to the first prehearing conference. *See* Appeal at 6, 17-19. But, as we explained in CLI-98-15, ''10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and

[3] NWC offers two related arguments — (1) that the Board applied the new standard selectively by not applying it to the NRC Staff and to BG&E when giving them more time in which to respond to any contentions NWC might file on October 1st, and (2) that the Board ignored recent precedent in which two of the instant Board's members applied the ''good cause'' rather than the ''unavoidable and extreme circumstances'' standard in another proceeding. *See* Appeal at 19-20. These arguments warrant only brief responses. The first is unpersuasive as the Board order did not address a motion for an extension of time, for good cause, or otherwise, but simply provided a schedule that gave the Staff and BG&E response times ''roughly equivalent'' to NWC's time to prepare initial pleadings. *See* LBP-98-26, 48 NRC at 242 n.8. The second ignores the fact that unreviewed Board rulings do not constitute precedent or binding law at this agency. *See, e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)).

[4] NWC asserts that the milestones and other procedural devices set out in the Commission's initial referral order (CLI-98-14, 48 NRC 39 (1998)) violate the APA's requirements that agencies conduct proceedings with ''due regard for the rights and privileges of all the interested parties or adversely affected persons,'' taking into account the ''conveniences and necessities of the parties or their representatives.'' *See* Appeal at 6, 14-15, citing 5 U.S.C. §§ 554(b), 558(c)). We do not doubt our obligation to treat all parties to our proceedings fairly — indeed, our original scheduling order could hardly have been clearer on our commitment to fairness (CLI-98-14, 48 NRC at 42-43) — but we cannot see how our effort to expedite the Calvert Cliffs proceeding prejudiced NWC's right to participate meaningfully in it. In addition, as a formal matter, one of the APA provisions cited by NWC (5 U.S.C. § 554(b)) applies only to agency proceedings required by statute to be ''on the record.'' *See* 5 U.S.C. § 554(a). The Commission's position, reiterated several times in recent years, is that NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications, except in particular situations where Congress has so mandated. *See, e.g.,* Final Rule, ''Streamlined Hearing Process for NRC Approval of License Transfers,'' 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998).

may set time limits where the rules do not prescribe a limit.'' 48 NRC at 53. We also stressed that:

> the Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials, CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules).

Id.

More specific to the issue at bar, it has long been the practice at this agency that boards may change the deadline for filing contentions to allow sufficient time for responses prior to the prehearing conference — a practice that our Appeal Board explicitly approved at least twice, in situations all but identical to ours. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 & n.15 (1980); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). As the Appeal Board commented in *Allens Creek,* ''it makes a good deal of sense to structure the proceeding so that all participants know, before they arrive at the conference, what position the proponents of the plant are taking on the various contentions.'' 10 NRC at 523.

The regulation governing the filing period for proposed contentions states simply that they must be filed ''[*n*]*ot later than* . . . fifteen . . . days prior to the holding of the first prehearing conference.'' 10 C.F.R. § 2.714(b)(1) (emphasis added). By its very terms, this regulation establishes only the *latest* time for filing proposed contentions; it nowhere precludes either the Board or the Commission from shortening that time frame. Indeed, section 2.718(e) provides the Board with broad authority to ''[r]egulate the course of the hearing'' and section 2.711(a) permits the Commission or Board to ''shorten[]'' regulatory time frames ''for good cause.''[5] The Board here had ''good cause'' in that the alteration of the time frame[6] would permit the Board *and NWC* to consider the Staff's answer to the proposed contentions prior to the scheduled date of

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[5] 10 C.F.R. §§ 2.718(e), 2.711(a). *See also Policy Statement,* CLI-98-12, 48 NRC at 20; Final Rule, ''Restructuring of Facility License Application Review and Hearing Processes,'' 37 Fed. Reg. 15,127, 15,129 (1972) (the Statement of Consideration which the Commission issued when promulgating section 2.711):

> Many of the time limitations prescribed by the current rules were set to allow the *maximum* time for the parties to the proceedings to perform various activities. There are instances where the activities covered by the limitations can be performed in much less time. In appropriate cases where it would not prejudice a party, the presiding officer is authorized to reduce the time limits by order. (Emphasis added.)

[6] In claiming that the Board ''shortened'' the time frame within which NWC was required to submit its contentions, NWC improperly relies on the fact that Board postponed the prehearing conference by more days than it postponed NWC's contentions deadline. This comparison gives the superficial — and incorrect — impression that the Board actually reduced the number of days available to NWC (from 15 days prior to the conference to 42 days prior thereto). Contrary to NWC's argument, the period for filing contentions was in fact *lengthened* twice — from September 17th to 30th and later, as a further accommodation, from September 30th to October 1st.

the prehearing conference (pursuant to 10 C.F.R. § 2.714(c), the Staff's answer would otherwise be due the day of the prehearing conference).

Moreover, in setting an October 1st filing deadline for contentions, the Board properly concluded that NWC would have by then had ample time within which to develop contentions — a conclusion with which we agree. To paraphrase only slightly our comment in CLI-98-19: by October 1st, NWC had had more than 5 months (157 days) since the April 27th publication of the NRC's notice of the application's filing (63 Fed. Reg. 20,663), more than 4 months (135 days) since the May 19th publication of the NRC's notice of acceptance for docketing of BG&E's application (63 Fed. Reg. 27,601), nearly 4 months (113 days) since the NRC announced the beginning of the public scoping process under the National Environmental Policy Act (63 Fed. Reg. 31,813 (June 10, 1998)), and nearly 3 months (85 days) since the NRC published the Notice of Opportunity for Hearing (63 Fed. Reg. 36,966 (July 8, 1998)). *See* CLI-98-19, 48 NRC at 134 n.1.[7]

4. **Sua Sponte *Board Contentions***

NWC challenges the Commission's caveat in its July *Policy Statement* and CLI-98-14 that the boards interject their own contentions *sua sponte* only in ''extraordinary'' circumstances. According to Petitioner, this caveat not only has the effect of ''chill[ing]'' the Board's willingness to raise health-and-safety contentions on its own motion but also results in a substantive change in our regulations, requiring notice and comment. *See* Appeal at 5-6, 8, 10, 11-12. In refusing to vacate our original referral order, we rejected essentially the same NWC argument. *See* CLI-98-15, 48 NRC at 55. As we pointed out there:

> The extent of the Board's authority to raise contentions *sua sponte* is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory staff — a question of resources and expertise peculiarly within the Commission's province to decide.[FN7]
>
> ---
>
> [FN7] Moreover, the *sua sponte* standards to which Petitioner objects mirror the language in 10 C.F.R. § 2.760a. . . .

It is difficult to understand, in any event, what relevance the *sua sponte* question has to NWC's current appeal. Given NWC's failure to raise any admissible

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[7] NWC also argues that, under 10 C.F.R. § 2.3, the general rule set forth in section 2.718 must yield to the specific 15-day rule in section 2.714(b)(1). *See* Appeal at 18. As noted earlier, Petitioner misreads section 2.3. That section applies only to conflicts between Subpart G rules and rules outside Subpart G; it does not govern conflicts within that subpart. In any event, we do not consider sections 2.714(b)(1) and 2.718 to be at odds with each other. The former establishes a ''default'' filing deadline for contentions in proceedings in cases where the Board issues no order under sections 2.711 and 2.718(e) setting such a deadline.

contentions itself, the Board has had no occasion to raise contentions *sua sponte* and, indeed, lacks authority to do so. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188-89 (1991).

C. Timeliness of Purported ''Contentions'' Submitted October 1st

On appeal, NWC asserts, for the first time, that in actuality it filed timely contentions in its October 1st ''Reply to the NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing.'' *See* Appeal at 4, 23, citing Reply at 11. NWC's supposed ''contentions'' state as follows:

> [T]he original Petition to Intervene does indicate a redressable injury. NWC alleged that BGE cannot safely operate Calvert Cliffs Units 1 and 2 past the original specified lifetime and that if the renewal license was extended it would pose an unacceptable health and safety risk. NWC also requested that the licensee not be granted its renewal license until after it has demonstrated at a hearing that BGE can safely operate Calvert Cliffs Units 1 and 2 for the requested renewal term of 20 years and that the operating license not be renewed until such time as it is determined that the plant can, in fact, be operated safely and within the bounds of the law for the requested renewal term.

We find NWC's position disingenuous. On its face, NWC's ''Reply'' did not purport to advance contentions. It merely made arguments supporting NWC's argument that its Petition to Intervene had asserted a ''redressable'' injury, for purposes of standing to intervene. Indeed, NWC's Reply stated both that ''NWC is not required to file its list of contentions at this time'' and that ''[b]efore considering the issues of specificity, particularity and redressability, NWC must be afforded the opportunity to file . . . its list of contentions . . . .'' Reply at 10. NWC's after-the-fact restyling of its Reply as a ''contentions'' filing is incompatible with these statements' clear implication that NWC had not yet filed contentions. NWC's restyling also cannot be squared with its oft-repeated assertions that it need not file contentions until 15 days prior to the prehearing conference and that the Board allotted insufficient time to prepare contentions. *See, e.g.,* NWC ''Status Report,'' filed October 1, 1998, at 2 (demanding ''adequate time to review the relevant material and set forth contentions'').

More fundamentally, NWC's Reply nowhere satisfies, or attempts to satisfy (or even refers to), any of the ''contention'' requirements of 10 C.F.R. § 2.714(b)(2): that petitioner provide ''[a] brief explanation of the bases of the contention''; ''[a] concise statement of the alleged facts or expert opinion which support the contention''; ''those specific sources and documents . . . on which the petitioner intends to rely . . .''; ''sufficient information . . . to show that a genuine dispute exists''; and either ''references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each

dispute'' or ''identification of each failure'' ''to contain information on a relevant matter as required by law.'' Indeed, NWC's Reply ignores not only these regulatory requirements but also explicit instructions in both the *Policy Statement* and CLI-98-14 on contention specificity. CLI-98-14, 48 NRC at 41; CLI-98-12, 48 NRC at 22.

For all these reasons, we reject NWC's belated argument that its October 1st Reply can be construed as including timely filed contentions.

D. Satisfaction of Late-Filing Criteria by Contentions Submitted October 13th

NWC next asserts that the Board erred in failing to balance the late-filing criteria of 10 C.F.R. § 2.714(a)(1)[8] prior to rejecting as untimely two contentions presented for the first time in NWC's October 13th Notice of Filing. *See* Appeal at 23-24. In that Notice, NWC contended that the license renewal application (1) is incomplete and must be withdrawn and/or summarily dismissed, and (2) fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations. *See* Petitioner's Notice of Filing, dated Oct. 13, 1998, at 1-2. But, as the Board pointed out, NWC failed even to address our late-filing criteria, and that default alone warrants rejection of late-filed contentions. *See* LBP-98-26, 48 NRC at 240-41.

NWC misconstrues our regulations when it asserts (Appeal at 24) that it is the Board's burden to show that untimely contentions do not satisfy our late-filing requirements. Rather, longstanding NRC practice obliges *Petitioner* to show that its contentions satisfy those requirements.[9] Indeed, the Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition.[10] NWC also argues that the Board erred in preventing

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[8] These five factors are: (i) good cause for failure to timely file, (ii) availability of other means of protecting petitioner's interests, (iii) extent to which petitioner's involvement may assist in the development of a sound record, (iv) extent to which existing parties will represent petitioner's interests, and (v) extent to which petitioner's participation will broaden the issues or delay the proceeding.

[9] *See, e.g., Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992) (''[p]etitioners must . . . demonstrate that a balancing of the five criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of their intervention''); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) (''the State has an extremely heavy burden to justify an intervention petition on those latter issues''); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980) (''Needless to say, the late petitioner must address each of those five factors and affirmatively demonstrate that, on balance[,] they favor permitting his tardy admission to the proceeding''). Given that NWC is in essence (though not in form) seeking an order permitting it to raise late-filed contentions, our conclusion in the text is also consistent with 10 C.F.R. § 2.732 that ''the applicant or the proponent of an order has the burden of proof.''

[10] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993). *See also Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) (''given its failure even to address the section 2.714 lateness factors, [the] intervention petition was correctly denied because it was untimely''). Moreover, based on our review of the current record in this proceeding, it would seem

(Continued)

NWC from arguing at a prehearing conference that it had satisfied the late-filing standards. *See* Appeal at 7. NWC's failure to address the required standards in its written October 13th submission prevents it from now complaining that it was denied an opportunity to do so, orally, at a prehearing conference.[11]

E. Admissibility of Contentions

NWC's two October 13th contentions not only were impermissibly late, but they also failed to meet our specificity requirements for contentions. The only basis NWC offers in support of its two late-filed contentions is the existence of the NRC Staff's requests for additional information, or ''RAIs.'' NWC provides no explanation how or why the RAIs are germane to either contention. This omission contravenes our regulatory requirements that a contention be accompanied by

> [a] concise statement of the *alleged facts or expert opinion* which support the contention . . . , together with *references to those specific sources and documents* . . . on which the petitioner intends to rely [and also] . . . [*s*]*ufficient information* . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact . . . *includ*[*ing*] *references to the specific portions of the application* . . . that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.714(b)(2)(ii)-(iii) (emphasis added). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). Mere reference to documents does not provide an adequate basis for a contention. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). This absence of specificity and support is, without more, a sufficient ground for rejecting the two contentions.

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unlikely that NWC could have satisfied the late-filing criteria, even had it tried. The most important criteria by far is ''good cause.'' It seems to us beyond dispute that, by October 1st, NWC had been given ample time within which to develop its contentions in this proceeding.

[11] NWC points to a recent case, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998), where a Board permitted a petitioner to appear at the prehearing conference and to argue that its contentions satisfied the late-filing criteria. *See* Appeal at 20. Assuming that NWC's representations regarding the Board's action in *Private Fuel Storage* are correct, the Board's decision would not support NWC's position. First, it would have been merely an act of discretion on the *Private Fuel Storage* Board's part. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985). Second, as noted in note 3, *supra,* board rulings not reviewed on appeal do not constitute precedent at this agency and therefore do not bind other boards. Third, the actual controlling Commission precedent on this issue yields the opposite result from that sought by NWC. In *Pilgrim,* 22 NRC at 468, the Appeal Board concluded that a petitioner had

> no *right* to respond to the applicant and Staff answers to his petition — i.e., a second opportunity to make the ''substantial showing'' on the five lateness factors that should have been included in the petition itself. . . . [A]lthough the Licensing Board might have accorded him that opportunity as a matter of *discretion,* it was not obliged to do so.

(Emphasis in original.) *See also id.* at 467 n.22 (''late petitioners['] obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness'').

See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144 (1993) (upholding Board ruling that the petitioner's ''assertion did not comply with specific pleading requirements for admissible contentions in that [petitioner] failed to describe the matters to which Staff questions are addressed or why they might constitute a defect in the Environmental Report'').

''Neither Section 189a of the Atomic Energy Act nor § 2.714 . . . permits the filing of a vague, unparticularized contention.'' *See* Final Rule, ''Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,'' 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). NWC attempts to excuse its failure to submit specific contentions on the ground that the Staff's failure to submit RAIs to the Board created a ''glaring inadequacy in the record'' and called for a postponement of the contentions deadline to allow an examination of the RAIs and BG&E's responses. *See* Appeal at 7, 20-21. But our regulations do not require the Staff to submit RAIs to the Board or to serve them on petitioners. *Rancho Seco,* 37 NRC at 152-53. Under our longstanding practice, contentions must rest on the *license application,* not on NRC Staff reviews. The Statement of Consideration accompanying our Contentions Rule (section 2.714) made our approach entirely clear:

> The Commission . . . disagrees with the comments that § 2.714(b)(2)(iii) should permit petitioner to show . . . that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents. . . . [B]ecause the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the Staff has published its FES [Final Environmental Impact Statement] and SER [Safety Evaluation Report].

54 Fed. Reg. at 33,171. *Accord, Rancho Seco,* 37 NRC at 153-54.

Contrary to NWC's view (Appeal at 7, 21-23), the NRC Staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions, and NWC has cited no language in the RAIs suggesting otherwise. Indeed, were the application as rife with serious omissions as NWC suggests, then NWC should have had no problem identifying such inadequacies — yet NWC has not done so. What NWC ignores is that RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory staff simply indicate that the Staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The Staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns.

The regularity of the RAI process can be seen in the Commission's Notice of Acceptance for Docketing of the Application, which expressly stated that although the Staff had ''determined that BG&E has submitted information . . .

that is complete and acceptable for docketing,'' ''[t]he docketing of the renewal application does not preclude requesting additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the application.'' 63 Fed. Reg. 27,601 (May 19, 1998). Likewise, our rules specify that ''[d]uring review of an application by the staff, an applicant may be required to supply additional information.'' 10 C.F.R. § 2.102(a).

The Commission considers many applications sufficiently complete for purposes of docketing, and for starting the adjudicatory process, even though the Staff subsequently poses questions to the applicants regarding those applications. For instance, the Commission in *Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395 (1995), ruled that an ''application may . . . be modified or improved as NRC review goes forward'' and that any view to the contrary ''is incompatible with the dynamic licensing process followed in Commission licensing proceedings.'' As we stated above, it is the license application, not the NRC Staff review, that is at issue in our adjudications. *See, e.g., id.* at 395-96; *Rancho Seco,* 37 NRC at 146-47. The NRC Staff will consider and resolve all safety questions regardless of whether any hearing takes place. NWC can trigger a separate adjudicatory review only if it comes forward with timely and concrete concerns of its own.

As the Board pointed out, ''[t]his is not to say'' that RAIs are always ''irrelevant to the adjudicatory process.'' *See* LBP-98-26, 48 NRC at 243. ''[I]f a petitioner concludes that a Staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).'' *Id. See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-39 (1991). Indeed, one reason for having a generic late-filed contention provision in the regulations is to have a logical, prenoticed method for intervenors to raise concerns in proceedings that relate to newly developed information. Here, NWC has done nothing like this, offering no specific safety concerns arising out of the RAIs but choosing instead to rest on their mere existence. If the Commission were to take NWC's preferred approach, and allow petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited proceedings, such as the Commission contemplated for license renewal, would prove impossible.

F. Propriety of Board's Stay of Discovery from NRC Staff

NWC challenges the Commission's directive in CLI-98-14, 48 NRC at 42, staying all discovery against the Staff. Petitioner claims that this directive was not prompted by a request from a party, was not based on evidence (let alone

substantial evidence), and did not permit NWC an opportunity to oppose the ruling. *See* Appeal at 10, 12, 13. NWC loses sight of the fact that this directive in CLI-98-14 had its origin in the *Policy Statement,* CLI-98-12, 48 NRC at 24,[12] and that policy statements need not be based on evidence in one individual case. There is, in any event, ample and obvious reason for the Commission's directive: the Commission was determined that the NRC Staff complete its safety and environmental reviews promptly, without simultaneously facing the unnecessary distraction of discovery. The Commission's approach allows for discovery against the NRC Staff at an appropriate time.

NWC nonetheless asserts that the Board erred in denying NWC's motion to delay the prehearing conference and the contention deadline until NWC had been given the opportunity to conduct discovery of the Staff pursuant to 10 C.F.R. §§ 2.740(b) & (c), 2.752. *See* Appeal at 12 n.10, 21. This assertion contravenes the terms of the cited regulation, as well as longstanding NRC case law. Sections 2.740 and 2.752 apply only to ''parties'' — a status NWC does not have in this proceeding. Moreover, other regulations applicable to obtaining discovery from the Staff likewise apply only to ''parties.'' *See* 10 C.F.R. §§ 2.720(h)(2)(ii), 2.744(a)-(e). Finally, as the Board correctly pointed out in its September 21st order (slip op. at 2):

> longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions. *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, *reconsid'n denied,* ALAB-110, 6 AEC 247, *aff'd,* CLI-73-12, 6 AEC 241 (1973).

See also Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 n.12, 468 (1982).

When promulgating the Contentions Rule in 1989 the Commission stated, in words fully applicable here:

> We reject the arguments that the new rule is unfair and a denial of due process because it requires intervenors to allege facts in support of its contention before the intervenor is entitled to discovery. Several months before contentions are filed, the applicant will have filed an application with the Commission, accompanied by multi-volume safety and environmental reports. These documents are available for public inspection and copying

[12] ''Except for establishment of the case file, generally the licensing board should suspend discovery against the Staff until the Staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the Staff before the Staff's review documents are issued will expedite the hearing, discovery against the Staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES.''

> in the Commission's headquarters and local public document rooms. . . . [This] rule will preclude a contention from being admitted where an intervenor has no facts to support its position and . . . contemplates using discovery . . . as a fishing expedition which might produce relevant supporting facts. The Commission does not believe this is an appropriate use of discovery. . . .

54 Fed. Reg. at 33,170-71. Over the years, our requirement that contentions rest on the license application rather than on the NRC Staff's review has not prevented innumerable petitioners, some quite recently, from framing admissible contentions and moving forward toward a hearing. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998). NWC, however, has failed to do so.

G. Purported *Ex Parte* Contacts

NWC claims that wrongful *ex parte* contacts between the Commission and the NRC Staff or BG&E are somehow suggested by the Commission's establishment of milestones in CLI-98-14, by its guidance in the same order regarding a stay of discovery against the Staff, and by the Board's failure in its September 29th order to require BG&E and the Staff to meet the purportedly heightened standard for extensions of time. *See* Appeal at 6, 12, 14, 19-20. But BG&E and the NRC Staff sought no extensions of time, so NWC's implication that the Board failed to act evenhandedly on extension requests is incorrect. Moreover, the Commission's inclusion of the milestone and discovery sections of CLI-98-14 is in fact attributable to a cause much more benign than supposed improper influence — they each derive directly from similar terms in the Commission's earlier Policy Statement. *Compare* CLI-98-12, 48 NRC at 20 (regarding the expeditious handling of proceedings and the authority to modify filing deadlines), 21 (regarding the establishment of milestones), 24-25 (regarding the stay of discovery against the Staff). NWC points to no actual evidence of improper *ex parte* contacts by BG&E or separation-of-functions contacts by the Staff, nor are we aware of any.

III. CONCLUSION

For all the reasons set forth above, as well as the reasons set forth in LBP-98-26, NWC's appeal is denied and LBP-98-26 is affirmed.[13]

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[13] As an alternative ground for affirmance, BG&E argues that NWC has not demonstrated standing to intervene. Like the Licensing Board, we do not reach the standing question in light of NWC's failure to file any timely contentions.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

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

Cite as 48 NRC 355 (1998) **LBP-98-30**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of **Docket No. 55-22234-SP**
(ASLBP No. 98-745-01-SP)

RANDALL L. HERRING
(Senior Reactor Operator License for Catawba Nuclear Station) **December 11, 1998**

The Presiding Officer, in a proceeding subject to the informal hearing procedures of 10 C.F.R. Part 2, Subpart L, denies the appeal of an Applicant for a Senior Reactor Operator license for the Catawba Nuclear Station from the NRC Staff's denial of his license application.

INITIAL DECISION
(Application for Senior Reactor Operator License)

Pending before me is the June 7, 1998 appeal of Randall L. Herring from the denial by the NRC Staff of his application for a Senior Reactor Operator (SRO) license for the Catawba Nuclear Station. For the reasons that follow, I am affirming the Staff's denial, although on a different basis than put forth by the Staff. I am also setting forth certain criteria that may govern a future reapplication by Mr. Herring.

A. Introduction

This appeal is governed by the informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L (10 C.F.R. §§ 2.1201-2.1263). I have been designated Presiding Officer to consider this appeal, and have appointed Administrative Judge Richard F. Cole to serve as my Special Assistant. 63 Fed. Reg. 34,197 (June 23, 1998). By Memorandum and Order (Hearing File and Specification of Claims), dated June 30, 1998, I granted Mr. Herring's request for a hearing and set forth schedules to be followed. On the same day, I issued a Notice of Hearing. 63 Fed. Reg. 36,720 (July 7, 1998).

Thereafter, on July 21, 1998, Mr. Herring filed a Specification of Claims, which outlined why he believed the NRC Staff had erred in denying his application for an SRO license. The Staff, in accordance with 10 C.F.R. § 2.1231(a), filed the Hearing File on July 23, 1998 (supplemented, pursuant to 10 C.F.R. § 2.1231(c), on September 11, 1998). Mr. Herring filed his written presentation of arguments on August 13, 1998 (hereinafter, ''Presentation''). The Staff responded on September 11, 1998, backed by affidavits of three witnesses: Messrs. D. Charles Payne, Melvyn N. Leach, and Everett Thomas Beadle. (On September 16, 1998, the Staff filed the notarized affidavit of Mr. Payne.)

I turn first to the background of the appeal items that are before me for review, then to a description of the grading guidelines applicable to the questions that Mr. Herring failed to pass and finally to a review of the questions raised by Mr. Herring in his Presentation.

B. Background

In December 1997, Mr. Randall L. Herring, a Staff Engineer at the Catawba Nuclear Facility (*see* Personal Qualification Statement--Licensee (NRC Form 398), Hearing File, Item 1), took the examination for a senior reactor operator license. That examination was designated as a ''Senior Reactor Operator (SRO) Instant'' examination, to be differentiated from an SRO Upgrade for current reactor operators (which Mr. Herring was not). *See* Form ES-303-1, Hearing File, Item 2. It included both a written test (which was administered on December 12, 1997) and an operating test (administered on December 2-5 and 16-18, 1997). Payne Aff. ¶¶ 8, 11. Mr. Herring passed both the written test (with a grade of 87%, with 80% representing the passing grade) and several portions of the operating test. But on January 27, 1998, he was advised by Region II of the NRC of the proposed denial of his SRO license based on failure to pass the operating test (Hearing File, Item 22). He further was advised of a number of options that he could pursue, including an informal NRC Staff review of the examination grading.

Mr. Herring chose the latter option. By letter dated February 11, 1998 (Hearing File, Item 23) to the Director, Division of Reactor Controls and Human Factors, NRR, he requested an informal review of the four topics of his operating test on which he had been graded ''Unsatisfactory'' — one with respect to ''Control Room Systems and Facility Walk-Through'' (Topic B.1.4) and three with respect to ''Administrative Items'' (Topics A.1, A.2, and A.4).

The Appeal Panel determined that he had answered two of those Topics correctly (Topics B.1.4 and A.1) but that two had not been answered satisfactorily (Topics A.2 and A.4)(Hearing File, Item 25). Although the Appeal Panel recommended that the license denial be overturned, Region II disagreed (Hearing File, Item 27). Region II determined, in effect, that incorrect answers to two out of four questions in a given examination area (Administrative) was sufficient to support failure of the operating test and hence of the SRO exam. By letter dated May 18, 1998 (Hearing File, Item 31), Mr. Herring was advised that the denial of his SRO was being upheld, together with options he could pursue at that time. One would have been to reapply for an SRO license, no earlier than 2 months from the date of that letter (*see* 10 C.F.R. § 55.35(a)), with the written examination being waived if the new license were sought within 1 year of the written examination date (December 12, 1997). Another was this appeal, which Mr. Herring elected.

C. Grading Standards

Regulations pertaining to operator-license examinations (including SRO examinations) are found in 10 C.F.R. Part 55. Under 10 C.F.R. § 55.33, an applicant for a license must pass both a written examination and an operating test. Because Mr. Herring passed the written SRO examination, only the operating test is here at issue.

To set forth consistent standards for operator and SRO examinations at various facilities, the Commission has issued NUREG-1021 (Interim Revision 8), ''Operator Licensing Examination Standards for Power Reactors.'' Grading standards for SRO examinations are set forth in NUREG-1021, Appendix E, ES-303, ''Documenting and Grading Initial Operating Tests'' (Hearing File, Item 19). With respect to Category A (''Administrative Topics''), the standards state, in pertinent part:

> After grading all of the topics in Category A, assess the applicant's topic grades and deficiencies and assign a single ''S'' or ''U'' grade for the category. If the applicant has a ''U'' in only one administrative topic, the examiner *may* fail the applicant in Category ''A'' *depending on the importance of the identified deficiency.* However, if the applicant has a ''U'' in two or more of the administrative topics, the examiner *must assign a grade of ''U''* for Category ''A'' [emphasis supplied].

NUREG-1021 at 4 of 28 (Interim Rev. 8, January 1997). Under these standards, it is clear why the recommendations of the Appeal Panel could not be followed. Mr. Herring was found by that Panel to be deficient in two separate topics of Category A. And while a deficiency in one such topic could have been evaluated as of insufficient importance to warrant a ''U'' grade, deficiencies in two such topics could not have been disregarded, irrespective of their significance.

In performing my review, I am accepting the determination of the Appeal Panel that two of the topics it had reviewed were answered satisfactorily. The question before me, then, is whether Mr. Herring was correctly evaluated in the two topics as to which the Appeal Panel had found deficiencies; for if he was, the ''Unsatisfactory'' grade he received from Region II would have been mandatory under applicable rules. On the other hand, if not, and if one topic were to remain ''U,'' whether the identified deficiency is of sufficient importance to warrant a ''U'' grade becomes significant. (Of course, if both topical areas were evaluated incorrectly, as the Applicant claims, Mr. Herring must be deemed to have passed the SRO exam.) I turn now to each of those topics.

D. Topics Being Appealed

1. Topic A.2

Topic A.2 relates to Equipment Control and included two separate questions that were asked in the Catawba main control room. The first of these questions concerned operability of the Nuclear Service Water system (designated as the RN system at Catawba), given a specific set of initial conditions, one of which was that ''Valve 1RN-2B in step 2.8 fails to operate, other valves in step 2.8 close'' (Hearing File, Item 3). According to the examiner (Mr. D. Charles Payne), this question had to be asked prior to the second question, inasmuch as the second question (concerning RN system configuration control for the given condition) was leading and could assist the Applicant in answering the first question correctly. Payne Aff. ¶ 24. In response to question 1, Mr. Herring verbally stated that the system was ''operable because the other valve in series worked 'OK' [and that therefore one] can isolate the lake.'' *Id.* ¶ 25. *See also* Presentation at 5.

Mr. Payne states that this answer was incorrect, and that the RN system was ''inoperable.'' He explained that the system was inoperable under the question conditions, as defined by Catawba Technical Specifications (CTS) (Hearing File, Item 9) and the RN system design basis document (DBD) (Hearing File, Item 10). Payne Aff. ¶ 25. After confirming that Mr. Herring considered the RN system to be operable under the conditions stated in Question 1, Mr. Payne gave Mr. Herring a copy of question 2 (Hearing File, Item 4). *Id.* Mr. Herring did not address operability in response to the latter question (nor did he attempt

to change his response to Question 1), but he provided the correct answer to Question 2. Mr. Payne explains that he graded Mr. Herring's response to the second question as satisfactory ''despite his incorrect understanding of the RN system's operability, because proper system configuration control was established.'' *Id.* ¶ 26.

Simply stated, Mr. Herring failed to follow the applicable Technical Specifications and Design Basis Document. The result of not declaring the RN system to be inoperable would be the likely circumventing of certain of the Catawba facility's administrative controls for dealing with Technical Specification issues — i.e., tracking of Limiting Conditions for Operation and performing operability evaluations, as described in Operations Management Procedure (OMP) 2-29, ''Technical Specifications Action Log.'' The NRC assigns great importance to operator actions, particularly SROs, in determining TS system operability and correctly implementing appropriate administrative process controls. *Id.* ¶ 28.

In his written presentation, Mr. Herring defends his answer to Item A.2 on several bases. First, he states that the RN system was operable based on the fact that 1RN-1B was closed previous to the failure of 1RN-2B to close. He added that 1RN-1A needed to be kept closed with power removed. Presentation at 5. In response, the Staff claims that the latter information was provided in response to Question 2 (where he had been graded satisfactory), and that Mr. Herring had not indicated that power should be removed from valve 1RN-1A to make the RN system operable (Payne Aff. ¶ 46). The Staff also disagrees with Mr. Herring that removing power from 1RN-1A is not a condition of operability (*id.* ¶ 47). It explains:

> The licensee (Catawba) expects licensed operators to make system operability determinations using OMP 2-29 (Presentation exhibit 13), Nuclear System Directive (NSD) 203, ''Operability,'' (Presentation exhibit 9), Catawba Technical Specification (CTS) (Hearing File, Item 9), and the Design Basis Document (DBD) for the affected system(s). (Hearing File, Item 10; Beadle affidavit, paragraphs 5-9; Leach affidavit). OMP 2-29 and NSD 203 are guidance documents which provide generic insight and perspective concerning operability, whereas the CTS and DBD are system specific with detailed requirements and action statements. As such, the facility licensee has attested that given the situation presented in Question 1 and 2 of administrative topic A.2, the proper licensed operator action is to apply TS 3.7.4 and refer to RN System DBD for evaluation of valve 1RN-2B. (Beadle affidavit, paragraphs 7, 9). Consequently, the ''A'' loop of the RN System should be declared inoperable per TS 3.7.4 based on valve 1RN-2B not being capable to position the RN System to the Standby Nuclear Service Water Pond.

Payne Aff. ¶ 47. The Staff adds that a licensed operator is expected to know, and be able to properly apply, the TS definition of ''operability,'' as well as know that the RN System is a TS system. *Id.*

Next, Mr. Herring acknowledges that the answer key for the exam states that the RN system was inoperable, but claims it was based on Recommended Action

Statements in the Nuclear Service Water System Design Basis Specification (Hearing File, Item 10). He asserts that Recommended Action Statements are not to be considered equivalent to Technical Specification action statements but are to be considered in conjunction with other documents, including Tech Specs and Bases. He then cites the definition of Operable from the Tech Specs and claims that the RN System was operable under that definition. Presentation at 5-6. In response, the Staff acknowledges that Recommended Action Statements are not equivalent to TS action statements and as such should not be relied upon solely as the basis for restoring the RN system to operability. It agreed that after performing the DBD specified action to close and remove power from 1RN-1A, a complete operability evaluation should be performed and reviewed by Operations management prior to exiting the TS 3.7.4 action statement and declaring the RN operable again. But it claims that that situation was not presented by these questions. It adds that the examination serves to assure that SRO applicants are familiar with and will operate the plant in accordance with the facility's license requirements (including Tech Specs), plant normal, abnormal, and emergency operating procedures, and management's administrative procedures. The Staff quotes Catawba management to the effect that ''operations management expects the licensed operator to follow this guidance [RN Design Basis Specification, Section 20.4.2.1 Power Operated Valves] and declare the 'A' loop inoperable.'' (Beadle Aff. ¶7.) The Staff concludes that Mr. Herring's answer does not meet these expectations (Payne Aff. ¶48).

With respect to Mr. Herring's claim that the examination answer key was based solely on the Recommended Action Statement of the DBD and that it conflicts with the general guidance of the Design Basis Specification (DBS) and OMP 2-29, the Staff disagrees. It states that the answer to Question 2 was based on the DBD but that the answer to the operability question (Question 1) was based on the CTS definition of operability (also defined in NSD 203) and its applicability to CTS 3.7.4 (Payne Aff. ¶49). The Staff notes that NSD 203 is a corporate-level policy document, applicable to three different nuclear plant sites, from which each facility may develop facility-specific compensatory actions that fall within the guidance (*id.* ¶53).

Mr. Herring further asserts that, in making the operability decision for Question 1 during the exam, he considered CTS 3.7.4, which requires a supply and discharge flow path capable of being aligned to the Standby Nuclear Service Water Pond (SNSWP) but does not require that the RN system be capable of automatically aligning to the pond, just that it be capable of being manually aligned to the pond. (He cites another CTS, 3.3.2, Item 14g, as requiring capability to automatically align or, if incapable, that there be manual alignment.) Presentation at 6.

The Staff acknowledges that Mr. Herring correctly states the definition of operable/operability but that his interpretation of how to apply the definition to the CTS is flawed. The Staff cites NSD 203 to the effect that a system is operable or has operability when it is capable of performing its specified function(s) (Presentation, Exh. 9), and asserts that one of the safety functions of the RN system is the capability to automatically swap from Lake Wylie to the SNSWP upon receipt of an emergency low pit level signal (Presentation, Exhs. 5, 6).

Next, Mr. Herring asserts that the first substep in step 2.8 of OP/O/A/6400/06C, Enclosure 4.10 (Hearing File, Item 9) closed 1RN-1A and, as a result, RN Pit A was isolated from the lake. Subsequently, all other valves to align RN to the SNSWP were aligned to their proper position with the exception of 1RN-2B. With RN in this alignment, Mr. Herring judged the RN system as able to fulfill the requirement in CTS 3.7.4 and hence as operable since 1RN-1A does not receive any signals to open the valve. He further explained that he judged the RN system to be operable because 1RN-1A was closed, not simply because it would operate. Mr. Herring also asserted that, before being asked Question 2 (and contrary to the recollection of the Examiner), as well as at the time he received Question 2, he had stated that 1RN-1A needed to be tagged closed with power removed, to maintain configuration control to ensure that 1RN-1A was not opened by an operator, which would make the RN system (loop A) inoperable. He cited a Summary Flow Diagram (Presentation, Item 13) as showing that with 1RN-1A closed, the intake from the lake is isolated. He concludes this argument with the observation that, since 1RN-1A was closed prior to the failure of 1RN-2B, at no time was there a possibility of diverting Standby Nuclear Service Water inventory to Lake Wylie. Presentation at 6-7.

In response to this latter argument, the Staff notes that NSD 203 states that the compensatory measure is to place *the valve* [emphasis provided by Staff] in its ESF position, and that the valve in this situation is 1RN-2B, not 1RN-1A as claimed by Mr. Herring. The Staff concludes that, since it is known that valve 1RN-2B will not close (per initial conditions of the question), and its ESF position is closed, the compensatory action in the Applicant's cited reference cannot be accomplished. The Staff does agree that having 1RN-1A in the closed position has the equivalent effect on that portion of the RN suction piping, but NSD 203 does not specifically address this condition. As permitted by the policy statement of NSD 203, however, this situation is specifically addressed in the RN system DBD (Hearing File, Item 10). Consequently, the required compensatory action, as set forth by the Staff, is to close 1RN-1A and remove power from the valve. The Staff asserts that this conclusion is supported by the facility licensee. Payne Aff. ¶ 53, citing Beadle Aff. ¶¶ 7-9. The Staff adds that Mr. Herring's statement in his Presentation that he had advised the examiner that it would be permissible to place an operations information sticker on the

valve control to prevent changes in valve position is irrelevant since, according to Mr. Payne, the Applicant made no such statement. Even if he had, however, the statement would have little if anything to do with the correctness of Mr. Herring's response to whether or not a particular valve (rather than the system as a whole) were operable.

I conclude with respect to Question 1 of Topic A.2 that the answer given by Mr. Herring — that the RN system was operable — was manifestly incorrect, given the mandatory initial conditions with which the question was freighted. The RN system was functional — i.e., it could be made to work by manual operation. But the system as a whole was inoperable, inasmuch as the automatic actuation built into the system would not work. Moreover, each of the scenarios posed by Mr. Herring in his Presentation that would lead to the answer he provided are fraught with fatal flaws, as outlined by Mr. Payne and reiterated here in summary form. Collectively, they do not undercut the Staff's finding that Mr. Herring did not answer Question 1 of Administrative Topic A.2 correctly.

Every reviewer of the question and answer provided by Mr. Herring of which I have been made aware (except, of course, Mr. Herring) agreed that the RN system was properly described as inoperable given the conditions underlying the question. These include Mr. Payne, the NRC examiner; Mr. Melvyn N. Leach, Chief, Operator Licensing Branch of NRC's Region III Office and Chairman of the Appeal Panel that conducted an informal review of Mr. Herring's answer to the examination question; Everett Thomas Beadle, employed by the licensee, Duke Power Company, as a Nuclear Instructor, Operator Training, at the Catawba Plant; Donald W. Bradley, employed by Duke Power Company as a Shift Operations Manager, Catawba Station; Mr. Michael Ernstes, another NRC Chief Examiner at Catawba, who concurred in operating test failure by signing Form ES-303-1 on January 20, 1998 (although not observing Mr. Herring's performance); Mr. Thomas Peebles, Chief of the Operator Licensing and Performance Branch, Region II; and Mr. John Munro, an examiner from the Operator Licensing and Human Performance Branch (HOHB), Office of Nuclear Reactor Regulation (NRR). *See* Payne Aff. ¶ 40.

In short, based on the considered opinions of these individuals, I am holding that Mr. Herring's answer to Question 1 of Administrative Topic A.2 was not correct and that the Staff's ''U'' grade was justified.

2. Topic A.4

Knowledge of the emergency plan for a facility is one of the items upon which an SRO candidate may be tested. *See,* in particular, 10 C.F.R. § 55.45(a)(11). Item A.4 was an emergency plan question that required the Applicant to make a Protective Action Recommendation (PAR) based on a specified set of conditions during a general emergency and then to reevaluate the PAR based on

changed meteorological conditions. Mr. Herring was asked three questions with respect to administrative topic A.4. The questions were asked in the reactor's main control room. Mr. Herring answered Questions 1 and 3 correctly. His failing grade was based on his response to Question 2. Payne Aff. ¶¶ 29-36.

Enclosure 4.2 of the Emergency Plan sets forth Protective Action Zones (PAZs) to be evacuated under specified circumstances. Hearing File, Item 15. Page 1 of 3 of that Enclosure is an Emergency Planning Zone (EPZ) map delineating the 10-mile EPZ. Pages 2 and 3 of Enclosure 4.2, each labeled ''Protective Action Zones Determination Table,'' set forth recommended zones for evacuation under specified circumstances. The examiner states that he observed Mr. Herring, in answering Question 2, to use Enclosure 4.2, page 3 of 3, rather than page 2 of 3, as expected and as appropriate for the given site conditions. *Id.* ¶ 30. In his response to Question 2, Mr. Herring listed twelve PAZs requiring evacuation and three requiring in-place sheltering. This response exactly matched the PAZs of Enclosure 4.2, page 3 of 3, for the given site conditions. *Id.* ¶ 32. The expected answer would have required evacuation of seven PAZs (rather than twelve), as set forth in Enclosure 4.2, page 2 of 3. *Id.* ¶ 33.

As the reason for the mistaken reference, the examiner noted that both pages had similar appearances and required care in assuring the proper table was being used. In addition, he noted that, according to § 3.0, ''Subsequent Actions,'' of the Emergency Procedure (RP/0/A/5000/005 at 2 of 4), the flowchart on Enclosure 4.3, page 1 of 3, should be used in answering Question 2. That flowchart provided that Enclosure 4.2, page 3 of 3, should be used only if plant conditions exist where ''large fission product inventory greater than gap activity [is] in containment.'' The examiner opined that Mr. Herring either improperly used the flowchart (i.e., believed that the containment had a large fission product inventory) or, alternatively, was careless in his use of Enclosure 4.2; but that, either way, Mr. Herring exhibited poor understanding and improper use of the emergency response procedure. *Id.* ¶ 32.

In his Presentation, Mr. Herring sets forth several reasons either why his answer was correct or why the question was ambiguous and should not be counted. First, Mr. Herring claims that, in answering Question 1 (on which he received a satisfactory grade), he used Section 2.0, Immediate Actions, of the Emergency Plan. Then, to answer Question 2 (the only one on which he was graded as unsatisfactory), he turned to Section 3.0, Subsequent Actions, of the plan, which describes several actions that an operator must take, including:

> Evaluate specific plant conditions, off-site dose projections, field monitoring team data, and assess need to update Protective Action Recommendations made to states and counties in previous notification. (*See* Enclosure 4.3, page 1 of 3, Guidance for Protective Actions, *Protective Action Recommendation Flowchart,* and *see* Enclosure 4.4, Evacuation Time

> Estimates for Catawba Plume Exposure EPZ). [Hearing File, Item 15, RP/O/A/5000/005, at 3 of 4, emphasis supplied.]

Mr. Herring observes that the flowchart referenced in section 3.0 is taken from the Emergency Plan. *See* Hearing File, Item 15, RP/O/A/5000/005, Enclosure 4.3, at 1 of 3. He characterizes two diamond figures appearing at the start of the flowchart. The first (''General Emergency Declared?'') is always answered affirmatively, according to Mr. Herring, since the procedure containing the flowchart is the General Emergency Procedure. The second diamond looks at whether windspeed is less than or equal to 5 mph. It directs the operator to one of two blocks, both of which are designated ''urgent'' and, according to Mr. Herring, correspond to the Immediate Action Step of Section 2.0. If yes, the action required is evacuation of seven zones and in-place shelter for eight zones. If no, the action required is to ''recommend evacuation of 2 mile radius & 5 miles downwind and recommend in-place shelter for zones not evacuated (referencing Encl. 4.2, Page 2 of 3).''

Mr. Herring then states that the immediate action step had been performed as the answer to Question 1, so that he then proceeded to the block ''Large Fission Product Inventory Greater Than Gap Activity In Containment?'' He asserts that he answered that question ''no'' which took him to the diamond ''Off-Site Doses Projected to Exceed Protective Action Guides.'' Based on a projected dose of 1.2 rem TEDE, his answer was yes, leading him to a block ''Recommend Protective Actions In Accordance With The Protective Action Guides (Encl. 4.3, page 3 of 3).'' With a projected dose greater than 1 rem TEDE, according to Mr. Herring, the PAR is ''Recommend evacuation of affected zones and shelter the remainder of the 10 mile EPZ not evacuated.'' He concludes by asserting that he proceeded to Enclosure 4.2, page 3 of 3, which directs use of a table to determine recommended zones for evacuation, and he determined the zones as set forth in his examination answer.

In response to this line of argument, the Staff examiner disagrees with the action to be taken for the second step of Procedure RP/05, section 3.0, *Subsequent Actions,* which I have quoted in pertinent part above. He claims that, because site meteorological conditions were changed significantly in Question 2 from those in Question 1, an update of the previous PAR per this step was the correct action to take. He adds that plant conditions had not changed and, therefore, he believed a knowledgeable operator would have expected a PAR determination similar in extent to that obtained in Question 1 but affecting different PAZs due to the change in wind direction. The Staff examiner goes on to agree with Mr. Herring that the subsequent action step of Section 3.0 directs the operator to the flowchart mentioned above. Payne Aff. ¶ 41.

At that point, however, the Staff examiner states that the ''operator should enter the flowchart at the 'Start' block, proceed through the chart answering

each decision block in turn based on plant and site conditions, and perform all associated actions as directed.'' *Id.* In other words, with a change in conditions, an operator should start again at the ''start'' designation on the flowchart.

The Staff examiner acknowledges that the Applicant had stated that the flowchart's *Urgent* blocks correspond to the Immediate Action step of Section 2.0 of Procedure RP/05, and that, since Immediate Action had been performed in response to Question 1, he then proceeded to the next block (making no updated PAR as a result of the *Urgent* block). The Staff further acknowledges that the Catawba management representative, Mr. Beadle, supported the course of action followed by Mr. Herring in not making an updated PAR as a result of the *Urgent* block. Beadle Aff. ¶ 18. In other words, neither Mr. Herring nor Catawba management would require a repeat of the entire flowchart.

Nonetheless, the Staff asserts that no procedural guidance or step in the Emergency Plan directs the operator to skip portions of the flowchart. Nor has there been provided, either by Mr. Herring or Catawba management, any approved facility procedure or emergency plan ''users guide'' which sanctioned such an action or omission. Payne Aff. ¶ 41. Moreover, even though Catawba management supported the initial steps followed by Mr. Herring, it reached the same result as advocated by the Staff. Catawba management reasoned that there were only two tables available to make PARs and that the table in Enclosure 4.2, page 3 of 3 (which Mr. Herring used in his answer), is eliminated inasmuch as there was no large fission product inventory greater than gap activity in containment, leaving the table in Enclosure 4.2, page 2 of 3, by elimination as the only table to use. Beadle Aff. ¶ 19.

After review of all the material submitted, I conclude that Mr. Herring failed to pass topic A.4 of Category A. However, Mr. Herring also claims that the question (and particularly the referenced flowchart) were ambiguous and that the flowchart was later modified to remove the ambiguities. That it was so modified is not in dispute. In the view of plant management, however, the modifications were human factor enhancements that did not invalidate Question 2, as written. Beadle Aff. ¶ 21. In addition, the correct answer to Question 2 (set forth in the answer key) was also changed to include evacuation of two additional PAZs from those originally designated, zones that had been selected by Mr. Herring for evacuation. Mr. Herring was given credit for evacuation of these PAZs. Payne Aff. ¶ 33.

In his Presentation (at 3), Mr. Herring challenges the correctness of the Staff statements to the effect that the only change between Questions 1 and 2 was an increase in windspeed and change of direction. He claims that the projected dose was also changed. But the Staff disagrees, citing the initial plant conditions supplied to Mr. Herring for all three of the questions. Payne Aff. ¶ 42.

Mr. Herring further contends that the Emergency Plan provides no procedural guidance in Enclosure 4.3, page 3 of 3, regarding which enclosure should be

used at that point to determine affected PAZs. The Staff claims — and it is not rebutted — that Mr. Herring did not inform the examiner of a problem with the procedure nor did he indicate any confusion regarding how to proceed in a proper PAZ determination. It states that Mr. Herring had been trained in use of these procedures and is also expected to be knowledgeable regarding actions to take if a procedure is confusing or in error. It concludes that the Staff does not expect licensed operators to follow procedures they believe to be in error without addressing the issue with licensee management and that, if Mr. Herring concluded during the examination that the procedure was confusing or in error, he should have raised the issue with the examiner (which he did not). Payne Aff. ¶43.

Finally, along the same line, Mr. Herring's Presentation asserts a lack of guidance to determine which page of Enclosure 4.2 to use and that the procedure is thus ''faulty.'' In support, Mr. Herring relies both on Mr. Steve Christopher, Supervisor of Emergency Planning, and the revisions to the procedure itself. The Staff indicates — correctly — that Mr. Christopher's concern was not shared by facility management (as indicated earlier in its analysis of proper actions to be taken) and, in addition, that Mr. Christopher has offered inconsistent opinions on this issue. Payne Aff. ¶44. Beyond that, the Staff notes that the question had been posed to one other applicant trained and qualified in the same manner as Mr. Herring and that this applicant had no trouble in answering the question correctly. *Id.* The Staff concludes that a ''less than optimal, but accurate, procedure does not excuse poor operator performance or lack of knowledge. Likewise, the fact that a procedure has been revised does not mean it was not useable or that future improvements won't be made.'' *Id.*

Based on the entire record, and as set forth earlier, I conclude that Mr. Herring answered Question 2 of Topic A.4 incorrectly. But I also recognize the considerable ambiguities in answering this question raised by Mr. Herring, particularly with respect to use of page 2 or page 3 of Enclosure 4.2. It is apparent that page 3 of 3 is to be used *only* when large fission product inventory is greater than gap activity in containment, but page 3 of 3 does not appear to include that caveat. Moreover, the flowchart is confusing in that it fails to state clearly that an operator should return to the ''Start'' designation each time a variation in meteorological conditions appears. That being so, I am giving Mr. Herring the benefit of doubt in this area and am holding that his answer to Topic A.4 should not be considered in determining whether he passed the examination administered to him.

3. Importance of Topic A.2

Because I have determined not to consider Topic A.4 in determining whether Mr. Herring passed the examination, I must turn to the importance of Question

1 of Topic A.2, to determine whether Mr. Herring's incorrect answer on only that topic should lead to his failure of the examination. As set forth previously, the Staff assigns considerable importance to that question, which concerned the operability of the Nuclear Service Water System (RN System). Mr. Payne regarded the question as important because it demonstrated that Mr. Herring improperly evaluated the operational status of a safety-related piece of equipment and demonstrated a significant lack of understanding of Technical Specifications (TS) operability. ''Because [Mr. Herring] considered the RN System to be operable, the Catawba facility's administrative controls for dealing with TS issues, including tracking of Limiting Conditions for Operation, and performing operability evaluations . . . could have been circumvented.'' Mr. Payne concludes that the ''NRC relies on SROs properly determining TS system operability and correctly implementing appropriate administrative process controls.'' He adds that Question 1, which Mr. Herring failed, was assigned a greater importance than Question 2, and that this conclusion ''is also supported by the importance ratings assigned to these knowledge and abilities (K/As) in ''Knowledge and Abilities Catalog for Nuclear Power Plant Operators — Pressurized Water Reactors'' (NUREG-1122, Hearing File, Item 35). Payne Aff. ¶28.

Catawba management also believes that questions concerning operation and operability of the RN system are important. They were developed to test a candidate's knowledge of the Technical Specifications for the RN system and the documents necessary to determine operability of the system's trains and components, and are based on certain knowledge requirements listed in NUREG-1122, rev. 1 (draft). Beadle Aff. ¶3. They also require that the operator be familiar with and follow the RN Design Basis Specification. *Id.* ¶7. The questions require knowledge that valve 1RN-2B has a safety function and has Technical Specification significance requiring operator action, knowledge as to which Mr. Herring had received training. *Id.* ¶9. Management adds that ''Mr. Herring's contention has merit as an engineering evaluation for operability, but it would be considered a subsequent action to the licensed operator actions taken at the time the valve failure was found. Mr. Herring was being evaluated as a licensed senior reactor operator candidate, not as a systems engineer.'' *Id.* ¶10.

Based on my own evaluation, and taking into account my disregard of the incorrect answer to Topic A.4, for reasons set forth earlier, I regard Mr. Herring's incorrect answer to Topic A.2 as significant enough to lead to his failure of the entire operator examination. I find particularly significant the belief by Catawba management (cited above) that Mr. Herring's contentions on Topic A.2 would have merit from the standpoint of a systems engineer (Mr. Herring's current position) but not from the standpoint of an SRO for which he is seeking a license.

E. Relief

When Mr. Herring's license application was denied on May 18, 1998, he was permitted to file this appeal, which he did. He also was told he could reapply for an SRO license no earlier than 2 months from the date of that letter (*see* 10 C.F.R. § 55.35(a)), with the written examination being waived if the application were submitted within 1 year of the written examination (December 12, 1997).

Because I am upholding the Staff's denial of the SRO license, this Decision will become the focal point for reapplying for an SRO license, should Mr. Herring elect to do so. Pursuant to 10 C.F.R. § 55.35(a), a renewal application may be submitted no earlier than 2 months from the date of this Decision. Because the earlier waiver of the written test will have expired, and because the regulation permitting such waiver (10 C.F.R. § 55.35(b)) appears to have no time limitation, I am pointing out that the Staff is authorized to extend the written-examination waiver to encompass a prompt reapplication if it deems such action to be appropriate.

F. Order

For the reasons stated, and based on the entire record, it is, this 11th day of December 1998, ORDERED

1. The appeal of Mr. Randall Herring from the NRC Staff's denial of his application for an SRO license is hereby *denied.*

2. If Mr. Herring chooses to reapply for an SRO license, he may do so any time following 2 months from the date of this Decision. 10 C.F.R. § 55.35(a).

3. A petition for review of this Decision by the Commission may be filed pursuant to 10 C.F.R. § 2.786. Any such petition must be filed within 15 days after service of this Decision and must conform to requirements set forth in 10 C.F.R. § 2.786. Within 10 days after service of a petition for review, the NRC Staff may file an answer supporting or opposing Commission review.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 11, 1998

Cite as 48 NRC 369 (1998) **LBP-98-31**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 30-31373-CivP
(ASLBP No. 98-735-01-CivP)
(EA 97-207)
(License No. 12-16559-01)
(Order Imposing Civil Monetary Penalty)

CONAM INSPECTION, INC.
(Itasca, Illinois)

December 16, 1998

In a civil penalty proceeding, the Licensing Board approves a settlement agreement between the NRC Staff and the Licensee and dismisses the proceeding.

MEMORANDUM AND ORDER
(Approval of Settlement Agreement and Dismissal of Proceeding)

On December 14, 1998, both parties to this civil penalty proceeding — Conam Inspection, Inc., and the NRC Staff — filed a joint motion for this Atomic Safety and Licensing Board to approve a settlement agreement (a copy of which is attached to this Order) and dismiss the proceeding. The NRC Staff initially sought a civil penalty of $16,000.00. The proposed settlement that we

have before us would require Conam to pay $15,000.00 but would also have the Order of November 5, 1997 imposing a civil monetary penalty rescinded.

The Licensing Board has, of course, already conducted a five-day evidentiary hearing on the Order. Pursuant to 10 C.F.R. § 2.203, we are authorized at any time following issuance of a notice of hearing, and without regard as to whether a hearing has already been held, to entertain a compromise and to approve a settlement, according ‘‘due weight’’ to the position of the Staff. By its December 14, 1998 motion for us to approve the settlement agreement, the Staff has indicated its approval of that agreement.

According due weight to the position of the Staff, we hereby *approve* the attached settlement agreement and *dismiss* the proceeding.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 16, 1998

Attachment: Settlement Agreement

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of | **Docket No. 30-31373-CivP**
(ASLB No. 98-735-01-CivP)

CONAM INSPECTION, INC.
(Itasca, Illinois)

SETTLEMENT AGREEMENT

The United States Nuclear Regulatory Commission (''NRC'') and Conam Inspection, Inc. (''Conam''), through their respective counsel, each of whom is authorized to execute this document, in consideration of the promises and representations contained in this document, hereby agree as follows:

1. On November 5, 1997, the NRC issued an ''Order Imposing Civil Monetary Penalty'' (the ''Order'') in Enforcement Action 97-207 (''EA 97-207'') with respect to certain alleged violations by Conam. The Order asserted that (a) a Conam radiographer had willfully failed to secure a sealed source assembly in the shielded position; (b) the Conam radiographer failed to conduct a survey of the entire circumference of the radiographic exposure device; and (c) the Conam radiographer received a radiation dose that brought his annual dose in excess of 5 rems total effective dose equivalent. The Order sought to aggregate these alleged violations to a Severity Level II problem.

2. On December 1, 1997, Conam requested an enforcement hearing in response to the Order entered in EA-97-207 in order to present to an Atomic Safety and Licensing Board (the ''Board'') testimony and evidence to contest the alleged violations and the Order as not justified under the evidence and applicable regulations. In connection therewith, Conam (a) admitted that the radiographer had failed to secure the sealed source assembly in the shielded position, but denied that this failure was willful; (b) denied that the radiographer failed to perform a survey as required in the regulations; and (c) denied that the radiographer's annual dose exceeded 5 rems total effective dose equivalent. Conam denied that there was any basis for aggregating the alleged violations to a Severity Level II problem.

3. After the depositions, admission of documents in evidence, the filing of a number of briefs, and one week of oral testimony during the hearing in this

matter, Conam and the NRC have concluded it is in their respective interests, as well as the public interest, to settle the disputes at issue in and related to EA 97-207. Therefore, the NRC and Conam agree as follows:

A. The NRC (through NRC Staff) and Conam will jointly move the Board to approve this Settlement Agreement and to terminate this proceeding.

B. Upon approval of this Settlement Agreement by the Board,

   1. the Order dated November 5, 1997, regarding the Notice of Violation and Proposed Imposition of Civil Penalty dated June 9, 1997, is and shall be rescinded and the ongoing litigation in EA 97-207 is and shall be terminated by agreement of the parties; and
   2. within five (5) business days of such approval, Conam will pay $15,000, to be paid to the Treasurer of the United States.

C. This Settlement Agreement constitutes final disposition of the matters giving rise to EA 97-207 and to this litigation. In consideration of the terms of this Agreement, the NRC Staff will assert no further enforcement claims, in any form or forum, related to the matters addressed in EA 97-207 and the underlying inspection and investigation reports; and CONAM will not pursue any further hearings on, or judicial review of, this matter.

4. The parties continue to maintain their respective positions in regard to the November 5, 1997 Order Imposing Civil Monetary Penalty. The parties agree that there remain differences of opinion on many of the issues raised by EA-97-207, the resolution of which involve factual and legal issues which have not yet been resolved. Accordingly, the parties understand and acknowledge that this Settlement Agreement is the result of compromise and shall not for any purpose be construed as an admission of the regulatory violations that Conam denies or as a concession by the NRC that no such violations occurred. Instead, this Settlement Agreement has been entered into in order to terminate further litigation without resolving the alleged violations and severity level disputed by Conam. Each party shall bear its own fees and costs.

IN WITNESS WHEREOF, Conam and the NRC have caused this Settlement Agreement to be executed by their duly authorized representatives.

United States Nuclear Regulatory Commission

By: Charles A. Barth 12-14-98
Office of the General Counsel

Conam Inspection, Inc.

By: Malcolm H. Brooks 12-8-98
McBride Baker & Coles
Chicago, Illinois

Cite as 48 NRC 374 (1998) **LBP-98-32**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of	**Docket No. 30-16055-ML&ML-REN (ASLBP Nos. 99-765-01-ML, 95-707-02-ML-REN) (Denial of Renewal of Materials License No. 34-19089-01)**
ADVANCED MEDICAL SYSTEMS, INC. (1020 London Road, Cleveland, Ohio)	**December 23, 1998**

The Presiding Officer consolidates proceedings for (1) the renewal of a materials license and (2) contesting the Staff's denial of that renewal, and determines that one issue common to both proceedings (and potentially dispositive of at least the denial proceeding) be litigated first. The Presiding Officer also admits two intervenors to the denial proceeding and sets dates for various filings by the parties under the informal hearing procedures of 10 C.F.R. Part 2, Subpart L.

RULES OF PRACTICE: INFORMAL HEARINGS

In a proceeding subject to 10 C.F.R. Part 2, Subpart L, oral presentations under 10 C.F.R. § 2.1235, where determined by the Presiding Officer to be necessary, do not contemplate cross-examination of witnesses by parties but only questions posed by the Presiding Officer.

MEMORANDUM AND ORDER
(Consolidation of Proceedings; Grant of Interventions)

I. PROCEDURAL BACKGROUND

Two proceedings are currently pending with respect to the renewal of Materials License No. 34-19089-01, of Advanced Medical Systems, Inc. (AMS). In the first, initiated by a timely application filed on November 29, 1994,[1] AMS sought renewal of its license for possession and use of radioactive materials (hereinafter, ''renewal proceeding''). By Memorandum and Order dated March 13, 1995, LBP-95-3, 41 NRC 195, the then Presiding Officer granted the request for a hearing of two Petitioners, the Northeast Ohio Regional Sewer District (NEORSD) and the City of Cleveland (City). The Order also permitted the Cuyahoga County Local Emergency Planning Committee (LEPC) to participate as an interested governmental entity, pursuant to 10 C.F.R. § 2.1211(b), subject to receipt from LEPC of affidavits defining its governmental status.[2] And it noted that the NRC Staff, pursuant to 10 C.F.R. §§ 2.1205(g)[3] and 2.1213, elected to participate as a party. The Order denied, for lack of standing, the petition for intervention of the Earth Day Coalition. No party appealed any of those rulings to the Commission, and the proceeding is currently pending.[4]

The second proceeding eventuated from the denial on September 28, 1998, by the NRC Staff of AMS's license renewal application (the ''denial proceeding''). The letter advising AMS of the denial noted that AMS could request a hearing on the denial. AMS did so, on October 15, 1998. On November 2, 1998, a Presiding Officer was designated for the denial proceeding (the same Presiding Officer that was currently serving in the renewal proceeding). Different Special Assistants had previously been designated for each of the proceedings. On November 4, 1998, the Presiding Officer for the denial proceeding issued an Order granting AMS's request for a hearing and, pursuant to 10 C.F.R. § 2.1205(j) and (k), provided an opportunity for interested persons and governmental bodies to seek to intervene or participate. Two petitions have thus far been received —

[1] AMS also submitted a renewal application dated January 26, 1995. That application and the November 1994 application were superseded by AMS's application dated October 25, 1995. The Staff's denial applies to all three applications.

[2] Participation by LEPC as an interested governmental entity was made contingent upon proof of the governmental status of LEPC. By Memorandum and Order dated August 23, 1995 (unpublished), the Presiding Officer approved LEPC's participation. In that same Memorandum and Order, the Presiding Officer also approved the participation of the Village of Newburgh Heights, Ohio, as an interested municipality.

[3] At the time of the initiation of the renewal proceeding, the current 10 C.F.R. § 2.1205(g) was designated as section 2.1205(f), and was so referenced in the March 13, 1995 Memorandum and Order. This Memorandum and Order will refer to sections of 10 C.F.R. Part 2, Subpart L, as they are currently designated.

[4] The Presiding Officer, in his August 23, 1995 Memorandum and Order, determined that the proceeding should be held in abeyance until completion of the Staff's review of AMS's license application.

that of the Northeast Ohio Regional Sewer District (NEORSD), and the City of Cleveland (City). The NRC Staff filed a response to both petitions on December 18, 1998, recommending that both NEORSD and the City be admitted as parties (although limiting the scope of issues that NEORSD might pursue).[5] AMS has not responded to either petition.

On December 3, 1998, the designated Presiding Officer for both the renewal and denial proceedings was replaced by the undersigned. 67 Fed. Reg. 67,939 (Dec. 9, 1998). Because of the desirability of consolidating the renewal and denial proceedings, as spelled out below, and after consultation with the Chairman of the Atomic Safety and Licensing Board Panel, and as authorized by 10 C.F.R. § 2.722(a), the undersigned hereby designates Administrative Judge Thomas D. Murphy as his Special Assistant. (Judge Murphy had previously been designated as a Special Assistant in the denial proceeding.) All correspondence, documents, and other materials are to be filed with Judge Murphy, as well as with Judge Bechhoefer. The address of the Special Assistant is: Administrative Judge Thomas D. Murphy, Atomic Safety and Licensing Board Panel, T3F23, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

II. INTERVENTION PETITIONS

As noted above, NEORSD and the City have petitioned to intervene in the denial proceeding. Both are already parties in the renewal proceeding. To become parties in the denial proceeding, they must show that their petitions were timely filed and must describe in detail their interests in the proceeding, how those interests may be affected by the results of the proceeding, and their areas of concern about the licensing activity that is the subject matter of the proceeding. 10 C.F.R. § 2.1205(e). The Presiding Officer must determine whether the specified areas of concern are ''germane'' to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h).

As set forth earlier, AMS has not responded to either of the petitions for leave to intervene. As outlined by the Staff in its response to the two intervention petitions, the new petitions of NEORSD and the City raise the issue of financial assurance for decommissioning, which was the sole reason for the Staff's denial of AMS's application. NEORSD and the City raised similar concerns in the earlier renewal proceeding. Because they were found to have standing to raise those issues in that proceeding, they clearly have standing to raise the identical issues in the denial proceeding. Moreover, those concerns are clearly ''germane'' to the denial proceeding. Finally, NEORSD's and the City's petitions were filed

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[5] The NRC Staff, in its response to the Presiding Officer's November 4, 1998 Show-Cause Order (*see* discussion *infra*) previously had taken the position that both are entitled to become parties.

within the time frame spelled out in the *Federal Register* notice and thus are manifestly timely filed.

Based on these considerations, the petitions of NEORSD and the City for leave to intervene in the denial proceeding are hereby being granted. The Presiding Officer agrees with the Staff, however, that matters in the NEORSD petition that are merely critical of the Staff's review process are not germane to this proceeding and may not be litigated. NEORSD's participation in the denial proceeding is limited to contesting AMS's proposal for financial assurance for decommissioning.

III. CONSOLIDATION

On November 4, 1998, the Presiding Officer in the renewal proceeding issued an ''Order To Show Cause Why Proceeding Should Not Be Suspended.'' The Order observed that the Staff had denied the renewal application, based on the Licensee's lack of the requisite financial assurance for decommissioning the facility, that AMS was contesting this denial (in the denial proceeding) and, accordingly, that there was no apparent reason for continuing the renewal proceeding (in which financial assurance for decommissioning had been identified as an issue) until the denial proceeding was concluded.

Only the NRC Staff responded. It took the position that the denial proceeding was not separate from the renewal proceeding and that the Presiding Officer should (1) consider the denial proceeding as subsumed in the renewal proceeding or, in the alternative, if the denial proceeding is considered a separate proceeding, should consolidate them; (2) suspend consideration of all issues in the renewal proceeding except for financial assurance for decommissioning required by 10 C.F.R. § 30.35; and (3) set a schedule for the parties to make their written presentations with respect to financial assurance for decommissioning.

As the Staff observes, the denial reflects the Staff's position with respect to an issue already admitted into the renewal proceeding, i.e., whether the renewal application complies with the requirements of 10 C.F.R. § 30.35. The sole matter at issue in the denial proceeding is ''whether the renewal application complies with the requirements of 10 C.F.R. § 30.35, such that [AMS] applications for renewal of its license should be granted.'' The Staff adds (Staff Response at 4) that ''[w]hether the Application complies with 10 C.F.R. § 30.35 should be litigated only once.''

The Presiding Officer here agrees that the decommissioning funding issue should be litigated only once but prefers to reach this result by consolidation. The resolution of this issue (either by upholding license denial or by overturning decommissioning funding as a basis for license denial) would be dispositive of the denial proceeding. It thus appears preferable to litigate it in the denial

proceeding. By consolidation, the issue as described in the denial proceeding would be litigated first. If the Staff prevails on this issue, the consolidated proceeding would be terminated, as all other issues in the renewal proceeding would become moot. If the Staff does not prevail, then other issues raised in the renewal proceeding could then be litigated, in the context of that proceeding.

IV. HEARING FILE

Under 10 C.F.R. § 2.1231(a), the NRC Staff is required to file a hearing file within 30 days of the Presiding Officer's order granting a request for hearing. Because the denial proceeding order issued on November 4, 1998, a hearing file in the denial proceeding should already have been filed.

However, the hearing file in the denial proceeding may well be coextensive with that in the renewal proceeding. The renewal proceeding hearing file was filed on April 12, 1995, and updated several times — most recently, on November 10, 1998. The Staff is hereby requested to file an updated hearing file (to the extent appropriate for the denial proceeding) by Friday, January 15, 1999.[6]

V. FILING SCHEDULES

The Commission's Rules of Practice contemplate that, after the hearing file has been made available, the Presiding Officer shall afford parties and section 2.1211(b) participants the opportunity to submit, under oath or affirmation, ''written presentations of their arguments and documentary data, informational material, and other supporting written evidence,'' on a schedule determined by the Presiding Officer. 10 C.F.R. § 2.1233. In that connection, the City has sought 45-60 days following AMS's submission for it to file its presentation. The NRC Staff notes that 30 days is an appropriate filing period but has no objection to 45 days for each party, including AMS (Staff Response to intervention petitions, dated December 18, 1998, at 7).[7]

Measuring the filing periods from the date of service of an updated hearing file (January 15, 1999), and allowing 5 days for mailing per 10 C.F.R. § 2.710, AMS should file (mail) its presentation by Monday, March 8, 1999. Other parties (including the Staff) should file (mail) their presentations by Friday, April 30, 1999. AMS may file (mail) its reply to the presentations of other parties by

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[6] The Staff is also requested to provide Judge Murphy with a complete hearing file by the same date.

[7] Earlier, in its November 17, 1998 response to the Order to Show Cause, the Staff had suggested a 30-day filing schedule, with 15 days' reply for AMS, from the date of service of the documents to which a response is being proffered.

Friday, May 28, 1999. (In addition, the Staff may file a reply to the responses of other parties by the same date, May 28, 1999.) Thereafter, the Presiding Officer will determine whether an oral presentation is necessary (see discussion below) and, if so, and after consultation with the parties, will set a schedule for such presentation, very likely at a location in or near Cleveland, Ohio.

VI. ORAL PRESENTATION

In its petition for leave to intervene in the denial proceeding, the City has requested an ''oral hearing'' pursuant to 10 C.F.R. § 2.1235. It adds (Petition at 6) that ''[t]he City believes that the ability to cross-examine witnesses in an oral presentation is crucial to create an adequate record for decision.''

In its response to the City's petition, the NRC Staff opposes this request. It claims that the City has provided no reason why an adequate record would not be created through written presentations.

Beyond that, the Staff observes — accurately — that an oral presentation, even where allowed by a Presiding Officer, does not contemplate cross-examination by parties. *See Curators of the University of Missouri,* CLI-95-1, 41 NRC 71, 120 (1995). Cross-examination would normally be available in a Subpart G case. *See* 10 C.F.R. § 2.743. It clearly would be beyond the authority of the Presiding Officer in a Subpart L case (such as both the renewal and denial proceedings are) to permit cross-examination by parties. Indeed, Subpart L explicitly provides avenues for Presiding Officers to recommend to the Commission that cross-examination or other procedures be adopted, but only where an applicant for renewal (such as AMS) requests such procedures at the time it requests its hearing (10 C.F.R. § 2.1205(b)) or where the Presiding Officer determines that such procedures are desirable in a particular case to achieve a fair and impartial hearing (10 C.F.R. § 2.1209(k)). Only the Commission itself could approve such procedures.

Accordingly, Cleveland's request for an oral presentation with opportunity for cross-examination is denied. Because the authorization for an oral presentation as described in 10 C.F.R. § 2.1235 depends on the state of the record after written presentations have been proffered, Cleveland's request to that extent is being deferred pending receipt of written presentations as described above.

VII. SETTLEMENT

In accordance with 10 C.F.R. § 2.1241, the parties are encouraged to reach a fair and reasonable settlement of this consolidated proceeding.

VIII. ORDER

For the reasons described above, and based on the entire record, it is, this 23d day of December 1998, ORDERED:

1. The petitions of the Northeast Ohio Regional Sewer District (subject to the limitations described above) and the City of Cleveland for leave to intervene in the denial proceeding are hereby *granted.*

2. The renewal proceeding and denial proceeding are hereby *consolidated.*

3. The issue to be resolved first in this consolidated proceeding is ''whether the renewal application complies with the requirements of 10 C.F.R. § 30.35, such that [AMS's] applications for renewal of its license should be granted.'' Consideration of other renewal issues is hereby deferred pending resolution of the financial qualification issue.

4. The filing schedules set forth earlier are hereby *adopted.*

5. The City of Cleveland's request for an oral presentation, including the right of parties to conduct cross-examination, is hereby *denied.* To the extent the City's request for an oral presentation is construed as a request for a presentation in accordance with 10 C.F.R. § 2.1235(a), action is *deferred* pending receipt of the parties' written presentations.

6. This Memorandum and Order is subject to appeal to the Commission in accordance with 10 C.F.R. § 2.1205(o).

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 23, 1998

Cite as 48 NRC 381 (1998) **LBP-98-33**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of **Docket Nos. 50-269-LR**
50-270-LR
50-287-LR
(ASLBP No. 98-752-02-LR)

DUKE ENERGY CORPORATION
(Oconee Nuclear Station,
Units 1, 2, and 3) **December 29, 1998**

In this Decision concerning license extension for the Oconee reactor, the licensing board denies intervention to three individuals and one organization. Although finding that the organization and individuals had standing to intervene, none had proffered an admissible contention.

STANDING: THE 50-MILE PROXIMITY PRESUMPTION IN LICENSE EXTENSION CASES

The ''proximity presumption'' used in reactor construction and operating license proceedings also should apply to reactor license extension proceedings. For construction permit and operating license proceedings, NRC case law recognizes a presumption that persons who live, work, or otherwise have contact within the area around a reactor have standing to intervene if they live within close proximity of the facility (e.g., 50 miles). Reactor license extension cases should be treated similarly because they allow operation of a reactor over an additional period of time during which the reactor can be subject to some of the same equipment failure and personnel error as during operations over the original period of the license.

CONTENTIONS: PENDING STAFF REVIEW AS A BASIS FOR CONTENTIONS

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 not generally a cause for concern since they eventually must be dealt with by Staff before a license can be granted, Petitioners must do more than just show that Staff review is ongoing, but rather, they must identify instances where the application itself is allegedly in error.

COUNCIL ON ENVIRONMENTAL QUALITY GUIDELINES

The NRC considers CEQ guidelines, but it is not bound by them if they substantively impact on the way the NRC performs its regulatory functions.

CONTENTIONS: GENERIC ISSUES COVERED BY RULEMAKING

Where NRC regulations provide that applicants for operating license renewals do not have to furnish environmental 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.

OBLIGATIONS OF PETITIONERS AND INTERVENERS IN LICENSING PROCEEDINGS

Petitioners generally are not excused from their hearing obligations despite the large number of documents in the licensing application.

MEMORANDUM AND ORDER
(Denying Petition to Intervene)

I. INTRODUCTION

The Chattooga River Watershed Coalition and Messrs. Norman ''Buzz'' Williams, William ''Butch'' Clay, and William Steven ''W.S.'' Lesan (collectively referred to as ''Petitioners'') seek to intervene in Duke Energy Corporation's license amendment application to extend the license of its Oconee Nuclear Station, Units 1, 2, and 3, for an additional 20-year period. This application was filed on July 6, 1998, and Petitioners submitted a timely request for

intervention on September 8, 1998. Thereafter, Petitioners supplemented their intervention requests by filing an amendment with an attachment to their petition on September 30, 1998, and by filing a supplemental intervention petition on October 30, 1998. In their October 30, 1998 supplemental petition, they also asked for a stay to prepare another supplemental list of contentions.

For the reasons stated herein, Petitioners' requests for intervention and for a stay are denied.

II. REQUIREMENTS FOR INTERVENTION

Before a petitioner may be granted a hearing and allowed to intervene in NRC proceedings, it must satisfy this agency's requirements for intervention set forth at 10 C.F.R. § 2.714(a)(1)-(2)(1998). The first requirement is a showing that the petitioner has standing to intervene. To establish the requisite standing, traditional legal judicial tests are applied which require the petitioner to show that: (1) the proposed action will cause ''injury in fact'' to the petitioner; (2) the injury is arguably within the zone of interests to be protected by the statutes governing the proceeding; and (3) the asserted injury is capable of redress in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

In addition, before being allowed to intervene, a petitioner must proffer at least one admissible contention for litigation. The standards for admissible contentions are set out in 10 C.F.R. § 2.714(b)(2) (1998). These regulations require that a contention include a specific statement of the issue of law or fact to be raised or controverted and a brief explanation of the basis for the contention. In addition, the contention should include a concise statement of the alleged facts or expert opinions that support it, together with references to those specific sources and documents on which each petitioner intends to rely to prove the contention. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996). Section 2.714(b)(2)(iii) also requires that each petitioner present sufficient information to show that a genuine dispute exists on a material issue of law or fact. A contention that fails to meet these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. Section 2.714(d)(2).

The Commission also has specifically set forth criteria for the admissibility of contentions in license extension proceedings in a *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998). As stated therein:

> The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 C.F.R.

> Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1427, ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants.'' *See* 10 C.F.R. §§ 55.71(d) and 51.95(c).

Id. at 22. *See also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123 (1998). (Order referring hearing requests for this proceeding.)

III. THE PETITIONERS' STANDING TO INTERVENE

To establish their standing for this proceeding, Petitioners Williams, Clay, and Lesan, have filed affidavits stating they are members of the Chattooga River Watershed Coalition (CRWC), and they and their families live, work, recreate, travel, drink water, and eat food produced within 20 miles of the Oconee Nuclear Station. Mr. Williams also states he is an employee and Executive Director of CRWC and serves as the organization's official representative.

Each of these individuals also claims that health and safety, property rights, and personal finances for him and his family could be adversely impacted by the proposed Oconee license amendment. Damages to the Petitioners could be caused by accidental radiological releases from the facility if the plant is allowed to operate for an additional 20 years. In regard to this extended operation, they are concerned that the Oconee license renewal application has unanswered questions regarding the structural integrity of the reactor and containment building, the effects of aging and embrittlement on the reactor vessels and containment vessels, the resolution of Oconee spent fuel disposal, the safeguards for terrorist actions, and the structural integrity of Oconee to withstand tornados and earthquakes. They also claim that their enjoyment of the Chattooga River Watershed may be diminished if the flora, fauna, air, and aquatic resources of the ecosystem are damaged or destroyed by such releases. They explain that such damage could occur because the Chattooga River Watershed lies within 15 miles of the Oconee facility at its closest point and that about 90% of the Watershed's entire 180,000 acres lies within 30 miles of the facility. *See* Petitioners' Supplemental Filing of October 31, 1998, and affidavits attached thereto.

Each of these individuals has authorized CRWC to represent him in this proceeding. They contend CRWC has standing to intervene as an organization since its mission (as stated in article III of its Bylaws) is

> [t]o protect, promote and restore the natural ecological integrity of the Chattooga River Watershed ecosystem; to ensure the viability of native species in harmony with the need for a healthy human environment; and to educate and empower communities to practice good stewardship on public and private lands.

They also claim that CRWC's educational mission could be diminished or destroyed by an accident at Oconee that causes CRWC employees (whose office is in Clayton, Georgia — a town only 30 miles from the Oconee facility) ''to suffer severe injury and/or die.'' *Id.*

Neither the NRC Staff nor the Applicant contest the standing of these three individuals. NRC Staff November 16, 1998 Response at 4-5; Applicant November 16, 1998 Response at 3-4. Staff also acknowledges that CRWC, the organization, has standing to intervene derived from its representational capacity on behalf of its members. However, Staff does not believe that CRWC's standing can be based on its own organizational activities. Applicant takes the position that CRWC does not have either organizational or representational standing. *Id.*

We agree with Staff and Applicant that these three individuals have standing to intervene. Nuclear Regulatory Commission case law establishes that sufficient potential injury in fact exists for establishing standing where a contested licensing action has obvious potential for offsite consequences and petitioners reside or engage in activities near the nuclear facility. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 162 (1998). Potential injury is obvious here because the aging and embrittlement of the Oconee reactor vessel and containment alleged by the Petitioners could cause accidents with potential offsite effects to these individuals.[1]

CRWC also has standing to intervene. Organizations as well as individuals may intervene in NRC proceedings. An organization may attempt to show standing through one of its individual members if it establishes that the member wishes to be represented by the organization and he or she lives or conducts activities within close enough physical proximity to the nuclear facility to be potentially adversely affected by the contested licensing action. *See Vermont*

[1] Although not necessary for a determination in this case, standing for these individuals can additionally be found based upon the ''proximity presumption'' used in reactor construction permit and reactor operating license proceedings. In those proceedings, Commission case law recognizes a presumption that persons who live, work, or otherwise have contact within the area around the reactor have standing to intervene if they live within close proximity of the facility (e.g., 50 miles). *See Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). We believe that this recognized 50 mile presumption should also apply to reactor license extension cases because license extensions allow operation of the reactor over an additional period of time during which the reactor can be subject to some of the same equipment failure and personnel error as during operations over the original period of the license.

Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-97-27, 36 NRC 196, 199 (1992). In this case, CRWC's representational standing has been established by Messrs. Williams, Clay, and Lesan establishing their own standing and authorizing CRWC to represent them. Having established an entitlement of CRWC to represent these individual members, there is no need to determine whether CRWC has established organizational standing in its own right.

IV. PETITIONERS' CONTENTIONS

Petitioners have listed four contentions for litigation in this proceeding. *See* Petitioners' October 30, 1998 Supplemental Petition at 3-5. The Staff and the Applicant oppose all four. *See* NRC Staff's November 16, 1998 Response at 8-23; Applicant's November 16, 1998 Response at 8-26.

Each of these contentions is set forth below, along with our analysis of its admissibility.

Contention 1

> As a matter of law and fact, Duke Energy Corporation's Application for Renewed Operating License for Oconee Nuclear Station Units 1, 2, and 3 (hereinafter referred to as ''Application'') is incomplete, and should be withdrawn and/or summarily dismissed.

As a basis for this contention, Petitioners cite several Babcock & Wilcox Owners Group (B&WOG) generic topical reports, BAW-2251 and BAW-2248, and an Applicant report pertaining to Oconee license extension which are currently under review by the Staff. They also reference a number of Staff Requests for Additional Information (''RAIs'') regarding the Oconee application which apparently are still outstanding. Petitioners' October 30, 1998 Supplemental Petition at 3. They claim the incomplete status of these reports and RAIs renders the application incomplete, and they assert that meaningful public and technical expert review, as well as their ability to litigate this case, has been inhibited by this lack of information.

We find this contention to be inadequate for failure to demonstrate, as required by 10 C.F.R. § 2.714(b)(2)(iii), that a genuine dispute exists on a material issue of law or fact. What Petitioners have done is search the record for instances of uncompleted Staff review of the Oconee application, and then assert that the application should be rejected based on these instances. This argument fails to recognize that all information regarding Staff review of an NRC licensing application does not have to be complete prior to the time the application is

contested at a hearing. ''Open items'' regarding a license application, which eventually must be dealt with by Staff before the license can be granted, are not unusual, nor does the fact that such items exist, standing alone, provide the basis for a contention. Indeed, to accept such a contention would be contrary to the well-established principal that contentions regarding the adequacy of Staff's review of a license application (as opposed to the application itself) are inadmissible in licensing hearings. *Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395-96 (1995). *See also id.,* CLI-95-1, 41 NRC at 121-22 and reactor cases cited in n.67. Because Petitioners have only shown that Staff review is ongoing and have not identified instances where the application itself is allegedly in error, Contention 1 must be rejected.

Similarly, Petitioners' complaint that Staff's open items prevent adequate public and technical expert review is also unpersuasive. The technical reports in question are part of the Oconee application and are available for public review. Contentions must be based upon problems with the reports themselves. After the NRC Staff completes its review, if Petitioners have problems with Staff conclusions, they are then free to intervene (if their intervention petition has been previously rejected) and file late contentions in accordance with 10 C.F.R. § 2.714(a)(1).

The RAIs cited by Petitioners also are not appropriate as a basis for contentions in this proceeding. The subject of RAIs in license extension cases was dealt with in the Commission's recent *Calvert Cliffs* decision. There the Commission, in holding that the petitioner's list of RAIs were not appropriate as contentions in that proceeding, stated:

> Contrary to NWCs view (Appeal at 7, 21-23), the NRC Staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions, and NWC has cited no language in the RAIs suggesting otherwise. Indeed, were the application as rife with serious omissions as NWC suggests, then NWC should have had no problem identifying such inadequacies — yet NWC has not done so. What NWC ignores is that RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory Staff simply indicate that the Staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The Staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns.

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998). This case is similar to *Calvert Cliffs* because the Petitioners here also have not shown how the presence of these RAIs evidence credible safety significance, how the Oconee application is materially

incomplete because of the RAI matters, or how the application fails to provide sufficient information to frame contentions.[2]

For all of these reasons, Contention 1 is rejected.

Contention 2

> As a matter of law and fact, Duke Energy Corporation's Application for Renewal Operating License for Oconee Nuclear Station Units 1, 2, and 3 does not meet the aging management and other safety-related requirements mandated by law and NRC regulations, and therefore should be withdrawn and/or summarily dismissed.

As basis for this contention, Petitioners again point to the unresolved status of BAW-2251 and BAW-2248, relied upon in Contention 1, and also cite owners group reports BAW-2243A and BAW-2244A as containing unresolved matters referenced in the Oconee application. However, as in Contention 1, Staff's ongoing review of reports relied upon in the application cannot be the basis for a contention. *See* Contention 1 discussion, *supra.* Moreover, Petitioners have erred in their reliance on BAW-2243A and BAW-2244A because these two reports have, in fact, already been approved by Staff. *See* NRC Staff's November 16, 1998 Response at footnote 9, Applicant's November 16, 1998 Response at 14; and Staff's revised Final Safety Evaluation for BAW-2243 and BAW-2244.

Petitioners also rely on several statements in the Oconee application as an additional basis for Contention 2. These include a statement concerning section v.3, 4.3-30 that Applicant will have to provide details to Staff about Applicant's inspection program. However, as a practical matter, this statement does not present a problem since, as pointed out by Staff in its response, detailed information regarding Applicant's inspection program is provided in the application at v.3, 4.3-29--30. *See* NRC Staff's November 16, 1998 Response at 12-13 and Attachment 1 thereto.

Petitioners also cite a statement in section v.1, 2.4-28 of the application which refers to a ''one time inspection'' for Applicant's pressure cladding demonstration program. Petitioners are concerned that performing this inspection in the license extension's early years could overlook ''ten years of wear and tear'' on the pressure cladding system in subsequent years. Petitioners' October 3, 1998

[2] In an unauthorized filing dated December 9, 1998, entitled ''New Information for the ASLBP to Consider with the Petitioners' First Supplemental Filing,'' Petitioners cite several new RAIs that they claim were not received by them until after the October 30, 1998 filing deadline. According to Petitioners, these RAIs support their first three contentions and identify areas where the application is deficient in providing essential information for evaluating issues of safety and aging effects. Staff and the Applicant have responded that this unauthorized filing does not materially aid the admission of these contentions. *See* Staff's December 22, 1998 Response and Applicant's December 21, 1998 Response. We agree. The new RAIs listed by Petitioners are merely additional examples of areas where information regarding the application is being sought by Staff, and, as such, are unacceptable as contentions or basis for contentions.

Supplement at 4. However, their concern is based on a misunderstanding about this subject. This statement refers only to the fact that a single inspection will be needed to determine whether there have been past cracks in the stainless steel cladding. It does not refer, as Petitioners evidently believe, to age-related management during the period of extended operation. *See* Final Safety Evaluation Report for Clarification of BAW-2244 found in Attachment 3 of Staff's November 16, 1998 Response.

As an additional basis for this contention, Petitioners refer to their statements in Contention 1. *See* Petitioners' October 30, 1998 Filing at 3. For the reasons stated in our discussion of Contention 1, we do not consider the basis provided for that contention to be adequate to support a contention. Accordingly, we find that Petitioners' Contention 2 is not admissible.

Contention 3

> As a matter of law and fact, Duke Energy Corporation's application for Renewed Operating License for Oconee Nuclear Station Units 1, 2, and 3 fails to meet mandated law under the National Environmental Policy Act (NEPA), and therefore should be withdrawn or summarily dismissed.

In proposed Contention 3, Petitioners claim that the Oconee application violates NEPA because it fails to furnish adequate environmental information regarding the project. They contend, as a basis for this contention, the specific violation of NEPA sections 1500.1(b), 1502.2(g), and 1502.21. Section 1500.1(b) states that ''NEPA procedures must insure that environmental information is available to public officials and citizens before actions are taken.'' Section 1502.2(g) states that ''[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying a decision already made.'' Section 1502.21 states that

> Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potential interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

As an additional basis, Petitioners claim that the application constitutes impermissible ''segmentation'' of a project which contradicts a series of NEPA cases. Finally, they assert that the application violates NEPA because of the incomplete RAIs.

This Board rejects Contention 3. As a preliminary matter, we note that sections 1500.1(b), 1502.2(g), and 1502.21 relied upon by Petitioners are

Council on Environmental Quality (CEQ) guidelines codified at 40 C.F.R. Part 1500. Although the NRC considers CEQ guidelines (*see* 43 Fed. Reg. 55,978-56,007 (Nov. 29, 1978)), it is not bound by them if they substantively impact on the way the NRC performs its regulatory functions. 49 Fed. Reg. 9352 (Mar. 12, 1984). In the first instance the NRC is bound by 10 C.F.R. Part 51 to implement NEPA. Petitioners have not contended, nor attempted to show, that Applicant's environmental report does not meet the specific requirements of 10 C.F.R. § 51.53(c).

More importantly, Petitioners have failed to provide an adequate basis for these NEPA claims to meet the requirements of 10 C.F.R. § 2.714(b)(2). Their only basis for alleging a section 1500.1(b) violation (i.e., that information must be made available before decisions are made) is a general reference to Contentions 1 and 2. But as we have already discussed, relevant information regarding the license extension was made publicly available in the Oconee application, and the pending Staff review of portions of the application does not alter the availability of this basic information.

Nor has sufficient information to establish a section 1502.2(g) violation (i.e., requiring that environmental impact statements assess impacts rather than justifying a decision already made) been made available. In support of this assertion, Petitioners refer to their ''discussion of M.S. Tuckman's application submittal letter.'' But that discussion in Petitioners' October 30, 1998 filing at page 2 only makes vague reference to an alleged close working relationship between Applicant and the NRC and does not appear to be related to a possible section 1502.2(g) violation. Similarly, the section 1502.21 allegation lacks adequate basis because it is not clear what Petitioners are referring to regarding the incorporation of materials by reference into environmental impact statements.

So too, Petitioners' ''segmentation'' argument is inadequate to provide an admissible basis. ''Segmentation,'' as it pertains to NEPA, occurs when environmental review of the total effects of a project is thwarted because portions of the project are dealt with separately. *See City of Rochester v. United States Postal Service,* 541 F.2d 967, 972 (2d Cir. 1976). Here, Petitioners seem to suggest that Applicant has intentionally delayed completing certain portions of the application to avoid an assessment of its overall effects. However, this argument fails because Applicant has filed a license application with the Staff for Oconee addressing required environmental issues. Petitioners could have alleged deficiencies in Applicant's treatment of these issues, but instead, as basis for their contentions, merely listed certain ''open items'' in the application which are not acceptable as contentions in NRC proceedings. In fact, these open items refer to safety issues that are not even NEPA related.

The Staff has not inappropriately segmented its treatment of the Oconee application. Thus far, Staff has prepared a Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, 1996 (GEIS)

which will generically apply to the Oconee application; and it will later issue a plant-specific environmental impact statement for Oconee which will supplement this GEIS. *See* 63 Fed. Reg. 50,257 (Sept. 21, 1998). Accordingly, no basis has been stated for Contention 3, and it must be rejected.

Contention 4

> The Petitioners submit that the specific issue of the storage of spent fuel and other radioactive substances on the site of the Oconee Nuclear station must be addressed in these proceedings. In addition, the status and capacity of the current spent fuel storage facility must be disclosed and addressed. The real and potential availability and viability of other High-Level Waste storage sites must be disclosed and addressed.

Petitioners' Contention 4 raises issues related to onsite storage, transportation, and ultimate disposal of Oconee spent nuclear fuel. However, none of these subjects can provide a basis for admissible contentions in this proceeding.

The Commission's regulations provide that applicants for operating license renewals do not have to furnish environmental 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. *See* 10 C.F.R. §§ 51.53(c)(2), 51.53(c)(3)(i), and 51.95. *See also* the presumptions in 10 C.F.R. § 51.23 regarding high-level waste permanent storage; *and see* Table B-1 in Appendix B to Subpart A of Part 51, ''Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants'' (which includes specific findings on offsite radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and onsite spent fuel storage). Each of these areas of waste storage is barred as a subject for contentions because 10 C.F.R. § 2.758 provides that Commission rules and regulations are not subject to attack in NRC adjudicatory proceedings involving initial or renewal licensing. In addition, Commission case law holds that Petitioners are precluded from litigating generic determinations established by NRC rulemakings. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889-90 (1983), *rev'd in part on other grounds,* CLI-84-11, 20 NRC 1, 4 (1984). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998). Petitioners have not offered any showing of special circumstances to establish the admissibility of Contention 4 by demonstrating that the application of these regulations does not serve the purpose for which these regulations were adopted. *See* 10 C.F.R. § 2.758(b). Thus, the areas of this contention dealing with spent fuel storage at the Oconee facility and at offsite facilities are not appropriate subjects for contentions.

The transportation of spent fuel rods from the Oconee reactor to an offsite storage site also is not a permissible subject for a contention in this proceeding. In SRM M970612 dated January 13, 1998, the Commission directed Staff to proceed with a generic rulemaking for the transportation of high-level waste. In it, the Commission also stated that license renewal applicants would not have to include these transportation issues in their applications if the rulemaking would not delay the license renewal application. *See* SECY-97-279 and SRM M970612 attached to Staff's November 16, 1998 Response as Attachment 2. Although this board is not bound by Commission SRMs, we agree with the general concept that it would be counterproductive to litigate issues that are being treated in an ongoing generic rulemaking unless there is good reason to do otherwise. As the Commission has recognized, delay to a license extension proceeding would provide a good basis for requiring treatment of the fuel transportation issue in the application and not awaiting completion of the transportation rulemaking. However, because this rulemaking commenced on January 13, 1998, and will become effective no later than September 1999, it is clear that the rulemaking will not delay the December 2000 completion of the Oconee license renewal proceeding. *See* NRC Staff Response of December 2, 1998 and affidavit of Donald P. Cleary attached thereto. No other good reasons are apparent as to why high-level transportation information should be included in the Oconee application.

V. PETITIONERS' REQUEST FOR A STAY

In their October 30, 1998 filing, Petitioners request that these proceedings be stayed pending their review of Staff's RAIs and the Applicant's responses. As part of this request, they ask that they be given 90 days after Applicant's responses to file a supplemental list of contentions.[3] We deny this request.

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[3] Related to this request is Petitioners' complaint that they have had insufficient time to prepare their case because of the huge number of documents in the Oconee application. They claim in this regard that the tight schedules in this proceeding severely compromise meaningful public review. Petitioners' October 30, 1998 filing at 2. Applicant responds that the Oconee application has been publicly available for at least 4 months (*see* 63 Fed. Reg. 37,909 (July 14, 1998)) and that most of the complained-about materials are unrelated to the Oconee license renewal. Applicant's November 16, 1998 Response at 27. Applicant also claims that Petitioners' complaints are at odds with the NRC's *Catawba* decision where the Commission stated:

> While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact 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) (''Statement of Policy''). Thus an intervener in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material. *Statements that such material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities connected with participation in Commission proceedings and, thus, do not present cognizable arguments.* (Emphasis added.)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

We agree that Petitioners' complaints about scheduling obligations and the size of the record in this proceeding do not excuse them from their hearing obligations.

Standards for granting stays in NRC adjudicatory proceedings are set forth in 10 C.F.R. § 2.788. These include a consideration of:

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.

Although Petitioners briefly mention potential irreparable injury to themselves in their December 8, 1998 filing (at 2), they do not address the three other standards in their request for a stay. However, even if addressed, it is apparent from the discussion below that they would not meet their burden in obtaining this stay.

With respect to the first criteria, there is no basis for concluding that Petitioners would have success on the merits. First, as we have already indicated, the fact that the Staff review process is ongoing does not establish a legal deficiency in the agency's licensing process. This is particularly so given the fact that RAIs can be the subject of late-filed contentions. Further, there is no reason for concluding that Petitioners' review of the RAIs and responses thereto would result in a valid contention, much less be successful on the merits after litigation.

Similarly, for criteria two and three regarding irreparable injury or harm to the parties, we have no basis to conclude that Petitioners will be irreparably injured or harmed by failing to review Applicant's responses to RAIs. In their December 9, 1998 filing, Petitioners contend that their interests in protecting and promoting the natural ecological integrity of the Chattooga River Watershed would be irreparably damaged should a major radiological accident occur. This claim, however, is far from compelling given their failure to allege specific problems with the Oconee license application that might cause such an event. Moreover, speculation that the RAIs may later reveal potential problems does not constitute a reasonable likelihood of irreparable injury for purposes of a stay. Applicant, on the other hand, may be harmed if its license extension application is not timely resolved.

Finally, criteria four, regarding where the public interest lies, also weighs against Petitioners. There is a public interest in assuring that Petitioners receive a fair opportunity to present their contentions about a license application. At the same time, however, the public interest requires the timely completion of adjudicatory proceedings. For this particular proceeding, the Commission emphasized this point by establishing milestones for its timely completion, including a directive that, within 90 days of the date of their September 15, 1998 order, the Licensing Board will reach a decision on intervention petitions and admissibility of contentions affecting the public health and safety almost three decades in the future. CLI-98-17, 48 NRC at 127. If Petitioners' extension

request is granted, not only will the Commission's milestone be missed, but completion of the remainder of the proceeding could be delayed because of additional time necessary to resolve new contentions and to conduct possible discovery and litigation related thereto.

Thus, because each of the standards for evaluating stays weigh against the Petitioners, their request is denied.

VI. CONCLUSION

For all the foregoing reasons, we find that Petitioners have standing to intervene. However, because their proffered contentions fail to meet the requirements for admissibility, their request for intervention is *denied.* Consequently, this proceeding is terminated.

Within 10 days of service of this Memorandum and Order, Petitioners may appeal this Memorandum and Order to the Commission by filing a notice of appeal and accompanying brief in accordance with 10 C.F.R. § 2.714a (1998).

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 29, 1998

Cite as 48 NRC 395 (1998) **DD-98-13**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of **Docket No. 50-271**
(License No. DPR-28)

VERMONT YANKEE NUCLEAR POWER CORPORATION
(Vermont Yankee Nuclear Power Station) **December 7, 1998**

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

I. INTRODUCTION

By a petition submitted pursuant to 10 C.F.R. § 2.206 on May 27, 1998, Mr. Jonathan M. Block, on behalf of the Citizens Awareness Network, Inc. (CAN or Petitioner), requested that the U.S. Nuclear Regulatory Commission (NRC) take immediate action with regard to the Vermont Yankee Nuclear Power Station operated by the Vermont Yankee Nuclear Power Corporation (Licensee or Vermont Yankee). By letter dated June 9, 1998, Petitioner supplemented the petition.

In the petition of May 27, 1998, the Petitioner requested that the NRC take immediate enforcement action by suspending the operating license for the Vermont Yankee facility until the entire facility has been subjected to an independent safety analysis review similar to the one conducted at the Maine Yankee Atomic Power Station. As an alternative, the Petitioner requested that the NRC immediately act to modify the operating license for the facility by requiring that before restart in June 1998 (1) Vermont Yankee management certify under oath that all backup safety systems and all security systems are fully operable and that all safety systems and security systems meet and comply with NRC requirements; (2) Vermont Yankee be held to compliance with all of the restart

criteria and protocols in the NRC [Inspection] Manual; (3) Vermont Yankee only be allowed to resume operations after the NRC has conducted a ''vertical slice'' examination of the degree to which the new design-basis documents (DBDs) and Final Safety Evaluation Report (FSAR) accurately describe at least two of the primary safety systems for the Vermont Yankee reactor; (4) once operation resumes, Vermont Yankee only be allowed to continue operation for as long as it adheres to its schedule for coming into compliance and completing the DBD and the FSAR projects; and (5) the NRC hold a public hearing to discuss the changes to the torus, the Vermont Yankee DBD and FSAR projects, and Vermont Yankee's scheduled completion of these projects in relation to operational safety.

By letter dated June 9, 1998, Petitioner renewed its requests for relief on the basis of an event occurring on June 9, 1998, at Vermont Yankee and reported by the Licensee in Daily Event Report (DER) 34366. This event involved the automatic shutdown of the reactor because of problems in the feedwater system. The Petitioner stated that this event indicated a lack of reasonable assurance that safety-related systems at Vermont Yankee will perform adequately.

On July 6, 1998, the Director of the Office of Nuclear Reactor Regulation informed the Petitioner that he was denying the request for immediate suspension or modification of the operating license at Vermont Yankee, that the petition was being evaluated under section 2.206 of the Commission's regulations, and that action would be taken in a reasonable time. In that letter, the Director also denied Petitioner's request for a public hearing.

On July 9, 1998, in accordance with established Staff guidance for reviewing section 2.206 petitions, the NRC requested that the Licensee address the concerns raised in the petition and the need to perform the actions requested by the Petitioner. The Licensee responded by letter dated September 14, 1998, and the information provided by the Licensee was taken into consideration by the NRC Staff.

The NRC Staff's review of the petition and its supplement is now complete. For the reasons set forth below, the Petitioner's remaining requests are denied.

II. BACKGROUND

In support of these requests, the Petitioner raised concerns about the operation of the Vermont Yankee facility, including challenges to the single-failure criterion, inadequate safety evaluations, potential overreliance on Yankee Atomic Electric Company analyses, an inadequate operational experience review program, high potential for other serious safety problems, and lack of adequate perimeter security. The Petitioner also attached four documents prepared by the Union of Concerned Scientists (UCS). One UCS document, dated May 14, 1998, provided a review of Vermont Yankee DERs made over the previous year as

requested by CAN. These DERs are verbal reports made by licensees under 10 C.F.R. § 50.72 to the NRC and put in written form by the NRC. Another UCS document, dated January 29, 1998, was addressed to the NRC Region I Senior Allegation Coordinator; it discussed a specific concern with NRC DER 33545 of January 15, 1998, associated with Vermont Yankee water hammer effects on certain systems. The third document, a UCS letter dated May 5, 1997, to the NRC Chairman and Commissioners, discussed mislocated fuel bundle loading errors. The final UCS document attached was titled ''Potential Nuclear Safety Hazard Reactor Operation with Failed Fuel Cladding,'' dated April 2, 1998. In the supplement to the petition of June 9, 1998, Petitioner asserted that the event on June 9, 1998, at Vermont Yankee indicated a lack of reasonable assurance that safety-related systems at Vermont Yankee will perform adequately.

Many of the DERs have been generated as a result of the Licensee's ongoing review of Vermont Yankee design-basis information, and the following is a brief history describing this effort. On October 9, 1996, the NRC issued a request for information to licensees pursuant to 10 C.F.R. § 50.54(f) regarding the adequacy and availability of design-basis information. The purpose of this request was to provide the NRC with added confidence and assurance that nuclear plants are operated and maintained within the design bases and any deviations are reconciled in a timely manner. This request was necessary on the basis of NRC's findings during inspections and reviews that identified broad programmatic weaknesses that have resulted in design and configuration deficiencies at some plants, including Millstone. The Licensee responded by letters dated February 14 and March 11, 1997, stating that although its overall performance in the areas of design and configuration control was sound, it would undertake a series of actions designed to provide improved configuration management. These actions included developing and implementing a design-basis documentation program and an FSAR verification program. The DBD program at Vermont Yankee was initiated in the fall of 1996. The NRC Staff evaluated the Licensee's response and determined that subsequent inspection in this area was necessary. From May 5 through June 13, 1997, the NRC Staff performed an architect/engineer (A/E) inspection, Inspection Report (IR) 50-271/97-201, to evaluate the capability of selected systems to perform the safety functions required by their design bases, as well as the adherence of the systems to their respective design and licensing bases, and the consistency of the as-built configuration and system operations with the FSAR. The NRC team concluded that the systems evaluated were capable of performing their intended safety functions; however, some concerns (apparent violations of NRC requirements) were identified. IR 50-271/97-10 documented the NRC followup inspection completed in November 1997 and provided the Notice of Violations (NOVs) associated with the concerns noted in the A/E report. On March 2, 1998, an enforcement conference was held with the Licensee to discuss the apparent violations of NRC requirements identified

in the A/E inspection. The Licensee responded to the NOVs by letter dated May 14, 1998, and the NRC will continue to evaluate the adequacy of the Licensee's corrective actions during future inspections, currently expected to be completed by the end of 1998.

The Licensee's DBD program has identified numerous design-basis issues, many of which required reporting under 10 C.F.R. §§ 50.71, 50.72, and/or 50.73. In the NRC's systematic assessment of licensee performance (SALP) for the period January 19, 1997, through July 18, 1998, issued on August 28, 1998, the NRC Staff found that the Licensee's program to review and document the plant's design basis has been rigorous, as evidenced by the number and significance of the issues identified during the development and validation of the system DBDs. The NRC Staff considers that the number and significance of the issues, some of which required reporting, demonstrate a desirable situation in which problems are identified and resolved.

The matters raised in support of Petitioner's requests are discussed below.

III. DISCUSSION

A. Evaluation of Plant Operation with Deficiencies

Petitioner titled this section ''Single-Failure Criterion Challenged,'' but the discussion focused on the cumulative effect of deficiencies at Vermont Yankee. Petitioner states that Vermont Yankee's volume of longstanding deficiencies in safety-related equipment strongly suggests that the single-failure criterion may have been violated. In support of this statement, reference is made by the Petitioner to an evaluation of Vermont Yankee DERs by the UCS dated May 14, 1998. Petitioner also states that it was not able to find any evidence that Vermont Yankee considered the impact of the cumulative effect of concurrent degraded conditions on the safety margin of the plant.

Appendix A to 10 C.F.R. Part 50 gives a definition of the single-failure criterion. The capability to withstand a single failure is a consideration in the design of nuclear power plants. For example, General Design Criterion 35 for emergency core cooling systems in Appendix A to 10 C.F.R. Part 50 states that suitable redundancy in components and features shall be provided to ensure that the system safety function can be accomplished, assuming a single failure.

Technical specification requirements must be met. A deficiency in a safety system, including deficiencies in which the capability to withstand a single failure is lost, is to be evaluated by licensees and treated as a degraded and nonconforming condition. A prompt determination of operability is to be made by licensees. For any deficiency, including those in which the capability to withstand a single failure is lost, licensees must evaluate the deficiency and, if the deficiency affects the design-basis requirements for the particular plant, correct

the deficiency in accordance with 10 C.F.R. Part 50, Appendix B, Criterion XVI, Corrective Action. The NRC has issued guidance regarding resolution of deficiencies in the form of Generic Letter (GL) 91-18, Revision 1, ''Information to Licensees Regarding NRC Inspection Manual Section on Resolution of Degraded or Nonconforming Conditions.'' The guidance in Vermont Yankee's corrective action program is consistent with the NRC's guidance in GL 91-18. Identified deficiencies are evaluated by the Licensee in accordance with the Licensee's corrective action program, which meets the requirements of 10 C.F.R. Part 50, Appendix B. If required by 10 C.F.R. §§ 50.71, 50.72, and/or 50.73 the deficiency is reported to the NRC.

NRC regulations do not explicitly require an integrated assessment of deficiencies. If a deficiency cannot be immediately corrected, the Licensee evaluates the acceptability of continued operation consistent with the NRC guidance in GL 91-18. A determination of operability is needed for each deficiency.

The NRC Staff requested and the Licensee provided an integrated assessment of items that were scheduled for final resolution after the spring 1998 outage by letters to the NRC dated May 1 and May 28, 1998. IR 50-271/98-06 documented the NRC's review of the Licensee's letter of May 1, 1998, and concluded that the Licensee's actions to resolve the outstanding items, as they pertain to restart of the plant following the spring 1998 refueling outage, have been appropriate. No concerns were identified by the NRC Staff regarding the operability determinations, compensatory actions, or corrective actions, as documented in IR 50-271/98-06.

In summary, deficiencies at Vermont Yankee are entered in the Licensee's corrective action program which meets the requirements of 10 C.F.R. Part 50, Appendix B. The acceptability of continued operation with outstanding deficiencies is evaluated using the NRC guidance in GL 91-18. The NRC has been aware of the events and deficiencies referred to by the Petitioner as the basis for its concern. The Staff assessed the DERs and concluded that an appropriate response would be to inspect Licensee activities. The results of the NRC review are documented in NRC inspection reports. For example, NRC IR 50-271/98-06 documented the NRC's inspection of the Licensee's engineering and technical support for operations as they pertain to the Licensee's process for evaluating deficiencies and determining the acceptability of continued operation with the deficiency. No concerns were raised with regard to operability determinations, compensatory actions, or corrective actions. No additional NRC actions were deemed necessary in this area.

B. Inadequate Safety Evaluations

Petitioner states that there is evidence that the Vermont Yankee Licensee performed inadequate safety evaluations required by 10 C.F.R. § 50.59 and listed DERs 31906, 31949, 32106, and 34005 as examples.

The Licensee stated in its response of September 14, 1998, to the petition that the examples cited are similar in that their cause can be traced to the difficulty in quickly retrieving the specific design-basis information in the time period available to determine system operability. Had the design bases been readily retrievable, it is unlikely that these issues would have constituted a condition requiring reporting. The Licensee has recognized the need to upgrade the DBDs and is currently performing this action, as previously discussed.

In Inspection Report 50-271/98-12, the NRC reviewed the four event reports listed by the Petitioner as examples of inadequate safety evaluations at Vermont Yankee. DER 34005 was found to not involve an inadequate safety evaluation. In this case, the Licensee was not able to immediately retrieve a necessary design-basis calculation for the anticipated transient without scram (ATWS) mitigation system. Subsequently, the Licensee found that the calculation had been performed by its fuel vendor and was in fact available. The Licensee retracted that event report due to the retrieval of this calculation. DERs 31906, 31949, and 32106 were each partially a result of inadequate design-basis information being available. This led to safety evaluations in support of modifications to plant RHR system operating procedures and installation of fire protection hardware that were erroneously found acceptable. The Licensee notified the NRC of these three conditions in March and early April 1997.

At the time of discovery, the Licensee was implementing its Individual Plant Examination of External Events (IPEEE) program. This special review revealed errors in both the original design of the plant, as well as weak documentation of certain design bases that led to the prior acceptance of these plant vulnerabilities to external-event-initiated internal flooding events. The Licensee appropriately reported these conditions to the NRC and took necessary corrective actions to remove the identified vulnerabilities. Since the conditions had not occurred that were necessary to exploit these plant vulnerabilities, such as a seismic event, no adverse safety consequences were realized even though the plant had operated outside of the design bases.

The Licensee Event Reports (LERs) associated with DERs 31906, 31949, and 32106 (LER 50-271/96-012 and 50-271/97-004, respectively) were reviewed by the NRC in section E8.3 of IR 50-271/97-10. In that report, the NRC concluded that the Licensee's root-cause analyses and corrective actions were acceptable and that these issues met the criteria for handling as noncited violations per section VII.B.3, ''Old Design Issues,'' of the NRC Enforcement Policy.

Subsequent to the Licensee notifying the NRC of these events, the NRC performed two major engineering/design inspections at the Vermont Yankee plant. The A/E team inspection in June 1997 concluded that there were weaknesses in the design control process; but that the Licensee was to address these deficiencies in its Configuration Management Improvement Project. In the engineering team followup inspection of November 1997, the NRC concluded that the Licensee had strengthened its design-bases documentation validation process as a result of the lessons learned from the A/E inspection. Further, the NRC found that the Licensee had adjusted the depth and breadth of its validation inspection using the Safety System Function Inspection techniques, similar to those used in the A/E team inspection, and concluded that its validation efforts should produce results similar to the A/E team review. The inspection results also included a number of findings, some of which were design-bases control violations that resulted in a Civil Penalty issued in April 1998.

In response to the Civil Penalty, the NRC determined that the Licensee's corrective actions were sufficient to identify and resolve existing design-bases errors. As a result of the Licensee's comprehensive corrective actions, the NRC concluded that no additional measures were warranted for the design-bases concerns at Vermont Yankee. The NRC will continue to monitor and assess the Licensee's progress in completing its proposed corrective actions as part of the regular inspection process for followup to identified violations.

The NRC has recently assessed the Licensee's performance in the area of safety evaluation as documented in IR 50-271/98-80 issued on July 16, 1998. The NRC reviewed the Licensee's procedural guidance for the safety evaluation program to assess that program against the latest guidance contained in NRC Inspection Manual 9900 and the regulatory requirements of 10 C.F.R. § 50.59. In addition, selected safety screenings and safety evaluations were reviewed. Although some deficiencies were noted, neither the deficiencies noted in the report nor the examples referenced in the petition constitute a condition warranting further extensive inspection in this area. The Licensee's corrective actions for the deficiencies noted in IR 50-271/98-80 will be evaluated during future inspections.

C. Potential Overreliance on Yankee Atomic Electric Company Analyses

Petitioner states that there is evidence that the Vermont Yankee Licensee has been relying upon Yankee Atomic Electric Company (YAEC) to conduct engineering analyses, and there is a potential that Vermont Yankee may have the same kind of serious compromises in safety systems that existed at other facilities that relied upon YAEC's engineering analyses. Petitioner refers to an NRC demand for information (DFI) to YAEC regarding information needed

by the NRC to determine whether enforcement action should be taken against YAEC to ensure future compliance, on the part of NRC licensees, with NRC requirements. DERs 31915, 32106, 33259, 33502, and 34145 were listed by the Petitioner as those that may have involved analyses by YAEC. Petitioner requested that the NRC suspend Vermont Yankee's license to operate until assurance can be obtained that all analyses that YAEC prepared for Vermont Yankee have been reviewed by the NRC Staff to ensure that they have been performed properly.

The NRC Staff acknowledges that YAEC performed many engineering analyses for Vermont Yankee.

The serious compromises (according to the Petitioner) in safety systems that existed at other facilities that relied upon YAEC's engineering analysis to which the Petitioner refers originated with an allegation involving YAEC's analyses performed for Maine Yankee Atomic Power Company (MYAPCo). A letter dated December 1, 1995, from the UCS contained an anonymous allegation that certain analyses performed by YAEC for MYAPCo were flawed. A number of investigations and technical reviews were initiated, and the NRC issued a DFI to YAEC and Duke Engineering & Services, Inc. (DE&S),[1] in December 1997. The DFI required an explanation why the NRC should permit any NRC licensee to use the services of YAEC and/or DE&S to perform loss-of-coolant accident (LOCA) analyses or any safety-related analyses to meet NRC requirements. The DFI was issued on the basis of NRC's concerns regarding specific inadequacies in small-break LOCA analyses provided by the YAEC LOCA Group to MYAPCo that caused MYAPCo to be in violation of NRC requirements. DE&S responded on February 27, 1998, to the NRC's DFI regarding continued engineering services to nuclear utilities. The response provided a detailed description of the reviews that had been conducted and the associated findings. NRC subsequently issued violations to MYAPCo on October 8, 1998.

After review of the complete record in this matter, the NRC Staff concluded that the actions taken by the YAEC LOCA Group caused MYAPCo to be in violation of Commission requirements in a number of areas, but that these actions did not result from willfulness on the part of DE&S and/or YAEC employees.[2] The Staff further concluded that the corrective actions accomplished and planned, as discussed in the DE&S response to the DFI, provide a basis for reasonable assurance that in the future, the NRC and licensees can rely upon DE&S to provide complete and accurate information and that DE&S is willing

[1] DE&S acquired portions of YAEC, including the YAEC LOCA Group, in December 1997.

[2] The NRC Staff addressed its final conclusions regarding the SBLOCA analysis violations at Maine Yankee in the NOV issued to MYAPCo on October 8, 1998. The NRC Staff's conclusions regarding the provision of LOCA analyses or other safety-related analyses to NRC licensees by YAEC and/or DE&S are discussed in letters to YAEC and DE&S dated October 8, 1998.

and able to otherwise conduct its activities in accordance with the Commission's requirements. Therefore, the NRC Staff determined that no further enforcement action shall be taken against YAEC or DE&S regarding the actions of the LOCA Group of concern in the DFI.

In reaching these conclusions, the NRC Staff considered the entire record of investigations and technical reviews that resulted in part or in whole from the allegation of December 1995. The broader implication of the allegation, beyond the specific analysis performed for Maine Yankee, suggested cause for concern in two areas. First, there was a concern regarding the adequacy of LOCA analyses provided to other NRC licensees, including Vermont Yankee, by the YAEC LOCA Group. Second, it also suggested cause for concern regarding the adequacy of other safety-related analyses performed by the Yankee Nuclear Services Division of YAEC on behalf of NRC licensees to demonstrate compliance with Commission requirements.

Regarding the first concern, in May 1996 the NRC Staff audited the LOCA analyses provided to Vermont Yankee by the YAEC LOCA Group. This review also incorporated a concern regarding the conditions and events leading to Vermont Yankee's LER No. 96-010 dated May 9, 1996.[3] The review concluded that the analyses performed by the YAEC LOCA Group for Vermont Yankee were consistent with the conditions on the use of the RELAP5YA code for Vermont Yankee as specified in the Staff's safety evaluations for the code dated August 25, 1987, and October 21, 1992. Note that the RELAP5YA code was a BWR version and was different than the Maine Yankee version, a pressurized water reactor version. Since the Staff's approval of the use of the code, the Staff found that the code had been transferred to a different computer operating system and that the fuel behavior package had been modified. The Staff reviewed these changes and concluded that approved quality assurance procedures were followed throughout the code modifications.

Regarding the second concern, the Independent Safety Assessment (ISA) of MYAPCo conducted in the summer of 1996 evaluated non-LOCA safety-related analyses performed by YAEC on behalf of MYAPCo. As stated in the ISA report dated October 7, 1996, the ISA concluded that conditions of approval in NRC safety evaluations were met in the use of selected analytic codes for perform-

[3] LER 96-010 was associated with an inadequate design/single-failure evaluation during a design change. The NRC Staff found that the plant-specific analysis had failed to consider the limiting single-failure scenario. This issue was addressed by the Staff in an NOV and Proposed Imposition of Civil Penalty — $50,000, dated August 23, 1996. The Staff concluded that this violation resulted from ineffective communications between the plant operations staff and the YAEC safety analysts, resulting in failure to identify the fact that the safety analysis assumptions were not consistent with the plant configuration. In its response to the DFI, DE&S noted that ineffective communication between YAEC, MYAPCo, and the NRC also played an important role in the assumptions of all parties regarding the demonstration of compliance with the technical requirements of 10 C.F.R. § 50.46. DE&S identified corrective actions to clearly define and formally document regulatory and organizational interface requirements with its nuclear clients to prevent recurrence of the communication and organizational responsibility uncertainties that contributed to the events described in the DFI.

ing non-LOCA safety-related analyses, but that weaknesses in documentation and validation represented vulnerabilities that warranted Licensee attention. The ISA also concluded that cycle-specific core performance analyses were excellent, but that weaknesses were found in more complicated, less frequently performed analyses. These weaknesses did not cause the analyses results to exceed the facility design and licensing bases. In its response to the DFI, DE&S described corrective actions, including strengthened personnel training; formal documentation of organizational roles, responsibilities, and communication requirements; and independent assessment to provide management with direct feedback on the compliance of work process, practices, and products. These corrective actions address the weaknesses identified by the ISA in documentation, validation, and the conduct of complicated, infrequently performed analyses.

In its letter of September 14, 1998, the Vermont Yankee Licensee indicated that the conclusions reached on the basis of the reviews conducted give confidence that the analyses performed by YAEC on Vermont Yankee's behalf are of high quality. The Vermont Yankee Licensee reviewed the concerns raised by the DFI for potential impact on Vermont Yankee. The Licensee indicated that an independent technical assessment of specific analyses performed for Vermont Yankee was conducted and stated that the assessment identified no significant technical errors. The Licensee did not uncover any reason to suspect the quality or the accuracy of engineering analyses performed by YAEC for Vermont Yankee.

On the basis of the results of several NRC Staff investigations and technical reviews, the NRC Staff has concluded that the violations associated with the SB LOCA analyses provided to MYAPCo by the YAEC LOCA Group were isolated. LOCA analyses and other safety-related analyses provided to NRC licensees by YAEC and/or DE&S, including the LOCA Group, have generally been found to be in compliance with NRC requirements. Therefore, the actions requested by the Petitioner are not necessary.

With respect to future work by DE&S, weaknesses or vulnerabilities identified during these reviews are being addressed by DE&S. Therefore, the NRC Staff has concluded that there is no basis for taking action against DE&S and/or YAEC to prevent them from providing safety-related analysis services to NRC licensees, nor to take action against NRC licensees, including Vermont Yankee, to prevent them from using the engineering services provided by YAEC and/or DE&S.

D. Inadequate Operational Experience Review Program

Petitioner states that there is evidence that strongly suggests that the Vermont Yankee Licensee does not have an adequate operational experience review program and listed DERs 31923, 32016, and 33789 as examples of inadequacy

and violation of NRC regulations. Petitioner states that an inadequate operational experience review program leads to ''compromised engineering conservation in safety systems, and the eventual failure of such systems during a serious emergency event.''

The Licensee acknowledges that weaknesses have been identified in the reviews of industry operation experiences in that reviews were not always timely and some opportunities to learn from industry operating experiences were sometimes missed. A task force was developed to address the weaknesses.

The NRC assessed Licensee performance in this area on September 6, 1997, and documented the findings in IR 50-271/97-06. The NRC concluded that the previous weaknesses identified in the Licensee's operating experience review process had been appropriately addressed through implementation of a new administrative procedure. This report also stated that a selected sample of recently dispositioned items identified that a proper review of the individual concerns had been made and that closure of the individual concerns had been achieved.

In IR 50-271/98-12, the NRC reviewed the three event reports listed by the Petitioner as examples that the Licensee does not have an adequate operational experience feedback (OEF) review program. On March 10, 1997, DER 31923 was identified as a result of the Licensee's IPEEE program. The Licensee determined that the root cause of this event was an inadequate initial design. Related to this cause was an inadequate flood design basis. This contributed to the Licensee's failure to identify this concern during earlier design studies, including those in response to NRC Information Notices on similar events in the industry. The Licensee's IPEEE program was a very detailed and intrusive review that questioned design-basis assumptions. Due to the scope of that review, this concern as well as several other flooding design concerns were discovered by the Licensee. The root cause and corrective actions for this event were described in LER 50-271/97-002. This LER was previously reviewed in section E8.3 of IR 50-271/97-10. In that report, the NRC concluded that the Licensee's root-cause analyses and corrective actions were acceptable and that this issue met the NRC Enforcement Policy for handling as a noncited violation per section VII.B.3, ''Old Design Issues.''

DERs 32016 and 33789 were found to be related. The earlier of these two events was discovered on March 25, 1997, as a result of the Licensee's operational experience feedback review of an event report by Lasalle on February 21, 1997. After this initial discovery, the Licensee took appropriate corrective measures to ensure that the standby gas treatment system would not be operated in a configuration that could lead to failure of the system during a design-basis accident. The Licensee prematurely removed the corrective actions, which resulted in a second event with the standby gas treatment system operated in a configuration that could lead to failure. The NRC issued a violation in IR

50-271/97-06 for this second event. The Licensee attributed the cause of this second event to a weakness in the license and design-basis information for this system. The Licensee appropriately reported this event to the NRC in LER 50-271/97-014.

As a result of additional engineering review committed to as a corrective action listed in LER 50-271/97-014, the Licensee discovered an additional vulnerability for the standby gas treatment system that was subsequently reported to the NRC on February 25, 1998, in DER 33789. The NRC concluded that this latter event was not a result of ineffective operational experience review, but rather a result of the corrective actions for an identified problem.

The NRC concluded that these event reports were a result of original design deficiencies, and related weaknesses in the design and licensing-basis information for the plant systems in question. The root causes of these events did not raise concern with the adequacy of the Licensee's current OEF review program, as discussed in IR 50-271/97-06. Except for DER 33789, which was a result of the Licensee's corrective actions program, these events predated the Licensee's revised OEF program as discussed in IR 50-271/97-06. Also, one of the events was Licensee identified by use of the OEF process.

The DERs referenced by the Petitioner do not constitute a failure of the operational experience review program. On the basis of NRC's previous inspection in this area, the Licensee has an adequate industry operational experience review program. Followup on the effectiveness of the Licensee's operational experience program remains an item of routine review for the NRC inspection staff.

E. High Potential for Other Serious Safety Problems

Petitioner states that since Vermont Yankee's safety evaluation and operational experience review program do not seem adequate, and since it has relied on YAEC engineering analyses, it is reasonable to expect that there are many more design and licensing-bases problems yet to be dealt with at Vermont Yankee. Petitioner states that the NRC required Salem and Millstone reactor licensees to certify that the safety-related systems at these facilities were within their design and licensing basis before permitting them to be restarted when pervasive and systemic problems very similar to those at Vermont Yankee were identified at these facilities.

As stated in the ''Background'' section of this Director's Decision, the A/E inspection conducted at Vermont Yankee was performed as a followup on the design-basis problems noted at facilities, including Millstone. As previously stated, the NRC team concluded that the systems evaluated were capable of performing their intended safety functions. The concerns identified were not of the significance of those observed at Millstone.

Salem Units 1 and 2 were shut down in May and June 1995, respectively, because of inadequate control room ventilation, and because of problems with a minimum flow valve that made the residual heat removal system inoperable. Before the shutdown, both Salem units were the subject of significant regulatory attention because of a series of performance problems dating back to 1990. Additionally, NRC Augmented Inspection Teams were dispatched to the Salem units every year between 1991 and 1994 to evaluate significant operational events, including a catastrophic turbine-generator failure and control rod system failures. The NRC was concerned about Salem operation because of frequent equipment failures and personnel errors and failure of previous initiatives to achieve long-term performance improvement. In June 1995, the Region I Regional Administrator issued a confirmatory action letter confirming the Licensee's commitment to develop a long-term plan to identify and correct the longstanding equipment deficiencies and address the poor condition of materials, weak management oversight, and ineffective corrective actions.

The magnitude of problems that existed at Salem have not been observed at Vermont Yankee. As previously stated, the NRC considers that the Licensee's safety evaluation and operational experience review program are adequate on the basis of NRC's inspections. In addition, the NRC has not identified any significant concerns with the YAEC/DE&S analysis for Vermont Yankee that warrant the actions requested by the Petitioner.

The Vermont Yankee Licensee is conducting a DBD and FSAR review that examines safety-related systems to identify and correct design and licensing-basis problems. Plant operation may continue during these assessments, provided the plant is operated in accordance with its license and NRC's regulations. Deficiencies identified are entered into the corrective action process and operability is determined using guidance similar to that contained in NRC GL 91-18 as discussed previously.

In our recent SALP IR 50-271/98-99, dated August 28, 1998, the NRC concluded that Licensee management established a lower threshold for problem reporting, thereby improving problem identification. Particularly noteworthy was management's implementation of the Configuration Management Improvement Project, which improved identification of design and licensing issues. The activities have been rigorous, as evidenced by the number and significance of the issues identified during the development and validation of the system DBDs. The NRC considered the Licensee's performance in engineering to be good. The SALP was based on the results of numerous NRC inspections at Vermont Yankee, including a major design (A/E) inspection of certain systems. On the basis of our recent assessment of engineering at Vermont Yankee, the Staff concluded that the actions requested by the Petitioner are not warranted.

F. Lack of Adequate Perimeter Security

Petitioner states that Vermont Yankee's lax perimeter security demonstrates that management did not adequately respond to all of the implications of the recent incident involving a former Vermont Yankee contractor. On August 19, 1997, this former contractor was involved in shootings in New Hampshire and Vermont that left four people dead. The individual was subsequently killed in a confrontation with Vermont law enforcement authorities. Law enforcement authorities later found bomb-making materials stored at the individual's residence. Petitioner states that NRC inspectors recently discovered a major weakness in the security system by having five out of eight inspectors successfully invade the security perimeter, including one inspector who passed through the metal detector with a gun.

The NRC conducted a special inspection at Vermont Yankee on August 27 and 28, 1997, to determine if the access authorization program, access controls, and fitness for duty program, as implemented, revealed information that should have prevented the individual involved in the shootings of August 19, 1997, from being granted unescorted access. The NRC determined that the Licensee's program met regulatory requirements. The NRC did not identify any information used by the Licensee in processing the individual for access authorization that should have prevented the Licensee from granting the individual unescorted access to the secured portions of the plant. The results of the inspection are documented in IR 50-271/97-07. No changes or corrective actions to the Licensee's program were found to be necessary.

The NRC conducted a physical security inspection at Vermont Yankee on March 16-19, 1998, as documented in IR 50-271/98-05. This inspection concluded that within the scope of the inspection, the Vermont Yankee Licensee had in place a satisfactory program for the protection of public health and safety. However, two violations of regulatory requirements associated with access control of packages and the intrusion detection (perimeter security) system were identified. The violations were categorized as Severity Level IV violations in accordance with the NRC enforcement policy and are discussed below.

Performance testing of the intrusion detection system by the NRC regional assistance team resulted in the assistance team's successfully gaining undetected access into the protected area by climbing over the protected area barrier without generating an alarm in six of ten zones. This weakness constituted a violation of NRC requirements. The Licensee took adequate corrective actions for the violation by immediately implementing compensatory measures and adjusting all fence zone sensors. All zones subsequently successfully detected deliberative, nonaggressive climbing attempts by a specially selected security force member. A specifically defined nonaggressive climb test was incorporated into regularly scheduled operability testing of the system. Despite this violation,

the NRC concluded that the Licensee's security facilities and equipment were well maintained and reliable on the basis of inspection, testing, maintenance, compensatory measures, protected area detection aids, and assessment aids.

During the performance testing of the personnel and package search equipment, a test device was placed in a backpack with other items and placed on the x-ray machine. The x-ray machine detected an object in the backpack that could not be identified and the backpack was physically searched by a security force member. However, the test device was not discovered during the physical search, constituting a violation of NRC requirements. The Licensee took adequate corrective actions, including counseling and retraining the search officer involved, as well as assessing the hand search practices utilized by other security officers. Lessons learned and performance expectations were also communicated to each individual member of the security force. The NRC concluded that the Licensee was conducting its security and safeguards activities in a manner that protected public health and safety on the basis of the inspection of the access authorization program, alarm stations, and access control of personnel and packages in the protected area despite the violation in this area.

The Licensee had adequately addressed the issues raised by IR 50-271/98-05 violations. The NRC performed a followup inspection described in IR 50-271/98-12 during the week of August 31, 1998, which included an evaluation of the Licensee's corrective actions for the violations and found the corrective actions acceptable. NRC's SALP report dated August 28, 1998, considered these issues and concluded that site management continued to provide appropriate oversight of the security program. These violations were not related to the situation involving the former Vermont Yankee contractor previously discussed. Therefore, since these situations are not related and no changes or corrective actions to the Licensee program were necessary following the former contractor issue, the NRC considers that Petitioner's statement that lax perimeter security demonstrates that management did not adequately respond to all of the implications of the recent incident involving a former Vermont Yankee contractor is not valid.

G. Operation Conditional upon the DBD and the FSAR Schedule

Petitioner stated that Vermont Yankee should be allowed to operate only if it meets the scheduling obligations it set up for completing DBDs and updating the FSAR (by imposition of a license condition or order). The petition stated that Vermont Yankee's lagging efforts at regulatory compliance easily justify this action.

As previously stated, on October 9, 1996, the NRC issued a request for information pursuant to 10 C.F.R. § 50.54(f) regarding the adequacy and availability of design-basis information. By letters dated February 14 and March 11, 1997,

the Licensee responded to the request for information. The Licensee committed to a series of actions designed to provide improved configuration management (adequacy and availability of design-basis information). These actions included a DBD program and an FSAR verification program. The A/E inspection previously discussed, IR 50-271/97-201, was conducted to review particular aspects of the Licensee's design control programs and processes. The DBD and the FSAR verification programs were originally scheduled to be completed by October 1998 and December 1998, respectively. The NRC understands that these programs require extensive use of engineering resources and that the scheduled date for completion of these programs may be delayed. The NRC Staff has concluded that Licensee management has placed an appropriately high emphasis on the configuration management improvement project, which includes the DBD and the FSAR verification programs. A delay in the Licensee's implementation would not necessarily constitute a condition warranting a license condition or imposition of an Order. The NRC Staff currently believes that an adequate time frame for completion of the FSAR verification programs is March 30, 2000, for structures, systems, and components of high safety significance as defined in the Licensee's maintenance rule, and March 30, 2001, for all other information. Delayed completion of these programs may be subject to enforcement.

With respect to Vermont Yankee's regulatory compliance, compliance issues have been appropriately addressed by the NRC and the Licensee as previously discussed. In the SALP report issued on August 28, 1998, the NRC concluded that Licensee performance has been good in all functional areas, which reflects NRC's assessment of regulatory compliance during the period of January 19, 1997, to July 18, 1998. On the basis of this information, the NRC has determined that the requested action is not necessary.

H. Necessity for a ''Vertical Slice'' Safety Assessment

Petitioner states that a ''vertical slice'' safety assessment on at least two systems for which the Licensee has completed review is necessary to be certain that Vermont Yankee's DBD and FSAR projects have accurately captured the actual operating condition of the facility's safety systems. By ''vertical slice,'' the Petitioner appears to be referring to an inspection similar to the A/E inspection previously performed and documented in IR 50-271/97-201. Petitioner references statements made during the enforcement conference on March 2, 1998, between the NRC and the Licensee following the NRC A/E inspection, which discussed the process that the Licensee was using in the DBD validation process.

This area was evaluated by the NRC and documented in IR 50-271/97-10. The NRC had been concerned that at the time of the A/E inspection, it did not appear that the DBD reviews would have identified the design issues found by the

NRC team based on an initial review of the Licensee's design-basis efforts. At the enforcement conference meeting on March 2, 1998, the Licensee stated that it had committed to perform the DBD reviews and recognized the need for DBD validation prior to issuance of the NRC's 10 C.F.R. § 50.54(f) letter regarding the adequacy and availability of design-basis information. However, the validation effort had not been fully defined at the time of the A/E inspection. The Licensee stated that the validation effort would have been designed to identify the type of problems found by the A/E team. On the basis of the findings of the followup inspection completed in November 1997 (IR 50-271/97-10) and the information provided at the March 1998 meeting, the NRC was no longer concerned with DBD validation effort. The NRC Staff documented this conclusion by letter dated April 14, 1998, which issued the NOV and civil penalty related to the A/E inspection and IR 50-271/97-10. The SALP report issued August 28, 1998, concluded that overall the activities in this area have been rigorous, as evidenced by the number and significance of the issues identified during the development and validation of the system DBDs.

The NRC considers that the Licensee's efforts in this area are adequate, and allocation of additional NRC resources to perform an additional ''vertical slice'' safety assessment is unnecessary at this time. The NRC will continue to evaluate the adequacy of the Licensee's corrective actions for the violations identified during the A/E inspection in future inspections.

I. Conduct of a Public Hearing in Brattleboro, Vermont to Inform the Public

Petitioner requested that the NRC conduct a public hearing in Brattleboro, Vermont, to inform the public about changes to the torus, compliance with the DBD and the FSAR process, results of the A/E inspection, results of an NRC ''vertical slice'' analysis of Vermont Yankee's first sets of DBDs, and the implications for public health and safety of Vermont Yankee's schedule for complying with the requirements that it verify and update all DBDs and the FSAR.

The NRC has conducted several public meetings on many of these issues. In addition, the NRC conducted a public meeting in Brattleboro, Vermont, on September 16, 1998, to discuss the results of the latest SALP for Vermont Yankee. Following the meeting with the Licensee, the NRC met with members of the public, including members of the Petitioner's organization, to discuss any issues that members of the public wished to discuss. Both the July 6, 1998 NRC letter to the Petitioner and the SALP public meeting notice indicated that NRC officials would be available following the SALP meeting. Issues discussed with members of the public included those described by the Petitioner. Further

commitment of NRC Staff resources to conduct the requested hearing is not warranted.

J. Review of Vermont Yankee Daily Event Reports

Petitioner attached to the petition a letter dated May 14, 1998, from the UCS to the Petitioner that contained a review of DER information at Vermont Yankee and provided general observations and conclusions. Concerns raised included the single-failure criterion, inadequate safety evaluations, potential overreliance on YAEC, and the program to review inadequate operational experience. These issues were addressed earlier in this Director's Decision. The conditions documented in the DERs have been addressed by NRC inspection followup when appropriate and no additional action is necessary.

K. Concern About Water Hammer Effects on Certain Systems

Petitioner attached a document titled ''Vermont Yankee HPCI/RCIC [High Pressure Coolant Injection Reactor Core Isolation Cooling] Waterhammer, DER 33545,'' dated January 29, 1998, to David J. Vito, Senior Allegation Coordinator for the NRC, from the UCS.

The document questioned (1) whether the Vermont Yankee FSAR analyses assume that HPCI and RCIC start and stop, and, if so, is suppression pool temperature such that conditions for water hammer exist; (2) whether the FSAR appropriately documents the existence (and related design and licensing basis) of the vacuum breakers in the HPCI and RCIC exhaust lines; and (3) whether the related Vermont Yankee LER should discuss the risk to the public from two fission product barriers being degraded (the fuel cladding due to known leaking fuel at Vermont Yankee, and the primary containment boundary due to potential water hammer).

In response, the NRC reviewed Vermont Yankee's subsequent LER 98-05, issued on April 9, 1998, and performed inspection activities at Vermont Yankee in June 1998, as described in IR 50-271/98-80. The NRC review found that the effect of the suppression pool air space pressure was not adequately considered in the original HPCI and RCIC vacuum breaker design. However, the NRC also concluded that the forces associated with the potential water hammer transients caused by this design issue would not have challenged the structural integrity of the piping.

Although the previous vacuum breaker design was not adequately described in the FSAR, earlier versions of HPCI and RCIC piping and instrument diagrams did accurately reflect the installed configuration. A subsequent modification to correct the design deficiency shows that controlled drawings, the DBDs for

HPCI and RCIC, and the FSAR have been or will be updated to reflect the newly installed vacuum breaker configurations. The NRC also sampled design changes since 1974 related to HPCI and RCIC and found none that would have influenced the piping configuration in question. Further, the DBD prepared for each system represents a comprehensive evaluation of past modifications and design information. In January 1998, during the preparation of the HPCI and RCIC DBDs, the Licensee identified the vacuum breaker deficiency. Therefore, on the basis of the NRC's and the Licensee's reviews, there is reasonable assurance that no past evaluations would have been flawed as a result of the lack of discussion in the FSAR.

Regarding the content of LER 98-05, the NRC concluded that the potential water hammer forces would not have been high enough to challenge pipe structural limits and, therefore, containment integrity. Regarding the fuel cladding, the leakage experienced in the last cycle of operation was limited to a single fuel rod bundle, and was within the operational limits of the Vermont Yankee technical specifications (TSs) and well below that assumed in the FSAR accident analysis. As such, no significant increase in risk was presented in this circumstance.

L. Mislocated Fuel Bundle Loading Errors

Petitioner also attached a letter dated May 5, 1997, from the UCS to the NRC regarding ''Mislocated Fuel Bundle Loading Error.'' The letter urges NRC to revisit the misoriented and mislocated fuel bundle loading issues for boiling-water reactors (BWRs). It also questioned the validity of General Electric's (GE's) estimated probability of these events as submitted to NRC.

GE proposed that these events be reclassified as accidents because they are potentially limiting events for critical power ratio (CPR) margin to the CPR safety limit, particularly for the BWR6 design. GE's estimated probability of these events was not accepted by the Staff, and they continue to be treated as anticipated operational occurrences for licensing purposes.

The UCS letter implies that GE may have purposely submitted an unrealistically low probability value for these events. GE's estimated probability was based on the fact that since 1981, when SIL-347 (which gives guidelines for core verification procedures for detection of misoriented fuel bundles) was first implemented, there had been no reported cases of plant operation with a misoriented bundle. GE's assessment was made before the Hope Creek misoriented fuel bundle event. GE's estimated probability in this specific case (Hope Creek) was not unreasonable considering reactor performance after SIL-347 implementation and before this event.

M. Potential Safety Hazard Reactor Operation with Failed Fuel Cladding

Petitioner also attached a document from the UCS titled ''Potential Nuclear Safety Hazard Reactor Operation with Failed Fuel Cladding,'' which concludes that existing design and licensing requirements do not allow plants to operate with known fuel cladding failures. This document was also provided to the NRC from the UCS to support a petition submitted pursuant to 10 C.F.R. § 2.206. A Director's Decision is being prepared. A copy of that Decision will be forwarded to the Petitioner when it becomes available.

With regard to plant safety, the Vermont Yankee plant is not prohibited from operation with a minimal amount of fuel cladding damage, as stated in the letter of July 6, 1998. The Vermont TS Section 1.1 addresses limits to be observed to prevent significant fuel cladding damage. Operation is allowed to continue with a minimal amount of fuel damage, provided that the coolant chemistry requirements of TS 3.6.B are met. These limits are set to values of coolant activity that ensure that the radiological consequences of postulated design-basis accidents are within the appropriate dose acceptance criteria. Petitioner did not submit any information indicating that Vermont Yankee has operated outside these limits.

N. Event of June 9, 1998

In response to the June 9 event, the NRC performed a special team inspection to review the causes, safety implications, and Licensee actions associated with the event. The event involved a reactor vessel high water level turbine trip (due to foreign material in a reactor feedwater valve) and reactor scram followed by an electrical transient. The NRC Staff concluded that continued operation of Vermont Yankee does not constitute an undue risk to public health and safety and immediate action to suspend or modify the operating license is not warranted at this time. IR 50-271/98-09, dated July 10, 1998, documented the team's findings.

IV. CONCLUSION

The NRC Staff has evaluated the information provided by the Petitioner as its basis for the actions requested. As previously discussed, the information provided by the Petitioner does not warrant any further action.

The NRC Staff has been closely monitoring events at Vermont Yankee and has taken numerous actions to ensure that there is no undue risk to public health and safety. The Petitioner did not submit any significant new information about

safety issues. The NRC already knew of the events, inspection reports, and concerns presented in support of the petition. Neither the information presented in the petition nor any other information of which the NRC is aware warrants the actions requested by the Petitioner. Accordingly, the Petitioner's requests for action are denied.

As provided in 10 C.F.R. § 2.206(c) a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. This Decision will constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 7th day of December 1998.

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