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PREFACE

This is the fifty-first volume of issuances (1 – 330) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2000, to June 30, 2000.

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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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) **January 6, 2000**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), to construct and operate an independent spent fuel storage installation (ISFSI) under 10 C.F.R. Part 72, the Licensing Board denies the request of intervenor State of Utah for the admission of late-filed, second amended contention Utah Q, Adequacy of ISFSI Design to Prevent Accidents.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Generally, in dealing with a late-filed contention, a presiding officer first analyzes the question of the issue's admissibility under the late-filing factors in 10 C.F.R. § 2.714(a)(1). Then, to the degree the balancing process mandated by that provision supports admission of the contention, the presiding officer goes on to determine whether the issue statement merits admission under the specificity and basis standards set forth in section 2.714(b)(2).

RULES OF PRACTICE: CONTENTIONS (ACCEPTANCE WHERE SUBJECT TO PENDING RULEMAKING)

A contention that seeks to litigate a matter that is the subject of an agency rulemaking is not admissible. *See* LBP-98-7, 47 NRC 142, 179, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

ADJUDICATORY HEARINGS: CONSIDERATION OF ISSUES INVOLVED IN RULEMAKING

It is, of course, a well-recognized proposition that the choice to use rulemaking rather than adjudication is a matter within the agency's discretion. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974).

MEMORANDUM AND ORDER
(Denying Request to Admit Late-Filed Second Amended Contention Utah Q)

In its April 22, 1998 ruling on the standing and contentions of the various intervening parties to this proceeding regarding the application of Private Fuel Storage, L.L.C. (PFS), for permission to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, the Licensing Board rejected contention Utah Q, Adequacy of ISFSI Design to Prevent Accidents, as lacking adequate basis. *See* LBP-98-7, 47 NRC 142, 195, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998). Intervenor State of Utah (State) now seeks to have an amended version of that contention admitted on a late-filed basis, a request opposed both by PFS and the NRC Staff.

For the reasons set forth below, we deny the State's request to admit this issue, finding that once again the State improperly seeks to raise a challenge in this adjudicatory proceeding that is properly the subject for rulemaking.

I. BACKGROUND

As set forth in the State's November 1997 intervention petition supplement, contention Utah Q provided that:

> The Applicant has failed to adequately identify and assess potential accidents, and therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

[State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] Facility (Nov. 23, 1997) at 114. As the basis for that contention, among other things, the State asserted that PFS had failed to address adequately the effects of a cask drop accident and of spent fuel element cladding embrittlement as they might cause nuclear material releases. As described in its August 20, 1999 request for admission of a second amended, late-filed contention Utah Q, *see* [State] Request for Admission of Late-Filed Second Amended Utah Contention Q (Aug. 20, 1999) at 13-14 [hereinafter State Request], following the Board's April 1998 dismissal of its initial contention Utah Q, the State continued to pursue the issue of the adequacy of cask stability accident analyses in the context of the rulemaking regarding the agency's 10 C.F.R. § 72.214 certification of the Holtec International (HI) HI-STAR 100 cask storage system. The HI-STAR 100 is another storage system manufactured by HI, the fabricator of the HI-STORM 100 system that is one of the two storage systems PFS intends to utilize for its Skull Valley facility. According to the State, because of its concerns expressed in contention Utah Q and correspondence between State consultant Dr. Marvin Resnikoff and the Staff that apparently began in February 1998, on May 21, 1999, the Staff issued an interim staff guidance (ISG) document, ISG-12, Buckling of Irradiated Fuel Under Drop Conditions. *See* State Request at 5, 14.

Previously, PFS had relied on an October 1987 Lawrence Livermore National Laboratory (LLNL) report, UCID-21246, to support its analysis of cask drop and tipover accidents. *See* [PFS], Safety Analysis Report [for PFS] Facility at 8.2-32, 8.4-3 (rev. 0 June 1997) [hereinafter PFS SAR]; *see also* [PFS] Answer to Petitioners' Contentions (Dec. 24, 1997) at 208. In ISG-12, the Staff described as ''simplistic'' the methodology used in that LLNL report to analyze irradiated fuel rod buckling resulting from cask bottom end drops and outlined several alternative analytical approaches to assess cask drop accident fuel integrity. State Request exh. 3, at 1 of 2 (ISG-12). Thereafter, HI modified its topical safety analysis report (TSAR) relative to the HI-STORM 100 system to provide a revised cask drop analysis, which was incorporated into the PFS application in an August 27, 1999 amendment. *See* PFS SAR at 8.2-31 to -32 (rev. 5 Aug. 1999).

According to the State, its second revised contention Utah Q reflects these unfolding events relative to the cask drop analysis supporting the PFS application.[1] As amended, that contention now provides:

> The Applicant has failed to adequately identify and assess potential accidents involving impacts to fuel cladding. In particular, the Applicant has failed to take into consideration (a) compounded embrittlement and thinning of the zircalloy cladding, and (b) the dynamic effects of a cask drop accident. Therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

State Request at 6. As the basis for the revised portions of this contention, noting that PFS now appears to rely on the post-ISG-12 revised HI TSAR for the HI-STORM 100 system, the State claims there are two significant deficiencies in the HI cask drop analysis for that storage system: (1) failure to account for the effects of the irradiation and consequent embrittlement of the zirconium alloy used in the fuel cladding; and (2) use of an overly simplistic static analytical model to account for the physical structure of the fuel pellets and their relationship to the cladding. *See id.* at 6-9. Further, addressing the five elements that make up the balancing test for late-filed issues set forth in 10 C.F.R. § 2.714(a)(1), the State concludes that its prompt filing after learning PFS intended to amend its license application to rely on the revised HI cask stability analysis provides the requisite good cause and that the other factors — development of a sound record, availability of other means to protect the petitioner's interests, representation of those interests by other parties, and broadening the issues or delaying the proceeding — also support admitting its late-filed amended contention Utah Q. *See* State Request at 12-16; *see also* [State] Reply to [PFS] and Staff Oppositions to Late-Filed Second Amended Utah Contention Q (Sept. 13, 1999) at 7-11 [hereinafter State Reply].

PFS and the Staff oppose the admission of the State's late-filed amended contention Utah Q, both for failure to meet the late filing standards and as improperly pled. Relative to the section 2.714(a)(1) five-factor balancing test, PFS maintains that the State lacks good cause for filing late because it should have submitted its concerns as much as 17 months earlier when its consultant, Dr. Resnikoff, began to raise questions about the LLNL report in the context of the HI-STAR 100 rulemaking. It also declares that the other four factors do not provide sufficient weight in favor of admission to overcome this significant deficiency. *See* [PFS] Response to [State] Request for Admission of Late-Filed Second Amended Utah Contention Q (Sept. 3, 1999) at 3-7 [hereinafter PFS Response]. The Staff,

[1] As the State notes, *see* State Request at 1 n.2, it initially sought admission of a revised contention Utah Q in a July 22, 1999 filing in which it asserted that PFS had to perform a revised cask stability analysis that conformed with the Staff's ISG-12 guidance. PFS responded by pointing out that HI had performed such an analysis in June 1999. According to the State, because it appeared PFS was going to adopt that analysis, the State withdrew its first amended contention Utah Q on August 18, 1999.

on the other hand, finds good cause for the State filing as it concerns embrittlement and thinning of zircalloy cladding, but concludes that in all other respects there is no good cause for late filing nor support for admission from a balancing of the other four factors. *See* NRC Staff's Response to [State] Request for Admission of Late-Filed Second Amended Utah Contention Q (Sept. 3, 1999) at 6-11 [hereinafter Staff Response].

According to PFS and the Staff, the State's amended contention Utah Q also is inadmissible because it seeks to raise matters that pertain to the agency's approval of the HI-STORM 100 cask system as suitable for use at ISFSI facilities, which the agency has determined are to be dealt with in the context of a cask certification rulemaking rather than any adjudication regarding the ISFSI where the cask will be located. Additionally both assert that the State has failed to establish there are any genuine disputed factual or legal issues relative to its cladding irradiation effect or fuel pellet dynamic loading concerns. *See* PFS Response at 7-10; Staff Response at 3-5.

II. ANALYSIS

Generally, in dealing with a late-filed contention, a presiding officer first analyzes the question of the issue's admissibility under the late-filing factors in 10 C.F.R. § 2.714(a)(1). Then, to the degree the balancing process mandated by that provision supports admission of the contention, the presiding officer goes on to determine whether the issue statement merits admission under the specificity and basis standards set forth in section 2.714(b)(2). In this instance, however, we conclude that no useful purpose would be served by an extensive exposition on the former point given that the latter is so clearly dispositive of the contention at issue.

As we noted in our initial ruling on the admissibility of contentions in this proceeding, a contention that seeks to litigate a matter that is the subject of an agency rulemaking is not admissible. *See* LBP-98-7, 47 NRC at 179. As the State itself recognizes, *see* State Request at 14-15, the agency has decided to utilize the rulemaking process for requests for approval of cask storage systems for spent nuclear reactor fuel, *see* 55 Fed. Reg. 29,181, 29,182 (1990) (casks will be approved by rulemaking and any safety issues that are connected with casks are properly addressed in rulemaking rather than in a hearing). It is, of course, a well-recognized proposition that the choice to use rulemaking rather than adjudication is a matter within the agency's discretion. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974). Nonetheless, in requesting that amended contention Utah Q be admitted, the State seeks to have the Board disregard that election. This we cannot do.

Although couched in terms of a challenge to the PFS license application for the Skull Valley facility, the discussion in the State's pleadings makes it

apparent that the State's real bone of contention is with the TSAR analyses of fuel pellet dynamics and cladding embrittlement/thinning that accompanied the recently approved HI request for certification of its HI-STAR 100 cask storage system, *see* 64 Fed. Reg. 48,259 (1999), and is a part of its certification request for the HI-STORM 100 cask storage system that is to be utilized at the PFS facility. Indeed, regarding these issues, the State has failed to present any cognizable matter that is specific to the use of the HI-STORM 100 cask storage system at the PFS facility. Rather, the State seeks to bootstrap its concerns about the sufficiency of the HI cask system into this adjudicatory proceeding by citing the fact that PFS ''relies'' upon the generic TSARs proffered by HI in the cask system certification rulemakings as support for the sufficiency of its application. *See* State Request at 6-7; State Reply at 3 n.2. Permitting such an assertion to form the acceptable basis for a contention, however, would nullify the agency's previous choice to use rulemaking as its method for arriving at a determination about the acceptability of cask storage systems, including the HI system at issue here.

Undoubtedly, the State may feel frustrated to have the Staff apparently acknowledge some of its concerns in issuing ISG-12, but find that its efforts do not translate into consideration of those matters in the context of this adjudicatory proceeding. This, nonetheless, is the case. As it has framed its concerns about the cask stability analysis for the HI-STORM 100 cask system in its amended contention Utah Q, the proper forum for the State to pursue those matters continues to be the ongoing certification rulemaking regarding that cask storage system. *See* 64 Fed. Reg. 51,271 (1999) (proposed certification rule regarding HI-STORM 100 cask system). As such, we find its contention inadmissible.[2]

III. CONCLUSION

In proffering its late-filed second amended contention Utah Q, the State seeks to have the Board delve into matters that are part and parcel of the certification rulemaking proceeding for the HI-STORM 100 system that is to be utilized at the PFS Skull Valley ISFSI. Because this contention attempts to have the Board litigate matters that are the subject of an ongoing Commission rulemaking proceeding, we conclude it does not present issues that are admissible in this adjudicatory proceeding.

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[2] In addition to the fuel pellet dynamic loading and embrittlement/thinning issues specified in the text of amended contention Utah Q, in the basis statement the State seeks to reintroduce several matters, such as intermodal transfer site/transport accidents, that the Board previously rejected in its April 1998 initial ruling on contentions. *See* State Request at 10-11. Nothing provided by the State in connection with second amended contention Utah Q gives us cause to revisit our ruling relative to those matters.

For the foregoing reasons, it is, this sixth day of January 2000, ORDERED that the State's August 20, 1999 request for admission of late-filed second amended contention Utah Q, Adequacy of ISFSI Design to Prevent Accidents, is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD[3]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 6, 2000

This Memorandum and Order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

[3] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, 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
(Request for Materials License Amendment) **February 10, 2000**

The Commission reviews and affirms an Atomic Safety and Licensing Board decision that upheld a license amendment issued to International Uranium (USA) Corporation. At issue in this proceeding is the Atomic Energy Act's definition of 11e(2) material, defined by the statute 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.'' 42 U.S.C. § 2014e. The Commission finds that the Presiding Officer's interpretation of the section 11e(2) definition reflects a sensible reading of the language and legislative history of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), and that the overall record supports the issuance of the license amendment. The Commission also directs the Nuclear Regulatory Commission Staff to revise the NRC's ''Final Revised Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores.'' 60 Fed. Reg. 49,296 (Sept. 22, 1995).

ATOMIC ENERGY ACT: SECTION 11e(2)

The section 11e(2) definition focuses upon the *process* that generated the radioactive wastes — the removal of uranium or thorium as part of the nuclear fuel

cycle. UMTRCA, however, does not require that the market value of the uranium recovered be the licensee's predominant interest.

RULES OF PRACTICE: NRC GUIDANCE DOCUMENTS

Like NRC NUREGs and Regulatory Guides, NRC guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations.

RULES OF PRACTICE: INTERPRETATION

It has long been an established principle of administrative law that an agency is free to choose among permissible interpretations of its governing statute, and that at times new interpretations may represent a sharp shift from prior agency views or pronouncements. This is permissible so long as the agency gives adequate reasons for changing course.

MEMORANDUM AND ORDER

I. INTRODUCTION

In this decision we review a Presiding Officer's Initial Decision, LBP-99-5, 49 NRC 107 (1999), which upheld a license amendment issued to the International Uranium (USA) Corporation (''IUSA''). The license amendment authorized IUSA to receive, process, and dispose of particular alternate feed material from Tonawanda, New York. The state of Utah challenges the license amendment and now on appeal seeks reversal of the Presiding Officer's decision. Envirocare of Utah, Inc., has filed an *amicus curiae* brief supporting Utah's challenge of the Presiding Officer's decision. The NRC Staff and IUSA support the Presiding Officer's decision. We affirm the decision for the reasons we give below.

II. BACKGROUND

IUSA owns and operates a uranium mill located at White Mesa, near Blanding, Utah. On May 8, 1998, IUSA submitted a request for a license amendment to allow it to receive and process approximately 25,000 dry tons of uranium-bearing material from the Ashland-2 Formerly Utilized Sites Remedial Action Program (FUSRAP) site, currently managed by the Army Corps of Engineers

and located near Tonawanda, New York.[1] The NRC granted the IUSA license amendment on June 23, 1998. Utah timely petitioned for leave to intervene in the license amendment proceeding. On September 1, 1998, the Presiding Officer admitted Utah as a party to the proceeding. *See International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137 (1998).

At issue in this proceeding is the Atomic Energy Act's definition of 11e(2) material, defined by the statute 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.*'' 42 U.S.C. § 2014e (emphasis added). Utah interprets this to mean that the primary purpose for acquiring the ore must be an interest in processing the material to recover the uranium. Emphasizing that IUSA is being paid over 4 million dollars to receive the Ashland-2 material from the FUSRAP site, Utah argues that IUSA's interest in obtaining the material is ''primarily for payment of a disposal fee'' and not for recovering any uranium the material might contain. Utah's Appeal Brief (May 24, 1999) at 11.

Utah explains that the fee IUSA will receive for this transaction far exceeds the monetary value of the uranium that might be extracted from the material. Utah accordingly suggests that the ''primary'' reason IUSA is *processing* the material is so that it can be reclassified as 11e(2) material and then disposed of at the IUSA mill site. *See id.* at 10.

In short, Utah argues that the NRC Staff improperly granted this license amendment because IUSA is not processing the Ashland-2 material ''primarily'' to recover its relatively minimal uranium content, but rather to obtain the generous handling and disposal fee. Utah emphasizes that IUSA's license amendment application failed to adequately substantiate that the material was to be ''processed primarily'' for its uranium content. Utah insists upon ''some objective documentation'' to show that recovery of the uranium, not payment for disposal, was IUSA's primary interest behind the license amendment. *See* Utah's Reply to NRC Staff's and IUSA's Briefs (June 28, 1999) (''Utah's Reply Brief'') at 10. Given the ''wide disparity'' between the fee IUSA will receive for taking and processing the material and the probable market value of the uranium that can be recovered, Utah claims that the ''only reasonable conclusion'' to be drawn is that the ''primary purpose of applying for the license amendment was to receive a four million dollar disposal fee.'' *Id.* at 9-11.

In interpreting what is meant by section 11e(2)'s requirement that ore be ''processed primarily for its source material content,'' Utah relies heavily upon language in the NRC's ''Final Revised Guidance on the Use of Uranium Mill

[1] IUSA made a similar request to receive, process, and dispose of uranium-bearing material from the nearby Ashland-1 and Seaway Area D FUSRAP sites. That license amendment is the subject of a separate NRC adjudicatory proceeding (Docket No. 40-8681-MLA-5) currently held in abeyance pending the outcome of this appeal.

Feed Material Other Than Natural Ores,'' 60 Fed. Reg. 49,296 (Sept. 22, 1995) (''Alternate Feed Guidance''). The Alternate Feed Guidance asks licensees to ''certify'' that the feed material will be ''processed primarily for the recovery of uranium and for no other purpose.'' *Id.* at 49,297. The Guidance goes on to enumerate three possible ways a licensee can ''justify'' this certification that feed material is to be processed for source material. The three possible factors a licensee can cite are ''financial considerations, high uranium feed content of the feed material, or other grounds.'' *Id.* Throughout this proceeding, the parties sharply have disputed the meaning of these and other statements in the Alternate Feed Guidance.

Utah, for instance, argues that the Guidance included a ''Certification and Justification'' test expressly to prohibit licensees from ''using a uranium mill to process material for the primary purpose of . . . [reclassifying] the material to allow it to be disposed of in the mill tailings impoundment.'' *See* Utah's Appeal Brief at 10, 12. Utah claims that processing material merely for the sake of reclassifying it as 11e(2) material is ''sham processing,'' and that the wastes or mill tailings generated from such ''sham processing'' do not meet the definition of 11e(2) byproduct material. *See id.* at 10-11. Utah concludes that IUSA ''failed to justify and document under the Alternate Feed Guidance any satisfactory or plausible grounds to show that [IUSA] was not engaged in sham processing.'' *Id.* at 11.

In LBP-99-5, the Presiding Officer rejected Utah's arguments. ''[O]re is processed primarily for its source material content,'' stated the Presiding Officer, ''when the extraction of source material is the principal reason for *processing* the ore,'' regardless of any other reason behind the Licensee's interest in acquiring the material or seeking the overall transaction. *See* 49 NRC at 109.

On the other hand, the Presiding Officer went on to explain,

> [i]f . . . the material were processed primarily to remove some other substances (vanadium, titanium, coal, etc.) and the extraction of uranium was incidental, then the processing would not fall within the statutory test and it would not be byproduct material within the meaning of the Atomic Energy Act. That is, the adverb ''primarily,'' applies to *what is removed from the material by the process* and not to the motivation for undertaking the process.

Id. (emphasis added). In the Presiding Officer's view, ''the only 'sham' that stops material from being byproduct material is if it is not actually milled. If it is milled, then it is not a sham.'' *Id.* at 111 n.6.

The Presiding Officer found this interpretation of section 11e(2) consistent with the language and legislative history of the Uranium Mill Tailings Radiation Control Act of 1978, as amended (UMTRCA). He went on to conclude that the Staff appropriately granted the license amendment because IUSA ''is milling ore'' to extract uranium and therefore is ''not involved in a sham.'' *See id.* at 113. The Presiding Officer also found that Utah had misunderstood the NRC Alternate Feed

Guidance. He rejected Utah's claim that the Guidance was intended to prevent material from being categorized as 11e(2) byproduct material if the Licensee's primary economic motive was to receive a fee for waste disposal instead of to recover the uranium. *Id.* at 112. ''The Alternate Feed Guidance,'' the Presiding Officer stated, ''is not supportive of the position, taken by the State of Utah, that material is to be considered byproduct only if the primary economic motivation is to remove uranium rather than to dispose of waste.'' *Id.* Under LBP-99-5, then, the Licensee's underlying motive or purpose for acquiring the material in the first place is irrelevant. What matters is that the material actually is processed through the mill to recover source material.

Both the NRC Staff and IUSA endorse the Presiding Officer's conclusions. The Staff explains that ''the Presiding Officer properly applied the [alternate feed] guidance by focusing on *whether the processing* was primarily to extract uranium,'' regardless of any economic motivations involved. *See* NRC Staff Opposition to Utah Appeal of LBP-99-5 (''Staff Brief'') (June 14, 1999) at 13 (emphasis added). The Staff also stresses that ''[n]either a high uranium content nor economic profitability is 'required' under the guidance,'' which provides three separate and alternative reasons a licensee can describe to support a proposed license amendment, including any number of reasons that might fall within the category of ''other grounds.'' *See id.* Indeed, the Staff argues, the definition of section 11e(2) byproduct material should be broad enough to encompass those fuel cycle activities involving the processing of even low grade — with relatively low concentration of uranium — feedstock. *Id.* at 15. ''Utah's attempt to require an economic motive test and to require detailed financial review should be rejected,'' the Staff urges. *Id.*

Focusing upon UMTRCA's legislative history, IUSA similarly concludes that at issue is simply whether the tailings and wastes were ''produced as part of the nuclear fuel cycle.'' *See* IUSA's Reply to Utah's Appeal Brief and Envirocare's *Amicus Curiae* Brief (''IUSA Brief'') (June 14, 1999) at 9-10. According to IUSA, those tailings and waste from feeds processed to recover uranium *outside* of the nuclear fuel cycle, as in a secondary or side-stream process at a phosphate recovery operation, would not be 11e(2) material because the actual *processing* was not [intended] primarily for the source material content. *Id.* But where there is a licensed uranium mill involved, ''the *only* question to be answered,'' argues IUSA, ''is whether it is reasonable to expect that the ore will, *in fact*, be processed for the extraction of uranium.'' *Id.* at 15.

While not adopting the Presiding Officer's reasoning in its entirety, the Commission affirms LBP-99-5, for the reasons given below.

III. ANALYSIS

To clear away a threshold matter, we must briefly consider the NRC Staff's claim that the Ashland-2 material *already was* section 11e(2) byproduct material, even before it was sent to IUSA and even before it was processed. *See* Staff Brief at 8 n.11, 14 n.18, 15 n.19. The Staff's theory derives from the Department of Energy's certification that the Ashland-2 material was the residue of a Manhattan Project uranium extraction project, and therefore constituted ''tailings or waste produced by the extraction . . . of uranium . . . from . . . ore processed primarily for its source material content'' within the meaning of section 11e(2). We find it unnecessary to reach the Staff argument. Historically, the NRC has maintained that it lacks regulatory authority over uranium-bearing material, like the Ashland-2 material, generated at facilities not licensed on or after 1978 (when UMTRCA was passed). *See United States Army Corps of Engineers,* DD-99-7, 49 NRC 299, 307-08 (1999). Nothing in this opinion addresses the pre-1978 question or should be understood to do so. Instead, our opinion rests solely on section 11e(2)'s ''processed primarily for its source material content'' clause.

On appeal, Utah finds the Presiding Officer's ''first error'' to have been that of having ''resort[ed] to interpretation of the AEA and the legislative history of UMTRCA in searching for the meaning of 'primarily processed for.' '' *See* Utah Appeal Brief at 11-12. Instead, Utah argues, the Presiding Officer should have focused only upon the NRC's Alternate Feed Guidance to discern how the section 11e(2) definition is to be applied and met. *Id.* at 12. The Commission, however, agrees with the Presiding Officer that the section 11e(2) definition, with its requirement that material be ''primarily processed for its source material content,'' can only be properly understood within the context of UMTRCA and its legislative history.

Based on an in-depth review of UMTRCA and its legislative history, and of the Alternate Feed Guidance and its background documents, the Commission reaches several conclusions. To begin with, the Guidance *does* appear to contemplate an NRC Staff inquiry into a licensee's motives for a license amendment, just as Utah suggests. The Guidance, for instance, expresses a ''concern that wastes that would have to be disposed of as radioactive or mixed waste would be proposed for processing at a uranium mill primarily to be able to dispose of it in the tailings pile as 11e.(2) byproduct material.'' 60 Fed. Reg. 49,296, 49,297 (Sept. 22, 1995). The Guidance thus outlines possible ''justifications'' that a licensee may describe in support of the license application, and these are intended to assist the Staff ''[i]n determining whether the proposed processing is primarily for the source material content *or for the disposal of waste.*'' *Id.* Indeed, the requirement of a licensee ''justification'' apparently stemmed from a 1993 Presiding Officer decision that questioned, in another proceeding, whether a simple licensee ''certification, without

more, would adequately protect against *ulterior motives* to dispose of waste.'' *See UMETCO Minerals Corp.,* LBP-93-7, 37 NRC 267, 283 (1993) (emphasis added).

Such statements do not support the NRC Staff's current view that under the Guidance all that matters is that processing for uranium was intended, regardless of underlying motive. On the contrary, the statements in both the proposed and final Guidance take as a given that processing for uranium content *will* take place, but also indicate that such processing should not be employed simply as a device to reclassify material to enable it to be disposed of — as 11e(2) byproduct material — at a uranium mill site.[2] As Utah has maintained, therefore, the Alternate Feed Guidance certainly can be understood — and is perhaps best understood — as reflecting an intent to prevent material from being categorized as 11e(2) byproduct material when the licensee's overriding economic motive is to receive a fee for waste disposal.

Yet, although the drafters of the Guidance apparently intended to distinguish between those license amendment requests where the licensee's overriding interest is obtaining uranium and those where payment for disposal is driving the transaction, the NRC Staff apparently has not consistently utilized the Guidance in this way. While the language of the Guidance may suggest that a licensee's motivations are to be scrutinized, parsed, and weighed, the NRC Staff typically has not relied upon such probing reviews of licensee motives. It has not been the Staff's practice, for example, to require licensees essentially to ''prove'' quantitatively or otherwise that the value of the uranium to be recovered from a particular licensing action will outweigh other economic reasons for the transaction. *See, e.g., UMETCO,* 37 NRC at 274, 281-82; Staff Brief at 15-16. Since the Guidance was first issued, it seems, there has been little connection between what the Guidance seemingly proposes and what the Staff in reality has required.

This fact has prompted the Commission on this appeal to take an in-depth look at the Guidance and its policy ramifications. We find that the apparent intent in the Guidance to have the Staff scrutinize the motives behind the license amendment transaction is neither compelled by the statutory language or history of UMTRCA nor reflects sound policy. Our review of UMTRCA and its legislative history confirms the Presiding Officer's conclusion that the requirement that material be ''processed primarily for its source material content'' most logically refers to the actual act of *processing* for uranium or thorium within the course of the nuclear

[2] In fact, when the Guidance was first proposed, there was a description of how owners of low-level or mixed waste, facing the high costs of disposal, might find it ''very attractive'' to ''pay a mill operator substantially less to process [the material] for its uranium content and dispose of the resulting 11e.(2) material,'' rather than to pay for disposal at a low-level or mixed waste facility. *See* ''Uranium Mill Facilities, Request for Public Comments on Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores,'' 57 Fed. Reg. 20,525, 20,533 (May 13, 1992) (''Proposed Guidance''). The Proposed Guidance labeled such transactions ''sham disposals,'' and implied they ''would not meet the definition of 11e.(2) byproduct material.'' *Id.* at 20,533.

fuel cycle, and does not bear upon any other underlying or ''hidden'' issues that might be driving the overall transaction.

As we describe in further detail below, the purposes behind the wording of section 11e(2)'s definition served: (1) to expand the types of materials that properly could be classified as byproduct material; (2) to make clear that even feedstock containing less than 0.05% source material could qualify as byproduct material; and (3) to ensure that the NRC's jurisdiction did not cross over into activities unrelated to the nuclear fuel cycle. The IUSA license amendment is consistent with these statutory intentions, regardless of whether IUSA's bigger interest was payment for taking the material or payment for the recovered uranium. Indeed, even accepting Utah's claim that the 4 million dollar payment IUSA contracted to receive for processing and disposing of the Ashland-2 FUSRAP site material *was* the primary motivator for this transaction, the tailings generated from the processing can still properly be classified as section 11e(2) byproduct material.

A. UMTRCA's Purposes and History

It may be helpful to outline a little of UMTRCA's legislative history and, in particular, how the section 11e(2) definition came about. UMTRCA had two general goals: (1) providing a remedial-action program to stabilize and control mill tailings at various identified inactive mill sites; and (2) ensuring the adequate regulation of mill tailings at active mill sites, both during processing and after operations ceased. As then Chairman Hendrie of the NRC explained to Congress, the agency at the time did not have direct regulatory control over uranium mill tailings. The tailings themselves were not source material and did not fall into any other category of NRC-licensable material. The NRC exercised some control over tailings, but only indirectly as part of the Commission's licensing of ongoing milling operations. Once operations ceased, however, the NRC had no further jurisdiction over tailings. This resulted in dozens of abandoned or ''orphaned'' mill tailings piles.

To prevent future abandoned and unregulated tailings piles, Congress enacted the 11e(2) definition, which expressly declared mill tailings to be a form of byproduct material. As Chairman Hendrie explained, tailings are ''fairly regarded as waste materials from the milling operation,'' but the proposed definition would classify them as byproduct material and thus make them licensable under the AEA. Under the new section 11e(2) definition, Chairman Hendrie emphasized, tailings generated during uranium milling operations would ''formally be byproducts rather than waste.'' *Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049, and H.R. 13650* (hereinafter ''UMTRCA Hearings I'') *Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce,* 95th Cong. 400 (1978) (statement of Joseph M. Hendrie, Chairman, NRC).

At the time Congress drafted UMTRCA, the Environmental Protection Agency had some authority over uranium mill tailings under the Resource Conservation and Recovery Act of 1976 (RCRA), but EPA had no authority over the milling process that generated the tailings. By defining mill tailings as a byproduct material, the new 11e(2) definition removed mill tailings from RCRA's coverage since RCRA excludes all source, byproduct, and special nuclear material. This exclusion from RCRA was intended to minimize any ''dual regulation'' of tailings by both EPA and the NRC. Chairman Hendrie suggested that since the NRC already regulated the site-specific details of uranium milling, it seemed logical for the NRC to regulate the treatment and disposal of tailings ''which we permitted to be generated in the first place.'' *Id.* at 342-43.

From the legislative history, we can glean a few conclusions about the actual wording of the 11e(2) definition. As originally proposed, the definition of 11e(2) byproduct material was directly linked to the Commission's definition of source material. The original definition referred to ''the naturally occurring daughters of uranium and thorium found in the tailings or wastes produced by the extraction or concentration of uranium or thorium from *source material as defined in [then] Section 11z.(2).*'' But Chairman Hendrie was concerned that a definition of byproduct material that was linked to that of source material would exclude ores containing 0.05% or less of uranium or thorium.[3] He proposed that the language be revised to ''from any ore processed primarily for its source material content.'' His discussion with Congressman Dingell went as follows:

> *Mr. Hendrie:* The Commission is informed that there are a few mills currently using feedstock of less than 0.05 percent uranium. As high grade ores become scarcer, there may be a greater incentive in the future to turn to such low grade materials.
>
> Since such operations should be covered by any regulatory regime over mill tailings, the Commission would suggest that the definition of byproduct material in H.R. 13382 be revised to include tailings produced by extraction of uranium or thorium from any ore processed primarily for its source material content.
>
> *Mr. Dingell:* I am curious why you include in that the word ''processed" primarily for source material content. There are other ores that are being processed that do contain thorium and uranium in amounts and I assume equal in value to those you are discussing here. Is there any reason why we ought not to give you the same authority with regard to those ores?
>
> *Mr. Hendrie:* The intent of the language is to keep NRC's regulatory authority primarily in the field of the nuclear fuel cycle. Not to extend this out into such things as phosphate mining and perhaps even limestone mining which are operations that do disturb the radium-bearing

[3] ''Source material'' has been defined by the Commission to exclude ores containing less than 0.05% of uranium or thorium. 10 C.F.R. § 40.4.

crust of the Earth and produce some exposures but those other activities are not connected with the nuclear fuel cycle.

UMTRCA Hearings I at 343-44.

There were, therefore, two principal intentions behind Chairman Hendrie's proposed language, which Congress accepted. First, the 11e(2) definition was intended to reach even ''low grade'' feedstock with less than a 0.05% concentration of uranium. Second, the definition was intended to make sure that the NRC's jurisdiction did not expand into areas not traditionally part of the NRC's control over the ''nuclear fuel cycle.'' The definition therefore ''focuses upon uranium milling wastes'' and not, for example, upon the wastes from phosphate ore processing which are also contaminated with small quantities of radioactive elements. *Id.* at 354 (''Section by Section Analysis of H.R. 13382 as Revised by NRC Recommended Language Changes''). Similarly, 11e(2) material was not to encompass uranium *mining* wastes because, as Chairman Hendrie explained, ''[w]e don't regulate mines. The mining is regulated by the Department of Labor under other regulations so our definition was drawn to maintain that and to keep us out of the mine-regulating business.'' *Id.* at 401.

We find, then, that the section 11e(2) definition focused upon whether the process generating the wastes was uranium milling within the course of the nuclear fuel cycle. As Chairman Hendrie made clear, the concentration of the uranium or thorium in the feedstock was not a determinative factor in whether the resulting tailings should be considered 11e(2) material. The focus was not on the value of the extracted uranium but on the activity involved.

In short, the section 11e(2) definition focuses upon the *process* that generated the radioactive wastes — the removal of uranium or thorium as part of the nuclear fuel cycle. *See Kerr-McGee Chemical Corp. v. NRC,* 903 F.2d 1, 7 (D.C. Cir. 1990). But UMTRCA does not require that the market value of the uranium recovered be the licensee's predominant interest, and thus UMTRCA does not require the NRC to ensure that no other incentives lie behind the licensee's interest in processing material for uranium. There simply is no reason under UMTRCA why licensees cannot have several motives for a transaction.[4] That IUSA's primary goal here may have been the 4 million dollar payment for disposal,

[4] *See also, e.g. Kerr-McGee,* 903 F.2d at 7 (where the court suggested that the word ''primarily'' in the section 11e(2) definition could be read to mean ''substantially,'' and thus the tailings from the coproduction of source material and rare earths could still be deemed 11e(2) byproduct material so long as *one* of the reasons for processing the ore was for extracting source material). The court's reasoning in *Kerr-McGee* is consistent with the UMTRCA history, which reflects that it has long been the case, for instance, that *both* vanadium and uranium might be extracted during a processing of material, and indeed that the amount of recoverable vanadium may very likely be much greater than that of the recoverable uranium. *See, e.g.,* UMTRCA Hearings I at 155 (where private company reprocessing material was extracting 2 1/2 pounds of vanadium for every 1/2 pound of uranium extracted); *see also* UMTRCA Hearings III at 136 (''We recover . . . about 1,000 pounds a day of uranium, about 4,000 pounds of vanadium''). There was never any suggestion in the legislative history that if the amount or value of the vanadium proved higher than that of the uranium, the tailings could not be categorized as 11e(2) byproduct material.

instead of potential profit from any recoverable uranium, does not in and of itself prevent the tailings generated from the milling process from falling within the section 11e(2) definition. Moreover, as we touch upon further below, making such purely economic considerations a determinative part of the Staff's review would unnecessarily divert agency resources to issues unrelated to public health and safety.

B. The Need for Revising the Guidance

In this litigation, Utah and the other parties focused not upon UMTRCA and its legislative history, but upon the NRC's Alternative Feed Guidance. The Commission, however, is not bound by the Guidance. Like NRC NUREGs and Regulatory Guides, NRC Guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations. *See, e.g., Curators of the University of Missouri,* CLI-95-1, 41 NRC 71, 149 (1995); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 2 (1997) (referring specifically to final Alternate Feed Guidance as ''non-binding Staff guidance''). Such guidance documents merely constitute NRC Staff advice on one or more possible methods licensees may use to meet particular regulatory requirements. *See, e.g., Curators,* 41 NRC at 150 & n.121; *Petition for Emergency and Remedial Action,* CLI-78-6, 7 NRC 400, 406-07 (1978); *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 n.10 (1983); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974). These guides, however, do not themselves have the force of regulations for they do not impose any additional legal requirements upon licensees. Licensees remain free to use other means to accomplish the same regulatory objectives. *See Curators,* 41 NRC at 150 & n.121; *Petition for Emergency and Remedial Action,* 7 NRC at 406-07; *Big Rock Point*, 17 NRC at 568 n.10; *Vermont Yankee,* 8 AEC at 811. ''[A]gency interpretations and policies are not 'carved in stone' but rather must be subject to re-evaluations of their wisdom on a continuing basis.'' *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 460 (1999) (referencing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863-64 (1984)).

Accordingly, it has long been an established principle of administrative law that an agency is free to choose among permissible interpretations of its governing statute, and that at times new interpretations may represent a sharp shift from prior agency views or pronouncements. *Chevron,* 467 U.S. at 842-43, 862. This is permissible so long as the agency gives ''adequate reasons for changing course.'' *Envirocare of Utah v. NRC,* 194 F.3d 72, 78 (D.C. Cir. 1999). Given that: (1) the disputed portions of the Alternate Feed Guidance are not derived directly from UMTRCA or its history; (2) the Guidance apparently has not been consistently

applied in the manner proposed by Utah; (3) the precise terms of the Guidance are not entirely clear (cf., e.g., ''other grounds''); and (4) the Commission believes that literal adherence to the apparent intent of the Guidance would lead to unsound policy results, the Commission declines to follow it here and will require the NRC Staff to revise it as soon as practicable.[5]

Several policy reasons support departing from the Guidance. First, the NRC's statutory mission is public health and safety. Our regulations establish comprehensive criteria for the possession and disposal of 11e(2) byproduct material under NRC or agreement state jurisdiction. *See* 10 C.F.R. Part 40, Appendix A. The criteria were designed to ensure the safe disposal of bulk material whose primary radiological contamination is uranium, thorium, and radium in low concentrations. But whether the concentration of uranium in the feedstock material is 0.058% or 0.008% — the initial high and low estimates, respectively, of the Ashland-2 material based upon samples taken — has *no* impact upon the general applicability and adequacy of the agency's health and safety standards for disposal of section 11e(2) material. Yet, in Utah's view, whether the actual uranium concentration proved to be 0.058% or 0.008% could well dictate whether the resulting tailings appropriately could be classified as section 11e(2) material and regulated by the NRC.

Utah's interpretation thus divides byproduct material into two different regulatory camps based solely upon market-oriented factors, i.e., the expected profit from selling recovered uranium versus any other economically advantageous aspects of the license amendment. Utah emphasizes, for example, that it ''has not objected to several [IUSA] alternate feed license amendment requests where the waste material contained [greater amounts] of uranium.'' *See* Utah's Petition for Review of LBP-99-5 (Feb. 26, 1999) at 9 n.10. From a health and safety perspective, though, there is no reason to prohibit IUSA from disposing of tailings material in its disposal cells solely on account of the feedstock having a lower uranium concentration or lower market value. *Cf. Kerr-McGee,* 903 F.2d at 7-8.

Second, the Guidance if applied as originally intended, would cast the NRC Staff into an inappropriate role, conducting potentially multifaceted inquiries into the financial attractiveness of transactions. The Staff essentially would need to look behind and verify every assertion about the economic factors motivating a proposed processing of material — an unnecessary and wasteful use of limited agency resources, at a time when the Commission increasingly has moved away

[5] The Commission has promulgated no regulation implementing the Guidance. Thus, the Commission's rejection of the Guidance does not present a situation where the Commission has altered ''suddenly and *sub silentio* settled interpretations of its own regulations.'' *Natural Resources Defense Council, Inc. v. NRC,* 695 F.2d 623, 625 (D.C. Cir. 1982). *See generally Syncor International Corp. v. Shalala,* 127 F.3d 90 (D.C. Cir. 1997); *Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579 (1997), *cert. denied,* 523 U.S. 1003 (1998); *United Technologies Corp. v. EPA,* 821 F.2d 714 (D.C. Cir. 1987).

from performing economics-oriented reviews that have no direct bearing on safety and are not specifically required by Congress.[6]

In addition, the NRC seeks to regulate efficiently, imposing the least amount of burdens necessary to carry out our public health and safety mission. Yet, as this proceeding itself demonstrates, the Alternate Feed Guidance's unwieldy ''Certification and Justification'' test lends itself easily to protracted disputes among the NRC Staff, intervenors, and the licensee over such issues as how much the licensee will ''really'' profit from selling recovered uranium, what the licensee's ''bigger'' motives may be, etc. All this effort and attention imposes burdens on the parties while detracting from our central mission — radiological safety, i.e., ensuring that there are no constituents in the alternate feed material that would prevent the mill from complying with all applicable NRC health and safety regulations.

Nor is it inconceivable that eventual potential changes in the marketplace could impact whether particular material might fall within the section 11e(2) definition one year but not the next, merely on account of some new market factor. Purely economic factors, in short, should not determine how radioactive material is defined. Whether IUSA was paid a ''substantial sum,'' as Utah emphasizes, a nominal sum, or had to pay a sum to acquire the Ashland-2 material has no bearing on health and safety issues. Therefore, this is not appropriately the Commission's concern and also should have no bearing on whether the resulting tailings meet the statutory definition of byproduct material under section 11e(2).

While it may be true, as Utah states, that when Congress enacted UMTRCA there was no ''thought of using offsite active uranium mills to process and dispose of industrial cleanup waste from FUSRAP sites,'' Utah's Reply Brief at 5, several congressmen did express an interest in having private corporations take and reprocess materials as a means to offset the federal government's ultimate disposal costs for cleaning up UMTRCA's designated Title I sites. *See, e.g., UMTRCA Hearings on H.R. 13382, H.R. 12938, H.R. 12535, and H.R. 13049* (''UMTRCA Hearings II'') *Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs,* 95th Cong. 82 (1978) (statement of Rep. Weaver) (some ''companies might be interested in sharing the cost of stabilization of tailings in return for access to minerals remaining in the piles'').[7] Then Chairman Hendrie voiced no objection, stating that ''[i]f they want to reprocess the piling to make a complete recovery of the resource there, I think that is fine from a

[6] *See, e.g.,* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,484 (June 5, 1996); *Wolf Creek,* 49 NRC 441 (1999).

[7] *See also, e.g.,* UMTRCA Hearings I at 89-90 (written statement of Rep. Johnson); *Hearings on S.3008, S.3078, and S.3253* (''UMTRCA Hearings III'') *Before the Subcomm. on Energy Production and Supply of the Senate Comm. on Energy and Natural Resources,* 95th Cong. 59 (1978) (statement of Sen. Haskell) (if private companies reprocessed some of the tailings, that would be regulated under the NRC's regulations).

conservation standpoint. It also puts them back in the active business of milling.'' *See* UMTRCA Hearings II at 82.

Here, the Ashland-2 material has been approved for processing and disposal, and the resulting byproduct material will be disposed of pursuant to the same health and safety standards that apply to any other 11e(2) material in an NRC-licensed mill: 10 C.F.R. Part 40, Appendix A. Though Utah may be dissatisfied with those standards, an adjudicatory proceeding is not the appropriate forum to contest generic NRC requirements or regulations. *See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

We note, additionally, that early in the proceeding Utah expressed concern that the Ashland-2 material, contrary to the NRC Staff's findings, possibly contained listed hazardous waste. But while the accuracy of the license application can appropriately be the subject of an adjudication, notwithstanding Staff findings, here subsequent events have rendered Utah's hazardous waste concern moot. Following negotiations with IUSA and, after analyzing investigations and data from the Ashland-2 site, Utah formally withdrew its allegation that the Ashland-2 material may contain listed hazardous waste. *See* Utah's Appeal Brief at 3 n.2. Although Utah is upset that the Staff's allegedly ''scanty'' review took only ''about six weeks,'' its own review failed to uncover any errors in the Staff's conclusion that the material contains no listed hazardous waste. Utah's remaining generalized complaint about how the Staff reached its conclusion is not a litigable issue, given that Utah now concurs with the Staff's conclusion and no longer alleges the presence of any listed hazardous waste.

Nevertheless, such disputes about the presence of hazardous waste are likely to recur, and the issue is a significant one, implicating three concerns: (1) possible health and safety issues; (2) the potential for an undesirable, complex NRC-EPA ''dual regulation'' of the same tailings impoundment; and (3) the potential for jeopardizing the ultimate transfer of the tailings pile to the U.S. government, for perpetual custody and maintenance. *See generally* UMTRCA, Title II, § 202 (section 83 of the AEA). In view of our decision that the Alternate Feed Guidance requires revision to reflect our decision on the 11e(2) definition, we will direct the Staff to consider whether the Guidance also should be revised to include more definitive and objective requirements or tests to ensure that listed hazardous or toxic waste is not present in the proposed feed material. We note, for example, that in a recent license amendment proceeding, the Presiding Officer declared it simply ''impossible'' for him to ''ascertain the basis for the Staff determination that this material is not hazardous.'' *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 5 (1997). Similarly, in another earlier proceeding, the Presiding Officer found that the ''Staff's new guidance for determining whether feed material is a mixed [or hazardous] waste appears confusing,'' and accordingly suggested there be more ''specific protocols . . . to determine if alternate feed materials contain hazardous components.'' *UMETCO,*

37 NRC at 280-81. The Commission concludes that this issue warrants further Staff refinement and standardization.

In conclusion, applying the Commission's statutory interpretation of section 11e(2) byproduct material, the Commission finds that the IUSA license amendment properly was issued and that the mill tailings at issue do constitute section 11e(2) byproduct material. From the information in the record, we believe that it was reasonable for the NRC Staff to have concluded that: (1) processing would take place, and (2) uranium would be recovered from the ore. Utah itself has acknowledged that ''[i]n three different estimates, taken from DOE documents, the average uranium content of the material ranged from a high of 0.058% to a low of 0.008%.'' *See* Utah's Appeal Brief at 4; *see also* Utah's Brief in Opposition to IUSA's License Amendment (Dec. 7, 1998) (''Utah's Brief in Opposition'') at 8, and Attachment at 7-8. Utah's own expert estimated that up to $617,000 worth of uranium might be recovered from the Ashland-2 material. *See* Utah's Brief in Opposition at 8, and Attachment at 9. Utah's primary argument all along has been that the monetary value of the recovered uranium would be much lower than the 4-million-dollar payment IUSA would receive, *not* that no source material would be recovered through processing. *See, e.g., id.,* Attachment at 9 (where Utah's expert stressed that the value of the uranium-238 that could be extracted from the Ashland-2 material ''represents a fraction (1.6 to 15 percent) of the $4,050,000 that [IUSA] will receive from Material Handling & Disposal Services fees''); Utah's Reply Brief at 11 (the ''disposal fee received by [IUSA] . . . is almost 60 times the value of the uranium recovery'').

Not only was it reasonable to conclude that uranium could be recovered from the Ashland-2 material, but it was also reasonable to conclude that the processing would indeed take place. IUSA had a contractual commitment to do so; its contract with the Army Corps of Engineers *required* IUSA to process the material prior to disposal. *See* IUSA Brief at 18, 25. In addition, as the Presiding Officer noted, ''IUSA has a history of successfully extracting uranium from alternate feed material and has developed credibility with the NRC . . . for fulfilling its proposals to recover uranium from alternate feeds.'' 49 NRC at 112. This was not an instance, then, where there was no reasonable expectation that the mill operator would in fact process material through the mill to extract recoverable uranium. Moreover, it is also the Commission's understanding that the Ashland-2 material *has* in fact been processed in the IUSA mill and that approximately 8,000 pounds of uranium were extracted. While that quantity of uranium was on the low end of IUSA's estimates, it nevertheless represents more than a minute or negligible recovery of uranium.[8]

[8] Moreover, even if we had adhered to and sought to apply the Guidance's tests for licensee ''motives,'' the record does not show that IUSA processed the Ashland-2 material as a means to change *non*-11e(2) material into

(Continued)

The Commission concludes, therefore, that the Presiding Officer's interpretation of the section 11e(2) definition reflects a sensible reading of the UMTRCA statute and legislative history — one we hereby embrace — and that the record overall supports the issuance of the license amendment.

III. CONCLUSION

For the foregoing reasons, LBP-99-5 is *affirmed.*
IT IS SO ORDERED.

For the Commission,

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of February 2000.

section 11e(2) material. IUSA was aware that the NRC Staff had accepted a DOE certification declaring that the Ashland-2 FUSRAP material met the 11e(2) byproduct material definition. Based upon the DOE certification, the Staff had concluded that ''the material could be disposed of directly in the White Mesa tailings impoundments,'' without any need of processing at the mill. *See* Technical Evaluation Report at 6, attached to Amendment 6 to Source Material License SUA-1358 (June 23, 1998). The Staff thus claims that ''sham disposal'' was not a concern ''since it did not appear that the material was being processed to change its legal definition, and as such was truly being processed for its uranium content.'' *See* Staff Aff. of Joseph Holonich at 7. Whether the Ashland-2 material actually already was section 11e(2) byproduct material under UMTRCA remains unclear. *See supra* at p. 14. Nevertheless, IUSA was aware that DOE, the Army Corps of Engineers, and the NRC Staff all had categorized the material as such, and that the Staff indeed had stated that this was material that could have been disposed of without any further processing. This suggests that IUSA had a genuine interest in processing the material for the uranium and not simply an interest in ''reclassifying'' the material by processing it. The subtle and complex nature of this inquiry, however, reinforces our view that discerning a licensee's motives for a license amendment transaction is a difficult, virtually impossible, and, in any event, unnecessary exercise. Accordingly, our approach in this decision rejects ultimate business motivations as irrelevant to the section 11e(2) definition.

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. 50-423-LA-3**
(ASLBP No. 00-771-01-LA)
(Facility Operating
License No. NPF-49)

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

February 9, 2000

In a proceeding subject to the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K, the Atomic Safety and Licensing Board grants the requests for a hearing of two Petitioners in a proceeding involving the reracking and expansion in capacity of a spent fuel pool. The Board found both Petitioners to have standing and that three of their joint contentions were admissible.

RULES OF PRACTICE: STANDING

Residence or activities within 10 miles of a facility (and in one case 17 miles from a facility) have been found sufficient to establish standing in a case involving the proposed expansion in capacity of a spent fuel pool.

RULES OF PRACTICE: CONTENTIONS

In order for a petition for leave to intervene to be granted, the petitioner must proffer at least one contention conforming to the requirements of 10 C.F.R. § 2.714(b) and (d).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Spent fuel pool design; Criticality excursions in spent fuel pools.

PREHEARING CONFERENCE ORDER
(Granting Request for Hearing)

This proceeding concerns the proposal by Northeast Nuclear Energy Company (NNEC or Licensee) to increase the capacity (through the addition of high-density storage racks) of the spent fuel storage pool of the Millstone Nuclear Power Station, Unit No. 3, located in New London County, Connecticut. On December 13, 1999, the Atomic Safety and Licensing Board conducted a prehearing conference in New London, Connecticut (Tr. 1-224). For reasons set forth below, the Board finds that both of the petitioners for intervention — the Connecticut Coalition Against Millstone (CCAM) and the Long Island Coalition Against Millstone (CAM) — have standing and have jointly proffered at least one admissible contention. Therefore, we grant the request for a hearing of those organizations.

A. Background

The background of this proceeding is set forth in our Memorandum and Order (Intervention Petition), dated October 28, 1999 (unpublished). There, we found the initial joint petition of CCAM and CAM to have been timely filed but deficient in its statement of standing. As provided by 10 C.F.R. § 2.714(a)(3), we permitted CCAM/CAM to file a supplement to their petition to address both standing and contentions (which need not be included in the initial petition). We also scheduled a prehearing conference, to be held in New London, Connecticut, on December 13, 1999.[1]

[1] *See* Notice of Prehearing Conference, dated November 2, 1999, published at 64 Fed. Reg. 60,854 (Nov. 8, 1999), as amended by Notice of Change in Time and Place of Prehearing Conference, dated November 24, 1999, 64 Fed. Reg. 67,327 (Dec. 1, 1999).

CCAM/CAM filed its supplement on November 17, 1999.[2] NNEC filed its answer on November 30, 1999.[3] The NRC Staff filed a response on December 7, 1999.[4]

At the December 13, 1999 conference, we ruled that, for reasons to be explained in a later order (this one), both CCAM and CAM have standing (Tr. 25, 224). But we did not rule at that time on the admissibility of any proposed contention. We now turn to those matters.

B. Standing

As we observed in our October 28, 1999 Memorandum and Order, a petition for leave to intervene must set forth with particularity the petitioner's interest in the proceeding (i.e., its standing) and how that interest may be affected by the results of the proceeding. To satisfy this standard, the petitioner must show that the proposed action will cause ''injury in fact'' to its interest and that such injury is arguably within the ''zone of interests'' sought to be protected by the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282 (1985). Where, as here, organizations are seeking to intervene, they may demonstrate either organizational standing or standing as the representative of at least one member who has standing individually and who authorizes the organization to represent his or her interests. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

The Petitioners' statement of standing is set forth in their Supplemental Petition. Both CCAM and CAM seek to establish standing as representatives of individual members. CCAM relies on the interest of Mr. Joseph H. Besade, a member of CCAM who states, *inter alia,* that he owns and resides on property in Waterford, Connecticut, within 2 miles of the Millstone facility. He outlines why he is opposed to the current amendment and authorizes CCAM to represent his interest in this proceeding.[5]

CAM relies on the interest of Ms. Jacqueline Williamson, a member of CAM who states, *inter alia,* that she owns and resides ''during much of the year'' upon property located on Fishers Island, New York, approximately 10 miles from the facility. She outlines why she believes the proposed reracking will increase risk

[2] Supplemental Petition To Intervene in Behalf of Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (Supplemental Petition).

[3] Northeast Nuclear Energy Company's Answer to Supplemental Petition to Intervene (NNEC Answer).

[4] NRC Staff's Response to Supplemental Petition to Intervene Filed by Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (Staff Response).

[5] Declaration of Joseph H. Besade, dated November 14, 1999, attached to CCAM/CAM Supplemental Petition.

to her and hence why she opposes the amendment, and she authorizes CAM to represent her rights and interest in the proceeding.[6]

The Petitioners thus are relying for standing on the proximity of the residences of the authorizing members to the facility. Residence within 50 miles of a facility has been found sufficient to support standing in a reactor-licensing case, but in cases involving spent fuel pool reracking, the required proximity is considerably less. Both the Licensee and Staff cite *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979), for the proposition that, although the 50-mile presumption does not apply in spent fuel pool cases, persons living ''little more than a stone's throw from the facility'' (which they equate to less than the 10-mile distance of Ms. Williamson's property) meet the proximity test.

On that basis, the Licensee and Staff agree that CCAM has established its standing through Mr. Besade, who lives 2 miles from the facility, but assert that Ms. Williamson's part-time residence 10 miles from the facility is too distant to permit CAM to attain standing under the proximity test. They ignore or attempt to distinguish, however, holdings by other licensing boards that residence or activities within 10 miles are sufficient to establish standing in a case involving the proposed expansion in capacity of a spent fuel pool. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); *id.,* LBP-87-17, 25 NRC 838, 842, *aff'd in part and rev'd in part on other grounds,* ALAB-869, 26 NRC 13 (1987); *see also Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), *aff'd,* ALAB-893, 27 NRC 627 (1988) (standing of individual living 10 miles from facility conceded by parties). Indeed, a distance of 17 miles has recently been deemed to be permissible as a basis for an organization's standing in a spent fuel pool proceeding similar in many respects to this one. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999).[7]

It is clear to us that the interests sought to be protected by CCAM and CAM (as set forth in declarations filed by David Lochbaum and Dr. Gordon Thompson) arguably fall within the zone of interests protected by both the Atomic Energy Act and NEPA. Further, no one contests the timeliness of the CCAM/CAM petition. Applying the proximity tests utilized in other spent fuel pool proceedings, we find both CCAM and CAM to have adequately demonstrated their standing to participate in this proceeding.

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[6] Declaration of Jacqueline Williamson, dated November 12, 1999, attached to CCAM/CAM Supplemental Petition.

[7] Both the Licensee and Staff observe that LBP-99-25 is a Licensing Board opinion that does not serve as binding precedent (Tr. 13, 16). We note, however, that in the *Shearon Harris* case the Staff did not object to the standing of the organization located 17 miles from the Shearon Harris facility. 50 NRC at 29.

C. Contentions

In order for a petition for leave to intervene to be granted, the petitioner must proffer at least one contention conforming to the requirements of 10 C.F.R. § 2.714(b) and (d). In particular, a contention must include (1) a brief explanation of the bases of the contention; (2) a concise statement of the alleged facts or expert opinion on which the petitioner intends to rely, including references to specific sources and documents; and (3) sufficient information to show that a genuine dispute exists with the applicant (or licensee) on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2). A contention may not be admitted if, where proven, it would not entitle the petitioner to relief. 10 C.F.R. § 2.714(d)(2)(ii).

In their Supplemental Petition, CCAM/CAM have jointly submitted eleven proposed contentions. The contentions are supported by a declaration and supplemental declaration of David A. Lochbaum, a nuclear engineer, and a declaration of Dr. Gordon Thompson, an analyst of nuclear and spent fuel issues with the degrees of Doctor of Philosophy in applied mathematics, Bachelor of Engineering in mechanical engineering, and Bachelor of Science in mathematics and physics. NNEC (in its Answer) and the Staff (in its Response) assert that none of the contentions is adequate. We considered each of the contentions at the prehearing conference and, based on the entire record, find three (numbers 4, 5, and 6) to be admissible. We will here deal with each of the proposed contentions *seriatim.*

1. Contention 1: ''Channel Blockage: Failure To Consider Credible Scenarios of Fully Blocked Flow Channels''

CCAM/CAM assert that the NNEC's application fails to consider credible scenarios of fully blocked flow channels; they challenge the scope of NNEC's evaluation because ''there are numerous credible scenarios that could cause an entire flow channel, or multiple flow channels, to become completely blocked.'' In support, they pose examples of ''credible'' scenarios which, they claim, could result in blockage of one or more flow channels. They fault the evaluation supporting the application as limited to nonmechanistic partial blockage of a single flow channel and claim that NNEC's application lacks a proper analysis to demonstrate that the irradiated fuel assemblies will remain adequately cooled in the event of the occurrence of such credible events.[8]

NNEC and the Staff each oppose this proposed contention as lacking an adequate basis, i.e., for being based on only one summary portion of the application and ignoring the more complete analysis performed by NNEC's contractor, Holtec International, set forth in a full, nonproprietary licensing report that is referenced in and incorporated into NNEC's application (albeit in a portion of the application in a

[8] Supplemental Petition at 8-10.

different volume from that referenced by CCAM/CAM). NNEC and the Staff fault CCAM/CAM for failing to explain why their postulated scenarios are credible or why the Holtec analysis is not bounding for such scenarios. NNEC further criticizes the proposed contention for failing to explain why the existing administrative controls to limit the potential for foreign material falling into the storage pool are inadequate, while the Staff criticizes the Petitioners for not recognizing or discussing the basis set forth in the Holtec analysis for considering partial blockage of a channel (rather than full blockage) as bounding.[9]

When asked about the Holtec analysis at the prehearing conference, the Petitioners indicated that they were aware of the analysis but regarded it as inadequate for not adequately bounding the possible scenarios (Tr. 34-35). They also mentioned other examples of debris allegedly discovered on the floor of spent fuel pools, without attempting to address either the belated introduction of such examples or whether those types of examples would be bounded by the Holtec analysis (Tr. 33-34, 45).

The Licensing Board finds that CCAM/CAM's failure to take into account the Holtec analysis in their Supplemental Petition, and their perfunctory reference to the analysis at the prehearing conference, indicates a fatal defect in the bases for the contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998). We reject this proposed contention as lacking an adequate basis, contrary to the requirement in 10 C.F.R. § 2.714(b)(2)(ii) and (iii).

2. Contentions 2 and 3

These two contentions are grouped together by CCAM/CAM under the topic heading ''Drop of Rack or Cask.'' We will deal with each separately.

a. Contention 2: ''Failure to Consider Dropping an Empty Rack onto Irradiated Fuel''

The Petitioners contend that the application is deficient for not properly accounting for the safety implications of a credible accident, i.e., the drop of a rack during installation. As bases, they assert that NNEC does not plan to install all of the new racks at the same time, and particularly that it will only install the southernmost Region 2 rack ''if and when necessary.'' CCAM/CAM claims that the NNEC application, if approved as submitted, will not ensure that the five adjacent storage racks will be empty when that rack is installed, thus creating the potential for an empty rack weighing more than 5 tons to fall onto a storage rack

[9] NNEC Answer at 8-10; Staff Response at 7-8.

or racks containing irradiated fuel assemblies, resulting in significant fuel damage and/or criticality problems.[10]

Both NNEC and the Staff regard this contention as not within the scope of the present proceeding. They cite existing Technical Specification 3.9.7 (which is not to be changed by the proposed amendment) prohibiting loads in excess of 2200 pounds from traveling over spent fuel assemblies, thus precluding the movement of an empty rack over irradiated fuel. NNEC claims such a condition is equal to any relief that could be obtained from this contention and adds that CCAM/CAM have not attempted to demonstrate that the Licensee is likely to violate such technical specification. At the prehearing conference, the Licensee and the Staff acknowledged that NNEC would have to apply for a technical specification change (a license amendment) if it were to move the empty rack over spent fuel, although not if it installed the rack at a time when it could use a pathway not requiring movement over spent fuel (Tr. 48-49). For its part, CCAM/CAM attempted to demonstrate a likelihood (based on past conduct) that NNEC would indeed violate the technical specification.

We find this contention to be premature at best. The technical specification currently precludes any damage envisaged by this contention. Should NNEC desire to transport the empty rack over spent fuel assemblies, it will have to apply for a license amendment that would (at least under current rules) result in a new opportunity for a hearing (to which CCAM/CAM could respond, if they chose). Further, CCAM/CAM have not made a showing adequate to anticipate violation by the Licensee of the technical specification. *See General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996). Accordingly, Contention 2 fails to demonstrate a valid dispute and hence must be rejected under 10 C.F.R. § 2.714(d).

b. Contention 3: ''No Evaluation of Cask Drop''

This contention is similar to Contention 2. It asserts that NNEC has not properly evaluated potential mechanical loads under accident conditions because it has not considered the drop of a shipping cask into the cask pit or fuel pool, potentially resulting in specified adverse safety consequences. It adds that NNEC's argument for not considering a cask drop — that it is not currently licensed to transport a cask into the spent fuel building — is ''frivolous,'' inasmuch as spent fuel eventually will be removed from the pool.[11]

NNEC and the Staff claim that this contention is beyond the scope of the proceeding and hence inadmissible for essentially the same reason they found Contention 2 to be inadmissible: Technical Specification 3.9.7, prohibiting the

[10] Supplemental Petition at 10-11.
[11] *Id.* at 11-12.

movement of loads greater than 2200 pounds over irradiated fuel. They assert that the spent fuel shipping cask trolley is physically incapable of carrying loads over the spent fuel storage pool and that the new fuel handling crane, the new fuel receipt crane, and the spent fuel bridge hoist do not have the capacity to lift an object as heavy as a spent fuel shipping cask. Finally, they maintain that, should NNEC decide at some later date to use a fuel shipping cask, such that it must be moved over irradiated fuel, an additional license amendment would be required (thus triggering a new opportunity for hearing, at least under current rules).

We agree and, because of these considerations, we find this contention to be beyond the scope of this proceeding and hence reject it.

3. Contentions 4-6

These contentions are all designated by CCAM/CAM as ''Criticality'' contentions. All relate to differing aspects of a single phenomenon, ''criticality.'' We will consider them separately, inasmuch as they are advanced as different contentions, although recognizing their common derivation.

a. Contention 4: "Undue and Unnecessary Risk to Worker and Public Health and Safety"

Petitioners assert that while the existing spent fuel storage racks at Millstone Unit 3 rely on physical separation to ensure that new and irradiated fuel assemblies are maintained in a subcritical configuration, NNEC's application seeks to maximize the irradiated fuel capacity by trading physical protection against criticality for a complex array of administrative controls. The Petitioners assert this trade-off increases the likelihood of a criticality accident.[12]

The basis proffered by CCAM/CAM is two-pronged. First, the application contains a complex array of administrative controls:

> After the expansion, the pool will contain three distinct administratively controlled storage regions . . .
>
> 41 Region 1 spent fuel racks can store fuel in either of 2 ways: (a) areas . . . with fuel allowed in every storage location are referred to as the 4-out-of-4 Region 1 storage area; or (b) areas of Region 1 . . . which contain a cell blocking device in every 4th location for criticality control, are referred to as 3-out-of-the-4 Region 1 storage area.
>
> . . . The storage in Region 2 will have more restrictive burnup/enrichment restrictions than Region 1 racks and use a 4-out-of-4 storage configuration.

[12] *Id.* at 13.

> . . . The storage in Region 3 racks will have more restrictive burnup/enrichment restriction than Region 2 racks. Region 3 racks will allow credit for decay of fissile plutonium and buildup of americium, which reduce reactivity, as a function of decay time credit.[13]

And, second, based on past experience, NNEC's ability to carry out such controls successfully is suspect. In that respect, the Petitioners note that, as indicated in a March 1996 issue of *TIME* magazine, and a December 1997 civil penalty/notice of violation, NNEC has been cited for violations in which it failed to maintain the plant's spent fuel pool configuration in conformance with design and accident analyses performed by Holtec International.[14] Thus, according to CCAM/CAM, the above-described complex array of administrative controls coupled with the fact that the Licensee has previously been cited for, *inter alia,* failing to maintain the plant's spent fuel pool configuration, is sufficient to present health and safety implications.

In rebuttal, NNEC's Answer points out that Millstone Unit 3 Technical Specifications (TS)

> *currently* incorporate administrative controls for two-region storage in the existing spent fuel storage racks. These include fuel burnup/enrichment limitations. *See* Technical Specification 3.9.14, Figure 3.9-1.

NNEC thus argues that there is nothing new or novel in the proposed administrative controls and, further, that such controls are widely used throughout the industry.[15]

Similarly, the NRC Staff asserts that the Petitioners' bases are insufficient because they do not identify (1) any deficiency in the proposed administrative controls; and (2) any new physical measure that is required to control the criticality of the spent fuel pool.[16] Further, the Staff asserts that ''[b]ecause the use of administrative controls together with physical means to control criticality in the SFP is already approved at Millstone Unit 3, Contention 4 is not within the scope of the proposed amendment.''[17]

The Board finds that the proposed use of additional administrative controls is indeed within the scope of this proceeding; were it not for the proposed expansion of spent fuel pool capacity, there would be no apparent need for additional controls. The argument that because certain administrative controls are currently in use at the Millstone Unit 3 fuel storage pool, so that new controls of a similar but expanded

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[13] *Id.* at 14, citations (to various sections of the NNEC application) omitted.

[14] CCAM/CAM explicitly cite a letter from L. Joseph Callan, Executive Director for Operations, NRC, to B.D. Kenyon, President and Chief Executive Officer Nuclear Group, NNEC, titled ''Notice of Violation and Proposed Imposition of Civil Penalties — –$2,100,000 (NRC Inspection Report Nos. 50-245/50-336/50-423: 95-44, 95-82, 96-01, 96-03, 96-04, 96-05, 96-06, 96-08, 96-09, 96-201),'' dated December 10, 1997.

[15] NNEC Answer at 13.

[16] Staff Response at 12.

[17] *Id.* at 14.

and more complex nature are not a modification of the spent fuel pool and thus outside the scope of the proposed amendment is, on the face of it, incorrect: the new controls are at the heart of the proposed amendment. To argue that the new set of controls is allowed because there are some current controls in place is similar to arguing that a major expansion of a hotel's capacity is within zoning constraints because it already has zoning approval for some rooms.

Complexity of additional administrative controls has previously been found to constitute an admissible contention in the face of numerous alleged cited incidents and violations, albeit in a construction-period recapture proceeding where the adequacy of a quality assurance/quality control program was in issue. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 14-21 (1993). Here, the alleged violations were less numerous but, if anything, more serious, resulting in the Staff's not permitting the reactor to operate pending resolution of severe management problems. Indeed, as CCAM/CAM point out, in September 1999 NNEC reportedly admitted, *inter alia,* that it had falsified certain environmental records and it pleaded guilty to 23 federal felonies, agreeing to pay $10 million in fines.[18]

Accordingly, the Licensing Board finds that Contention 4 is admissible. For the sake of brevity, we adopt the following restatement of Contention 4:

> The new set of administrative controls trades reliance on physical protection for administrative controls to an extent that poses an undue and unnecessary risk of a criticality accident, particularly due to the fact that the licensee has a history of not being able to adhere to administrative controls with respect, *inter alia,* to spent fuel pool configuration.

b. Contention 5: "Significant Increase in Probability of Criticality Accident"

As the second of their criticality contentions, Petitioners criticize NNEC's proposal for allegedly eliminating an existing barrier against criticality in the fuel pool at Millstone Unit 3. The present Technical Specifications require soluble boron to be maintained in the spent fuel pool's water at all times. NNEC proposes to change the requirement for soluble boron in the spent fuel pool as follows:

> The proposed Technical Specifications will require a minimum concentration of 800 ppm of soluble boron in the pool water during fuel movement to assure k_{eff} will remain less than or equal to 0.95 assuming a dropped or misloaded fuel assembly. The surveillance interval for this soluble boron concentration in the proposed Technical Specifications is consistent with Westinghouse improved STS 3.7.16.[19]

[18] Supplemental Petition at 33.
[19] *Id.* at 16, citing portion of NNEC application.

CCAM/CAM claim that the present Technical Specifications require soluble boron to be maintained within the spent fuel pool water any time irradiated fuel assemblies are stored in the pool but that, under the proposed change, the Technical Specifications would require such soluble poison only during times of fuel movements, not otherwise. According to CCAM/CAM, the evaluation submitted by NNEC clearly stated that a single movement error can result in the required criticality margin being violated unless there is soluble boron in the spent fuel pool water.

NNEC in its response to this contention states that there is no reason to credit or verify the soluble boron concentration at any time other than fuel movement:

> Under the proposal, boron would be required to be verified by surveillance only during fuel assembly movements within the SFSP. *Id.* The proposal again does no more than reinstate the prior TS with respect to surveillance. The Supplemental Petition discusses the possibility of fuel movement errors and undetected misloaded fuel assemblies. Supplemental Petition at 18. The 800 ppm boron in the SFSP is credited to prevent criticality in the event of a misloaded or a dropped fuel assembly. Accordingly, both the proposed TS and the previously approved TS required a surveillance during fuel movements. Contrary to the proposed contention, there is no reason to credit or verify the soluble boron concentration at any time other than fuel movement. Additional surveillance would constitute unneeded operational and administrative burdens.[20]

The NRC Staff argues that Contention 5 lacks a sufficient basis in that Petitioners do not propose how a fresh fuel assembly might be misloaded and remain undetected; and, even presuming such misloading occurs, do not describe how soluble boron concentration might drop after fuel movements cease. According to the Staff, the Petitioners acknowledge that the Licensee will maintain soluble boron concentration at 800 ppm during movements of fuel assemblies, as would be required by proposed TS 3.9.1.2 (citing the Supplemental Petition at 17). The Staff goes on to state that Petitioners' contention presumes that soluble boron concentration would drop once fuel movements are stopped (citing *id.* at 18). The Staff attempts to counter Petitioners' argument by explaining that, while there is no Technical Specification requirement proposed to maintain boron concentration when fuel assembly movements have ceased, the water in the SFP will remain borated unless the Licensee takes action to remove the boron or the water containing the boron leaks out of the pool as the result of some event. Petitioners do not assert any mechanism through which either of these alternatives might occur. The Staff thus concludes that, because boron concentration must drop for criticality to

[20] NNEC Answer at 15. ''Petitioners fail to recognize that the effect of this change is primarily to change the TS surveillance schedule for boron concentration during fuel movement. As a practical matter, boron in the spent fuel pool does not disappear after fuel movements, nor is it appreciably diluted over time.''

occur, as Petitioners assert, and Petitioners do not suggest how this might happen, Contention 5 lacks a sufficient basis.[21]

In response to these arguments, Petitioners claim (Tr. 100) that:

> it wasn't long ago, . . . Boron did go somewhere because there was a leakage in the spent fuel pool that went undetected for something like 12 hours and, presumably, the water that leaked out did contain Boron and that meant there was some change that occurred in the fluid in the pool.

The Board agrees that, as asserted by CCAM/CAM and not disputed by any party, the present Technical Specifications require soluble boron to be maintained within the spent fuel pool water any time irradiated fuel assemblies are stored in the pool. The proposed change, on the other hand, would require such soluble poison only during times of fuel movements, not otherwise. The evaluation submitted by NNEC clearly states that, as claimed by the Petitioners, a single movement error can result in the required criticality margin being violated unless there is soluble boron in the spent fuel pool water.

The Board has determined that this basis for the contention does indeed raise an unresolved question of fact:

> Will the proposed change in schedule of surveillance of the soluble boron in the fuel pool lead to a significantly increased likelihood of a criticality accident stemming from a misloaded fuel element, during the interval between fuel movements?

There is no debate as to the efficacy of boron monitoring during fuel movement, but Petitioners point to the fact that changes in fuel pool water constituents can and do occur in the interval between fuel movements. If there were confidence that a misloaded assembly would be reliably detected at the time of fuel movement, this issue would be resolved. Hence, establishing the degree of confidence that can be placed in detection of a misloaded fuel element is a key part of resolving the question at hand. We accordingly admit this contention.

c. Contention 6: "Proposed Criticality Control Measures Would Violate NRC Regulations"

Petitioners assert that the criticality control measures proposed by NNEC would violate Criterion 62 of the General Design Criteria (GDC) set forth in 10 C.F.R. Part 50, Appendix A. Specifically, they point out that GDC 62 requires that ''[c]riticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations,'' but

[21] Staff Response at 18.

that NNEC proposes to seek to prevent criticality at Millstone 3 by the use of ongoing administrative measures. The following are cited by the Petitioners as administrative measures:

1. Maintenance of a given content of soluble boron in pool water;
2. Limits on fuel enrichment/fuel burnup in Region 1 4-out-of-4 racks and Region 2 racks; and,
3. Limits on fuel enrichment/fuel burnup and fuel decay time in Region 3 racks.

During the prehearing conference (Tr. 139), Petitioners better delineated their view of what constitutes objectionable administrative controls. They set forth two classes of administrative measures: those that are made over a finite time period and, after having been made, are no longer necessary; and those that are required on an ongoing basis.

As controls of the first type, they mentioned the design and construction of a rack with fixed spacing between fuel assemblies that requires actions of an administrative type to perform correctly. Once the rack is installed, no further ongoing administrative action of any kind is required to exploit the physical phenomena of separation of fuel assemblies. Similarly, they mention the placement of boral plates around the cells in the rack, requiring administrative and quality control measures, up to the point when the rack is completed and installed. No further ongoing action is required.

In contrast, the second category of administrative actions are those that are required on an ongoing basis. CCAM/CAM mention taking credit for burnup and enrichment, the soluble boron and for decay time, all of which require ongoing administrative measures. They assert that the development of GDC 62 under the Atomic Energy Commission shows that, in the early versions of this criterion, there was a possibility for ongoing administrative actions and that this possibility was removed as the criterion evolved and came to its present form. They claim that, during that period of evolution of the criterion, there was extensive comment from the nuclear industry, from the Advisory Committee on Reactor Safeguards, and from the Staff of the Atomic Energy Commission. All of them accepted the evolution of this criterion into its present form, which excludes administrative measures of an ongoing type.

In response to Licensing Board inquiries, CCAM/CAM categorized fuel enrichment as an administrative control that is required to be maintained on an ongoing basis, because the assemblies come into the plant and out of the reactor. But they denied any implication that, in designing the rack, fuel enrichment could be ignored. They asserted that the enrichment is fixed at the fuel enrichment facility and every plant has, as one of the key technical specifications, a limit on the enrichment of fuel that comes into the plant. As for potential change, they explained

that the design of the rack will be predicated upon the assumption of some upper level of enrichment of fuel that might be inserted into that rack. They acknowledged that, to ensure that fuel never enters this licensed facility with an enrichment level above the level that was specified in the rack design does require ongoing administrative actions. But they differentiated those controls from the types of ongoing administrative actions that are needed to keep track of the burnup and the enrichment combination that is used to take credit for burnup, which is the type of control to which Contention 6 refers. Thus, it appears from the discussion summarized above that, by the term ''administrative controls,'' the Petitioners mean a set of rules or algorithms involving the continuing reference to the burnup or decay time of a fuel element; and, also, to the use of soluble boron to control reactivity.

In sum, CCAM/CAM claim in this contention that GDC 62 is the sole regulatory foundation for criticality control in fuel pools, that the NRC Staff has employed other documents in its consideration of criticality, but these documents are not regulations. For example, the NRC has repeatedly referred to a Draft for Comment of Proposed Revision 2 to Regulatory Guide 1.13, dated December 1981, titled ''Spent Fuel Storage Facility Design Basis.'' That document, in addition to being a draft, is not a regulation. Further, CCAM/CAM claim that the NRC Staff has on various occasions allowed nuclear power plant licensees to rely upon administrative measures for criticality control, as NNEC proposes, but that such reliance violates GDC 62 and therefore violates NRC regulations.

In response, NNEC argues that CCAM/CAM's concern is unsupported and lacks an adequate legal or technical basis.[22] The Licensee acknowledges that GDC 62 requires that ''[c]riticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations'' and that, in fact, the NNEC proposal utilizes physical systems (racks in a geometrically safe configuration, neutron absorber material, soluble boron in the SFSP water) and processes (enrichment, burnup, and decay restrictions), as well as administrative controls, to prevent criticality. NNEC claims that its proposal fully meets GDC 62.

NNEC also cites (NNEC Answer at 17) an NRC Appeal Board ruling that

> General design criteria, as their name implies, are ''intended to provide engineering goals rather than precise tests or methodologies by which reactor safety [can] be fully and satisfactorily gauged.'' *Nader v. NRC,* 513 F.2d 1045, 1052 (DC Cir. 1975). [General Design Criteria] are cast in broad, general terms and constitute the minimum requirements for the principal design criteria of water-cooled nuclear power plants. There are a variety of methods for demonstrating compliance with GDC. Through regulatory guides, standard format and content guides for safety analysis reports, Standard Review Plan provisions, and Branch Technical positions, license applicants are given guidance as to acceptable methods for implementing the general criteria. *However, applicants are free to select other methods to achieve the same goal. If there is*

[22] NNEC Answer at 17-19.

conformance with regulatory guides, there is likely to be compliance with the GDC. Even if there is nonconformance with the staff's guidance to licensees, the GDC may still be met.

Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 567 n.7 (citation omitted) (emphasis added). ''Simply stated, staff guidance generally sets neither minimum nor maximum standards.'' *Id.* at 568, n.10. *See also* 36 Fed. Reg. 3255 (1971); 10 C.F.R. § 50.34(a)(3)(i).

NNEC goes on to assert that CCAM/CAM's analysis should identify the spent fuel assembly characteristics upon which subcriticality depends, that NNEC has evaluated the k_{eff} for various types of fuel assemblies containing a certain maximum enrichment and concluded that the racks can safely accommodate, without credit for borated water, fuel of various initial enrichments and discharge burnups, provided the combination falls within the acceptable domain indicated in Figure 4.1.1 of Attachment 5 to the Application. (As discussed previously, boron is only credited for accident analyses.) NNEC asserts that the fuel enrichment/burnup criteria will be established in Technical Specifications and that it will comply through appropriate administrative procedures. Application, Attachment 3, at 1. NNEC concludes that nothing in the Supplemental Petition indicates that the subcriticality of the SFSP will not be maintained.

Further, NNEC also construes Petitioners' claim to be that NNEC's use of ''administrative measures'' is not in conformance with RG 1.13 (based apparently on the theory that enrichment and burnup restrictions are administrative measures). Petitioners reference a section of RG 1.13 that provides that a nuclear criticality analysis should demonstrate that criticality could not occur without at least two unlikely, independent, and concurring failures or operating limit violations. RG 1.13, at 1.13-9. Petitioners claim that because misplacement of a fuel assembly could cause criticality, NNEC's administrative controls do not satisfy RG 1.13. NNEC opposes the CCAM/CAM contention for failing to explain how NNEC's proposed use of administrative controls contradicts this section of RG 1.13. NNEC asserts that RG 1.13 does *not* state that a licensee cannot take credit for burnup. As discussed above, RG 1.13 indicates that the nuclear criticality analysis should be performed, *assuming a design-basis event occurs despite the use of the administrative controls.* NNEC claims it has performed that accident analysis, that Petitioners fail to provide any support for the contention that misplacement of a fuel assembly will result in an SFSP criticality, and, contrary to the Petitioners' claim, there is no basis provided in which to infer that NNEC will not meet GDC 62.

According to NNEC (NNEC Answer at 19), the fuel storage rack designs will prevent criticality in the SFSP by the use of geometrically safe configurations and Boral neutron absorbers. NNEC's proposal to take credit for fuel burnup limits as a means to maintain SFSP subcriticality is also clearly consistent with GDC 62. GDC 62 provides that criticality shall be prevented by physical systems or

processes. The burnup of fuel, as well as its enrichment, is a physical process that affects criticality. NNEC states that CCAM/CAM have failed to provide an adequate basis to support this proposed contention. For these reasons, NNEC argues that the proposed contention must be dismissed.

Similarly, the Staff argues that the Petitioners ignore the provisions of 10 C.F.R. § 50.68, which explicitly provide for the administrative controls claimed by Petitioners to be prohibited by GDC 62. Furthermore, GDC 62 specifically allows criticality to be prevented by physical systems and processes. According to the Staff, the regulations explicitly provide that applicants may choose between relying on a criticality monitoring system in accordance with 10 C.F.R. § 70.24 or complying with the provisions of 10 C.F.R. § 50.68(b). Section 50.68(b) provides for the use of plant procedures (§ 50.68(b)(1)); administrative controls (§ 50.68(b)(2) and (3)); soluble boron (§ 50.68(b)(4)); and maximum enrichment (§ 50.68(b)(7)). The Staff claims that nothing in GDC 62 is inconsistent with section 50.68 and there is no basis for asserting that administrative controls may not be used.

The Staff further claims, with respect to Petitioners' assertions, that failure of administrative measures that seek to limit fuel enrichment, burnup, or decay time is a likely occurrence, is likely to result in more than one fuel assembly out of compliance with specified limits, and that such failures can precede or follow, rather than being concurrent with, failure of administrative measures for maintaining a given concentration of soluble boron in pool water. The Staff argues that Petitioners provide only bare assertions and do not give a single example of the ''variety of accident scenarios involving criticality'' (Supplemental Petition at 21) asserted to violate GDC 62 under accident conditions. Accordingly, the Staff views these assertions as not comprising a sufficient basis for Contention 6, and claims that the Petitioners have failed to meet the Commission's requirements for establishing a valid contention.

There appears to be a dispute as to what types of ''administrative controls'' are permitted under 10 C.F.R. § 50.68, consistent with GDC 62. The plain language of section 50.68(b)(2) states:

> The estimated ratio of neutron production to neutron absorption and leakage (k-effective) shall be calculated assuming the racks are loaded with fuel of the maximum fuel assembly reactivity and flooded with unborated water and must not exceed 0.95, at a 95 percent probability, 95 percent confidence level. This evaluation need not be performed if administrative controls and/or design features prevent such flooding or if fresh fuel storage racks are not used.

In this context, the term ''administrative controls'' refers to measures to control flooding with unborated water — not burnup or decay time. Similar language is used in section 50.68(b)(3) to refer to administrative controls and/or design features to ''prevent such moderation [optimum moderation] or if fresh fuel storage racks are not used.'' In that connection, 10 C.F.R. § 50.68(b)(1) and (2) refer to

fresh fuel; section 50.68(b)(4) refers to irradiated fuel. The term ''administrative controls'' is not found in section 50.68(b)(4) though reference is made to soluble boron and to fuel reactivity.

NNEC in its answer refers to burnup and decay time as ''physical processes'' in the sense used in GDC 62. The dictionary definition of process most applicable here is: ''a particular method of doing something, generally a number of steps or operations.''[23] Although a condition of fuel burnup may be the outcome of a process, calling burnup a ''physical process'' confuses the end with the means.

Burnup and decay time are indicia of physical processes: burnup occurs in the core and decay in the core and spent fuel rack. This raises the question of scope of the physical processes mentioned in GDC 62.

In citing *Big Rock Point,* 17 NRC at 567 n.7, NNEC ignores the fact that there is no iron-clad guarantee that following the applicable guides assures adherence to the General Design Criteria: ''there is *likely* to be compliance with the GDC.'' Likely, but not certain.

The Board has determined that the basis for Contention 6, i.e., that

> GDC 62 requires that: ''Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.'' NNEC proposes to seek to prevent criticality at Millstone 3 by the use of ongoing administrative measures,

does indeed raise a genuine material dispute that warrants further inquiry in this proceeding. Specifically, except with respect to identifying the precise administrative controls proposed to be utilized, as well as the existing administrative controls that would be superseded, the litigable issue posed by Contention 6 essentially boils down to a question of law: Does GDC 62 permit a licensee to take credit in criticality calculations for enrichment, burnup, and decay time limits, limits that will ultimately be enforced by administrative controls?

We hereby admit Contention 6.

4. Contentions 7 and 8

These contentions are denominated by CCAM/CAM as contentions involving ''Accidents Potentially Involving Exothermic Reaction of Cladding.'' Both relate to accidents of this type. Because they are proffered as separate contentions, we will consider them separately for admissibility purposes, even though they have some common theses.

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[23] *Webster's Third International Dictionary* 1808 (Unabridged), definition 1.a(3).

a. Contention 7: ''Significant Increase in Probability and Consequences of Overheating Accident''

CCAM/CAM (citing NNEC's application) claim that the NNEC proposal would significantly increase both the irradiated fuel inventory and associated decay heat levels in the spent fuel pool. According to the Petitioners, the result would be an increase in radioactive material (source terms) in the pool and a reduction of the time available to respond to a loss of spent fuel cooling event, leading to a greater probability of failure to restore cooling in time to prevent overheating damage.[24]

CCAM/CAM explain this conclusion by stating that, if the greater capacity were implemented, there will be significantly less water in the pool, and the higher heat loads (conceded, in their view, by NNEC) would result in less time than is currently available to cope with a loss of spent fuel cooling.

NNEC responds by asserting that the only spent fuel pool accident discussed in the Unit 3 FSAR and required to be discussed in the amendment application is a fuel handling accident in which a fuel assembly drops onto the fuel racks during refueling activities. It asserts that an increase in number of fuel assemblies has no impact on that design-basis scenario. Beyond that, with respect to the heat load assertions, NNEC asserts that the primary consideration involved is the ability of the cooling system to remove decay heat, that it has reanalyzed the pool's thermal performance and determined its capability to remove the increased heat load while maintaining water temperature within the design limit, and that the Petitioners have neither cited nor directly challenged the sufficiency of such reanalysis.[25]

The Staff likewise criticizes the contention for failing to present a specific statement of fact or law to be controverted. The Staff assumes that the Petitioners are asserting that the proposed amendment would increase the probability and consequences of an overheating accident but notes that they do not provide a scenario tracking the severe accident about which they are concerned. But, more important, the Staff criticizes the Petitioners for not mentioning the heat-load analyses already performed by NNEC — the existing licensing basis for pool heat load consideration, set forth in the FSAR, and NNEC's later demonstration (January 1999) that there is time to address a loss of spent fuel cooling.

In considering this proposed contention, we need not here address whether the Licensee has analyzed the proper design-basis accident — that specified in Draft Regulatory Guide 1.13, Rev. 1, December 1975 — or whether it should have analyzed the heat-load accident scenario mentioned by CCAM/CAM (Tr. 145)

[24] Supplemental Petition at 21-22.

[25] NNEC Answer at 20-21. NNEC notes that a nonproprietary version of the thermal-hydraulic analysis was submitted to the NRC on April 5, 1999, and has been provided to this Licensing Board. NNEC also asserts that it has been licensed since March 1991 for 2160 assemblies, that the original FSAR indicated that the plant was licensed for 1869 assemblies, and that the current application proposes to increase the current storage capacity of 756 elements by 1104 cells, to a total of 1860 cells. *Id.* at 21 n.14.

and set forth in Proposed Revision 2 to Regulatory Guide 1.13, December 1981, or some other accident. For the initial analysis performed by NNEC, as set forth in its FSAR, already assumes a larger inventory of spent fuel in the pool (2160 assemblies) than NNEC seeks through the current proposal (1860 assemblies), and the Petitioners do not challenge the adequacy of this FSAR analysis. That being so, the contention lacks an adequate basis and, accordingly, is not accepted. *See* 10 C.F.R. § 2.714(b)(2).

b. Contention 8: ''Increased Probability and Consequences of Severe Accidents''

In this contention, CCAM/CAM claim that NNEC proposes to ''modify'' (i.e., increase the storage capacity of) the spent fuel pool in a manner that will significantly increase the probability and consequences of ''severe'' accidents, defined as ''accidents which involve partial or total uncovering of fuel assemblies and exothermic reaction of fuel cladding.'' The basis presented is a February 1999 report prepared by one of its experts, Dr. Gordon Thompson, with respect to the spent fuel pools at the Shearon Harris facility. As CCAM/CAM point out, the probability of severe accidents will increase because

> (1) center-center distances in the fuel racks will decrease from the present 10.35 inches in the Region 3 racks to 9.017 inches in the new Region 2 racks; (2) convective circulation of water, air or steam will be further suppressed by the presence of additional racks in the pool; and (3) the greater heat load and reduced water mass in the pool will reduce the timescale of an accident in which interruption of cooling leads to evaporation of water and the uncovering of fuel assemblies.[26]

As NNEC points out, the Petitioners provide no legal or factual bases for considering ''severe'' accidents (construed as ''beyond design basis'' accidents. Hence, the contention lacks an adequate basis.

We agree. Although, as we have observed, the appropriate design basis accident (e.g., as designated in either Reg. Guide 1.13, Rev. 1, or in Reg. Guide 1.13, proposed Rev. 2, or possibly elsewhere) may be subject to some question, all of the accidents that CCAM/CAM seek to have evaluated (although not clearly identified) would appear to constitute beyond-design-basis accidents. As such, they need not be analyzed by NNEC. Furthermore, with respect to a NEPA analysis, the Appeal Board has held that the NRC did not intend to apply its Severe Accident Policy Statement to a license amendment proceeding involving reracking of a spent

[26] Supplemental Petition at 24.

fuel pool. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 282 (1987).[27]

For all of the foregoing reasons, we find both that Contention 8 lacks an adequate basis and that it seeks, contrary to prior NRC rulings, to litigate a subject matter that cannot be heard in a proceeding of this type. We accordingly decline to admit Contention 8.

5. Contentions 9 and 10

These two contentions involve two aspects of the ''Consideration of Alternatives'' by NNEC. We will consider each separately.

a. Contention 9: Failure to Conduct a Sound and Prudent Evaluation of Alternatives to High Density Storage Racks

In this contention, CCAM/CAM claim that the evaluation of alternatives referenced in the license amendment application, which concluded that dry storage was technically feasible but that the least expensive type of dry storage entailed a capital expenditure approximately 3.5 times that of wet storage, is defective both because it was performed by a subcontractor (Holtec International) with a conflict of interest and because it relied on outdated information. As a basis, the Petitioners assert that Holtec International has an interest in the wet-storage option, through its design of the racks and through manufacture by Holtec's designated manufacturer, and that none of the dry storage options currently certified/licensed by NRC is manufactured by Holtec. CCAM/CAM faults the application for failing to demonstrate that the evaluation of alternatives was free from conflict and also for failing to describe the current usage of dry casks to store spent fuel on site.[28]

NNEC and the Staff oppose this contention both because, even if proven, it would be of no consequence because it would not entitle the Petitioners to any relief and because there is inadequate specificity with respect to the allegation of outdated information. NNEC adds that it, not Holtec, submitted the evaluation of alternatives to the NRC. Both state that Holtec itself offers certified dry cask storage designs. Finally, NNEC asserts that the NRC (not NNEC) is responsible for complying with NEPA obligations, including the consideration and evaluation of alternatives, and Holtec's alleged conflict thus could not apply to the NRC Environmental Assessment.[29]

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[27] But, as NNEC observes, even if the policy statement were to be applied here, Petitioners have made no factual showing that the probability of occurrence of such an accident is high enough to warrant consideration. NNEC Answer at 31.

[28] Supplemental Petition at 25-27.

[29] NNEC Answer at 26-29; Staff Response at 26-27.

We need not and do not here treat what relief we could grant were this contention to be proven. Inadequacies in environmental submissions by an applicant, or in the Staff's performance of environmental obligations based in part on those submissions, might well lead to meaningful relief. But here, for the reasons advanced by the Licensee and Staff, the bases provided by the Petitioners for this contention are so deficient as to warrant our rejection of the contention for lack of an adequate basis. *See* 10 C.F.R. § 2.714(b)(2) and (d)(2). We so rule.

b. Contention 10: Failure to Consider the Severe Accident Implications of Alternative Options

CCAM/CAM claim that NNEC has not properly evaluated the available alternatives and the implications of those alternatives with respect to the probability and consequences of severe accidents (defined here as an accident involving partial or total uncovering of fuel assemblies and exothermic reaction of fuel cladding). They assert that a severe accident could occur in the manner and with the consequences set forth in a February 1999 report of their consultant, Dr. Gordon Thompson, which is attached to the Supplemental Petition. They add a severe accident is the almost certain outcome of a severe reactor accident involving substantial containment failure or bypass.

NNEC portrays this contention as confused, internally inconsistent, and redundant. Both NNEC and the Staff assert that the contention's focus on alternatives implies that it is based on NEPA (although NEPA is never cited therein) but that the core assertion — that wet storage alternatives involve severe accident risks and dry storage options do not — are safety concerns duplicative of those appearing in earlier contentions. NNEC adds that the idea of a severe reactor accident triggering a severe spent fuel pool accident is remote and speculative and has long ago been rejected as a permissible contention, at least in the absence of much stronger support than was present there and is proffered here. *See Vermont Yankee,* ALAB-919, *supra,* 30 NRC at 45-47. The Staff adds that Dr. Thompson's statement is conclusory only and lacks substantiation of his opinion and that, inasmuch as the application poses no changes in reactor operation, as opposed to spent fuel pool operation, it is beyond the scope of this proceeding.[30]

In our opinion, this contention appears to be requesting analysis of a severe accident without adequate demonstration of the causation of such an accident or the likelihood that such an accident might occur at this facility. *See* LBP-98-7, *supra,* 47 NRC at 181. The contention is thus not admissible.

[30] NNEC Answer at 29-30; Staff Response at 27-28.

6. Contention 11: Environmental Impact — An Environmental Impact Statement Is Required

This contention recognizes that NRC has published in the *Federal Register* an Environmental Assessment and Finding of No Significant Impact for this licensing action.[31] CCAM/CAM find error in this Environmental Assessment for its failure to discuss the impacts described in the Petitioners' proposed Contentions 1-10, particularly the added risk of criticality accidents, and it concludes that an Environmental Impact Statement (EIS) is required.

As a predicate for their argument, CCAM/CAM denominate the proposed action as a ''major Federal action'' significantly affecting the quality of the human environment. They base this claim on the expert opinions of both Mr. Lochbaum and Dr. Thompson, as well as a report by Brookhaven National Laboratory.[32] They claim that the increased risk of criticality accidents engendered by the reracking proposal mandates the issuance of an EIS that must, in their view, examine the costs and benefits of, *inter alia,* a dry cask storage alternative. Finally, they assert that, even if issuance of an EIS is not required, we should require that one be issued as a matter of discretion, under authority of 10 C.F.R. §§ 51.20(b)(14) and 51.22(b).

NNEC and the Staff oppose this contention for similar reasons. They claim that normally an EIS is not required for spent fuel pool reracking cases such as this one and, in NNEC's view, the ''speculative scenarios relied on by the Petitioners'' do not require an EIS.[33] They also claim that we lack jurisdiction to order preparation of an EIS as a matter of discretion. NNEC adds that this contention should be rejected for the same reasons it asserted that we should reject all the others; that the aggregation of claims is no stronger than its components.[34]

We, of course, have not rejected all of the earlier contentions, as NNEC hypothesizes. We have accepted three of the ''criticality'' contentions on the basis that they raise legitimate safety issues. Nonetheless, Petitioners have presented nothing that suggests these issues create a major federal action out of what has been deemed, at least for other reactors, as not a major action. To the extent the three contentions should prove meritorious, corrective actions will be ordered that will either alleviate the problem or, alternatively, deny or condition the license amendment sought.

Without regard to alleged potential jurisdictional deficiencies (a question we do not consider here), this contention is accordingly rejected.

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[31] 64 Fed. Reg. 48,675 (Sept. 7, 1999).

[32] NUREG/CR-6451, August 1997. By its own characterization, the report deals with the likelihood and consequences of spent fuel pool accidents at ''permanently shutdown'' nuclear plants.

[33] NNEC Answer at 31.

[34] *Id.*

D. Procedures

In view of our findings that CCAM and CAM each have standing and that they have jointly proffered three admissible contentions, their request for a hearing is hereby being granted. They are admitted as parties to this proceeding.

As set forth in the Notice of Opportunity for Hearing in this matter, this spent fuel capacity expansion proceeding is subject to the hybrid hearing procedures set forth in 10 C.F.R. Part 2, Subpart K (§§ 2.1101-2.1117). *See* 64 Fed. Reg. 48,672, 48,675. Those procedures may be used at the request of any party and, if requested, are mandatory for use in the proceeding. Under those procedures, there is a 90-day discovery period, which may be extended upon a showing of good cause based on exceptional circumstances. 10 C.F.R. § 2.1111. (We would propose to authorize a similar discovery period, whether or not any party elects to invoke Subpart K procedures.) Thereafter, under Subpart K, the parties submit a detailed written summary of all facts, data, and arguments that each intends to rely upon to support or refute the existence of a genuine and substantial dispute of fact regarding any admitted contentions. 10 C.F.R. § 2.1113(a). Then, an oral argument is conducted by the Atomic Safety and Licensing Board in which the parties address the question whether any of the issues require resolution in an adjudicatory proceeding because there are specific facts in genuine and substantial dispute that can be resolved with sufficient accuracy only by the introduction of evidence. 10 C.F.R. § 2.1115(b). Thereafter, the Licensing Board would issue a decision that designates the disputed issues of fact, together with any remaining issues of law, for an evidentiary hearing. 10 C.F.R. § 2.1115(a)(1).

Pursuant to 10 C.F.R. § 2.1109(a), any party that wishes to utilize the procedures of 10 C.F.R. Part 2, Subpart K must file a written request for an oral argument within 10 days of the date of this Memorandum and Order.

E. Order

Based on the foregoing, it is, this 9th day of February 2000, *ordered*:

1. The request for a hearing of CCAM/CAM is hereby *granted.* CCAM and CAM are admitted as parties to this proceeding.

2. Contentions 4, 5, and 6 are hereby *admitted.* Other contentions are hereby *rejected* as inadmissible for litigation.

3. Any party that wishes to utilize the procedures of 10 C.F.R. Part 2, Subpart K must file its request by February 22, 2000.

4. Whether or not any party invokes Subpart K procedures, discovery shall commence on February 28, 2000, and shall terminate on May 30, 2000.

5. A telephone prehearing conference will be scheduled, at a time and place to be hereafter established, to determine precise dates for further matters leading to either an oral argument or evidentiary hearing, as appropriate.

6. A Notice of Hearing is being issued simultaneously with this Prehearing Conference Order.

7. In accordance with the provisions of 10 C.F.R. § 2.714a(a), this Memorandum and Order may be appealed to the Commission by the Licensee or Staff within 10 days after service of this Order. Such an appeal shall be asserted by filing a notice of appeal and accompanying supporting brief, conforming to the requirements set forth in 10 C.F.R. § 2.714a(c). Any other party may file a brief in support of or opposition to the appeal within ten (10) days after service of the appeal.

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
February 9, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of **Docket No. 70-754-MLA**
(ASLBP No. 00-774-02-MLA)

GENERAL ELECTRIC COMPANY
(Vallecitos Nuclear Center) **February 17, 2000**

In this proceeding concerning the General Electric Company's pending application for the renewal of the 10 C.F.R. Part 70 materials license issued for its Vallecitos Nuclear Center in 1994, the Presiding Officer dismisses as inexcusably tardy the request for a hearing submitted by Petitioners Tri-Valley CAREs, Western Legal Foundation, Save Our Sunol, and Citizens Along the Roads and Tracks.

RULES OF PRACTICE: UNTIMELY REQUEST FOR HEARING

There is nothing in either the Commission's Rules of Practice or its jurisprudence that empowers members of its Staff to breathe new life into an opportunity for hearing that is already confronted with the passage of the filing deadline that established that opportunity. Rather, 10 C.F.R. § 2.1205(*l*)(1) requires the rejection of a late-filed request for a hearing unless the petitioner can establish that the filing delay was excusable and that granting the request would not result in undue prejudice or undue injury to any other participant in the proceeding.

MEMORANDUM AND ORDER
(Dismissing Hearing Request as Untimely)

On August 19, 1999, the Commission published in the *Federal Register* a notice of opportunity for hearing in connection with the pending application of the General Electric Company (Licensee) for a renewal of the 10 C.F.R. Part 70 materials license that had been issued for its Vallecitos Nuclear Center in 1994. *See* 64 Fed. Reg. 45,289 (1999). The notice specified that any request for a hearing on the application had to be filed within 30 days of the date of its publication, i.e., by no later than Monday, September 20, 1999 (September 18 falling on a Saturday).

No such request was filed by the prescribed deadline. On November 15, 1999, almost 2 months after that deadline had been reached, a hearing request nonetheless was jointly submitted by four organizations: Tri-Valley CAREs, Western States Legal Foundation, Save Our Sunol, and Citizens Along the Roads and Tracks (Petitioners).

Acknowledging the tardiness of their hearing request, Petitioners sought to justify the late filing by pointing to what assertedly had transpired at an October 20, 1999 public meeting conducted in Livermore, California, with regard to what they described as the imminent shipment of spent nuclear fuel rods from Erie, Pennsylvania, to the Vallecitos facility. According to Petitioners, they each had representatives at that meeting and had been verbally assured during its course by unspecified NRC representatives that, despite the fact that ''the submittal deadline for requests was long past,'' a hearing request ''would [be] entertain[ed].'' Petitioners also maintained that, prior to the October 20 meeting, they had been unaware both that Vallecitos had received a Part 70 license in 1994 and that a license renewal process was underway.

A. In an unpublished January 6, 2000 order, I informed Petitioners that the explanation tendered for the untimely filing of their hearing request could not carry the day. Insofar as the asserted Staff representation at the October 20 meeting was concerned, I noted that, on that date, the prescribed deadline for the filing of hearing requests had long since been reached. As I then observed, ''there is nothing in either the Commission's Rules of Practice or its jurisprudence that empowers members of its staff to breathe new life into an opportunity for hearing that is already confronted with the passage of the filing deadline establishing that opportunity.'' (Order at 3). Rather, section 2.1205(*l*)(1) of those Rules in terms requires the rejection of a late hearing request unless the requestor establishes to the satisfaction of the Commission or the presiding officer both that the filing delay was excusable and that the grant of the request would not result in undue prejudice or undue injury to any other participant in the proceeding (*id.* at 3-4).

In the totality of circumstances, I nevertheless decided to accord the Petitioners a second opportunity to meet the section 2.1205(*l*)(1) late-filing acceptance standard in a supplemental submission to be filed no later than January 21, 2000. They were cautioned, however, to bear in mind the settled principle that notices published in the *Federal Register* are deemed to constitute notice to all, with the consequence that ignorance of the content of such a notice is not regarded as an excuse for failing to take some action called for by the notice. On that score, they were referred (*id.* at 4) to *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 173 (1998) (citing 44 U.S.C. § 1508).

B. In an unpublished January 18 order, the January 21 deadline for Petitioners' supplemental filing was extended *sua sponte* to February 4, 2000, to enable them to address as well certain other contentions advanced by the Licensee in a belated answer to the hearing request. (In an unpublished January 27 order, the Licensee's motion for leave to file its answer out-of-time was granted.) On February 8, nothing having been received from the Petitioners in the interim, at my request Licensing Board Panel counsel contacted by telephone one of its representatives. When informed by her that Petitioners had taken no action in response to the January 6 and 18 orders, Panel counsel stressed the importance of a prompt submission, with an accompanying motion for leave to file out-of-time, should Petitioners desire to have their hearing request receive further consideration.

On February 15, again at my request, Panel counsel made a second call to the office of that representative and was told by an associate of the representative that the Petitioners have abandoned their endeavor to obtain a hearing on the Vallecitos license renewal application. While it was not clear to Panel counsel whether Petitioners planned to provide formal word to that effect by submission of a request to withdraw, there appears to be no good reason to hold the matter on the docket any longer to accommodate the possibility of such written notification. In all events, it is clear from Petitioners' default that the hearing request must be dismissed. Indeed, the concluding sentence in the January 6 order explicitly informed them that, should they fail to avail themselves of the opportunity given them in that order to address the lateness question, that would be the likely outcome.

It need be added only that, while Petitioners now will not receive an adjudicatory hearing on the concerns expressed in their hearing request, the dismissal of that request does not foreclose the presentation of those concerns to the NRC Staff for its consideration in acting on the license renewal application. In this connection, it may well be that such is what the staff representative had in mind in making the statement at the October 20 meeting alluded to in the hearing request.

For the foregoing reasons, and without reaching the other assertions of infirmity contained in the Licensee's answer to it, the hearing request is hereby *dismissed* as inexcusably tardy. Given this disposition, the proceeding is *terminated.*

It is so ORDERED.

BY THE PRESIDING OFFICER

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 17, 2000

This Order is issued pursuant to the authority of the Presiding Officer designated for this proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Frederick J. Shon, Special Assistant

In the Matter of **Docket No. 40-3453-MLA-3**
(ASLBP No. 99-761-04-MLA)

ATLAS CORPORATION
(Moab, Utah) **February 17, 2000**

RULES OF PRACTICE: STANDING

In assessing 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 a matter of right in a licensing proceeding, the Commission has long applied contemporaneous judicial concepts of standing. *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).

RULES OF PRACTICE: STANDING

With the promulgation of the Commission's Subpart L regulations, the practice of applying judicial concepts of standing was codified and 10 C.F.R. § 2.1205(h) now provides that in ruling upon a hearing request the Presiding Officer must find that a petitioner meets the judicial standards for standing.

RULES OF PRACTICE: INFORMAL HEARINGS (AREAS OF CONCERN)

In an informal Subpart L proceeding, the areas of concern constitute the general subject matter of the issues a petitioner wishes to litigate.

RULES OF PRACTICE: INFORMAL HEARINGS (AREAS OF CONCERN)

An area of concern is ''germane'' if it is relevant to the question whether the license amendment at issue should be denied or conditioned.

MEMORANDUM AND ORDER

This proceeding involves a request by the then Licensee, Atlas Corporation, to amend materials license SUA-917 covering activities at the long-closed Moab Mill and its associated uranium mill tailings pile. The Atlas Corporation amendment application sought to modify the reclamation plan for the 130 acre pile consisting of approximately 10.5 million tons of tailings situated on the west bank of the Colorado River in Grand County, Utah, near the town of Moab. During the pendency of the NRC's licensing review, the Atlas Corporation, in September 1998, filed for bankruptcy and, on December 1, 1999, the federal bankruptcy court entered an order confirming its reorganization plan. Thereafter, on December 27, 1999, the Director of the Office of Nuclear Material Safety and Safeguards issued an order transferring materials license SUA-917 to the Moab Mill Reclamation Trust (with PricewaterhouseCoopers LLP as Trustee) in order to carry out the remediation of the Moab site.

On October 28, 1999, the Presiding Officer issued a Memorandum and Order in this proceeding concluding that the hearing request and intervention petition of the Petitioners, Grand Canyon Trust et al., was timely filed. The factual background and procedural history of the Atlas license amendment proceeding are set forth in that Memorandum and Order and need not be repeated here. It suffices to note the Presiding Officer found that, even though the hearing request and intervention petition were filed long after the date for such filings set forth in the agency's notice of opportunity for hearing, the NRC Staff recently had proposed and then added a number of license conditions to the Atlas license amendment concerning groundwater remediation that were not among the subject matters included in the original hearing notice. In these circumstances, the Presiding Officer concluded that the intervention petition could not be deemed untimely because the issues the Petitioners sought to raise related to groundwater contamination from the

Atlas tailings pile entering the Colorado River causing jeopardy to, or the take of, endangered native fish species in violation of the Endangered Species Act.

In opposing the Petitioners' hearing request and intervention petition, Atlas Corporation and the Staff only addressed the timeliness issue and did not confront the other regulatory requirements for intervention concerning whether the Petitioners had standing to intervene or had raised concerns germane to the proceeding. Because the Commission's regulations, 10 C.F.R. § 2.1205(h), require the Presiding Officer to make an affirmative determination on these other regulatory requirements for intervention, the Presiding Officer directed the Staff (and because of its bankruptcy, invited the Licensee) to file a response to the Petitioners' assertions with respect to standing and the germaneness of their concerns. The Presiding Officer also provided the Petitioners with an opportunity to supplement their intervention petition with any additional material regarding their standing. After the grant of various requests for extensions of time, including one by the Trustee of the newly created Moab Mill Reclamation Trust, the questions regarding standing and the germaneness of the Petitioners' concerns are now ripe for decision.

I. STANDING OF THE PETITIONERS

The right of a petitioner to participate in a Commission license amendment proceeding stems from section 189a of the Atomic Energy Act, as amended. In pertinent part, that statutory provision states that ''[i]n any proceeding under this Act, for the . . . 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.'' 42 U.S.C. § 2239(a)(1)(A). In turn, the Commission's regulations for Subpart L informal proceedings, 10 C.F.R. § 2.1205(e)(1) and (2), provide that a request for a hearing must describe in detail the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. In assessing 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 a matter of right in a licensing proceeding, the Commission has long applied contemporaneous judicial concepts of standing. *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). With the promulgation of the Commission's Subpart L regulations, that practice was codified and 10 C.F.R. § 2.1205(h) now provides that in ruling upon a hearing request the Presiding Officer must find that a petitioner meets the judicial standards for standing.

As the Commission has frequently stated, ''[t]o 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.'' *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998). The asserted injury may be either an actual one or harm that is threatened in the future. *Georgia Tech,* CLI-95-12, 42 NRC at 115; *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Additionally, the injury must be to an interest that arguably falls within the ''zone of interests'' protected or regulated by the statute at issue. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998); *Quivira Mining,* CLI-98-11, 48 NRC at 6, 8. A petitioner is required to make this same showing whether or not the petitioner is an individual or an organization seeking to intervene in its own right. *Georgia Tech,* CLI-95-12, 42 NRC at 115. When an organization seeks to derive standing from one 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. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30 (1998). The organization also must show that the interests it seeks to protect are germane to its purpose and that neither the claim asserted nor the requested relief requires the participation of an individual member in the proceeding. *Id.* at 30-31.

The Petitioners' hearing request and intervention petition names eight organizations, governmental units, businesses, associations, and individuals as petitioners: the Grand Canyon Trust; Grand County, Utah; Dave Bodner; Ken Sleight; 3-D River Visions; Joseph Knighton; the Sierra Club; and the Colorado Plateau River Guides. As set forth in the Petitioners' intervention petition and the supplemental declaration of Bill Hedden, who is a member of the Grand Canyon Trust and its Utah Conservation Director, the Trust, which is based in Flagstaff, Arizona, is a nonprofit organization of approximately 4,000 members. The Grand Canyon Trust is dedicated to the protection and restoration of the canyon country of the Colorado Plateau, including its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. Grand Canyon Trust, et al., Request for Hearing and Petition for Leave to Intervene (Jan. 27, 1999) at 12-13 [hereinafter Petition]; Grand Canyon Trust's Supplemental Evidence of Standing (Nov. 16, 1999), Exh. A, Declaration of Bill Hedden at 1 [hereinafter Supplemental Declaration].

According to the petition, the members and staff of the Grand Canyon Trust work to protect and preserve the ecosystems of the Colorado Plateau, including the area of the Atlas tailings pile. The petition asserts that members of the Trust raft, canoe, and fish the stretch of the Colorado River adjacent to the tailings pile and that some members are biologists, who study the fish and wildlife of the river and its ecosystems and who have professional, as well as personal, interests in the health of important habitats and ecosystems in and around Moab. Petition at 13. The petition further states that the enjoyment of the Moab Valley by the members of the

Trust is partially dependent on the continued existence of native fish species such as the endangered Colorado squawfish (i.e., pikeminnow) and razorback sucker. Finally, the petition claims that the spiritual, recreational, scientific, and health benefits that Trust members derive from their use and enjoyment of the river, its ecosystems, and native fisheries have been and will continue to be adversely affected by the Atlas site and the massive levels of contamination from the tailings pile into the river causing jeopardy to native endangered fish species. *Id.*

In his declaration, Mr. Hedden states that he has lived within 2 miles of the Colorado River for 23 years and that he rafts and canoes the river about 6 times a year, including the stretch of the river adjacent to the Atlas tailings pile. He asserts that, because of the toxic plume from the tailings pile, he now must avoid the western side of the river in the area of the pile and that he can no longer fish or use river water to drink or cook with downstream of the pile. Supplemental Declaration, Exh. A at 2-3. As a trained biologist, Mr. Hedden declares that he has an intense intellectual interest in the functioning of the river ecosystem and that he has devoted his life and career to conservation work in the Moab area, including efforts to preserve critical habitat for the endangered Colorado pikeminnow and the razorback sucker. According to his declaration, Mr. Hedden, who once observed a Colorado pikeminnow, constantly looks for them while on the river and would consider it one of his most exciting wildlife viewing experiences to see a pikeminnow or a razorback sucker in the Moab area. *Id.* at 3-4.

Mr. Hedden's declaration further claims that the Atlas tailings pile is one of the largest remaining sources of contamination on the upper Colorado River and that the near extinction of these endangered species is a clear indication that the ecosystem has been driven out of balance. He states that seeing an intact ecosystem upon which these endangered species depend is the most important part of his scientific, intellectual, emotional, and recreational interest in the Moab area. In this regard, he asserts that the government has failed to evaluate adequately the feasibility of groundwater cleanup at the Atlas site and whether these endangered species can survive years more of contamination from the pile. Finally, he recites that he has invested a great deal of time and resources in helping to establish the Matheson Wetland Preserve directly across the river from the Atlas site and that the agency's actions with regard to the tailings pile and the continuing water contamination from the pile directly harm the scientific, aesthetic, and conservation purposes for which he has worked in creating the wetlands preserve. *Id.* at 3-5.

The Petitioners' intervention petition and supplemental declaration also detail the various ways in which each of the other named Petitioners, or a member of the named petitioning organization, use and enjoy, or are economically dependent on, the river and its environs. Similarly, the Petitioners' pleadings particularize how the contamination of the river by the tailings pile negatively impacts each of the Petitioner's uses, livelihood, and enjoyment of the river. Finally, with respect to each Petitioner or member of the petitioning organization, the intervention

petition and supplemental declaration indicate that appropriate actions to halt the groundwater and river water contamination from the Atlas tailings pile are essential to addressing the various injuries and concerns. Petition at 13-18; Supplemental Declaration Exh. A (Declarations of Kimberly Schappert, William E. Love, Dave Bodner, Joseph Knighton, M. Darren Vaughan, John S. Weisheit, Stephen Young, and Ken Sleight).

In its response to the Petitioners' supplemental declarations of standing, the Staff concedes that the Petitioners have established their standing. *See* Nuclear Regulatory Commission Staff's Response to Grand Canyon Trust's Supplemental Evidence of Standing (Nov. 30, 1999) at 1, 5 [hereinafter Staff Response]. Although not conceding the issue, the Trustee of the Moab Mill Reclamation Trust — the transferee of material license SUA-917 — states that the Trust does not object to the Petitioners' standing. *See* PricewaterhouseCoopers LLP's, as Trustee for the Moab Mill Reclamation Trust, Response to December 10, 1999 Order Regarding Standing (Jan. 17, 2000) at 1-2 [hereinafter Trustee Response].

The Staff's concession that the Petitioners have met the requirements for standing is well founded. From the intervention petition and supplemental declaration, it is apparent that the lead Petitioner, the Grand Canyon Trust, intends to establish its standing as the representative of the members of the organization. It thus seeks to rely upon the interests and establish the standing of its member Bill Hedden, who also is the Utah Conservation Director of the Grand Canyon Trust. As the above recital shows, the Petitioners' supplemental declaration amply establishes Mr. Hedden's professional and personal interest in, and use and enjoyment of, the Colorado River and its environs in the vicinity of the Atlas tailings pile and the harm to his use and enjoyment of the river due to the contamination from the tailings pile. It is clear, therefore, that Mr. Hedden has asserted harm that fully satisfies the injury in fact element of the test for standing.

Similarly, Mr. Hedden adequately demonstrates that the injury to him is fairly traceable to the proposed licensing actions (and the newly added, Staff-initiated license conditions relating to groundwater contamination) regarding the modification of the reclamation plan for the tailings pile. 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 chain of causation is plausible.'' *Sequoyah Fuels,* CLI-94-12, 40 NRC at 75. Here, Mr. Hedden asserts various harms to his use and enjoyment of the river caused by contamination of the river from the tailings pile. It is undisputed that the river contamination is a consequence of groundwater contamination from the Atlas tailings pile which, in turn, is one of the subjects of the challenged licensing actions. Accordingly, Mr. Hedden also meets the causation element of the test for standing.

With respect to the other factors that govern Mr. Hedden's standing, a decision requiring, for example, the Staff to shorten the time periods contained in the Staff-initiated license conditions relating to groundwater contamination in order to begin

correcting conditions that he claims violate the Endangered Species Act, would likely redress at least some of his asserted injuries. Therefore, the redressability element of the test for standing also has been satisfied. Similarly, the interest asserted by Mr. Hedden in the supplemental declaration concerning the impacts of river contamination from the Atlas tailings pile on the endangered Colorado pikeminnow and razorback sucker are the same interests underlying the Endangered Species Act. Thus, there can be no doubt that the interests Mr. Hedden asserts fall well within the zone of interests protected and regulated by the Endangered Species Act — one of the statutes governing the licensing activities of the NRC. Accordingly, Mr. Hedden satisfies all the standards for establishing standing and the Grand Canyon Trust may rely upon his standing in its capacity as his representative.

As the representative of its members, however, the Grand Canyon Trust also must demonstrate that the interests it seeks to protect are germane to its organizational interests and that neither the claims it asserts nor the relief it requests require the participation in the proceeding of an individual member. These requirements are easily met by the lead Petitioner. As stated in the intervention petition, the mission of the Grand Canyon Trust is to protect and restore the canyon country of the Colorado Plateau, including the rivers and diversity of its wildlife. This mission, therefore, closely dovetails with the interests this Petitioner seeks to protect in this proceeding. Likewise, the Grand Canyon Trust's participation in the proceeding as the representative of its members does not require any individual member to participate in order for the Trust to pursue its claims under the Endangered Species Act or to obtain relief. Accordingly, the lead Petitioner has established its standing and has met the requirements of 10 C.F.R. § 2.1205(h).

In light of the clear standing of the Grand Canyon Trust, there is no need to freight this ruling with an analysis of the standing of each of the other named Petitioners. It suffices to note that each individual named as a Petitioner and each named organization, either in its own right or as the representative of its members, also meets the requirements for standing. *See* pp. 57-58, *supra.*

II. THE PETITIONERS' AREAS OF CONCERN

Pursuant to the Commission's Subpart L informal proceeding regulations, 10 C.F.R. § 2.1205(e)(3), a petitioner must identify and describe the petitioner's ''areas of concern about the licensing activity that is the subject matter of the proceeding.'' The Presiding Officer must then determine that the ''specified areas of concern are germane to the subject matter of the proceeding.'' 10 C.F.R. § 2.1205(h). In an informal Subpart L proceeding, the areas of concern constitute the general subject matter of the issues a petitioner wishes to litigate. A petitioner's statement of concerns, therefore, ''must provide enough specificity to afford the Presiding Officer the ability to link the concern with the subject matter of the proceeding

in order to make a decision to admit the statement for litigation.'' *Sequoyah Fuels Corp.,* LBP-94-39, 40 NRC 314, 316 (1994). To do this, a statement of concerns must contain information specific enough to establish that the concerns are ''generally'' within the range of matters subject to challenge in the proceeding. *See* 54 Fed. Reg. 8269, 8272 (1989) (Statement of considerations, informal hearing procedures for materials licensing adjudications). And, an area of concern is ''germane'' if it is relevant to the question whether the license amendment at issue should be denied or conditioned.

In their intervention petition, the Petitioners assert five areas of concern challenging whether the NRC's licensing action with respect to the Atlas site complies with the requirements of the Endangered Species Act. As set forth in their intervention petition, the Petitioners claim that: (1) the NRC has violated its duty to conserve endangered species under section 7(a)(1) of the Endangered Species Act, 16 U.S.C. § 1536(a)(1), by failing to take action to conserve the fish before proceeding with the capping plan (Petition at 19-21); (2) the NRC's approval of the requested license amendment violates the agency's duty under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), to avoid jeopardizing and modifying the critical habitat of the endangered species and in failing to use the best scientific and commercial data available (*id.* at 21-22); (3) the NRC's approval of groundwater remediation actions without first analyzing whether these actions will succeed in protecting the endangered species violates the Endangered Species Act and the National Environmental Policy Act (*id.* at 23-24); (4) the NRC's approval of the requested license amendment violates section 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1532(a)(1)(B), by authorizing the continued illegal take of the endangered fish species (*id.* at 24-25); and (5) the NRC's approval of the requested license amendment before completing consultation on the entire action, including groundwater remediation, violates section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (*id.* at 25-27).

In its response to the Petitioners' supplemental declaration, the NRC Staff concedes that the Petitioners ''have identified areas of concern germane to this proceeding.'' Staff Response at 1, 5. Similarly, the Trustee of the Moab Mill Reclamation Trust ''finds no reason at this time to dispute that Petitioner's specified areas of concern are germane to this proceeding.'' Trustee Response at 2. As the Staff and the Trustee of the Moab Reclamation Trust concede, the Petitioners' concerns 1, 2, 3, 4, and 5 raise matters that are linked to the subject matter of the proceeding. The Petitioners have also set forth their concerns with sufficient specificity to establish that each concern is generally within the range of matters subject to challenge in this proceeding. Finally, the Petitioners' concerns are clearly relevant, and hence germane, to the question whether the license amendment at issue, specifically the Staff-initiated license conditions relating to groundwater matters, should be modified or otherwise conditioned. Accordingly, the Petitioners' concerns 1, 2, 3, 4, and 5 are admitted.

III. JURISDICTION OF PRESIDING OFFICER

Along with their supplemental declaration concerning the standing of the various Petitioners, Grand Canyon Trust, et al., also filed a motion requesting a preliminary ruling on the jurisdiction of the Presiding Officer to consider and rule upon the Petitioners' claims under the Endangered Species Act leveled against the NRC's licensing action. *See* Grand Canyon Trust's Motion for Preliminary Ruling on Jurisdiction and Supplemental Statement of Area of Concern (Nov. 16, 1999) [hereinafter Petitioners' Motion]. *See also* Grand Canyon Trust's Reply in Support of Motion for Preliminary Ruling on Jurisdiction (Jan. 13, 2000). The Petitioners' motion, however, seemingly is at odds with their earlier filed request for hearing and petition to intervene setting forth their five areas of concern involving alleged NRC violations of the Endangered Species Act.

Nevertheless, the Petitioners argue that NRC caselaw indicates that the Presiding Officer does not have jurisdiction over whether a violation of the ESA has occurred, which they assert is the ultimate question raised by their stated areas of concern. Relying on the Director's Decision in *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2; Hope Creek Generating Station, Units 1 and 2), DD-80-18, 11 NRC 620, 623 n.7 (1980), the Petitioners assert that ''in one of the few cases in which the NRC has actually considered endangered species issues, the NRC has held that it does not have the authority to determine whether the agency's licensing activities resulted in a 'take' of an endangered species in violation of the ESA.'' Petitioners' Motion at 3. Thus, the Petitioners assert the proper forum for their ESA claims is federal district court because the Presiding Officer lacks the authority to grant the injunctive relief against violators that is required by the caselaw in citizen's suits brought under the Endangered Species Act to enforce the provision of the statute. *Id.* at 2-5.

Contrary to the Petitioners' arguments, the Presiding Officer has jurisdiction in this proceeding to consider, and rule upon, the Petitioners' areas of concern alleging that the agency's licensing actions violate various provisions of the Endangered Species Act. Putting aside the fact that a Director's Decision is not binding precedent for a Presiding Officer or an Atomic Safety and Licensing Board in a licensing proceeding, the Petitioners misapprehend the significance of the Director's statement in *Salem,* DD-80-18, 11 NRC at 623 n.7, with regard to NRC licensing proceedings.

In a footnote in *Salem,* the Director stated that the NRC's obligation under the Endangered Species Act is to ensure, in consultation with the Secretary of the Interior, that action authorized by the NRC is not likely to jeopardize the continued existence of an endangered species. Citing the enforcement provisions of the ESA (15 U.S.C. § 1540(a)-(e)) in which civil and criminal penalties may be imposed for knowing violations of the Act, the Director also indicated that the issue whether the incidental impingement of two shortnose sturgeons on the intake screens at

the Salem facility constituted a violation of the ESA was a question outside the purview of the agency. Both of the Director's statements are correct. By relying in their motion upon the Director's statement concerning the enforcement provisions of the ESA, it appears the Petitioners now seek to alter the terms of the relief they sought in entering the licensing proceeding. Licensing hearings, as in the case of the agency licensing activities referred to by the Director in *Salem,* are intended to resolve properly raised issues concerning whether NRC licensing actions are in compliance with the various statutes the agency must follow. *See e.g., Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 357-60 (1978). Thus, issues of NRC compliance with the provisions of the Endangered Species Act, including issues such as whether agency licensing actions are likely to cause jeopardy to, or the take of, endangered species are matters within the Presiding Officer's jurisdiction in this licencing proceeding.

On the other hand, there is no question that the imposition of the statutory enforcement sanctions for intentional violations of the ESA are beyond the authority of the agency and the Presiding Officer. The Petitioners, however, affirmatively sought to intervene in this licensing proceeding and to advance five areas of concern with respect to the agency's licensing action. By taking these voluntary actions, the Petitioners, at the very least, implicitly acknowledged that the Presiding Officer has the authority to consider and rule upon their claims in the context of this licensing proceeding — claims that on their face only appear to challenge NRC compliance with various provisions of the ESA relative to the proposed licensing action. *See* Petition at 19-27. Further, having affirmatively sought to intervene and to advance five areas of concern, the Petitioners also have accepted the inherent limitations on the Presiding Officer's authority in licensing proceedings. This being so, the Petitioners cannot now be heard to complain that, because of the lack of injunctive power, the Presiding Officer lacks authority to consider the same areas of concern that they asked to be admitted. Rather, if the Petitioners, for whatever reasons, have now determined that they wish a kind of relief that is different from that which the Presiding Officer can provide, they are free to withdraw their intervention petition and seek relief elsewhere if they deem such action appropriate.

IV. CONCLUSION

In its earlier October 28, 1999 Memorandum and Order, the Presiding Officer concluded that the Petitioners' hearing request and intervention petition must be deemed timely filed. For the reasons set forth in this Memorandum and Order, the Presiding Officer finds that the Petitioners have standing and have set forth areas of concern that are germane to the subject matter of the proceeding. Accordingly, the

Petitioners have met the requirements of 10 C.F.R. § 2.1205(h) and their request for hearing and petition to intervene are granted.

V. OTHER MATTERS

This Memorandum and Order and the Presiding Officer's earlier October 28, 1999 Memorandum and Order are now subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order. The appeal may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

Further, pursuant to 10 C.F.R. § 2.1231(a), the Staff shall prepare and file the hearing file by March 24, 2000. The hearing file shall contain a chronologically numbered index of each item comprising the hearing file. Each item in the hearing file shall be separately tabbed in accordance with the index and each item shall be separated from the other hearing file items by a substantial colored sheet of paper that contains the tabs for the hearing file item that follows.

Finally, the Presiding Officer intends to hold a telephone conference with the parties at 11:30 a.m. EST on Wednesday, March 8, 2000. Therefore, counsel for each party shall file with the Presiding Officer by Friday, March 3, 2000, a filing setting forth the name and telephone number of counsel who will participate in the telephone conference.

It is so ORDERED.

BY THE PRESIDING OFFICER

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 17, 2000

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) **February 29, 2000**

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 dismisses contention Security-C, Local Law Enforcement, for want of prosecution by sponsoring intervenor State of Utah.

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

As part of a presiding officer's duty to maintain order and to take appropriate action to avoid delay and regulate the course of a hearing and the conduct of the parties, a licensing board is expected to take action when parties, for whatever reason, fail to comply with scheduling and other orders. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS; SANCTIONS

RULES OF PRACTICE: DEFAULT; DISMISSAL OF CONTENTION (DEFAULT)

The parameters of a presiding officer's authority to act in situations in which a party fails to comply with scheduling or other orders are outlined in 10 C.F.R. § 2.707, which provides in pertinent part that ''[o]n failure of a party to file an answer or pleading within the time prescribed . . . [or] to appear at a hearing . . . the presiding officer . . . may make such orders in regard to the failure as are just . . . .'' (Footnote omitted.) Previously, this provision has been invoked as the basis for dismissing a contention following a sponsoring party's failure to continue to prosecute the issue, including a failure to appear at a scheduled hearing. *See Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, *aff'd in part,* ALAB-934, 32 NRC 1 (1990); *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982).

LICENSING BOARDS: RESPONSIBILITIES (DEVELOPMENT OF RECORD ON DEFAULTED ISSUES); SCOPE OF REVIEW (*SUA SPONTE*)

RULES OF PRACTICE: DEFAULT; *SUA SPONTE* REVIEW

Notwithstanding cases suggesting that a presiding officer must undertake a review of an issue subject to dismissal because of a party default to ensure there are no serious matters that require consideration, *see Pilgrim,* LBP-76-7, 3 NRC at 157; *see also Seabrook,* LBP-90-12, 31 NRC at 431, such an evaluation must be tempered by the Commission's admonition that a presiding officer should, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of admitted contentions only in ''extraordinary circumstances'' and then in accordance with the appropriate procedural dictates, which includes Commission referral of any decision to look into such matters. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22-23 (1998).

MEMORANDUM AND ORDER
(Dismissing Contention Security-C)

By filing dated February 14, 2000, Intervenor State of Utah (State) advised the Licensing Board that it does not intend to proceed with further litigation on

contention Security-C, Local Law Enforcement. In a February 22, 2000 telephone conference, Applicant Private Fuel Storage, L.L.C. (PFS), and the NRC Staff — the other two parties involved in litigating issues regarding the adequacy of the physical security plan (PSP) for the PFS proposed 10 C.F.R. Part 72 Skull Valley, Utah, independent spent fuel storage installation (ISFSI) — requested that, in accordance with 10 C.F.R. § 2.707, contention Security-C be dismissed for want of prosecution.

We agree that this matter is no longer at issue. Accordingly, for the reasons set forth herein, we dismiss contention Security-C.

I. BACKGROUND

Contention Security-C was initially admitted as part of the Board's June 29, 1998 ruling on the State's nine PSP contentions, albeit limited to the issue of compliance with the requirements of 10 C.F.R. Part 73 regarding local law enforcement agency (LLEA) timely response to incidents at the proposed Skull Valley ISFSI. In so ruling, we also rejected a portion of the contention that sought to question whether PFS had complied with the requirement of 10 C.F.R. § 73.51(d)(6) to have a ''documented liaison'' with an LLEA, in this instance the Tooele County, Utah sheriff's office. We did so on the basis of a cooperative law enforcement agreement (CLEA), which had been shown to exist between the Skull Valley Band of Goshute Indians (Skull Valley Band), on whose reservation the proposed PFS facility is to reside, the United States Department of the Interior's Bureau of Indian Affairs, and Tooele County, that provided the LLEA with law enforcement jurisdiction on the Skull Valley Band reservation. *See* LBP-98-13, 47 NRC 360, 369-70 (1998). Subsequently, in ruling on a State motion for reconsideration, we admitted this portion of the contention (as well as portions of two other previously dismissed issue statements) to address the question whether the existing CLEA had been properly adopted by the Tooele County Commission. *See* LBP-98-17, 48 NRC 69, 75-76 (1998). The State then sought to have the admitted contention amended to incorporate a further challenge to the validity of the CLEA based on statements of the Tooele County Attorney declaring his belief that the CLEA did not require the county to provide law enforcement services to PFS, a request we rejected as failing to meet the late-filing standards of 10 C.F.R. § 2.714(a)(1). *See* LBP-99-7, 49 NRC 124, 128-29 (1999). Ultimately, the CLEA adequacy portion of the contention was resolved in our August 1999 decision granting a PFS motion for summary disposition, which was based on the unrebutted PFS showing that the Tooele County Commission had acted to ratify the CLEA in accordance with Utah state law. *See* LBP-99-31, 50 NRC 147, 152-53 (1999). This ruling had the effect of returning contention Security-C to its originally admitted scope.

In a November 15, 1999 order, we scheduled an evidentiary hearing on contention Security-C for March 14-15, 2000, with prefiled testimony to be submitted on February 29, 2000. *See* Licensing Board Order (Schedule for Evidentiary Hearing Regarding Contention Security-C) (Nov. 15, 1999) at 2 (unpublished). In a February 14, 2000 pleading, the State indicated it has decided not to litigate contention Security-C further. Noting the history of this contention as set forth above and reiterating its belief there is no current contractual agreement in place with the Tooele County sheriff's office that confers jurisdiction on the county for PFS-related law enforcement activities, the State explains it is declining to participate further in that ''its real safety concerns will not be heard in the March hearing because of the narrow confines of Utah Security-C.'' [State] Notification of Its Decision Not to Go Forward with Utah Security-C (Feb. 14, 2000) at 4 [hereinafter State Notification]. Thereafter, by a February 17, 2000 issuance, we advised the parties that a February 22, 2000 telephone prehearing conference previously scheduled to discuss administrative matters relating to the planned March 2000 hearing would be held to discuss instead the State's February 14, 2000 filing, including the applicability (if any) of 10 C.F.R. § 2.707, the provision of the agency's rules of practice governing participant defaults. *See* Licensing Board Memorandum and Order (Schedule for Prehearing Conference) (Feb. 17, 2000) at 1-2 (unpublished).

During the telephone conference, the State declared that it would stand on its February pleading. *See* Tr. at 1292. Both PFS and the Staff requested that, in accordance with section 2.707, contention Security-C should be dismissed as having been abandoned by the State. Further, in response to Board questions, both parties indicated there were no significant safety issues relating to the contention that provided cause for additional, independent Board consideration of the matter. *See id.* at 1293-97. In response to these representations, the State demurred, stating that the Board ''should do whatever you need to do.'' *Id.* at 1299.

II. ANALYSIS

As part of a presiding officer's duty to maintain order and to take appropriate action to avoid delay and regulate the course of a hearing and the conduct of the parties, a Board is expected to take action when parties, for whatever reason, fail to comply with scheduling and other orders. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982). The parameters of a Board's authority to act in such situations are outlined in 10 C.F.R. § 2.707, which provides in pertinent part that ''[o]n failure of a party to file an answer or pleading within the time prescribed . . . [or] to appear at a hearing . . . the presiding officer . . . may make such orders in regard to the failure as are just . . . .'' (Footnote omitted.) Previously, this provision has been invoked as the

basis for dismissing a contention following a sponsoring party's failure to continue to prosecute the issue, including a failure to appear at a scheduled hearing. *See Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, *aff'd in part,* ALAB-934, 32 NRC 1 (1990); *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982).

In this instance, the State has advised the Board of its unequivocal intent not to participate further in connection with contention Security-C.[1] *See* State Notification at 5; Tr. at 1298-99. This essentially places the State in default relative to the scheduled mid-March 2000 hearing on this contention.[2] As a consequence, dismissal of its contention is appropriate at this juncture.

In taking this action, however, we note that in several of the cases in which parallel actions have been taken, there is the suggestion that the Board must undertake a review of the issue to ensure there are no serious matters that require consideration. *See Pilgrim,* LBP-76-7, 3 NRC at 157; *see also Seabrook,* LBP-90-12, 31 NRC at 431. Both the PFS and the Staff make the point that this consideration must be tempered by the Commission's admonition, most recently reiterated in its 1998 policy statement on the conduct of adjudication, that a presiding officer should, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of admitted contentions only in ''extraordinary circumstances'' and then in accordance with the appropriate procedural dictates, which includes Commission referral of any decision to look into such matters. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22-23 (1998). After again reviewing contention Security-C, as well as its basis relative to the admitted question of timely LLEA response capability and the information regarding this matter provided by the Staff in its December 15, 1999 position statement, *see* NRC Staff's Statement of Its Position Concerning Group I-II Contentions (Dec. 15, 1999) attach. at 18, we are unable to find anything in question about this matter that reaches this level, making dismissal appropriate.[3]

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[1] In so stating, however, the State also made it clear that it was not withdrawing the contention. *See* Tr. at 1298.

[2] As we observed during the February 22 prehearing conference, *see* Tr. at 1292, technically the State is not in default until the date for filing its prefiled testimony has passed. In this instance, however, having been advised by the State of its clear intent not to meet this schedule, we see no purpose would be served by delaying our dismissal action until sometime after that event.

In addition, as we indicated during the prehearing conference, *see* Tr. at 1293, the State's action in informing the Board and the other parties of its intent not to proceed well prior to the due date for submitting prefiled testimony, rather than simply failing to file on the required date, is a course that we commend. Its action evidences an appropriate concern for avoiding unnecessary resource expenditures by the Board and the other litigants.

[3] Also regarding this matter, we note that although the State indicated its February 14, 2000 pleading might contain safeguards information and, appropriately, treated it as nonpublic information, we agree with the assessment of PFS and the Staff that it, in fact, does not contain such information. *See* Tr. at 1291. Accordingly, we direct that it be made part of the public record of this proceeding.

III. CONCLUSION

In connection with contention Security-C, Local Law Enforcement, Intervenor State of Utah has informed the Board that it no longer intends to pursue this issue as a matter for litigation in this proceeding. In accordance with its authority under 10 C.F.R. § 2.707, the Board finds that the State's decision to abandon its prosecution of this issue warrants dismissing contention Security-C from this proceeding. And with this ruling, all party issues regarding the adequacy of the proposed PFS facility PSP have been resolved.

For the foregoing reasons, it is, this twenty-ninth day of February 2000, ORDERED that

1. Contention Security-C is *dismissed* from this proceeding; and
2. The State's February 14, 2000 pleading entitled ''State of Utah's Notification of Its Decision Not to Go Forward with Utah Security-C'' shall be placed into the public record of this proceeding.

THE ATOMIC SAFETY AND
LICENSING BOARD[4]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 29, 2000

This Memorandum and Order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

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[4] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of **Docket Nos. 50-245**
50-336
50-423
(License Nos. DPR-21,
DPR-65,
and NPF-49)

NORTHEAST UTILITIES
(Millstone Nuclear Power Station,
Units 1, 2, and 3) **February 15, 2000**

The Petitioners requested the Staff to take the following actions: (1) immediately suspend or revoke Northeast Utilities' (NU's) license to operate the Connecticut Yankee (CY) (Haddam Neck) and Millstone reactors due to chronic mismanagement; (2) investigate the possibility that NU made material misrepresentations to the NRC concerning engineering calculations and other information or actions relied upon to ensure the adequacy of safety systems at CY and Millstone; (3) if an investigation determines that NU deliberately provided insufficient and/or false or misleading information to the NRC, revoke NU's operating licenses for CY and Millstone, or, if not, keep the reactors off-line pending a Department of Justice independent investigation; (4) if the reactors remain operating, Petitioners request that they remain on the NRC's Watch List; (5) keep CY and Millstone off-line until NU's chronic mismanagement has been analyzed, remedial management programs have been put into effect, and the NRC has evaluated and approved the effectiveness of NU's actions; (6) in the event NU decides to decommission any or all of the reactors at issue, Petitioners request the NRC not to permit any decommissioning activity to take place until the above issues are resolved; and (7) commence an investigation into how the Staff allowed the illegal situation at NU's Connecticut reactors to exist and continue over a decade.

The Final Director's Decision was issued on February 16, 2000, and the petition was closed. The NRC had earlier issued a Partial Director's Decision (DD-97-21, 46 NRC 108) dated September 12, 1997, which addressed all of the Petitioners' requests, with the exception of the request that the NU operating licenses for the Millstone units be revoked if an investigation determined that NU deliberately provided insufficient and/or false or misleading information to the NRC. The decision on that request was deferred at the time of the Partial Director's Decision because several NRC investigations were under way. The Millstone facilities remained shut down under NRC Order until NRC management had been provided evidence that the Licensee had fulfilled the intent of the two orders. The Director's Decision concluded that, through the actions that NRC required the Millstone facilities to complete prior to restart, and which the Licensee complied with, the intent of the Petitioners' request was met. Hence, the Staff did not find the revocation of the Millstone licenses appropriate and, as such, did not grant the final portion of the Petitioners' request. The NRC is currently continuing to closely monitor the Millstone facilities as agency and regional focus plants.

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

I. INTRODUCTION

By letter dated November 25, 1996, as amended on December 23, 1996, Ms. Deborah Katz and Mr. Paul Gunter (the Petitioners), on behalf of the Citizens Awareness Network, and the Nuclear Information and Resources Service, respectively, filed a petition pursuant to Title 10 of the *Code of Federal Regulations,* section 2.206. The Petitioners requested that the U.S. Nuclear Regulatory Commission (NRC) take the following actions: (1) immediate suspension or revocation of Northeast Utilities' (NU's or the Licensee's) licenses to operate its nuclear facilities in Connecticut; (2) investigation of possible NU material misrepresentations to the NRC; (3)(a) revoke the operating licenses for NU's nuclear facilities if an investigation determines that NU deliberately provided insufficient and/or misleading information to the NRC, and (b) if NRC chose not to revoke NU's licenses, continued shutdown of NU facilities until the Department of Justice completes its investigation and the results are reviewed by the NRC; (4) continued listing of the NU facilities on the NRC's Watch List should any facility resume operation; (5) continued shutdown of NU facilities until the NRC evaluates and approves NU's remedial actions; (6) prohibition of any predecommissioning or decommissioning activities at any NU nuclear facility in Connecticut until NU and the NRC take certain identified steps to ensure that such activities can be safely conducted; (7) initiation of an investigation into how the NRC allowed the asserted illegal

situation at NU's nuclear facilities in Connecticut to exist and continue for more than a decade; and (8) an immediate investigation of the need for enforcement action for alleged violation of 10 C.F.R. Part 50, Appendix B. The bases for the Petitioners' assertions were NU and NRC inspection findings and NU documents referred to in the petition and a VHS videotape, Exhibit A, which accompanied the petition. Specifically, the Petitioners identified areas that included inadequate surveillance testing, operation outside the design basis, inadequate radiological controls, failed corrective action processes, and degraded material conditions.

The NRC informed the Petitioners in a letter dated January 23, 1997, that their request for immediate suspension or revocation of the operating licenses for the NU nuclear facilities in Connecticut was denied and the issues in the petition, as amended, were being referred to the Office of Nuclear Reactor Regulation for appropriate action.

The NRC issued a Partial Director's Decision (DD-97-21, 46 NRC 108) dated September 12, 1997, which addressed all of the Petitioners' requests, with one exception. Specifically, with respect to Request 3a of the Petitioners' request, the NRC deferred a decision on the request that the NU operating licenses for the Millstone units be revoked if an investigation determined that NU deliberately provided insufficient and/or false or misleading information to the NRC. The decision on that request was deferred at the time the Partial Director's Decision was issued because several NRC investigations were under way. Request 3b of the petition, regarding the continued shutdown of NU facilities until the Department of Justice completed its investigation and the results are reviewed by the NRC, was denied in the Partial Director's Decision. Notwithstanding the NRC's 1997 denial of Request 3b, the NRC concludes that, through the actions the NRC required the Millstone facilities to complete prior to restart, the intent of Request 3b was met.

II. DISCUSSION

Since the time that NRC decided to defer a decision on Request 3a, the NRC has conducted numerous investigations involving Millstone, many of which were open at the time of the Partial Director's Decision. On the basis of these investigations, the NRC found instances in which inaccurate or incomplete information had been provided to the NRC. For example, the Licensee provided inaccurate and incomplete information to the NRC in submittals regarding the offloading of fuel to the Millstone Unit 1 spent fuel pool. A Severity Level III Notice of Violation was issued to the Licensee on May 25, 1999, based in part on the willful submittal of inaccurate or incomplete information. Another investigation, conducted in conjunction with the U.S. Attorney's Office (Department of Justice), determined that the Licensee deliberately provided inaccurate and incomplete information to the NRC regarding the qualifications of candidates for operator

licenses. On September 27, 1999, the Licensee pleaded guilty in Federal Court to nineteen violations of the Atomic Energy Act and six violations of the Clean Water Act. At the pleading, the Licensee agreed to pay $10 million in fines and other compensations, in part, for false statements made to the NRC concerning the qualifications of candidates for operator licenses. The fines were of historic proportion and sent a very clear and distinct message that the NRC does not tolerate false statements or inaccurate information from licensees.

The NRC has carefully evaluated the Petitioners' request and has determined that revocation of the Millstone licenses is not warranted for several reasons. First, the NRC issued two orders (August 14 and October 24, 1996) to the Licensee that required, in part, that the Licensee (1) contract with a third party to verify the adequacy of its efforts to establish adequate design bases and controls and (2) retain an independent third party to oversee implementation of its plan for reviewing and dispositioning safety issues raised by employees. Both of these orders were closed by letters dated March 11 and April 28, 1999, respectively, based on satisfactory completion of the terms of the orders. Second, the Licensee has made significant changes in the management and operation of the facility since the 1996 time frame. Third, the NRC provided significant oversight of the changes that occurred at Millstone and found them to be acceptable. That oversight included the creation of a Special Projects Office for the Millstone facility; augmentation of the resident inspector staff at the site; and conduct of several restart inspections, multidisciplined team inspections, and Independent Corrective Action Verification Program inspections. The results of these inspection efforts, as well as information from the then-ongoing and completed investigations, were considered by the Commission in its decision to authorize restart of Millstone Units 2 and 3. Millstone Unit 3 was restarted in July 1998 and Millstone Unit 2 in May 1999. Fourth, significant enforcement action has been taken against NU (1) to reinforce the importance of operating the plants in accordance with the regulations and the terms of its licenses and (2) to emphasize the importance of ensuring that information submitted to the NRC is complete and accurate. In addition to the two referenced orders and the $10 million penalty assessed in conjunction with the criminal proceeding, the NRC also issued a $2.1 million penalty in December 1997 for programmatic deficiencies, issues related to technical specifications, and recurring problems of inadequate procedures and failure to follow procedures, as well as other penalties and Notices of Violation.

III. CONCLUSION

Therefore, notwithstanding the information developed by the NRC in its investigations, the NRC has determined that the revocation of the Millstone licenses is not warranted, given the changes made at the facility, NRC's oversight of those

changes, and the enforcement actions taken to date. Accordingly, the NRC is not able to grant this final aspect of the Petitioners' request. However, the NRC is currently continuing to closely monitor the Millstone facilities and will continue to solicit stakeholders' input, as appropriate.

As provided in 10 C.F.R. § 2.206(c), a copy of this Final Director's Decision will be filed with the Secretary of the Commission for the Commission's review. This Final Director's Decision will constitute the final action of the Commission (for Petitioners' Request 3a) 25 days after its 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 15th day of February 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation) **March 2, 2000**

The Commission denies discretionary interlocutory review of an Atomic Safety and Licensing Board Memorandum and Order, LBP-99-43, 50 NRC 306 (1999), which denied Utah's request for the admission of a late-filed contention. The Commission concludes that this question does not meet the Commission's standards for discretionary interlocutory review.

RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING)

Good cause is the most important of the five factors to be weighed in determining whether a late-filed contention will be admitted.

RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING)

If good cause for the late filing of a contention is not shown, the contention will be admitted only on a ''compelling showing'' on the four factors found at 10 C.F.R. § 2.714(a)(1)(ii)-(v).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

As a general matter, NRC rules prohibit interlocutory appeals. *See* 10 C.F.R. § 2.730(f).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

To qualify for interlocutory review, a petitioner must show that the Licensing Board's decision either threatens ''immediate and serious irreparable harm'' (10 C.F.R. § 2.786(g)(1)) or ''[a]ffects the basic structure of the proceeding in a pervasive and unusual manner'' (10 C.F.R. § 2.786(g)(2)).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The admission or denial of a contention, where the intervenor has other contentions pending in the proceeding, is a routine interlocutory ruling not subject to immediate appellate review; such rulings must ''abide the end of the case.''

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The disallowance of a late contention does not result in a ''pervasive effect on the structure of litigation,'' justifying interlocutory review.

MEMORANDUM AND ORDER

I. INTRODUCTION

The State of Utah has requested that the Commission grant discretionary interlocutory review of an Atomic Safety and Licensing Board Memorandum and Order, LBP-99-43, 50 NRC 306 (1999), denying Utah's request for the admission of a late-filed contention with respect to the application of Private Fuel Storage, L.L.C., for a license to construct and operate an independent spent fuel storage installation (ISFSI). Finding that this question does not meet the Commission's standards for discretionary interlocutory review, we deny the State's petition.

II. BACKGROUND

PFS proposes to build an ISFSI on the Skull Valley, Utah, reservation of the Skull Valley Band of the Goshute Indians. Utah has filed numerous contentions in this matter, several of which are pending before the Board.

On June 23, 1999, Utah requested the admission of its late-filed Amended Contention C, which challenged the adequacy of revised design-basis accident dose calculations incorporated into PFS's license application by a May 19, 1999 amendment. Its original Contention C, which had been timely filed and admitted by the Licensing Board, raised issues concerning the dose analysis for such an accident.

On February 10, 1999, PFS submitted new calculations in response to a Staff Request for Additional Information (RAI) asking it to revise its calculations using an alternative methodology contained in a new interim Staff guidance document. On April 21, 1999, PFS filed a motion to have Utah Contention C dismissed as moot. On May 7, 1999, Utah responded that the issues raised in its contention were not moot, because PFS's Safety Analysis Report had not been amended and still contained the calculation to which the State objected. After PFS formally amended its SAR in May, the Board granted the motion to dismiss Contention C on June 17, 1999. On June 23, 1999, Utah filed its motion for admission of its late-filed, Amended Contention C, which claimed the revised dose analysis was also inadequate.

The Board ruled that Utah did not meet the requirements for the admission of a late-filed contention under 10 C.F.R. § 2.714(a)(1)(i)-(v). Specifically, the Board found that Utah did not have ''good cause'' for waiting until June to challenge the revised dose analysis when the new calculations had been made available more than 4 months earlier. Good cause is the most important of the five factors to be weighed in determining whether a late-filed contention will be allowed. *See, e.g., Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322 (1994). If good cause is not shown, the contention will be allowed only on a ''compelling showing'' on the four factors found at 10 C.F.R. § 2.714(a)(1)(ii)-(v). *Id.*

III. STANDARD FOR INTERLOCUTORY REVIEW

As a general matter, NRC rules prohibit interlocutory appeals. *See* 10 C.F.R. § 2.730(f). To qualify for interlocutory review, a petitioner must show that the Licensing Board's decision either threatens ''immediate and serious irreparable harm'' (10 C.F.R. § 2.786(g)(1)), or ''[a]ffects the basic structure of the proceeding in a pervasive and unusual manner'' (10 C.F.R. § 2.786(g)(2)). Utah's petition for review argues that immediate review is warranted under section 2.786(g)(2) because the Board's decision will affect the basic structure of the proceeding by significantly increasing the litigation burden on the Intervenors.

We find that the Board's refusal to admit Utah's Amended Contention C will not have a ''pervasive effect'' on this proceeding as that term is used in our regulations. Our prior decisions interpret this provision as allowing review in only

exceptional cases. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992) (consolidation of informal proceeding with formal proceeding had a pervasive effect on structure of proceedings). None of our prior decisions has found the admission or denial of a contention, where the intervenor has other contentions pending in the proceeding, to be anything more than a routine interlocutory ruling not subject to immediate appellate review; such rulings must ''abide the end of the case.'' *Northern States Power Co.* (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251 (1978).[1]

In contrast, several cases have considered and rejected the argument that the increased litigation burden caused by the allowance of a contention had a pervasive effect on the structure of the litigation. *See, e.g, Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91 (1994); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-861, 25 NRC 129 (1987). Similarly, no pervasive effect results from the disallowance of a late contention. At bottom, such cases turn on fact-specific questions of ''good cause'' for lateness — questions that can be reviewed, if necessary, after the Board's final decision.

Utah does not claim that the other ground for interlocutory appeal — serious irreparable harm — applies. We see nothing in Utah's filing that would suggest it would suffer such harm.

IV. CONCLUSION

For the foregoing reasons, Utah's petition for discretionary interlocutory review is *denied.*

[1] In contrast, where *all* contentions have been denied, thereby precluding the would-be intervenor from participating (10 C.F.R. § 2.714a(b)), or where the applicant argues that all intervenor's contentions should have been denied, thereby barring the intervenor from the litigation (10 C.F.R. § 2.714a(c)), the affected party may appeal as of right.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of March 2000.

Commissioner McGaffigan would have granted discretionary interlocutory review, clarified the nature of the Intervenor's obligations to timeliness, and remanded the contention to the Board.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 55-32443-SP**

MICHEL A. PHILIPPON
(Denial of Senior Reactor Operator License) **March 2, 2000**

The Commission reverses and remands a Presiding Officer's Initial Decision reversing the Staff's denial of an application for a senior reactor operator license. The Commission concludes that the Presiding Officer misinterpreted a Staff appeal panel's evaluation of the candidate's examination performance and erroneously found the Staff estopped from arguing that the candidate had allowed a lapse in procedures to occur.

SENIOR OPERATOR LICENSE: CRITERIA

The NRC Staff did not abandon the findings of the Staff appeal panel on appeal before the Atomic Safety and Licensing Board, and therefore did not waive the defense of the Staff appeal panel's findings that the candidate allowed a lapse in procedures during his examination. The issue of the candidate's performance on the simulator portion of the senior reactor license examination is remanded to the Presiding Officer for reconsideration.

MEMORANDUM AND ORDER

I. INTRODUCTION

The NRC Staff has petitioned the Commission to review a Presiding Officer's Initial Decision, LBP-99-44, 50 NRC 347 (1999), reversing the denial of the application by Michel A. Philippon for a senior reactor operator (SRO) license. Because we find the Presiding Officer erred in finding that the NRC Staff had waived its defense of Philippon's grade with respect to one competency rating factor, we reverse the decision and remand for further consideration.

II. BACKGROUND

Philippon took his SRO exam in April 1998, passing the written portion but failing the operating portion. He requested an informal review by a panel of NRC Staff who were not involved in his original grading. The Staff appeal panel raised Philippon's grade on several ''competencies,'' but the overall grade was still below passing. The Chief of the Operator Licensing Branch, Division of Reactor Controls and Human Factors, Office of Nuclear Reactor Regulation, accepted the Staff appeal panel's recommendation that Philippon's license application be denied. Philippon then sought a hearing before the Atomic Safety and Licensing Board Panel. After an informal adjudication under 10 C.F.R. Part 2, Subpart L, the Presiding Officer increased Philippon's grade on two competencies, resulting in an overall passing grade.

The Staff has appealed the Presiding Officer's Initial Decision with respect to one competency rating, competency C.4.c. The grade on that competency will make the difference whether Philippon passes or fails.

The simulator portion of the operating test consisted of three scenarios, each including five to nine events to which the shift crew were required to respond. Test Scenario 2-2, event eight, involved a leak in the residual heat removal suction line, which caused the torus water level to drop. This required the SRO candidate to enter an Emergency Operating Procedure (EOP 29.100.01), a procedure that directs personnel to try to isolate the leak and also to monitor the torus water level. Unbeknownst to the crew, the leak could not be isolated. While the leak was being addressed, the plant experienced a loss of offsite power (event nine), and the emergency diesel generator failed to start up automatically. This called for an Abnormal Operating Procedure (AOP 20.300.03) for manually starting a backup combustion turbine generator. The offsite power source powers various equipment, including the standby feedwater pump and the main turbine bypass valves, that can be used to cool and relieve pressure in the reactor pressure vessel.

These basic facts are not in dispute: Philippon directed the Balance of Plant operator to work on the generator startup. After performing only the first three steps, the Balance of Plant operator informed Philippon that the procedure would take too long to implement because the backup generator takes 10-15 minutes to warm up, and therefore offsite power could not be restored before emergency depressurization was required. Philippon allowed the Balance of Plant operator to discontinue the AOP and directed him to other tasks relating to the torus water problem.

The Staff contended before the Presiding Officer that, had Philippon instructed the Balance of Plant operator to complete other steps in the procedure while the generator was warming up rather than discontinuing the procedure, the offsite power could have been restored prior to emergency depressurization. This would allow a more controlled release of pressure from the reactor pressure vessel.

At issue in competency C.4.c is whether the SRO candidate ''ensured the safe, efficient implementation of procedures by the crew.'' The examiner, Hironori Peterson, found that Philippon violated the AOP by allowing the Balance of Plant operator to prematurely abandon attempts to restart the backup generator. Peterson gave Philippon a score of 1 out of a possible 3.

After considering the scenario, the examiner's comments, and the candidate's contentions, the Staff appeal panel found Peterson's assessment too harsh. In its October 1, 1998 findings, ''Review of Appeal by Michel Philippon Senior Reactor Operator Candidate — Fermi,'' the appeal panel concluded that with respect to Competency C.4.c:

> Abnormal Operating Procedure AOP 20.300.03, Loss of Offsite Power is a ''Continuous Use'' procedure. However, as stated in the subsequent action note prior to Step 1, ''at the discretion of the Control Room SRO [Philippon] steps of this procedure may be performed simultaneously.'' *Although the candidate directed the [Balance of Plant operator] to ''forget the procedure and monitor the Torus Water Level,'' subsequent action of the procedure should have been carried out* . . . . Directing the actions of EOP 29.100.01 (Primary Containment Control and Secondary Containment and Rad Release) regarding the decreasing torus water level and the increasing reactor building sump levels was very important.
>
> However, it appears the candidate, as SRO, *failed to maintain command and control of the actions of the BOP to ensure implementation of a plant procedure* that had been directed to be performed. Management Procedure MGA03, Enclosure A, Step A.2 states, ''When one of the exit conditions specified in the EOP flowchart is satisfied or it is determined that an emergency no longer exists, the operator exits the EOP flowchart . . . .'' For the given plant condition EOP 29.100.01 was in effect and had not been exited at the time of the loss of power event. The Subsequent Actions of AOP 20.300.03 Loss of Offsite Power, were not immediate; and there were no immediate actions to be performed by the operators.
>
> In summary the NRC assigns a rating of 2 . . . for Competency C.4.c *due to the candidate allowing a lapse in implementation of a procedure.* [Emphasis added.]

The Presiding Officer said that the Staff appeal panel had found a ''lapse'' in an EOP. The Presiding Officer refused to consider the Staff's evidence and arguments concerning an AOP lapse, finding those arguments inconsistent with the appeal panel's conclusions and that the Staff was limited to defending those conclusions. The Presiding Officer concluded that the Staff, by taking a position contrary to the appeal panel's findings, had conceded that there was no lapse in the EOP. He therefore gave Philippon a score of 3, the highest possible score.

The Staff maintains that the appeal panel's grade was based on Philippon's lapse in implementing the AOP, and that it provided sufficient evidence below that the actions taken by Philippon during his test were incorrect and constituted a lapse in the AOP.

III. THE PRESIDING OFFICER ERRED IN INTERPRETING THE STAFF'S POSITION

After careful review, we hold that the Staff appeal panel found an AOP lapse, not an EOP lapse, and therefore the NRC Staff did not depart from the appeal panel's findings in defending the case before the Presiding Officer on the ground that Philippon had not adhered to the AOP.

It appears that the Presiding Officer misunderstood the conclusions reached by the Staff appeal panel. The Presiding Officer, apparently agreeing with Philippon,[1] found that the Staff appeal panel had faulted Philippon for assigning the Balance of Plant operator to the offsite power problem, rather than for prematurely removing the operator from that procedure. The Presiding Officer then objected that ''the Staff does not respond to Mr. Philippon's challenge to the appeal board's conclusion explaining how it scored his performance . . . [but] goes off in an entirely different direction'' by continuing to argue the error of removing the Balance of Plant operator from the offsite power procedure.

Although it is unfortunate that the Staff appeal panel, in the final sentence of its findings, did not again specify in which procedure it found a lapse, it could not have been referring to the EOP, as Philippon and the Presiding Officer thought, but must have been referring to the AOP. The appeal panel mentioned no EOP lapse. On the other hand, the AOP was the ''procedure'' to which the appeal panel referred when it said that ''although [Philippon] directed the BOP to '*forget the*

[1] The Presiding Officer was perhaps influenced by Philippon's argument on appeal, which claimed:

> [the Staff appeal panel's] conclusion was that because the first few steps of the Loss of Offsite Power abnormal operating procedure were directed to be performed, that a lapse occurred in performing the Torus low level portion of the Emergency Operating Procedure. The staff reviewer is suggesting that because the EOP had not been exited that any actions performed outside of the EOP resulted in a lapse in performing the EOP.

Philippon's appeal to the Licensing Board on Competency C.4.c contended that there had been no lapse in the EOP.

procedure and monitor the Torus Water Level,' subsequent action of *the procedure* should have been carried out'' (emphasis added). The appeal panel also must have been referring to the AOP when it stated in its conclusions that the candidate ''as SRO, failed to maintain command and control of the actions of the BOP to ensure implementation of a plant procedure that had been directed to be performed,'' because the AOP was the procedure that was not completed.

In addition, in the dispute between Philippon and the examiner on competency C.4.c, the issue was never whether an EOP lapse occurred. The Staff appeal panel's findings summarized the examiner's position as follows:

> The examiner contends the candidate was preoccupied with the Torus level problem and that he did not adequately prioritize actions needed to restore power to essential plant equipment. Rather than directing the BOP to expedite and perform the Loss of Off-site Power procedure, the candidate as SRO told the BOP to forget the procedure and monitor the torus water level.

The examiner, in other words, found an AOP violation. Nowhere in the appeal panel's conclusion is there any statement to suggest that the panel found, in the words of the Presiding Officer's Initial Decision, the ''diametrically opposed'' position that a fault actually occurred in following the EOP. If the panel were reaching a conclusion the exact opposite of the examiner's conclusion, it would undoubtedly have said so.

Furthermore, the Presiding Officer based his decision in part on a perceived discrepancy in the appeal panel's findings, but that discrepancy disappears if the panel's findings are interpreted correctly. The Presiding Officer's Initial Decision points to the appeal panel's findings on competency C.7.b in concluding that there was no lapse in the EOP. In grading Philippon's performance on competency C.7.b (''Directing Operations, Safe Directions'') for scenario 2-2, events eight and nine, the appeal panel overturned the examiner's conclusions that there had been a lapse in the execution of the EOP 29.000.01, and increased Philippon's grade from a 1 to a 3.[2] The Presiding Officer reasoned that because the same scenario and events were being evaluated, a perfect score on competency C.7.b cannot be reconciled with an imperfect score on competency C.4.c. In reality, however, this seeming discrepancy is no discrepancy at all, but simply further evidence that the appeal panel, in grading C.4.c, found a lapse in a *different* procedure than the one considered in competency C.7.b. The only way that the differing grades can be reconciled is by recognizing that the panel was evaluating Philippon's performance relating to two different procedures.

[2] Whereas the examiner had found that Philippon incorrectly directed a crew member to use safety relief valves (SRVs) to relieve the pressure in the reactor pressure vessel, resulting in a too-rapid depressurization, the appeal panel found both that using the SRVs was a method authorized by the EOP to reduce pressure and that a cooldown rate exceeding plant technical specifications was acceptable under the circumstances.

Finally, the statements in the appeal panel's conclusion on competency C.4.c that the EOP had not been exited, when taken in context, do not indicate that the lapse in question involved the EOP. The appeal panel commented on the importance of the EOP in the course of justifying its decision to increase Philippon's grade from a 1 to a 2. Statements that monitoring the torus water level (part of the EOP) was ''very important,'' and that there was no immediate action to be taken on the AOP, were, logically, rationales why the appeal panel considered the AOP lapse a relatively minor one, warranting an increase in Philippon's grade. It is, therefore, evident that the lapse the Staff appeal panel was discussing was the same AOP lapse that the examiner found.

For the foregoing reasons, the Staff should not have been foreclosed from arguing before the Board that there had been a lapse in AOP implementation.

The Presiding Officer did not find that there was no lapse in Philippon's implementation of the AOP. Because the determination that Philippon should have a perfect grade was based not on a finding that there was no lapse at all, but on an interpretation of the appeal panel's findings that we find to be incorrect, we reverse the ruling and remand the case for consideration of whether there was a lapse in the implementation of the AOP warranting a grade of 2 on competency C.4.c.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 2d day of March 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket Nos. 40-8681-MLA-5**
40-8681-MLA-6

INTERNATIONAL URANIUM (USA)
CORPORATION
(Request for Materials License Amendment) **March 30, 2000**

Based upon a court of appeals decision, which upheld the NRC's interpretation of the Atomic Energy Act to preclude intervention by a competitor alleging only economic injury, the Commission affirms two Presiding Officer decisions, LBP-99-11, 49 NRC 153 (1999), and LBP-99-20, 49 NRC 429 (1999), both of which dismissed a Petitioner whose only interest was as a ''competitor.'' The Commission also terminates one of the proceedings, given that the sole Petitioner was dismissed for lack of standing.

ORDER

The Commission last year placed in abeyance two appeals filed by Envirocare of Utah, Inc. (''Envirocare''). Envirocare appealed its dismissal from two separate Subpart L proceedings, both involving license amendment requests made by the International Uranium (USA) Corporation (''IUSA''). *See* LBP-99-11, 49 NRC 153 (1999); LBP-99-20, 49 NRC 429 (1999). In both proceedings, the Presiding Officer found that Envirocare's asserted ''competitor'' injury was insufficient as a ground for standing to intervene in our adjudicatory proceedings.

The Commission already had affirmed Envirocare's dismissal on the same ground from two other license amendment proceedings. *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998); *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259 (1998). Envirocare, however, sought judicial review in the District of Columbia Circuit of the Commission's decisions in *Quivira* and *IUSA*. In the interest of avoiding repetitious pleadings by Envirocare, IUSA, and the NRC Staff, the Commission placed Envirocare's current appeals in abeyance, pending the outcome of Envirocare's petition for review in the D.C. Circuit.

On October 22, 1999, the court of appeals upheld *Quivira* and *IUSA* and thus found reasonable the NRC's interpretation of the Atomic Energy Act to preclude intervention by a competitor alleging only economic injury. *Envirocare of Utah, Inc. v. NRC,* 194 F.3d 72 (D.C. Cir. 1999). That decision resolves the current Envirocare appeals. As we held in *Quivira* and *IUSA,* Envirocare's competitor injury is by itself insufficient for standing under the AEA. Accordingly, the Presiding Officer's decisions in LBP-99-11 and LBP-99-20 are hereby affirmed.

Envirocare was the only challenger of the license amendment at issue in the above-referenced MLA-6 proceeding. Accordingly, that proceeding is hereby terminated. The state of Utah remains a party in the MLA-5 proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of March 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket Nos. 50-295**
50-304

COMMONWEALTH EDISON COMPANY
(Zion Nuclear Power Station,
Units 1 and 2) **March 30, 2000**

In this order, the Commission denies two petitions to intervene and challenge a request by Commonwealth Edison Company to exempt both units of the Zion facility from certain of the Commission's physical security regulations.

RULES OF PRACTICE

Participants in NRC proceedings are expected to comply with NRC orders, as well as its procedural regulations set forth in 10 C.F.R. Part 2.

EXEMPTIONS

The Atomic Energy Act's legislative history indicates that Congress intentionally limited the opportunity for a hearing to certain designated agency actions — and those actions do *not* include exemptions. Thus, we continue to regard our previous analysis of the question whether a person is entitled to a hearing regarding a request for an exemption from NRC regulations as valid. As Senator Hickenlooper pointed out, the statute ''clearly specifies the type of circumstance in which hearings are to be held.'' *Id.* Unless the exemption in question here can

be properly characterized as one of these ''circumstances,'' Petitioners have no right to a hearing.

EXEMPTIONS

The Zion exemption is plainly a pure ''exemption'' of the kind contemplated in our rule, and cannot be viewed as a license amendment or a rule modification.

EXEMPTIONS

Commonwealth Edison has filed an application under 10 C.F.R. § 73.5 (a provision specifically providing for exemptions, analogous to 10 C.F.R. § 50.12 in *Commonwealth of Massachusetts,* 878 F.2d 1516 (1st Cir. 1989)) for an exemption from a set of requirements imposed by 10 C.F.R. § 73.55. Both regulations are referred to in the Zion license. Thus, as in *Commonwealth of Massachusetts,* the grant of this exemption does not change or amend the Zion license or modify the Commission's regulations, and accordingly a hearing is not required in this case. *See also Kelley v. Selin,* 42 F.3d 1501, 1517 (6th Cir. 1995) (''[T]he grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights'').

RULES OF PRACTICE: STANDING

Section 189a of the AEA provides that ''any person whose interest may be affected by the proceeding'' must be granted a hearing. 42 U.S.C. § 2239(a). Pursuant to NRC regulations, a petition for intervention must ''set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . and the specific aspect or aspects of the subject matter of the proceeding as to which [the] petitioner wishes to intervene.'' 10 C.F.R. § 2.714(a)(2). *See generally Envirocare of Utah v. NRC,* 194 F.3d 72 (D.C. Cir. 1999). ''Accordingly, a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment,* not simply a general objection to the facility.'' *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (emphasis in original), *petition for review denied sub nom. Dienethal v. NRC,* No. 99-1132 (D.C. Cir. Jan. 21, 2000).

RULES OF PRACTICE: STANDING

In their petition, Petitioners allege simply that they reside within 50 miles of the Zion Plant, that operations at the plant impact their health, safety, and financial

interests, and that an order will impact these interests. In addition, they allege that they have ''direct information concerning the threat to health and safety posed by Zion Nuclear Station.'' These broad and conclusory statements are insufficient to establish standing.

RULES OF PRACTICE: STANDING

Petitioners fail to even mention, much less demonstrate, *how* they might be harmed from granting of the exemption at issue here. In fact, nowhere in the petition do Petitioners even discuss the exemption. Thus, Petitioners cannot be said to have ''set forth with particularity'' how their interests could be affected as our rules require. *See* 10 C.F.R. § 2.714(a)(2). Petitioners bear the burden to allege facts sufficient to establish standing. It is ''incumbent upon . . . [Petitioners] to provide . . . some 'plausible chain of causation,' some scenario suggesting how'' they might be harmed by the granting of this exemption. *Zion,* 49 NRC at 192. The petition is devoid of this link to the exemption request.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commonwealth Edison Company (''ComEd'' or ''the Licensee'') has requested an exemption for both units of the Zion facility from certain requirements in the NRC's regulations involving physical security. Two individuals, Randy D. Robarge and Edwin D. Dienethal (jointly, ''Petitioners''), have requested that the Commission grant them leave to intervene in the exemption proceeding. For the reasons stated below, we deny the Petitioners' request.

II. BACKGROUND

On July 30, 1999, ComEd filed a request for an exemption, pursuant to 10 C.F.R. § 73.5, from certain regulations that govern physical protection at all nuclear power plants for the Zion Nuclear Power Station, Units 1 and 2 (''Zion Station'').[1] The Zion Station is a two-unit facility that has been removed from service and is being prepared for decommissioning. On February 13, 1998, ComEd certified that it had permanently ceased operations at Zion, and on March 9, 1998, ComEd certified that all fuel had been removed from the reactor. Thus, in accordance with

[1] Letter from R.M. Rich, Vice President — Regulatory Services, Commonwealth Edison, to U.S. Nuclear Regulatory Commission, Document Control Desk (July 30, 1999).

10 C.F.R. § 50.82(a)(2), the Zion license no longer authorizes ComEd to load fuel into the reactor vessel or to operate the reactor.

The requested exemption involved in this case would relieve ComEd of the need for compliance with five separate provisions of 10 C.F.R. § 73.55 that pertain to protecting nuclear reactors against sabotage — specifically, subsections (a), (c)(6), (e)(1), (f)(4), and (h)(3) — and allow ComEd to implement a revised ''defueled physical security plan'' that ComEd asserts would be more appropriate for a permanently shut down and defueled facility. After review of the exemption request, the NRC Staff prepared and published an ''Environmental Assessment and Finding of No Significant Impact,'' 64 Fed. Reg. 53,423 (Oct. 1, 1999). On October 18, 1999, the NRC Staff issued the requested exemption based on its findings under 10 C.F.R. § 73.5 that the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest. *See* 64 Fed. Reg. 57,155 (Oct. 22, 1999).[2]

On October 27, 1999, the Petitioners filed a joint letter, *pro se,* asking ''for leave to intervene in [ComEd's] application to amend its Facility Operating License [*sic*]. . . .'' Letter of October 27, 1999 (''the petition''), at 1. On November 12, 1999, ComEd filed a letter with the Commission requesting an extension of time in which to respond to the petition.

On November 16, 1999, the Commission issued an Order that (1) granted ComEd's request for an extension of time in which to respond, (2) established a schedule for responses by both ComEd and the NRC Staff, and (3) provided the Petitioners with an opportunity to file a reply to the ComEd and Staff responses. The Order also noted the failure of both the Petitioners and ComEd to comply with NRC regulations regarding service of pleadings and admonished all participants to comply with these regulations in the future. *See* Order of November 16, 1999.

The NRC Staff filed an immediate response, noting that contrary to Petitioners' assertions, ComEd had filed a request for an exemption, not a request for a license amendment. Staff then argued that section 189a of the Atomic Energy Act does not provide a right to a hearing on an exemption request. It further asserted that Petitioners had failed to demonstrate their standing to intervene. On November 29, 1999, one week after its response was due, ComEd filed a letter stating that ''[t]he NRC Staff's Response sets forth an adequate basis for the Commission to decide that the [petition] . . . should be denied.'' Letter of November 29, 1999

[2] The Commission determined ''that the proposed alternative measures for protection against radiological sabotage meet the same assurance objective and the general performance requirements of 10 CFR 73.55 considering the permanently shutdown conditions at the ZNPS with all of the fuel in the spent fuel pool.'' *Id.*

(''ComEd Response'') at 1.[3] The Petitioners did not file a reply to the NRC Staff's response.

III. PETITIONERS' RIGHT TO INTERVENE

A. Hearing on Exemptions

Although Petitioners characterize the proceeding in which they seek to intervene as one for an ''amendment'' to the Zion license, the proceeding identified in the petition is one for consideration of an exemption from the NRC's regulatory requirements in 10 C.F.R. Part 73. Thus, the question at the outset is whether the Atomic Energy Act (''AEA'') of 1954, as amended, provides a right to a hearing on a request for an exemption from an NRC regulation.

Section 189 of the AEA provides, in pertinent part, that:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any party whose interest may be affected by the proceeding and admit that person as a party to the proceeding.

42 U.S.C. § 2239(a)(1)(A).

The Commission has previously considered this provision in connection with a request for a hearing on an exemption. In 1982, the U.S. Department of Energy (''DOE''), the applicant for a construction permit for the Clinch River Breeder Reactor (''CRBR''), sought an exemption under the authority of 10 C.F.R. § 50.12(b) from the restrictions of 10 C.F.R. § 50.10(c) to allow preliminary site work prior to issuance of the construction permit. Although we had previously denied a similar request, we took the matter under advisement and after an ''informal'' hearing granted the requested exemption. *See generally United States Department of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 (1982) (''*Clinch River*'').

The intervenors in that proceeding, the Natural Resources Defense Council, Inc., and the Sierra Club, argued that the AEA required a formal adjudicatory hearing regarding the DOE exemption request. The Commission rejected that argument. We found that section 189a of the AEA deliberately limited hearing rights to those

[3] The Licensee, having requested an extension of time and thereby initiating a process that resulted in the issuance of the November 16th Order, not only failed to file a timely response after seeking and obtaining the right to do so, but also failed to inform the Commission of its decision not to file a reply until a week after the response was due and then only after the Office of the Secretary inquired if a response would be forthcoming. Furthermore, the ''letter'' that ComEd subsequently filed did not contain any explanation for its lack of timeliness. The Commission again emphasizes that participants in NRC proceedings are expected to comply with NRC orders, as well as its procedural regulations set forth in 10 C.F.R. Part 2.

particular types of administrative actions that were listed in that section, and we concluded that granting the exemption in question in the *Clinch River* case was not one of those actions. *Id.* The legislative history of section 189a supports our interpretation.

When the draft of the AEA was reported out of the Joint Committee on Atomic Energy in June of 1954, it contained two provisions that are relevant to this analysis: section 181 and section 189, which were both contained in chapter 16, entitled ''Judicial Review and Administrative Procedure.'' Section 181 of the draft Act, entitled ''General,'' was the first section of chapter 16, and contained language that applied the Administrative Procedure Act (''APA'') to the Commission's actions and required ''regular administrative procedures'' to be followed in both public and nonpublic proceedings, depending on the sensitivity of national security interests. *See* S. Rep. No. 83-1699, at 82 (1954). The section closed with a sentence that read ''[u]pon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.' '' *Id.*

Meanwhile, section 189, the last section in chapter 16 and entitled ''Judicial Review,'' provided:

> Any final order granting, denying, suspending, revoking, modifying, or rescinding any license or construction permit, or application to transfer control, or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered in an ''agency action'' of the Commission shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the scope of judicial review and other remedies provided by section 10 of the Administrative Procedure Act.

Id. at 85. Thus, as introduced in late June of 1954, the draft AEA's provision for intervention was separate from the provision for judicial review. While the intervention provision would have granted a hearing to parties affected by any action, the judicial review provision was limited to specifically identified actions.

The current wording of the first sentence of section 189a was introduced as part of an amendment offered by Senator Hickenlooper of Iowa. The amendment was debated and passed on July 16, 1954. *See generally* 100 Cong. Rec. 10170-71 (1954).[4] The Hickenlooper amendment created a new section 189 which provided:

> a. In any proceedings under this act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance of [*sic*] modification of rules or regulations dealing with the activities of licensees, and in any proceeding brought under the provisions of section 153, and in any proceeding for the payment of compensation, an award or royalties under section 156, 186(c) or 188, 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.

[4] On the same day, the Senate passed a separate Hickenlooper amendment repealing the language in section 181 quoted above.

> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an ''agency action'' of the Commission shall be subject to judicial review in the manner prescribed in the act of December 20, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act.

100 Cong. Rec. at 10170. Thus, the amendment combined the hearing requirement from the last sentence of the original section 181 with the original section 189 that had specified judicial review for only the particular items identified therein. As Senator Hickenlooper explained,

> this section reincorporates the provisions for hearings formerly made in section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held.

100 Cong. Rec. at 10171.[5] The amendment was passed without opposition, *id.,* and section 189 in the final version of the AEA contained this wording basically intact.[6]

The upshot of this history is that Congress intentionally limited the opportunity for a hearing to certain designated agency actions — that do *not* include exemptions. Thus, we continue to regard our previous analysis of the question whether a person is entitled to a hearing regarding a request for an exemption from NRC regulations as valid. As Senator Hickenlooper pointed out, the statute ''clearly specifies the type of circumstance in which hearings are to be held.'' *Id.* Unless the exemption in question here can be properly characterized as one of these ''circumstances,'' Petitioners have no right to a hearing.

Petitioners in this case sought leave to intervene ''in [Com Ed's] application to amend its Facility Operating License.'' It has been argued on other occasions — and perhaps implicitly by Petitioners here — that by granting an exemption the NRC is somehow ''amending'' the license involved in the agency action. Thus, we must address whether the requested Zion exemption, regardless of its label, somehow constitutes an action for which a hearing is required, i.e., whether the exemption is in effect an amendment of the facility license or modification of the rules and regulations dealing with the activities of licensees. As we demonstrate below, the Zion exemption is plainly a pure ''exemption'' of the kind contemplated in our rule, and cannot be viewed as a license amendment or a rule modification.

The issue was raised in *Commonwealth of Massachusetts v. NRC,* 878 F.2d 1516 (1st Cir. 1989). In that case, the United States Court of Appeals for the First Circuit found that the NRC's grant of an exemption did not constitute a license amendment. In 1989, the NRC granted Boston Edison an exemption from the

[5] The *Clinch River* decision, *supra,* mistakenly cites the debate as 100 Cong. Rec. at 10181. *See* 16 NRC at 421.

[6] The final version of the 1954 AEA contained only minor changes in section 189. The wording of the first sentence of section 189a remains the same today.

requirement in 10 C.F.R. Part 50, App. E, to conduct a biennial full-participation emergency preparedness exercise at the Pilgrim facility, and did not offer a hearing. *See* 54 Fed. Reg. 336, 338 (Jan. 5, 1989). The Commonwealth of Massachusetts challenged the exemption, arguing that it constituted an amendment to the Pilgrim license and that the AEA required the NRC to hold a prior hearing. 878 F.2d at 1519.

The Court of Appeals rejected the Commonwealth's argument. The Court noted that although the Boston Edison license required Boston Edison to operate in accordance with NRC regulations, the exemption was granted pursuant to another NRC regulation, 10 C.F.R. § 50.12, also in Part 50, the source of the requirement from which Pilgrim was being exempted. Thus, the Court noted,

> [t]he same regulation which imposes the emergency drill requirement . . . allows for exemptions to it. The exemption did not change Edison's duty to follow NRC rules; it only changed which rule applied for a brief period of time. Edison was thus operating in accordance with its unaltered license.

878 F.2d at 1521.[7] In essence, the Court ruled that the exemption provision, section 50.12, was an integral provision of the regulations which were made generally applicable by the license. Thus, the exemption the NRC had granted from the exercise requirement was authorized by a regulation specifically applicable to that requirement, and therefore the Commission had neither modified its regulations nor amended Boston Edison's obligation under its license ''to operate in accordance with NRC regulations[.]'' *Id.*

The same is true here. ComEd has filed an application under 10 C.F.R. § 73.5 (a provision specifically providing for exemptions, analogous to 10 C.F.R. § 50.12 in the *Commonwealth of Massachusetts* case) for an exemption from a set of requirements imposed by 10 C.F.R. § 73.55. *See* Letter of July 30, 1999, note 1, *supra,* and Attachment 2 to that letter. Both regulations are referred to in the Zion license. Thus, as in *Commonwealth of Massachusetts,* the grant of this exemption does not change or amend the Zion license or modify the Commission's regulations, and accordingly a hearing is not required in this case.[8] *See also Kelley v. Selin,* 42 F.3d 1501, 1517 (6th Cir. 1995) (''[T]he grant of an exemption from

[7] The exemption at issue was granted under the terms of 10 C.F.R. § 50.12(a)(2)(5), which relates specifically to the special circumstance of ''temporary relief.'' *Id.* The same general exemption authority, 10 CFR § 50.12(a)(2), permits the granting of an exemption in five other special circumstances that are not focused on ''temporary relief.''

[8] As noted above, the First Circuit found that the exemption ''only changed which rule applied for a brief period of time.'' *Commonwealth of Massachusetts,* 878 F.2d at 1521. Although the exemption here is ''permanent,'' for all practical purposes (for the Zion Station in its permanently shutdown and defueled condition), that difference does not require a different analysis on our part. Both the provision authorizing the exemption and the regulation from which the exemption has been granted are part of the same regulatory scheme governing physical security (10 C.F.R. Part 73), referred to in the facility license and which Com Ed continues to have a duty to follow. Thus the license and the regulations anticipate exemptions — which may be granted without amending the license or modifying the regulations.

a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights.'').

In short, there is no right to request a hearing in this case because the action involves an exemption from NRC regulations and not one of those actions for which section 189a of the AEA provides a right to request a hearing.

B. Standing

If the AEA provided for hearings on exemption requests, which it does not, we would have to consider the Petitioners' standing. As discussed below, we conclude that the Petitioners lack the requisite standing to intervene even if this were a case in which Petitioners had a right to request a hearing.

Section 189a of the AEA provides that ''any person whose interest may be affected by the proceeding'' must be granted a hearing. 42 U.S.C. § 2239(a). Pursuant to NRC regulations, a petition for intervention must ''set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . and the specific aspect or aspects of the subject matter of the proceeding as to which [the] petitioner wishes to intervene.'' 10 C.F.R. § 2.714(a)(2). *See generally Envirocare of Utah v. NRC,* 194 F.3d 72 (D.C. Cir. 1999). ''Accordingly, a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment,* not simply a general objection to the facility.'' *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (emphasis in original), *petition for review denied sub nom. Dienethal v. NRC,* No. 99-1132 (D.C. Cir. Jan. 21, 2000).

In their petition, Petitioners allege simply that they reside within 50 miles of the Zion Plant, that operations at the plant impact their health, safety, and financial interests, and that an order will impact these interests. Petition at 1-2. In addition, they allege that they have ''direct information concerning the threat to health and safety posed by Zion Nuclear Station.'' *Id.* at 1. These broad and conclusory statements are insufficient to establish standing.

The Petitioners fail to even mention, much less demonstrate, *how* they might be harmed from granting of the exemption at issue here. In fact, nowhere in the petition do the Petitioners even discuss the exemption. Thus, the Petitioners cannot be said to have ''set forth with particularity'' how their interests could be affected as our rules require. *See* 10 C.F.R. § 2.714(a)(2). The Petitioners bear the burden to allege facts sufficient to establish standing. It is ''incumbent upon . . . [Petitioners] to provide . . . some 'plausible chain of causation,' some scenario suggesting how'' they might be harmed by the granting of this exemption. *Zion,* 49 NRC at 192. The petition is devoid of this link to the exemption request. We note that one of the Petitioners, Mr. Dienethal, recently requested a hearing in another NRC licensing proceeding, and thus, he should have been fully aware of

the Commission's requirements to demonstrate standing when requesting a hearing. Petitioners have failed to show standing and for this additional reason, Petitioners' request for hearing is denied. *Zion,* 49 NRC at 185.

IV. CONCLUSION

For the reasons given above we find that the Petitioners do not have a right to a hearing under section 189a of the Atomic Energy Act. Accordingly, their request for a hearing is denied.

IT IS SO ORDERED.

For the Commission

ANNETTE VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of March 2000.

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) **March 10, 2000**

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 in part and denies in part a PFS motion for partial summary disposition on contention Utah E/Confederated Tribes F, Financial Assurance. The Board also denies Intervenor State of Utah's request for the release of PFS proprietary information, albeit without prejudice to further consideration of that issue at a future time designated by the Board. Finally, under 10 C.F.R. § 2.730(f), the Board refers its summary disposition ruling regarding the financial assurance issues to the Commission for its immediate review.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is ''no genuine issue

as to any material fact and that the moving party is entitled to a decision as a matter of law.'' The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

FINANCIAL QUALIFICATIONS: MATERIALS LICENCE

As the Commission previously found in its decision in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997), relative to 10 C.F.R. Part 70, there is no reason to apply the financial qualifications requirements of 10 C.F.R. Part 50 in a 10 C.F.R. Part 72 proceeding in toto, although there may be some parallels in appropriate circumstances. *See* LBP-98-7, 47 NRC 142, 187 (1998).

FINANCIAL QUALIFICATIONS: MATERIALS LICENCE

A financial qualifications finding of reasonable assurance relative to a 10 C.F.R. Part 72 facility can be based on licensee commitments and proposed NRC Staff license conditions that require the applicant to meet certain financial requirements, the fulfillment of which are subject to post-license Staff review as a condition of beginning facility construction and operation.

FINANCIAL QUALIFICATIONS: MATERIALS LICENCE

Allowing licensee commitments and proposed Staff licensing conditions to provide the basis for a reasonable assurance finding is not an improper waiver of the 10 C.F.R. Part 72 financial qualifications standards or an infringement on an intervenor's right to litigate material issues bearing on a licensing decision.

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

When relevant parties, by reason of a protective order, have access to information claimed to be proprietary and considerable effort would be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has protected status, the resolution of disputes over the nature of the

protected information is best left until after the conclusion of a merits resolution relative to the issues of the litigation. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982).

RULES OF PRACTICE: REFERRAL OF RULING

Under 10 C.F.R. § 2.730(f), a Licensing Board is given the authority, in instances when a prompt Commission decision is necessary to prevent detriment to the public interest or unusual delay or expense, to refer its ruling on a party motion or other pleading to the Commission for its immediate review.

RULES OF PRACTICE: REFERRAL OF RULING (MOTION FOR SUMMARY DISPOSITION)

Although a summary disposition decision constitutes a merits ruling on a contention ''as a matter of law,'' it nonetheless often has a factual element that would make referral to the Commission of questionable propriety. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 & n.6 (1977).

RULES OF PRACTICE: REFERRAL OF RULING TO THE COMMISSION

Any Licensing Board reluctance to refer a summary disposition ruling is outweighed by the Commission's recent admonition that "boards are encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible in the proceeding.'' *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 23 (1998).

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: Financial qualifications.

MEMORANDUM AND ORDER

(Granting in Part, Denying in Part, and Referring Ruling on Summary Disposition Motion Regarding Contention Utah E/Confederated Tribes F)

In a December 3, 1999 motion, Applicant Private Fuel Storage, L.L.C. (PFS), asks that the Licensing Board grant partial summary disposition in its favor

on contention Utah E/Confederated Tribes F, Financial Assurance. With this issue, which the Board admitted in its April 1998 initial ruling on standing and contentions, *see* LBP-98-7, 47 NRC 142, 187, 215, 236, *reconsideration denied,* LBP-98-10, 47 NRC 288, 294-95, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998), Intervenors State of Utah (State) and the Confederated Tribes of the Goshute Reservation (Confederated Tribes) seek to challenge various aspects of the financial qualifications of PFS to construct and operate its proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). The State, as the lead intervenor for this issue, opposes the PFS motion, while the NRC Staff supports the Applicant's request. Additionally, in connection with this contention and the PFS motion the State has requested, as part of its December 27, 1999 response to the PFS motion and its January 10, 2000 reply to the NRC Staff's December 22, 1999 response to the PFS motion, the release of all claimed proprietary information relating to the PFS summary disposition motion, which PFS and the Staff oppose.

For the reasons set forth below, we grant in part and deny in part the PFS dispositive motion. We also deny the State's proprietary information release request. Moreover, because our determination on the PFS summary disposition motion concerns an issue of some importance that the Commission already has identified as sufficiently distinctive to warrant its attention in this proceeding, pursuant to 10 C.F.R. § 2.730(f), we refer our rulings on the PFS dispositive motion to the Commission for its further consideration.

I. BACKGROUND

A. PFS Financial Qualifications

In its license application, describing itself as a limited liability company owned by eight United States utilities, PFS states that its financial qualifications for the requested Part 72 license are, among other things, based on its financing plan to obtain the necessary funds to construct, operate, and decommission the proposed Skull Valley facility. According to PFS, among the financing mechanisms it will use are equity contributions from PFS members pursuant to subscription agreements, preshipment customer payments pursuant to service agreements (through which member and nonmember customers commit to store their spent fuel at the PFS facility and PFS agrees to provide storage services), and annual storage fee payments pursuant to the service agreements. PFS also indicates that it reserves the option to obtain portions of needed construction funds through the sale of debt securities secured by the service agreements. *See* [PFS], License Application for Private Fuel Storage Facility at 1-3 to -4 (rev. 0 June 1977).

PFS then goes on to describe its phased approach to construction and operation. Under already completed Steps I-III, PFS undertook preliminary investigations, formed PFS as a legal entity, and prepared and submitted the license application, the last step being funded by direct payments from PFS members pursuant to the subscription agreements. Step IV, which includes this licensing proceeding, detailed design efforts, and bid specification preparations, is ongoing. The $10 million budgeted for this phase is being financed by PFS members' payments pursuant to the subscription agreements. *See id.* at 1-5 (rev. 1 May 1998).

When and if a license is granted, Step V, the construction phase, will begin. This includes site preparation, construction of an access road and various administration, maintenance, and operations buildings and the cask storage pads, canister transfer and transport equipment procurement, and transportation corridor construction. Its $100 million budgeted cost (in 1997 dollars) is to be financed by $6 million dollars in equity contributions from PFS members pursuant to subscription agreements and, in larger measure, by the service agreements with PFS members and nonmember entities that call for payment spread out over the period of time from construction through spent fuel delivery. According to PFS, raising the nonequity portion of Step V costs through service agreements will allow it to avoid construction financing costs, although it retains the option to finance the nonequity portion of Step V costs through debt financing secured by the service agreements. According to the PFS application, no construction will proceed unless service agreements committing for spent fuel storage services in a nominal target range of 15,000 metric tons uranium (MTU) have been signed. *See id.* 1-5 to -6 (rev. 1 May 1998 & rev. 4 Aug. 1999).

The operational phase for the PFS facility, Step VI, is to be funded by the service agreements. The significant budgeted costs for this phase include procurement and/or fabrication of canisters ($432 million) and storage casks ($134 million), which will be obtained on an as-needed basis to coincide with fuel-moving schedules. According to PFS, all capital costs associated with spent fuel transportation and storage, including canister and storage cask procurement and/or fabrication, will be paid pursuant to the service agreements prior to PFS accepting customers' spent fuel. Also under the service agreements, customers will be required annually to pay ongoing operations and maintenance costs for spent fuel storage, estimated to be $49 million annually for a 20-year facility operating life and $31 million annually for a 40-year life. These costs include labor, operations support, storage canisters, storage casks, transportation fees, transport and storage consumables, maintenance and parts, regulatory fees, quality assurance and other expenses, low-level radioactive waste disposal, contingencies, radiological and nonradiological decommissioning funds, and associated operating costs. PFS states that the service agreements will include escalators that are tied to specific costs of doing business at the site, including such items as labor rates and NRC and insurance fees. Also, according to PFS, service agreements, which

must be signed by PFS members as well, will provide assurance of continued payment by requiring customers to provide annual financial information, meet creditworthiness requirements, and provide additional financial assurances (e.g., advance payments, irrevocable letters of credit, third party guarantees, or payment and performance bonds) as needed. *See id.* at 1-6 to -7 (rev. 0 July 1997 & rev. 4 Aug. 1999).

B. Contention Utah E/Confederated Tribes F

The contention that is the subject of the pending PFS dispositive motion challenges the adequacy of this financial qualifications construct. As admitted in LBP-98-7, contention Utah E/Confederated Tribes F provides as follows:

> Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license in that:
>
> 1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. *See* 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.
>
> 2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed [PFS facility (PFSF)], and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.
>
> 3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The Applicant must submit a copy of each member's Subscription Agreement, *see* 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.
>
> 4. To demonstrate its financial qualifications, the Applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, *see* 10 C.F.R. Part 50, Appendix C, § II.
>
> 5. The Applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the ''possessor'' of the spent fuel casks. The Applicant must address these issues. *See* 10 C.F.R. § 72.22(e).
>
> 6. The Applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. *See* 10 C.F.R. Part 50, App. C, § II.

7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.

8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.

9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.

10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

47 NRC at 251-52. This contention represented consolidated portions of contentions Utah E, Confederated Tribes F, and Castle Rock 7. *See id.* at 187, 214-15, 236. Upon the later withdrawal of sponsoring Intervenors Castle Rock Land and Livestock, L.C., and Skull Valley Co., Ltd., the Board removed the reference to Castle Rock 7 from the contention's designation, although its substance remained unchanged because Castle Rock 7 had been adopted by remaining Intervenor Confederated Tribes. *See* LBP-99-6, 49 NRC 114, 119-20 (1999). The Board also designated the State as the lead intervenor for this contention. *See* Licensing Board Memorandum and Order (Memorializing Prehearing Conference Rulings) (May 20, 1998) at 2 (unpublished).

In admitting this contention, the Board stated that

> while differences between the financial qualifications requirements of 10 C.F.R. Part 50, including Appendix C, and those in 10 C.F.R. Part 72 suggest the Part 50 provisions are not applicable in toto to Part 72 applicants, we agree with the Staff that Part 50 should be used as guidance in reviewing PFS's financial qualifications.

LBP-98-7, 47 NRC at 187 (citation omitted). Thereafter, in ruling on the various appeals that were taken from the Board's April 1998 ruling on standing and contentions, the Commission observed that this statement was ''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.'' CLI-98-13, 48 NRC at 36. The Commission went on to provide the following guidance:

> In *Claiborne* the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. The conditions had the effect of assuring financial qualifications and obviating further litigation on 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. 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.

Id. at 36-37 (citations omitted).

C. PFS Motion for Partial Summary Disposition

In its December 3, 1999 motion for partial summary disposition regarding contention Utah E/Confederated Tribes F, which it supports with a statement of fourteen material facts not in dispute, PFS asserts that there are no disputed material factual issues so that it is entitled to a merits ruling in its favor regarding all contention subparts except six, for which it does not request summary disposition. *See* [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 3, 1999) at 3 [hereinafter PFS Motion]. The principal support for this result, according to PFS, is the attached statement of its Chairman, John Parkyn, in which he attests to the PFS commitments that:

> ''PFS will not commence ISFSI construction unless and until it has committed funds sufficient to provide fully for the construction of an ISFSI (including PFS's administrative and operational costs during construction of the project) with an initial capacity of at least { }[1] MTU, whether these funds are obtained through equity contributions, through Service Agreements, or through other committed forms of financing . . . ,''

id. Declaration of John Parkyn (Dec. 2, 1999) at 2 (quoting Letter from John Parkyn, Chairman, PFS, to Director, NRC Office of Nuclear Materials Safety and Safeguards (Sept. 15, 1998) attach. B, PFSF LA RAI No. 1, Question 1-1, at 2 of 2) [hereinafter Parkyn Declaration], and

> ''PFS will not commence operations of the PFSF, and will not accept spent nuclear fuel for storage at the PFSF, unless PFS has in place long term Service Agreements for spent fuel storage services with its members and customers sufficient to cover the costs of operating and maintaining the facility with respect to the spent fuel to be accepted and stored under the contracts. The costs for the storage of additional spent fuel at the PFSF (beyond that contracted for under the initial Service Agreements at the commencement of operations) will simply be

[1] Carrotted material, such as the figure set forth here and in the Staff proposed license condition set forth on page 109 has been excised because it has been identified by PFS as proprietary information in accordance with 10 C.F.R. § 2.790.

> covered by long term Service Agreements for spent fuel storage services with PFS's members and customers. The costs of any additional construction necessary to enable the storage of additional spent nuclear fuel at the PFSF will be funded through equity contributions, the Service Agreements, or other committed forms of financing. . . ,''

id. at 3. According to PFS, consistent with the Commission's holding in *Claiborne,* CLI-97-15, 46 NRC at 303-09, these commitments are sufficient to demonstrate the requisite reasonable assurance under 10 C.F.R. § 72.22(e) that PFS is financially qualified to construct, operate, and maintain the Skull Valley facility.

In its December 22, 1999 response to this PFS motion, which is supported by the affidavit of Staff financial analyst Alex F. McKeigney, the Staff declares it agrees that PFS is entitled to partial summary disposition as requested. Initially, the Staff notes that in April 1998, it directed a number of requests for additional information (RAIs) to PFS inquiring about various aspects of its financial assurance for facility construction and operation and in a September 1998 response PFS provided copies of its limited liability company agreement and business plan, as well as the form of the subscription agreement that defines the obligation of the eight entities that are PFS members to contribute to the company. *See* NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 22, 1999) at 4-5 [hereinafter Staff Response]. According to the Staff, based on its review of that information, in its December 15, 1999 site-related safety evaluation report (SER) for the PFS facility, the Staff has proposed two license conditions that would provide:

> A. Construction of the [PFS] Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a Facility with the initial capacity as specified by PFS to the NRC [{ } MTU capacity]. Construction of any additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.
>
> B. PFS shall not proceed with the Facility's operation unless it has in place long-term Service Agreements with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility, for the entire term of the Service Agreements.

Id. at 7 (quoting [SER] of the Site-Related Aspects of the [PFSF ISFSI] (Dec. 15, 1999) at 17-4; *see also id.* Affidavit of Alex F. McKeigney Concerning Utah Contention E (Financial Assurance) (Dec. 22, 1999) at 3 [hereinafter McKeigney Affidavit]. The Staff concludes that these proposed conditions, along with the various other materials provided by PFS in response to the Staff RAIs, are sufficient to establish that partial summary disposition should be granted in favor of PFS on contention Utah E/Confederated Tribes F because the contention's subparts, other than paragraph six regarding adequate cost estimates, either have been mooted or resolved.

In its December 27, 1999 response to the PFS motion and its January 10, 2000 reply to the Staff's motion response, the State vigorously disagrees with PFS and the Staff. In its response to the PFS motion, which is supported by the sworn declarations of Michael F. Sheehan, Ph.D., managing partner of the regulatory policy, economics, and finance consulting firm of Osterberg and Sheehan; Utah Department of Environmental Quality (DEQ) Radiation Control Division Director William J. Sinclair; and David A. Schlissel, president of the private consulting firm Schlissel Technical Consulting, Inc., the State declares initially that the Commission's *Claiborne* decision is not controlling in this instance because 10 C.F.R. § 70.23(a)(5), which was the operative financial assurance regulatory provision for the LES enrichment facility, is completely different from 10 C.F.R. § 72.22(e), which requires a financial assurance finding relative to ISFSI facilities like that of PFS. According to the State, the language of section 72.22(e) is much more like that of 10 C.F.R. § 50.33(f), thus mandating that the more stringent requirements of 10 C.F.R. Part 50, App. C, be utilized. This is particularly so, the State maintains, given that (1) the PFS facility is significantly different from the LES operation in terms of its potential public health and safety and environmental impacts; (2) the NRC enforcement mechanisms cited by the Commission in support of its *Claiborne* decisions are likely not to provide an effective mechanism for ensuring that PFS will continue to be financially qualified throughout the term of its licensed activity; and (3) PFS has failed to provide a sophisticated financial plan that accounts for, among other things, its liability for losses and damages from onsite accidents or natural events. *See* [State] Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (Dec. 27, 1999) at 3-14 [hereinafter State Response]. Additionally, the State asserts that the PFS commitments are so vague and ambiguous that PFS will be the sole arbiter of whether it meets the requirements of section 72.22(e), thus becoming the functional equivalent of a regulatory exemption that will both remove from public scrutiny any assessment of whether PFS ultimately meets those requirements and deprive the State of its right to a prior hearing on financial qualifications issues. *See id.* at 14-18. Finally, the State maintains that summary disposition is inappropriate because, as is noted in its attached statement of material facts in dispute, there are various unresolved factual questions that include the structure of the limited liability entity; whether the listed members of PFS will withdraw or have withdrawn from the company; the scope of the PFS commitments and how they will operate; and documentation of PFS funding sources and the term of such funding. *See id.* at 18-19.

In its reply to the Staff's response, which also is supported by the affidavit of Dr. Sheehan, the State points out several additional problems that require the PFS summary disposition motion be denied. These include (1) the Staff-proposed license conditions, like the PFS commitments, are vague, open-ended, and unenforceable, lacking compliance standards as well as any indication of who

will determine compliance; (2) Staff reliance on those license conditions to fulfill the Part 72 financial qualifications requirements deprives the State of a meaningful hearing on that subject and constitutes the improper grant of a rule waiver to PFS; and (3) contrary to the Staff's assertions, the *Claiborne* decision has no applicability to the PFS facility.[2] *See* [State] Reply to the Staff's Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes F (Jan. 10, 2000) at 3-12 [hereinafter State Reply]. Additionally, the State declares that the Staff lacks any record to support its position that PFS meets the financial qualifications requirements of Part 72 given the lack of experience and qualifications of its supporting witness, Mr. McKeigney. *See id.* at 12-14. Finally, the State maintains there are numerous material factual disputes, which include questions about (1) which versions of the PFS limited liability company agreement, business plan, and subscription agreements Mr. McKeigney reviewed in making his financial qualifications findings; (2) the lack of any mention of the effect of the sale of two PFS members' nuclear power plants on other PFS members and their equity contributions; (3) the marketability of the facility as it will affect safe operation; (4) the lack of any documentary material on PFS's current assets, liabilities, or capital structure; (5) what project costs should be considered in making a financial qualifications determination; (6) the supposed role of service agreements and the availability of Price Anderson Act ''insurance'' in allocating financial responsibility and covering nonroutine expenses; and (7) the impact on PFS operations of payment defaults by entities storing fuel at the PFS facility. *See id.* at 15-19.

D. State Request for Release of Proprietary Information

In its December 27, 1997 response to the PFS motion, citing what it characterizes as the efforts of PFS to ''hide behind a veil of secrecy'' relative to the nature and support for its financial qualifications commitments, the State requests that the PFS motion and all attachments other than the PFS agreement be declared an ''open public record.'' State Response at 13-14. Then, in the course of its January 10, 2000 reply to the Staff's December 22, 1999 response to the PFS December 3, 1999 dispositive motion, the State describes how it was ''amazed''

[2] As we described in some detail in our February 4, 2000 issuance denying a January 19, 2000 Staff motion to strike portions of the State's January 10, 2000 reply, in issuing its SER on December 15, 1999, the Staff mistakenly used a draft version of SER chapter 17, the financial assurance chapter, that included proposed license conditions different from those described in the Staff's December 22, 1999 response to the PFS dispositive motion. Although the Staff subsequently sought to correct this error, the State sought to base part of its reply on this mistake, asserting, for instance, that this apparent misstep warranted further discovery to untangle conflicts in the Staff's position. We concluded, however, because the State had assumed the two conditions proposed in the Staff's response (as opposed to those in the SER) are the conditions that satisfy the Staff's financial qualifications determinations, we could review its reply without gaining further clarification. *See* Licensing Board Memorandum and Order (Denying Motion to Strike Pleading) (Feb. 4, 2000) at 6 (unpublished).

to learn that certain documents publicly filed with its December 27, 1999 response to that PFS motion contained information regarding the PFS facility's minimum capacity that, although contained in the Staff's proposed license condition, nonetheless is considered proprietary by PFS. State Reply at 19. Declaring that it ''strongly objects'' to keeping any portion of a proposed or final license condition nonpublic, the State urges the Board to release all claimed proprietary information relative to this summary disposition proceeding. *Id.* at 20.

The Board provided for party responses to this disclosure request, which PFS filed on January 28, 2000. In its response, PFS objects to this State request, asserting that the State has failed to make any showing that either the specific information on the facility's minimum initial capacity or any other information the State wants released is not proprietary under the controlling agency regulation, 10 C.F.R. § 2.790. *See* [PFS] Response to [State] Request for Release of [PFS] Proprietary Information (Jan. 28, 2000) at 3, 6-7. Additionally, PFS declares that under established Commission caselaw, any resolution of this question should be deferred until after a resolution of the merits of this proceeding. *See id.* at 5, 8. In a pleading filed that same date, although deferring to the other parties' views on whether the minimum initial capacity figure was proprietary, the Staff declared that the State had failed to make any showing to support its position that all claimed proprietary information should be disclosed. *See* NRC Staff's Response to [State] Request for Public Disclosure of Proprietary Information (Jan. 28, 2000) at 2.

II. ANALYSIS

A. Summary Disposition Standards

We recently have summarized the general standards governing our consideration of summary disposition requests as follows:

> Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is ''no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.'' The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

B. Application of Commission's *Claiborne* Decision to Contention Utah E/Confederated Tribes F

Although we must utilize these precepts as we consider the PFS partial summary disposition motion, from the PFS, Staff, and State pleadings, it is apparent that a cardinal matter at issue is the effect of the Commission's 1997 *Claiborne* decision on the financial assurance controversy now before the Board. Accordingly, before moving to a consideration of the specifics of the PFS partial summary disposition request, we think it appropriate to address the overarching question of the impact of the Commission's *Claiborne* determination upon the financial assurance controversy in this proceeding.

Depending upon their position regarding the PFS motion, the parties seek either to have us find the *Claiborne* ruling controlling or declare it not apropos in the current circumstance because it concerned a 10 C.F.R. Part 70 uranium enrichment facility. And at the forefront of each of their arguments is a comparative parsing of the language of the financial qualifications provisions in 10 C.F.R. Parts 50, 70, and 72.

Section 72.22(e) states that an applicant for a license to construct and operate an ISFSI must provide information that shows it ''either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds'' to cover estimated construction costs, estimated operating costs over the ISFSI's planned life, and estimated decommissioning costs. By way of comparison, section 50.33(f)(1) declares that a reactor construction permit applicant shall submit information that demonstrates it ''possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs,'' while section 50.33(f)(2) directs that a reactor operating license applicant must submit information demonstrating that it ''possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license.'' This, in turn, can be contrasted with section 70.23(a)(5), which states that the Commission must determine whether an applicant for a license to construct and operate a uranium enrichment facility ''appears to be financially qualified to engage in the proposed activities.''

According to the State, the Commission's *Claiborne* approval of license conditions similar to those proposed by the Staff for the PFS facility was based on the less exacting ''appears to be financially qualified'' criteria of section 70.23 and could never meet the section 72.22 standard that contains no ''appears to be'' qualifier. The State thus concludes that the ''reasonable assurance'' language of Part 72 requires that the PFS ISFSI facility be treated in accordance with the financial qualifications requirements that append to power reactor facilities under Part 50 rather than Part 70 uranium enrichment facilities, rendering inappropriate the reliance on license conditions like those utilized in *Claiborne.*

The Commission's analysis in *Claiborne* suggests, however, that the answer is otherwise. There, comparing the financial qualifications standards of Parts 50 and 70, the Commission noted that prior to 1968 the language in the two provisions was ''essentially the same'' and permitted considerable case-by-case flexibility relative to both regulatory schemes. CLI-97-15, 46 NRC at 300. Thereafter, in what the Commission described as regulatory action that ''had the effect of breaking any link that existed'' between reactor and materials applicants, the agency adopted a rule change that added specific criteria and associated guidance (10 C.F.R. Part 50, App. C) for reactor license applicants. *Id.* at 301-02. As a consequence, the Commission concluded, notwithstanding similar early language, the 1968 rule change had the impact of making different, more stringent standards applicable for Part 50 licensees.

In this instance, the financial qualifications provisions of Parts 50 and 72 have some of the same general language, in terms of their requirements that ''reasonable assurance'' be found, but, as with Part 70, the specifics of each are very different. The information required under Part 72, which was first adopted in 1980 without any specific reference to the financial assurance requirements of Part 50, *see* 45 Fed. Reg. 74,693 (1980), is much less detailed than that demanded by Part 50.[3] This indicates to us, as the Commission found in *Claiborne,* that there is no reason to apply the financial qualifications requirements of Part 50 in this Part 72 proceeding in toto, although there may be some parallels in appropriate circumstances. *See* LBP-98-7, 47 NRC at 187.

This, of course, brings us to the next concern posed by the State: whether a Part 72 financial qualifications finding of reasonable assurance can be based on a license provision that requires the Applicant to meet certain fiscal requirements, the fulfillment of which are subject to post-license Staff review, as a condition to beginning facility construction and operation. The State declares that, given the highly toxic radiological inventory of spent fuel, such a provision cannot meet the ''reasonable assurance'' standard of Part 72. Once again, however, the rationale posited by the Commission in *Claiborne* relative to the financial qualification requirements of Part 70 suggests this is not the case. In concluding there that the use of such a license condition was appropriate, the Commission noted, among other things, that the health and safety risks associated with a Part 70 gas centrifuge enrichment facility were less than those associated with Part 50 nuclear power reactors, which have large radionuclide inventories and stored energy for dispersing

[3] As the Commission noted in adopting Part 72 in 1980, ISFSI activities originally were licensed under Part 70. *See* 45 Fed. Reg. at 74,693. In contrast, however, to the 1968 rulemaking that the Commission found created a significant break between the financial assurance requirements of Parts 50 and 70, any difference between Parts 70 and 72 engendered by the adoption of a separate Part 72 is considerably less pronounced given that neither Part 70 nor Part 72 has the specific requirements of Part 50. In fact, the additional detail in Part 72 goes to the matter of costs, *see* 10 C.F.R. § 72.22(e)(1)-(3), which will continue to be the subject of litigation in this proceeding under subpart six.

such material. CLI-97-15, 46 NRC at 306 & n.18. Although the State asserts that the health and safety concerns involved with a Part 72 facility are more on a par with a power reactor than an enrichment facility, the Commission previously has indicated otherwise. In the statement of considerations supporting a 1995 rulemaking that revised Part 72 to permit the Director of the Office of Nuclear Materials Safety and Safeguards to issue a site-specific license for the storage of spent fuel at ISFSIs located at reactor sites, in responding to a comment that ISFSI licensing should be the same as for new reactors or other facilities, the Commission noted:

> The Commission agrees in part with the thrust of the comments, that is, that NRC regulations as applied should achieve a comparable level of protection for the public health and safety, whether the NRC-licensed activity is operation of a nuclear power reactor, storage of spent fuel in an ISFSI or a [monitored retrievable storage (MRS) facility], or disposal of high-level radioactive wastes in a geologic repository. Significantly, however, the goal of comparable protection does not mean ISFSI activities must be regulated by NRC's using the same NRC requirements as for reactors or geologic repositories.
>
> Specifically, the public health and safety risks posed by ISFSI storage . . . are very different from the risks posed by the safe irradiation of the fuel assemblies in a commercial nuclear reactor, which requires the adequate protection of the public factor in the conditions of high temperatures and pressures under which a reactor operates. The risks of ISFSI storage are also very different from those posed by the safe disposal of the irradiated fuel in a geologic repository, which would require isolation of the wastes from the accessible environment for thousands of years.
>
> Nuclear fuel irradiated in a power reactor is highly radioactive and produces considerable heat. However, after the minimum 1 year of cooling that precedes its storage in an ISFSI, cooling and some shielding requirements will decrease as a result of the natural decay process over time. A fuel assembly cooled for 10 years after discharge from the reactor (typically the age of spent fuel actually placed in dry storage) generates approximately 500 watts of heat, which is on the order of the amount of heat generated by the light bulb in a floodlamp. In addition, its radiation dose rate is approximately one-half the rate when it was discharged from the reactor. ISFSIs are therefore designed to adequately dissipate the remaining heat, provide sufficient shielding from the radioactivity, and safely confine any gaseous and particulate radioactive nuclides.
>
> The potential ability of irradiated fuel to adversely affect the public health and safety and the environment is largely determined by the presence of a driving force behind dispersion. Therefore, it is the absence of such a driving force, due to the absence of high temperature and pressure conditions in an ISFSI (unlike a nuclear reactor operating under such conditions that could provide a driving force), that substantially eliminates the likelihood of accidents involving a major release of radioactivity from spent fuel stored in an ISFSI.

60 Fed. Reg. 20,879, 20,882-83 (1995) (citations omitted). Given this recent discussion indicating the hazards generally associated with an ISFSI are very different from those involved with a power reactor, it is not surprising that the Commission, in line with its holding in *Claiborne,* suggested to the parties and

the Board that financial qualifications license conditions would be appropriate in the context of this Part 72 proceeding as well.[4]

By the same token, we find unconvincing the State's attempts, *see* State Response at 8-11, 16-17, State Reply at 10-12, to discount the *Claiborne* decision's reliance on the availability of Staff post-licensing inspection and enforcement activities relative to Applicant commitments or license conditions as a basis upon which to rest a finding of reasonable assurance relative to the PFS commitments and corresponding proposed Staff license conditions. The State cites various agency cases involving 10 C.F.R. Part 50 power reactor health and safety issues for the proposition that post-licensing resolution can only be utilized sparingly. *See* State Response at 16-17 (citing *Consolidated Edison Co. of New York* (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 952 (1974), and *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978)). In the context of financial assurance for nonpower reactor facilities, however, the Commission in *Claiborne* appears to have taken a broader view of the matter. *See* CLI-97-15, 46 NRC at 308 (agency's ''inspection and enforcement tools provide further assurance'' that the public health and safety would not be jeopardized); *see also id.* at 306-07 (''NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements'').

Finally, in light of the Commission's *Claiborne* decision, we do not find compelling the State's concerns that allowing the PFS commitments and the Staff's proposed license conditions to provide the basis for a reasonable assurance finding is an improper waiver of the 10 C.F.R. Part 72 financial qualifications standards or an undue infringement on the State's right to litigate material issues bearing on the PFS licensing decision.[5]

Accordingly, we decline to accept the State's attempt to have the use of financial qualifications-related PFS commitments and Staff proposed license conditions declared unacceptable ab initio in the context of a Part 72 proceeding. As such, the question becomes whether the Applicant commitments and the corresponding

[4] We note that in this rulemaking, citing the lack of agency licensing experience, the Commission specifically declined to discontinue its practice of requiring direct Commission authorization for the licensing of an ISFSI, like the PFS facility, that is located at a site other than a reactor. *See* 60 Fed. Reg. at 20,883. While this choice further supports our determination here to refer our ruling to the Commission, we do not think it impacts on the broader question of the appropriate measures that are needed to assure a finding of adequate financial qualifications in a Part 72 proceeding.

[5] In fact, the Staff's ongoing inspection and enforcement responsibilities go a long way in addressing a principal State concern in this proceeding, i.e., the implications of reactor decommissioning either prior to sending fuel to the PFS site or during the PFS license term. Besides the Staff's responsibility to oversee the financial qualifications of PFS as the receiver of the spent fuel, the agency already has an ongoing responsibility to ensure that reactor licensees involved in spent fuel storage arrangements have provided adequate funding for such arrangements until the Department of Energy takes title to and possession of the fuel for repository disposal. *See* 10 C.F.R. § 50.54(bb).

proposed license conditions are adequate to support summary disposition regarding the nine specific subparts of this contention that are at issue.[6]

C. PFS Summary Disposition Motion

Turning to the substance of the PFS motion for partial summary disposition, we deal with the overall validity of the license conditions proposed by the Staff in its December 15, 1999 SER, as amended, which in all material respects conform to the commitments made by PFS, as well to each of the nine contention subparts that are at issue.[7]

1. PFS Commitments/Staff Proposed License Conditions

Initially, we find unpersuasive the State's attempt to demonstrate that summary disposition is inappropriate because the PFS commitments, and the concomitant Staff proposed license conditions are too vague and ambiguous to support a reasonable assurance finding. *See* State Response at 14-15; State Reply at 7-10. The principal State problems here are (1) the meaning of the term ''construction''

[6] In attempting to distinguish this proceeding from *Claiborne,* the State also relies on the fact that the Commission there relied, in part, on the fact that the applicant has " 'developed a reasonably sophisticated financial plan.' " State Response at 11 (quoting *Claiborne,* CLI-97-15, 46 NRC at 307). The State then goes on to list various items, including contingent liabilities from accident damages, insurance coverage, and an insufficient funding stream due to expenses, as matters that have not been addressed in the PFS commitments so as to render them inadequate under *Claiborne. See id.* at 11-13. These, however, are all matters that relate to the sufficiency of various specific aspects of the PFS request for summary disposition, not a basis for refusing to entertain the motion in toto.

[7] There has been no challenge by PFS or the Staff to the qualifications or expertise of the State's supporting declarants. As part of its challenge to the PFS and Staff summary disposition filings, however, the State declares that the individuals utilized by PFS and Staff as their principal declarants supporting the assertions in those parties' pleadings, PFS Chairman John Parkyn and Staff financial analyst Alex F. McKeigney, are not qualified to provide this support, albeit for different reasons.

According to the State, Mr. Parkyn's affidavit is deficient because (1) there is no resolution by the Board of Managers binding PFS to such commitments; and (2) his attached resume is inadequate to establish that his experience or education is sufficient to support the various opinions about financial planning, marketing, and spent fuel storage economics that are made in his affidavit. *See* State Response at 19-20. On the first point, putting aside the fact that, as PFS Chairman, Mr. Parkyn does appear to have authority to make major commitments on behalf of PFS, *see* Parkyn Declaration exh. 2, at 22 (PFS company agreement section 702(d)(i) allowing PFS Chairman to ''execute bonds, mortgages and other contracts on behalf of [PFS]''), the question of his authority becomes immaterial in light of the Staff's proposed license conditions that would adopt the PFS commitments as part of the license. In connection with the second matter, while Mr. Parkyn's resume could be more descriptive in terms of the time frames within which he held his various positions, in light of his overall experience, nothing gives us cause to question his qualifications relative to the matters that are of pivotal concern here.

Relative to Mr. McKeigney, the State acknowledges that although he worked for some 21 years as a planner and financial analyst for the nuclear industry, Mr. McKeigney has been employed by the NRC as a financial analyst only since 1997, a period the State asserts is too brief to provide him with the experience to write license conditions or evaluate financial qualifications from the government perspective, including the utility of governmental functions such as post-licensing enforcement, which is referenced as a basis for the Staff's conclusion that summary disposition is appropriate. *See* State Reply at 13. On the basis of the record before us, we find nothing to suggest that Mr. McKeigney lacks sufficient experience, either as a financial analyst or a government employee, to support the Staff's conclusions. Indeed, we have noted previously, *see supra* p. 116, the Commission itself has affirmed the adequacy of Staff post-licensing inspection and enforcement efforts as support for financial assurance findings.

and the degree to which it incorporates the costs associated with bringing spent fuel shipments (either by constructing an intermodal transfer point or a rail line spur) from the main rail line to the PFS facility; (2) whether the PFS operational commitment includes all operational, maintenance, and fixed costs; (3) funding sufficiency for additional storage commitments beyond the PFS initial operation target; and (4) the term of customer service agreements. The first two points, however, are matters that relate to the question of what are the PFS ''costs'' that its financial commitments must cover, which will be litigated relative to subpart six of this contention. So too, the State's concern about funding sufficiency determinations for additional storage commitments beyond the PFS target for initial operation is addressed by the Staff's first proposed license condition, which requires such additional construction can commence only after adequate funding for such additional construction is fully committed. As to the question of the length of customer service agreements, although the State considers the Staff's license condition reference to ''long term'' too vague, we are unable to agree given (1) the Commission's acceptance of that term in its *Claiborne* decision; and (2) the PFS commitment to obtain service agreements that cover operating and maintenance costs for the entire life of the PFS facility. *See* PFS Motion at 8.

The State's attempt to have us deny summary disposition on this basis thus is misplaced.

2. Subpart 1 — Adequacy of PFS Ownership Information

a. PFS Position

PFS proffers two undisputed material facts, designated four and five, which (as is the case with the rest of the PFS material factual statements not in dispute) are supported by the affidavit of PFS Chairman Parkyn, in which it asserts that the owners of PFS have been identified to the Staff and their relationships are explained in the PFS subscription agreement, which also has been provided to the Staff. *See* PFS Motion, Statement of Material Facts on Which No Genuine Dispute Exists at 3 [hereinafter PFS Undisputed Material Facts]. As a consequence, PFS asserts this portion of the contention is moot. *See* PFS Motion at 10-11.

b. Staff Position

Based on the affidavit of Mr. McKeigney in which he states that PFS provided the names of the owners and adequate information on their relationships in responses to Staff RAIs, the Staff declares its agreement with the PFS position on subpart one. *See* Staff Response at 8; McKeigney Affidavit at 3.

c. State Position

In opposing the PFS motion, based on the affidavit of Mr. Schlissel, the State disputes both of the material facts relied upon by PFS. *See* State Response, [State] Statement of Disputed and Relevant Material Fact at 10-11 [hereinafter State Disputed Material Facts]; *id.* exh. D, at 1-2 (declaration of David A. Schlissel); *see also* State Reply at 16. According to the State, two of the eight utilities that currently are PFS members either have sold, or are in the process of selling, their reactor units so as to no longer need spent fuel storage services. Additionally, the State contends that the relationship between the PFS members has not been adequately described in that the copy of the PFS limited liability agreement attached to the Parkyn affidavit as exhibit two does not include all the addenda and exhibits that are referenced in its table of contents, in particular exhibit A (Steps II and IV capital contributions), exhibit B (member subscription agreement form); exhibit C (interested utility subscription agreement form), and exhibit F (capital contributions).

d. Board Ruling

Although the State has framed certain factual disputes relative to this item, we conclude they do not preclude summary disposition because they are not material. Regarding the possibility that some of the original eight PFS members may drop out before construction, as we have noted above, the PFS commitments and the Staff's proposed license conditions will not allow facility construction to move forward unless sufficient funds, including equity contributions from PFS members, have been committed to the project. If it turns out at the time construction is to begin that, because of the number of PFS members available to make equity contributions there is a funding shortage, then PFS will not be able to begin construction. Indeed, the PFS membership agreement addresses this question by additional calls for equity contributions from remaining members and adding members to the PFS consortium. *See* Parkyn Declaration exh. 2, at 7-9 (PFS limited liability company agreement). Moreover, it is apparent from the discussion in the agreement regarding the agreement exhibits about which the State has expressed a concern, they are not material in that they would not provide any information that would impact on the efficacy of the PFS commitments or the proposed license conditions. Summary disposition in favor of PFS on this portion of contention Utah E/Confederated Tribes F is appropriate.

3. Subpart 2 — Adequacy of PFS Financial Base

a. PFS Position

PFS again proffers two material facts not in dispute, designated six and seven, that it asserts provide a basis for summary disposition on this second portion of the contention. Essentially, PFS declares that the State's concerns about the adequacy of its financial base are immaterial because it has obligated itself not to build without (1) sufficient committed funds to cover construction costs; and (2) in-place customer service agreements sufficient to cover facility operating and maintenance costs, including debt financing amortization. PFS also declares that the State's concerns about premature termination are groundless given that the company agreement keeps the company in existence until at least 2045 and can be extended by its members, the PFS commitments to ensure that the company will not begin construction and operation without the commitment of sufficient funds, and the fact the service agreements with customers will provide that PFS will remain in existence to provide agreed upon spent fuel storage services, thus precluding voluntary termination of PFS before its regulatory and licensing obligations are completed and its Part 72 license is terminated. *See* PFS Motion at 11-12; PFS Undisputed Material Facts at 3-4; Parkyn Declaration at 5-6.

b. Staff Position

The Staff again agrees with the PFS position, pointing out that the applicant entity in *Claiborne* also was a newly formed entity with no executed contractual commitments from its project partners or lender funding, yet the Commission found license conditions like those proposed here to be sufficient to ensure the requisite reasonable assurance. *See* Staff Response at 8-12; McKeigney Affidavit at 3.

c. State Position

Relying on the affidavit of Dr. Sheehan, the State disputes material facts six and seven, declaring that the PFS commitment does not show that its financial basis is sufficient to assume ownership and operation obligations for the facility or that the commitments address amortization of any debt financing. In addition, the State declares there is no assurance that PFS will not be subject to termination before the expiration of its Part 72 license or the removal of all the casks from Skull Valley. The State notes that under the PFS agreement, PFS may be terminated at any time by the consent of those members with a ''Class A Percentage Interest,'' a class defined in exhibit A to the agreement that has not been put before the Board; that, depending on the date of licensing, the 2045 termination date may not be sufficient to cover the PFS 20-year term plus one 20-year renewal; that members

can withdraw at any time; and that a statement by Mr. Parkyn that customer service agreements will require PFS to remain in existence to provide any agreed fuel storage services is meaningless because the service agreements have not been provided for the record. *See* State Response, State Disputed Material Facts at 11-13; *id.* exh. A at 2-3, 9-10, 12 (Declaration of Michael Sheehan) [hereinafter Sheehan Declaration]; State Reply at 17-18.

d. Board Ruling

As we have noted earlier, in line with the Commission's *Claiborne* decision, reasonable assurance is provided by the PFS commitment and the Staff proposed license conditions requiring that PFS must have adequate financial resources, including debt financing amortization, in place for construction and operation prior to beginning those activities. On the issue of the continuing existence of PFS, we find (as did the Staff) the PFS commitment to include a provision in the customer service agreements that will obligate it to continue to provide spent fuel storage services until license termination is sufficient to provide the requisite reasonable assurance. Moreover, as with the Commission's *Claiborne* decision, in which there likewise were no contract agreements with prospective customers, *see* CLI-97-15, 47 NRC at 304, we do not find lack of any existing ''draft'' agreements is material to the requisite reasonable assurance finding. Compare also *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983) (implementing details should not become the focus of litigation over the adequacy of power reactor emergency plans). We thus find summary disposition in favor of PFS appropriate as to this portion of the contention as well.

4. Subpart 3 — Adequacy of PFS Funding Documentation, Including Business Plan and Subscription Agreements

a. PFS Position

The two material factual statements not in dispute set forth by PFS in support of summary disposition on this subpart, numbered eight and nine, state that (1) its financial assurance flows from the PFS commitments not to commence facility construction until there is a sufficient funding commitment to do so and to commence facility operation only after service agreements are in place fully to cover the costs of facility maintenance and operation; and (2) PFS will have no liabilities other than providing spent fuel storage and related services to customers for which it will be paid under the service agreements. *See* PFS Undisputed Material Facts at 4; *id.* Parkyn Declaration at 6-7. As a consequence, PFS declares this subpart is moot because, based on its commitments, it has done all it needs

to do to demonstrate financial assurance, thereby alleviating it from any obligation to further document its funding sources. *See* PFS Motion at 12-13.

b. Staff Position

Relying on the affidavit of Mr. McKeigney, the Staff declares that the PFS commitments, as reflected in the Staff's proposed license conditions, in conjunction with the Staff's inspection verification activities, that include confirmation that subscription and service agreements have been executed, establish that there are no material disputed facts relative to this subpart as well. Although expressing its disagreement with the assertion in PFS undisputed material facts statement number nine that PFS will have no liabilities on the basis that PFS may incur some commercial bank or other third party lender liability relative to its construction of the facility, the Staff nonetheless concludes that the PFS commitments, as incorporated in the Staff proposed license conditions, establish that such liability would not interfere with the debt repayment or facility construction or operation ability of PFS and thus fail to provide grounds for not granting summary disposition to PFS regarding this subpart. *See* Staff Response at 12-13 & n.6; *id.* McKeigney Affidavit at 4.

c. State Position

Regarding PFS undisputed material fact statement numbers eight and nine, citing the affidavit of Dr. Sheehan, the State declares that it has not been provided with a copy of the PFS members' subscription agreements or of the service agreements and, accordingly, there is no evidence whether, as PFS asserts, these agreements will be adequate to provide reasonable assurance that they provide sufficient funding commitments. *See* State Disputed Material Facts at 13-14; Sheehan Declaration at 8, 10, 12.

d. Board Ruling

As was the case in *Claiborne,* we find the PFS commitment, as reflected in the proposed Staff license conditions, to have member subscription agreements and customer service agreements in place that are sufficient to cover the costs of construction and operation prior to beginning those activities provide the requisite reasonable assurance and make summary disposition appropriate relative to this

portion of this contention.[8] Moreover, under the terms of the PFS commitments and the Staff's proposed license conditions, the most significant aspect of the PFS business plan relative to the ability of PFS to undertake facility construction and operation — the costs of facility construction and operation — will be subject to litigation under basis six of this contention.[9]

5. Subpart 4 — Adequacy of PFS Documentation on Current Financial Status

a. PFS Position

Relying again upon undisputed material factual statements eight and nine, PFS declares that this subpart's claim that PFS must provide a current assets, liabilities, and capital structure statement to establish financial assurance is without merit in light of the PFS commitments, the nonapplicability of the 10 C.F.R. Part 50 financial assurance requirements, and the description of its capital structure in its agreement and its pro forma subscription agreements provided to the Staff. In addition, according to PFS, this basis is without substance given that PFS will have no liabilities other than providing spent fuel storage and related services to customers, for which it will be paid under the service agreements, and has a capital structure that would not adversely affect the financial assurance it has established through its commitments. *See* PFS Motion at 13; PFS Undisputed Material Facts at 4; Parkyn Declaration at 6-7.

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[8] In its December 15, 1999 statement of position regarding this contention, the Staff notes that

> because PFS has not provided copies of each member's executed Subscription Agreement, and because PFS has provided neither blank forms of Service Agreements nor copies of any executed Service Agreements, the staff has concluded that the documents supplied to date are insufficient to support reasonable assurance that PFS is financially qualified to construct, operate, and decommission the proposed facility pursuant to 10 C.F.R. § 72.22(e). The Staff considers that this issue will be resolved upon PFS' compliance with the Staff's recommended license conditions, supported by adequate documentation, before construction is allowed to commence.

NRC Staff's Statement of Its Position Concerning Group I-II Contentions (Dec. 15, 1999) attach. at 4. As we read the Commission's *Claiborne* determination, such a finding is permissible in the context of a non-Part 50 financial qualifications review and dispositive of the PFS concern here.

[9] In its *Claiborne* decision, the Commission noted that, relative to the issue of whether financial difficulties might lead to construction safety problems, in addition to the applicant's advance funding commitment, the Commission's reasonable assurance finding was based on the applicant's construction cost estimate, which had been established as ''reasonable.'' CLI-97-15, 46 NRC at 307. According to the Commission, the solidness of the applicant's cost estimate indicated it understood its funding commitment, had seriously considered the factors that would contribute to project expenses, and was in a position to recognize promptly any unforseen cost escalation difficulties, thereby allowing it time to maintain its financial qualifications. *See id.* Recognizing that the ''reasonableness'' of the PFS cost estimate is still at issue relative to subpart six of this contention, this nonetheless does not preclude us from granting summary disposition relative to this and other portions of contention Utah E/Confederated Tribes F. Rather, it serves to emphasize the importance of the cost issue. Consistent with *Claiborne,* in the face of a record establishing that construction or other costs are significantly beyond PFS estimates, a final determination of PFS compliance with the reasonable assurance requirement of section 72.22(a) could be problematic without some additional showing by PFS regarding its understanding of the scope of project expenses and its funding commitment.

b. Staff Position

The Staff likewise finds summary disposition appropriate for this subpart, declaring that a current PFS statement of assets, liabilities, and capital structure is irrelevant given that, consistent with the PFS commitments and the proposed license condition, PFS need not and will not have any significant financial assets or liabilities until after a license is granted. *See* Staff Response at 13; McKeigney Affidavit at 4-5.

c. State Position

Again based on Dr. Sheehan's affidavit, the State declares there is a dispute regarding PFS material factual statement number nine in that PFS may have significant liabilities that will impair funding of construction, operation, maintenance, decommissioning, and transportation services. *See* State Disputed Material Facts at 13-14; Sheehan Declaration at 7-8.

d. Board Ruling

Once more, consistent with the Commission's *Claiborne* ruling, we find summary disposition in favor of PFS appropriate relative to this portion of Contention Utah E/Confederated Tribes F. The premise of the various liability concerns posed by the State is that PFS will be permitted either to construct or operate the facility when there is an inadequate revenue stream to cover the costs reasonably involved in such activities, a premise we find is inconsistent with the PFS commitments and the Staff proposed license conditions. Further, we note that to the extent the State, in the context of this subpart (as opposed to subparts five and ten), now seeks to incorporate ''liabilities'' relating to contingent matters such as accident or natural event losses, the State is requesting information that falls outside the scope of 10 C.F.R. Part 50, App. C, § II.A.2 (requiring applicant statement of ''assets, liabilities, and capital structure as of the date of the application'') that it references as support for this portion of its contention.

6. Subpart 5 — PFS Liability for Spent Fuel Casks

a. PFS Position

Referencing undisputed material factual statements ten and eleven, PFS asserts that summary disposition is appropriate for this claim because (1) as the Commission noted in the *Claiborne* case, the NRC licensing process will ensure that the PFS facility is a safe site such that there will not be an allocation of accident recovery to PFS that would cause a funding shortfall; and (2) notwithstanding the fact

that, unlike the reactor financial assurance provisions, *see* 10 C.F.R. § 50.54(w), there is no requirement for Part 72 licensees to have accident recovery onsite property insurance, PFS will have insurance sufficient to cover the costs of accident remediation that is greater than the amount of insurance coverage the Commission has proposed is necessary for spent fuel kept at an onsite reactor ISFSI (citing 62 Fed. Reg. 58,690, 58,691-92 (1997)), albeit to cover mobile radioactive sources, not the onsite spent fuel storage. *See* PFS Motion at 14-15 & n.11; PFS Undisputed Material Facts at 4; Parkyn Declaration at 7-8.

b. Staff Position

Agreeing that a 10 C.F.R. Part 72 licensee is not required to carry onsite property insurance, the Staff also concludes summary disposition is appropriate in connection with this subpart because (1) PFS has indicated in its licensing submittals that customers must retain title to their own fuel during storage; and (2) PFS has stated the service agreements assigning the terms of legal and financial responsibility among the customers, as owners of the fuel, and PFS, as the facility owner, and those agreements will be subject to Staff inspection verification. *See* Staff Response at 14-15; McKeigney Affidavit at 5-6.

c. State Position

The State disputes material fact numbers ten and eleven, asserting, based on the affidavit of Utah DEQ Director Sinclair, that the circumstances at the Atlas Corporation Moab, Utah uranium mill tailings site establish that Staff deferral of financial assurance decisions results in public health and safety impacts. *See* State Disputed Material Facts at 14; State Response, exh. B at 1-3 (declaration of William J. Sinclair). Also establishing disputed material facts, the State contends, is the fact that PFS has no assets of its own and no deep pockets to ensure responsibility for accident recovery or funding shortfalls; has not produced any onsite or offsite insurance policies and has failed to commit to obtaining such policies; has failed to show that the policies it ''contemplates'' retaining are adequate to cover an ISFSI at which 40,000 MTUs of spent nuclear fuel will be stored; and has not even provided the Staff with the service agreements that purportedly will contain language that assigns the terms of legal and financial responsibility among customers. *See* State Disputed Materials Facts at 14-15; Sheehan Declaration at 4-5, 8-9, 12-13; State Reply at 18.

d. Board Ruling

In granting summary disposition in favor of PFS on this portion of contention Utah E/Confederated Tribes F, in conjunction with the Commission's *Claiborne*

endorsement of Staff post-licensing inspection and enforcement activities as ensuring financial qualification, we take notice of the PFS commitments that it will (1) offer storage services only on the condition that each customer retain title to its fuel throughout the storage period; and (2) include in each customer service agreement an assignment of legal and financial responsibility among the customers, as owners of the spent fuel, and PFS. With regard to the latter, we note that while PFS has not provided any specifics on what this assignment will be, consistent with the Commission's *Claiborne* decision, its commitment to include this allocation in the service is sufficient to render this concern moot.

To the degree this subpart involves the issue of the adequacy of PFS liability insurance arrangements, for the reasons we detail in addressing subpart ten below, *see* section II.C.10.d below, we grant summary disposition in favor of PFS relative to the offsite liability question and deny its motion as to the matter of onsite liability.

7. Subpart 7 — Adequacy of Existing Market Documentation

a. PFS Position

Relative to the claim in this subpart that PFS must document the existing market for spent fuel storage services and service agreement commitments to establish sufficient construction funding, PFS declares it moot because of its commitment not to build without sufficient funding and not to operate without sufficient service agreements to cover the full cost of facility operation and maintenance, including debt financing amortization. Further, as this subpart seeks to question the sufficiency of the PFS initial MTU funding designation as adequate to cover operation, decommissioning, and contingencies, in addition to declaring the figure put forth by the State to be irrelevant because this is not the figure PFS intends to use, PFS also declares that the State's challenge, as it relates to contingencies and decommissioning, is really a challenge to the adequacy of the PFS cost estimate and decommissioning funding, which are matters for consideration under subpart six of this contention or contention Utah S, Decommissioning, both of which are not the subject of this summary disposition motion. *See* PFS Motion at 15-16 & n.12; PFS Undisputed Material Facts at 4 (undisputed material fact statement number twelve); Parkyn Declaration at 9.

b. Staff Position

The Staff declares its proposed license conditions render this portion of the contention moot, given that they provide construction cannot start without fully committed construction funding sufficient for a facility with the initial capacity specified by PFS, making a documented spent fuel storage market unnecessary.

The Staff also agrees with the PFS position that the claims regarding the adequacy of the PFS initial capacity figure to cover contingencies and decommissioning are subject to consideration under subpart six of Utah E/Confederated Tribes F concerning PFS cost estimates and Utah S regarding decommissioning. *See* Staff Response at 15-16 & n.7; McKeigney Affidavit at 6.

c. State Position

The State asserts a dispute with PFS material factual statement number twelve on the basis that, because PFS has no assets of its own, PFS must demonstrate it has an adequate market to generate an income stream from service agreements. *See* State Disputed Material Facts at 15; Sheehan Declaration at 12; State Reply at 16-17.

d. Board Ruling

As we have indicated previously, the PFS commitments and the Staff proposed license conditions do not permit construction or operation unless PFS is able to obtain funding commitments sufficient to cover these activities. As a consequence, relative to this facility, the question of the existence and adequacy of the market for spent fuel storage services is not material to the requisite reasonable assurance finding under 10 C.F.R. § 72.22(e). Accordingly, we grant summary disposition in favor of PFS on this portion of the contention. Moreover, as both PFS and the Staff suggest, any question about the adequacy of the PFS initial capacity figure to cover contingencies and decommissioning is subject to consideration under subpart six to contention Utah E/Confederated Tribes F concerning PFS cost estimates and contention Utah S regarding decommissioning.

8. Subpart 8 — Propriety of PFS Use of Debt Financing

a. PFS Position

Also rendered moot by the PFS financial commitments, according to PFS, is this subpart declaring that debt financing is not a viable option for construction funding until supporting documentation, including service agreements, is provided and a minimum value of service agreements is committed. PFS declares that, as with the *Claiborne* case, its commitment not to commence construction until it has committed funds in place makes the source of funds, whether debt financing or otherwise, irrelevant to its financial qualifications. *See* PFS Motion at 16-17; PFS Undisputed Material Facts at 4 (undisputed material fact statement number thirteen); Parkyn Declaration at 9.

b. Staff Position

The Staff likewise finds this contention subpart moot, declaring that PFS may not need to incur debt to finance construction costs and, in any event, because of the Staff's proposed license conditions requiring it to have funding commitments before construction begins, PFS would have an adequate basis to attract debt financing and to repay any debt and associated interest expense. *See* Staff Response at 16; McKeigney Affidavit at 6.

c. State Position

The State declares PFS material factual statement thirteen is in dispute because PFS has offered no support for its claim that the PFS commitment will raise sufficient revenue, including debt financing, to begin construction and the use of debt financing could burden PFS with such construction debt that there would not be sufficient revenues to cover both the debt and operation and maintenance costs. *See* State Disputed Material Facts at 16; Sheehan Declaration at 4, 7.

d. Board Ruling

As with subpart four, this stream of revenue concern relating to debt amortization is rendered moot by the PFS commitments and Staff proposed license conditions, which require that before it can begin construction or operation, PFS must have the committed funds that are necessary to undertake that activity, including funding that will cover any debt financing that it must undertake. Accordingly, summary disposition in favor of PFS on this portion of the contention is appropriate as well.

9. Subpart 9 — Adequacy of PFS Measures to Address Service Agreement Breach

a. PFS Position

Relative to this State concern about the impact if storage clients stop payments to PFS because of client insolvency or unresolved disputes with PFS, PFS declares this shortfall concern should be resolved in its favor because (1) before shipping fuel to the PFS facility, PFS customers, including PFS members, will be required to make most of their payments to PFS, i.e., a three-part base storage payment, that will cover costs of facility construction, spent fuel canister and cask manufacture, spent fuel preparation equipment, transportation, and PFS

general and overhead expenses;[10] and (2) PFS periodically will evaluate customer financial health to ensure fee payment, using financial information required to be provided by customers under each service agreement, will require customers to meet creditworthiness requirements, and has available a variety of methods, such as advance payments, irrevocable letters of credit, third-party guarantees, and payment and performance bonds, to ensure there will be customer payments sufficient to adequately fund the facility. *See* PFS Motion at 17-18; *see* PFS Undisputed Material Facts at 5 (undisputed material factual statement number fourteen); Parkyn Declaration at 9-10.

b. Staff Position

The Staff finds no material facts in dispute because (1) it is expected that in the normal course of any business entity's operation, some customers will make insufficient payments, which can be addressed with standard legal remedies; and (2) PFS has stated it will collect most of a customer's storage payment in advance before fuel will be stored at the facility. *See* Staff Response at 17; McKeigney Affidavit at 6-7.

c. State Position

PFS material factual statement number fourteen is in dispute, the State asserts, because there are no service agreements in evidence; annual storage fees are paid annually, not prior to receipt of the fuel; there is no payment scheme for reactors that plan to decommission before the end of the potential 40-year license period for PFS and so will not be available to pay annual storage fees; spent fuel cannot be returned to decommissioned sites in the event storage fees are not paid; and PFS has failed to account for uncollectible accounts. *See* State Disputed Material Facts at 16; Sheehan Declaration at 11-12. Additionally, the State declares that the Staff's analysis relating to this subpart is inadequate because there is no evidence that up front payments will be made to PFS prior to fuel shipments or that inservice debt will be irrelevant; the Staff is improperly deferring to the Applicant's evaluation of customer financial health and has no reason to believe the service agreements will require customers to provide financial information; and the Staff's reliance on standard legal remedies does not comport with reality. *See* State Reply at 18-19 & n.10.

[10] In his affidavit accompanying the PFS motion, PFS Chairman Parkyn indicates that for a facility of the initial design capacity now being proposed by PFS, the prepaid base storage fees would ''conservatively'' cover 75% of the total amount to be received by PFS for storage services over the 20-year initial life of the facility, with annual storage fees intended to cover operating and maintenance costs providing the balance. *See* Parkyn Declaration at 4, 10.

d. Board Ruling

Consistent with the Commission's *Claiborne* determination, the PFS requirement for substantial base storage payments and its commitment to require in the service agreements that customers (1) periodically provide pertinent financial information; (2) meet creditworthiness requirements; and (3) provide any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond) provides the requisite reasonable assurance such that summary disposition in its favor is appropriate on this portion of the contention. As we have indicated, service agreements bearing these provisions need not be in place to provide the requisite reasonable assurance, given that those agreements will be subject to Staff verification as part of the inspection process relating to PFS and the Staff's independent financial assurance review responsibilities relative to PFS customers' irradiated fuel management and funding programs. *See* 10 C.F.R. § 50.54(bb).

10. Subpart 10 — Adequacy of PFS Resources for Non-Routine Expenses

a. PFS Position

Referring again to undisputed material factual statements ten and eleven, PFS maintains summary disposition in its favor is appropriate on this portion of contention Utah E/Confederated Tribes F regarding the adequacy of PFS resources to cover worst case spent fuel transportation, storage, or disposal accidents because (1) offsite transportation accident recovery is governed by 10 C.F.R. Part 71 and United States Department of Transportation regulations; (2) spent fuel transportation accident cost recovery would be covered under the Price-Anderson Act, 42 U.S.C. § 2210, *see also* 42 U.S.C. § 2014(t), (ff); 10 C.F.R. § 140.91, app. A, art. III (definition of ''insured shipment''), which makes reactor licensees or the United States Department of Energy (DOE) responsible; (3) under the standard spent fuel disposal contract between DOE and nuclear utilities, spent fuel disposal costs, including transportation and attendant accident recovery costs, are the responsibility of DOE; (4) NRC technical review, inspection, and enforcement activities makes the possibility of significant accidents at the PFS facility a very low probability, as reflected in the fact that there are no NRC onsite or offsite liability insurance requirements for ISFSIs like the PFS facility; and (5) PFS will have onsite nuclear property insurance and offsite nuclear liability insurance sufficient to cover cost recovery for any foreseeable accident at the PFS facility. *See* PFS Motion at 18-20; PFS Undisputed Material Facts at 4; Parkyn Declaration at 7-8.

b. Staff Position

In supporting the PFS request for summary disposition on this contention basis, the Staff declares that (1) PFS is correct that spent fuel transportation safety issues are outside the scope of this proceeding; (2) transportation accident liability is addressed under the Price-Anderson Act provisions of the Atomic Energy Act (AEA) and implementing NRC regulations, which would include coverage under specific 10 C.F.R. Part 50 power reactor licensee policies during spent fuel transportation and coverage for DOE contractors who might transport spent fuel from the PFS facility to a DOE repository; and (3) the PFS plan to obtain the largest commercial nuclear liability insurance policy available, in the amount of $200 million, as well as property insurance in the amount of $70 million, is sufficient contingency funding coverage. *See* Staff Response at 18-20; McKeigney Affidavit at 7. In doing so, however, Staff affiant McKeigney states his disagreement with the statement in PFS undisputed material factual statement number eleven that PFS onsite and offsite nuclear liability insurance coverage will meet or exceed any requirement for ISFSIs, noting that there are no such NRC requirements and an ongoing NRC financial assurance rulemaking regarding spent fuel storage concerns only permanently shutdown reactor licensees, not offsite ISFSIs. *See* McKeigney Affidavit at 7-8.

c. State Position

The State disputes material fact numbers ten and eleven, declaring that PFS has no assets of its own and no deep pockets to ensure responsibility for accident recovery or funding shortfalls; has not produced any onsite or offsite insurance policies and has failed to commit to obtaining such policies; and has failed to show that the policies it ''contemplates'' retaining are adequate to cover an ISFSI at which 40,000 MTUs of spent nuclear fuel will be stored. *See* State Disputed Material Facts at 14-15; Sheehan Declaration at 4-5, 8-9, 12-13. In addition, the State contests the PFS motion because there is no license condition requiring PFS to carry any amount of insurance and because of its belief that the Price-Anderson Act may not cover spent fuel coming from a Part 72 facility or from the PFS facility to a non-DOE facility. *See* State Reply at 18; *id.* exh. 1, at 3 (supplemental declaration of Michael Sheehan).

d. Board Ruling

As this portion of contention Utah E/Confederated Tribes F concerning the financial ability of PFS to deal with worst case accidents relates to transportation incidents, we find summary disposition in favor of PFS is appropriate. Putting aside our previous rulings regarding the scope of this proceeding relative to transportation

issues, it is apparent that in all material respects, transportation-related incidents will be covered under the provisions of the Price-Anderson Act, AEA § 170, 42 U.S.C. § 2210, and regulatory implementing provisions, including 10 C.F.R. Part 140. Although the State raises questions about Price-Anderson Act coverage relative to spent fuel transfers between Part 72 ISFSI facilities (of which the PFS facility is the only one currently the subject of the agency's licensing process) or shipment from PFS to a non-DOE, non-Part 50 facility, it has not shown that such shipments are in any way contemplated or likely.

In connection with the question of PFS financial assurance relative to onsite or offsite liability from worst case incidents, we find that summary disposition is appropriate in favor of PFS relative to the offsite liability issue.[11] Utilizing its discretionary authority, NRC could require PFS to provide Price-Anderson Act financial protection, with its concomitant liability limitations. *See* AEA § 170a, 42 U.S.C. § 2210(a). As PFS and the Staff have pointed out, however, at this juncture the agency has decided not to invoke its discretionary authority relative to Part 72 ISFSIs. *Compare* 43 Fed. Reg. 46,309, 46,310 (1978) (Part 72 proposed rule statement of considerations indicating Commission is considering whether to exercise Price-Anderson Act discretionary authority to prescribe financial protection requirements) *and* ICF Inc., The Price-Anderson Act — Crossing the Bridge to the Next Century: A Report to Congress, NUREG/CR-6617, at 5 (Oct. 1998) (contractor report prepared for NRC Office of Nuclear Reactor Regulation) (after 1997, NRC evaluated whether to invoke Price-Anderson Act discretionary authority relative to material licensees and decided no apparent need existed) [hereinafter NUREG/CR-6617] *with* 62 Fed. Reg. 58,690, 58,690-91 (1997) (Parts 50/140 proposed rule statement of considerations regarding onsite and offsite liability coverage for permanently shutdown power reactors indicating the subject of ISFSI financial protection requirements will be addressed after technical and licensing issue efforts regarding safeguards requirements, emergency planning, and potential fuel storage handling activities). As a practical matter, the PFS facility thus falls into the same category as the *Claiborne* enrichment facility that also was not under the Price-Anderson Act umbrella, albeit as a matter of congressional direction. *See* AEA § 193(e), 42 U.S.C. § 2243(e).

As a consequence, we think the Commission's direction in the *Claiborne* proceeding regarding the scope of the applicant's financial protection requirements provides a useful template for addressing that question here. In *Claiborne,* in the notice of opportunity for hearing on the Part 70 enrichment facility application,

[11] Initially, PFS suggests that this matter and the related concern in subpart five are subject to summary disposition because the agency's licensing findings, by their very nature, ensure a facility that will operate in a manner that will have no onsite or offsite worst case accident-related consequences. It is apparent, however, that this assertion is not dispositive in connection with financial protection analysis. *See* 62 Fed. Reg. 58,690, 58,691 (1997) (in determining appropriate liability limitations for permanently shutdown power reactors, Staff analyzes beyond design basis accidents relating to spent fuel storage).

after noting that its Part 140 provisions in (1) sections 140.15-.17 provide adequate guidance regarding proof of financial protection (insurance) and (2) Appendix A provide the models for the form, content, and coverage of nuclear energy liability insurance, the Commission went on to observe:

> As to amount, the applicant shall, in the first instance, justify the amount of insurance it intends to purchase, in terms of a reasonable evaluation of the risks required to be covered by the legislation, but in no case need the applicant provide an amount greater than the maximum amount available from commercial nuclear energy liability insurers.

56 Fed. Reg. 23,310, 23,312 (1991). As a consequence, notwithstanding that the Price-Anderson Act liability limitation was not applicable, the Commission required that the applicant obtain no more than the maximum amount of nuclear liability insurance currently commercially available.

In this instance, relative to its offsite liability, PFS has committed to obtain a nuclear energy liability insurance policy in the amount of $200 million. Because this is currently the largest commercially available policy, *see* NUREG/CR-6617, at 76 ($200 million largest nuclear liability insurance policy currently available); *see also* Staff Response, McKeigney Affidavit at 7 (PFS has stated it will obtain largest commercial nuclear liability insurance policy available in the amount of $200 million), in accordance with the Commission's *Claiborne* guidance, we find this commitment sufficient to merit summary disposition in favor of PFS on this point.

As to the question of onsite property coverage, however, the matter is not so clear. PFS has committed to providing insurance in the amount of $70 million, which it describes (and the Staff agrees) is adequate. We are aware of nothing, however, that would establish that, as is the case with its offsite liability insurance commitment, this amount is the largest commercially available coverage. *See also* 10 C.F.R. § 50.54(w)(1) (minimum reactor facility onsite insurance must be lesser of $1.06 billion or amount of insurance generally available from private sources). Consequently, in light of the State's unrebutted assertions regarding a lack of any particularized showing concerning the coverage that is necessary for the PFS facility, and the apparent lack of conformance with the Commission's *Claiborne* guidance regarding liability insurance, there appears to be a material factual issue in dispute relative to PFS onsite liability coverage that precludes entry of summary disposition relative to this aspect of the contention. We thus deny the motion on this point.

D. Joint Report on Further Litigation Regarding Contention Utah E/Confederated Tribes F

With this summary disposition ruling, as well as our additional discovery and late-filed contentions rulings made today, *see* LBP-00-7, 51 NRC 139 (2000);

Licensing Board Memorandum and Order (Ruling on Discovery Requests) (Mar. 10, 2000) (unpublished), it appears that paragraph six of this contention relating to the PFS cost estimates for construction and operation and the size of the PFS onsite liability under paragraphs five and ten are the only issues for further litigation under this contention. Accordingly, the Board requests that on or before *Friday, March 17, 2000,* the parties provide the Board with a joint report indicating what portion of the scheduled June 1999 hearing time needs to be devoted to litigation of these issues. Additionally, the parties should indicate what portion, if any, of the proceeding on this contention will need to be closed because it will involve the discussion of proprietary information. Also in this report, the parties should provide information on the status of the cask application relating to the Utah GG, Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks.

If the parties believe that a telephone conference with the Board regarding this scheduling matter would be useful as well, they should provide the Board with two or three alternative times that the parties will be available during the week of March 20, 2000.

E. State Request Regarding Release of Proprietary Information

As we described in section I.D above, in its December 27, 1999 response to the PFS December 3, 1999 motion and again in its January 10, 2000 reply to the Staff's December 22, 1999 response in support of that motion, the State has requested that various documents that are now being treated as proprietary, and therefore not subject to public release, be placed in the public docket of this proceeding. Specifically, the State has asked for public release of (1) the PFS motion and all attachments except, perhaps, the portions of the PFS limited liability agreement included as exhibit two to Mr. Parkyn's affidavit be made part of the public docket of this proceeding; and (2) all information relating to the PFS December 3, 1999 summary disposition motion claimed to be proprietary. Putting aside the problem that, with perhaps the exception of its designation of the PFS figure for its nominal storage target and a reference to ''legal arguments,'' the State has not specifically identified any information it believes is being wrongfully withheld, our review of the circumstances surrounding this request reinforces our original judgment that the resolution of such questions is better deferred.

In this regard, we note initially both protected safeguards and proprietary information have been implicated in connection with several of the contentions to this proceeding. As a consequence, the Board has attempted to take a practical approach that directs the immediate resources of the Board and the parties who need access to this protected information to resolving the merits of the issues concerning that protected information rather than attempting to reach a definitive resolution about the nature of the information. Thus, the Board's protective orders regarding

this protected information do not mandate separate, redacted copies of pleadings containing purported protected information; instead, a party filing a pleading in which protected information may be implicated only is required to place in the public docket and serve upon other parties to the proceeding not concerned with the contention involving that information a letter or some other form of notice that a pleading has been filed in which protected information may be implicated. *See* Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) at 2 (unpublished) (proprietary information); Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) at 9 (unpublished) (safeguards information). The Board contemplated that, with this record, the Board and any of the parties would be in a position to resolve any disputes over the nature of the protected information when a merits resolution had been reached relative to the issues in this proceeding. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982). Moreover, as with this Memorandum and Order, the Board has attempted to limit its use of protected information so that its issuances, to the greatest extent possible, can be placed in the public record of the proceeding.

In its attempt to have the Board abandon this construct, the State has illustrated the very problems the Board has sought to avoid. In responding to the PFS motion that was labeled as containing proprietary information and contained an affidavit from PFS Chairman Parkyn supporting that designation, the State sought to file a sanitized response. As it turned out, however, the State's response contained references to the current PFS nominal storage target figure and several dollar figures in exhibit D to the motion that PFS considers proprietary. When PFS informed the State of its concerns, the State then had to ask for the return or destruction of all served copies. Thereafter, it provided another redacted version for the agency docket and to those to whom it had given its original response that included the PFS-designated proprietary information.

As the myriad current filings relating to contention Utah E/Confederated Tribes illustrate, the parties and the Board are very busy litigating the merits of this case. The State, as the lead intervening party on this and other contentions that involve protected information, by reason of the Board's protective orders has full access to information PFS considers proprietary. Assuming that a protected information claim relative to a pleading and/or attachments is supported by a properly executed affidavit, we see no reason at this juncture to engage in the considerable effort that may be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has that protected status. This is a matter that is best left to the conclusion of the merits of this litigation. As a consequence, we deny the State's requests for a determination regarding, and release of, all claimed proprietary information pertaining to the December 3, 1999 PFS summary disposition motion, which we understand to include all PFS and Staff pleadings

marked as containing such information, albeit without prejudice to their renewal at a future time designated by the Board.

III. COMMISSION REFERRAL

In ruling on the PFS dispositive motion, we take one additional action we find appropriate in light of the particular circumstances here. Under 10 C.F.R. § 2.730(f), a Licensing Board is given the authority, in instances when a prompt Commission decision is necessary to prevent detriment to the public interest or unusual delay or expense, to refer its ruling on a party motion or other pleading to the Commission for its immediate consideration.

Generally, we would be reluctant to use this authority to refer a summary disposition ruling to the Commission. Although a summary disposition decision constitutes a merits ruling on a contention ''as a matter of law,'' it nonetheless often has a factual element that would make referral of questionable propriety. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 & n.6 (1977). Certainly, our summary disposition ruling in this instance has a factual element to it.

Nonetheless, we invoke this provision and refer our ruling in section II.A-C above to the Commission. At the heart of our determination here is the legal question of the application and interpretation of the reasonable assurance standard of 10 C.F.R. § 72.22(e) in light of the Commission's financial assurance ruling in *Claiborne*. Moreover, any reluctance we otherwise may have is, in significant measure, outweighed by the Commission's recent admonition that ''boards are encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible in the proceeding.'' *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 23 (1998). Coupled with the Commission's expression of interest regarding the application of the financial assurance provisions of Part 72 to this proceeding previously quoted in section I.B above, *see* CLI-98-13, 48 NRC at 36-37, this guidance convinces us such an action is warranted in this instance, with the realization that, if we are wrong in this regard, the Commission can simply choose to decline the referral.[12] *See Marble Hill,* ALAB-405, 5 NRC at 1192-93.

[12] This date, we also make several additional rulings that bear some relationship to our decision regarding the PFS dispositive motion, including rulings on State discovery requests to PFS and the Staff and a State request to admit late-filed amendments to contention Utah E/Confederated Tribes F. Although we do not refer these rulings, or the portion of this decision relating to the State's request for proprietary information release, in the exercise of its inherent supervisory authority over the agency's adjudicatory process the Commission obviously is free to take up these matters if it wishes.

IV. CONCLUSION

Recognizing proposed license conditions LC17-1 and LC17-2 set forth in the NRC Staff's December 15, 1999 SER for the PFS facility and the PFS commitments to:

1. Incorporate into its customer service agreements (member and nonmember) provisions that mandate:

    a. PFS will not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated;

    b. An assignment of legal and financial responsibility between the customer, as the owner of the spent fuel, and PFS, including an acknowledgment that each customer must retain title to its fuel throughout the storage period;

    c. Customers will be required to (i) periodically provide pertinent financial information; (ii) meet creditworthiness requirements; and (iii) provide PFS with any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond); and

2. Obtain an offsite liability policy in the amount of $200 million, i.e., a policy that matches the largest commercially available offsite insurance coverage available,

with regard to contention Utah E/Confederated Tribes F, Financial Assurance, the December 3, 1999 PFS motion for partial summary disposition is granted as to those paragraphs of the contention identified as one through five (other than the onsite liability insurance issue), seven through nine, and paragraph ten as it relates to offsite liability insurance, and is denied as to those parts of paragraphs five and ten that relate to onsite property insurance. In addition, the State's December 27, 1999, and January 10, 2000 requests to require the disclosure of information designated by PFS as proprietary are denied as premature. Finally, in accordance with 10 C.F.R. § 2.730(f), the Board refers its rulings in section II.A-C above to the Commission for its consideration.[13]

For the foregoing reasons, it is this tenth day of March 2000, ORDERED, that:

1. The December 3, 1999 PFS motion for partial summary disposition of contention Utah E/Confederated Tribes F is *granted in part and denied in part* as described in section IV above;

[13] We would add that, in making this referral, the Board does not contemplate that the pendency of the referral should cause any delay in the litigation of contention subparts five, six, and ten that are not resolved here. *See* 10 C.F.R. § 2.730(g).

2. The parties should provide the Board with a joint report on further litigation of paragraphs five, six, and ten of contention Utah E/Confederated Tribes F under the schedule outlined in section II.D above.

3. The December 27, 1999, and January 10, 2000 State requests to disclose all proprietary information in the PFS and Staff pleadings relating to the PFS December 3, 1999 partial summary disposition motion are *denied,* without prejudice to their subsequent renewal at a time designated by the Board following the conclusion of the Board litigation of the merits of the contentions admitted in this proceeding;

4. On or before *Friday, March 17, 2000,* the State, PFS, and the Staff should advise the Board in a joint filing whether they have any objection to the public release of any specific parts of this Memorandum and Order because it would involve the disclosure of proprietary information subject to nondisclosure under 10 C.F.R. § 2.790; and

5. In accordance with 10 C.F.R. § 2.730(f), the Board's rulings in section II.A-C above are *referred* to the Commission for its consideration and further action, as appropriate.

THE ATOMIC SAFETY AND
LICENSING BOARD[14]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 10, 2000

This Memorandum and Order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

[14] Pursuant to recent Board issuances on e-mail service of documents identified as containing proprietary information, copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for PFS, the State, and the Staff. In addition, this date a memorandum was sent by e-mail to all the parties in this proceeding advising them of the issuance of this decision and the Board's determination to afford this decision confidential treatment pending a response by the State, PFS, and the Staff to the Board's inquiry under ordering paragraph four above. *See* Licensing Board Memorandum (Notice Regarding Issuance of Decision on Motion for Partial Summary Disposition of Contention Utah E/Confederated Tribes F) (March 10, 2000) (unpublished).

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)

March 10, 2000

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 State of Utah's request for the admission of late-filed bases for contention Utah E/Confederated Tribes F, Financial Assurance.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Although a presiding officer generally first analyzes the question of a nontimely issue's admissibility under the 10 C.F.R. § 2.714(a)(1) late-filing criteria before turning to the question of its admissibility under the specificity and basis requirements of section 2.714(b)(2), there may be instances when the latter point is so clearly dispositive that it is all that needs to be addressed. *See* LBP-00-1, 51 NRC 1, 5 (2000).

RULES OF PRACTICE: CONTENTIONS (GENUINE DISPUTE ON A MATERIAL ISSUE OF LAW OR FACT)

When the granting of partial summary disposition in a separate ruling addresses the substance of the arguments put forth in support of contention bases sought to be admitted as late-filed, such bases cannot constitute a genuine dispute on a material issue of law or fact so as to be admissible in the proceeding. *See* 10 C.F.R. § 2.714(b)(2)(iii).

MEMORANDUM AND ORDER

(Denying Request for Admission of Late-Filed Bases for Contention Utah E/Confederated Tribes F)

By motion dated January 26, 2000, Intervenor State of Utah (State) seeks the admission of what it labels three late-filed bases for previously admitted contention Utah E/Confederated Tribes F, Financial Assurance. These so-called late-filed bases, numbered eleven, twelve, and thirteen, which in reality are new subparts of its earlier admitted contention, reflect State concerns about the financial assurance analysis set forth in the recently issued NRC Staff Safety Evaluation Report (SER) for the proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation at issue in this proceeding. Applicant Private Fuel Storage, L.L.C. (PFS), opposes the admission of these additions to the contention, alleging they fail to meet the 10 C.F.R. § 2.714(a)(1) standards governing late-filed issues and fail to specify litigable issues under the criteria of 10 C.F.R. § 2.714(b)(2), while the NRC Staff supports the admission of basis thirteen.

For the reasons set forth below, we deny the State's late-filed admission request in toto.

I. BACKGROUND

As we detail in another Board decision regarding this contention that we issue today, *see* LBP-00-6, 51 NRC 101, 106-07 (2000), as admitted, contention Utah E/Confederated Tribes F with its ten subparts challenges various aspects of the adequacy of the financial qualifications construct for the proposed PFS facility, *see* LBP-98-7, 47 NRC 142, 251-52, *reconsideration denied,* LBP-98-10, 47 NRC 288, 294-95, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998). In a December 3, 1999 motion for partial summary disposition that is the subject of LBP-00-6, PFS has sought a judgment in its favor on all but one of these ten subparts. The State opposes this request, while the Staff supports the PFS dispositive motion.

As the primary foundation for its support of the PFS motion, the Staff relies upon two proposed license conditions that would require PFS to fulfill certain commitments prior to beginning construction and operation of its proposed facility. As set forth in the Staff's December 15, 1999 SER for the PFS facility, they provide:

> LC17-1 Construction of the Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by PFS to the NRC. Construction of any additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.
>
> LC17-2 PFS shall not proceed with the Facility's operation unless it has in place long-term Service Agreements with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility, for the entire term of the Service Agreements.

Safety Evaluation Report of the Site-Related Aspects of the [PFS] Facility [IFSFI] at 17-7 (Dec. 15, 1999, as revised Jan. 4, 2000).

In response to these proposed license conditions, the State seeks the late-filed admission of three additional subparts for contention Utah E/Confederated Tribes B. These provide:

> *Basis 11*: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) contravene the financial qualification requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), which require a substantive determination of financial qualification before a license is issued. The proposed license conditions do not assure that the Applicant will be financially qualified at the time the license is issued because the Applicant neither possesses the necessary funds, nor has reasonable assurance of obtaining the necessary funds to cover estimated construction costs, estimated operating costs over the planned life of the ISFSI, and estimated decommissioning costs. Postponing the financial qualification analyses and determination to post-hearing resolution also violates Intervenor State of Utah's and other parties' rights to a prior hearing on all financial issues material to the licensing decision, and is contrary to Section 189(a)(1) of the Atomic Energy Act.
>
> *Basis 12*: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) improperly grant to PFS an exemption to 10 CFR §§ 72.22(e) and 72.40(a)(6), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.
>
> *Basis 13*: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) do not provide adequate standards or procedures against which Applicant's performance, and therefore its ability to meet the financial qualification requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), can be judged. The licensing conditions are vague and open-ended, and do not establish procedures for making or challenging these future determinations. As a consequence, the licensing conditions completely deprive the State and other parties of a full and fair hearing on the issue of whether the Applicant is financially qualified to operate an ISFSI in Utah.

[State] Request for Admission of Late-Filed Bases for Utah Contention E (Jan. 26, 2000) at 4-5 [hereinafter State Request].

According to the State, under the late-filing criteria of 10 C.F.R. § 2.714(a)(1), good cause exists for the late-filing of these bases because they were submitted within 30 days of the January 7, 2000 date the Staff made the SER with these conditions publically available. *See id.* at 7-8; [State] Reply to [PFS] and NRC Staff's Responses to Utah's Request for Admission of Late-Filed Bases for Utah Contention E (Feb. 11, 2000) at 14-16 [hereinafter State Reply]. Further, the State declares that the other four late-filing factors also support admission in that (1) its challenges are supported by the testimony of Michael F. Sheehan, Ph.D., its financial assurance expert, thereby establishing its ability to develop a sound record; (2) it has no other means to protect its interests because if the license conditions remain intact as a result of the Board's summary disposition ruling, it will have no other opportunity to challenge them; (3) no other party will represent its position because none has a similar admitted contention; and (4) admitting these issues will focus the proceeding on the Staff's action without broadening its scope beyond the already admitted issue or delaying the proceeding. *See id.* at 9-10; State Reply at 17-18. Finally, it asserts that the admission of these contentions is appropriate for, as is discussed at some length in the State's two filings in connection with the PFS partial summary disposition motion, they frame cognizable legal and factual issues including (1) the proposed license conditions violate the financial assurance requirements applicable to the PFS facility under 10 C.F.R. §§ 72.22(e), 72.40(a)(6), because they permit licensing in the absence of a PFS demonstration that it is financially qualified; (2) they constitute the improper Staff grant to PFS of an exemption from the financial assurance requirements of Part 72; (3) they are based on an improper reading of the Commission's decision in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997); (4) they are impermissibly vague, ambiguous, and unenforceable; and (5) they permit a post-license review of financial assurance that violates the State's right to a hearing. *See id.* at 5-7; State Reply at 3-14.

PFS opposes the admission of the late-filed additions to contention Utah E/Confederated Tribes F, asserting that (1) there is no ''good cause'' under factor one because the additions should have been filed shortly after PFS first set forth its construction costs commitment in a September 1998 response to a Staff requests for additional information (RAI), after PFS refused to answer discovery questions about market-related documents in June 1999, or after the PFS December 3, 1999 partial summary disposition motion; and (2) the balance of the other four factors do not support admission either, particularly given that the more heavily weighted factors three and five — sound record development contribution and broadening issues/delay — weigh against admission. *See* Applicant's Response to [State] Request for Admission of Late-Filed Bases for Utah Contention E (Feb. 4, 2000) at 18-20. Additionally, PFS asserts that the various legal and factual challenges set

forth in the late-filed subparts are not admissible issues because (1) they constitute a challenge to the agency's financial qualifications regulations as interpreted and applied by the Commission in its *Claiborne* decision; (2) consistent with the Commission's *Claiborne* decision, PFS does not need an exemption from the Part 72 financial assurance requirements; and (3) they mischaracterize the license conditions and, as such, do not establish a genuine dispute on a material issue of law or fact. *See id.* at 3-18.

The Staff, on the other hand, declares that the three new subparts do not run afoul of the late-filing criteria of section 2.714(a)(1), principally because it concludes there was good cause for the State filing, coming as it did within 30 days of the early January 2000 date on which the revised SER containing the proposed license conditions was made publically available. *See* NRC Staff's Response to ''[State] Request for Admission of Late-Filed Bases for Utah Contention E'' (Feb. 4, 2000) at 6-9 [hereinafter Staff Response]. Relative to the three subparts' admissibility under section 2.714(b), the Staff finds subparts eleven and twelve inadmissible because they are footed in a misreading of the Part 72 financial assurance regulations and the Commission's interpretation of those regulations in *Claiborne* and its June 1998 guidance to the Board in this proceeding, *see* CLI-98-13, 48 NRC at 36-37. *See* Staff Response at 10-14. The Staff, however, does not oppose the admission of basis thirteen, concluding it appropriately raises a factual issue about the adequacy of the Staff's license conditions. *See id.* at 15-16.

II. ANALYSIS

We recently observed that although a presiding officer generally first analyzes the question of a late-filed issue's admissibility under the 10 C.F.R. § 2.714(a)(1) criteria before turning to the question of its admissibility under the specificity and basis requirements of section 2.714(b)(2), there may be instances when the latter point is so clearly dispositive that it is all that needs to be addressed. *See* LBP-00-1, 51 NRC 1, 5 (2000). Such a circumstance is before us again.[1]

[1] Although we conclude it is unnecessary to delve into the section 2.714(a)(1) five-factor balancing analysis here, we do consider it appropriate to provide some observations relative to the question of ''good cause.'' In our June 1998 issuance providing a general schedule for this proceeding and associated guidance for its conduct, we declared that, in connection with late-filed contentions based on the Staff SER and its draft and final environmental impact statements (DEIS and FEIS) relating to the proposed PFS facility, any issue statements should be filed within 30 days of these documents being made available to the public. This statement regarding timing, however, had two important caveats. We requested that the Staff (1) notify the intervening parties and the Board of its intent to make these documents publicly available at least 15 days prior to their public issuance; and (2) take steps to see that the Intervenors are notified of the actual public release of these documents and their availability on an expedited basis. As we noted there, the former request was intended to provide the intervening parties with an opportunity to ensure the availability of their experts to review these documents promptly. *See* Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished).

(Continued)

In a separate ruling issued this date, we grant in part a December 3, 1999 PFS motion for partial summary disposition of contention Utah E/Confederated Tribes F. In so doing, we there address the various State arguments that are the substance of the three additional contention bases it now seeks to have us admit as late-filed. Our ruling in favor of PFS on these points in the context of that decision resolves those matters. *See* LBP-00-6, 51 NRC at 113-18. As a consequence, they do not here constitute a genuine dispute on a material issue of law or fact so as to be admissible in this proceeding. *See* 10 C.F.R. § 2.714(b)(2)(iii). We thus find them inadmissible.[2]

III. CONCLUSION

In light of the Board's decision this date in LBP-00-6 on the PFS December 3, 1999 motion for partial summary disposition of contention Utah E/Confederated Tribes F, Financial Assurance, in which we rule in favor of PFS on the substance of the matters put forth by the State in the late-filed issues it seeks to have admitted in its January 26, 2000 motion, we deny that motion as failing to put forth litigable issues.[3]

From the unrebutted representations in the State's motion and the record surrounding our previous ruling on a dispute relating to a Staff motion to strike portions of a State pleading relating to contention Utah E/Confederated Tribes F, *see* State Motion at 7-8; Licensing Board Memorandum and Order (Denying Motion to Strike Pleading) (Feb. 4, 2000) at 5 (unpublished), it appears that the Staff's notice to the State was contemporaneous with December 15, 1999 ''issuance'' of the SER (i.e., the issuance date assigned by the Staff). On that date, however, the document apparently was not ready for public distribution and, indeed, the time it took to print and distribute the SER resulted in the State not having a copy until December 27, 1999, 12 days after the State was notified the SER had been issued. This sequence of events does not seem particularly responsive to the Board's requests regarding notice and availability of the SER. Whether the Staff will be more mindful of our requests when it comes to the DEIS and FEIS remains to be seen. Its actions in this regard undoubtedly will be a factor in any Board determination regarding the timeliness of Intervenor late-filed contentions relating to these significant environmental documents.

[2] Although the Staff declares that subpart 13 regarding the vagueness and open-endedness of its proposed license conditions is admissible because it involves factual issues, *see* Staff Response at 15-16, its argument does not reflect our ruling this date on those State concerns in the context of the PFS summary disposition motion.

[3] As part of that ruling, we refer our decision on the PFS dispositive motion to the Commission for its consideration. *See* LBP-00-6, 51 NRC at 136. Although we do not refer this related ruling to the Commission, it is, of course, free to review our determination here if it wishes to do so.

For the foregoing reasons, it is, this tenth day of March 2000, ORDERED that the State's January 26, 2000 request for admission of late-filed subparts of contention Utah E/Confederated Tribes F, Financial Assurance, is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD[4]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 10, 2000

This Memorandum and Order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

[4] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

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)

March 21, 2000

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 State of Utah's request for the admission of late-filed bases for contention Utah S, Decommissioning, that challenge the timing of the payment of escrowed funds to cover the estimated costs of decommissioning individual storage casks.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

The admission of a late-filed issue is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). In seeking admission, the burden of proof is on the petitioner, who must affirmatively address all five factors and demonstrate that, on balance, they warrant overlooking the lateness of the filing. Yet, even if a late-filed contention meets the requirements of section 2.714(a)(1), it must also satisfy the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), in order

to receive merits consideration. *See, e.g.,* LBP-99-43, 50 NRC 306, 312 (1999), *petition for interlocutory review denied,* CLI-00-2, 51 NRC 77 (2000).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The NRC Staff's later Safety Evaluation Report endorsement or nonendorsement of an applicant's viewpoint, as expressed in its application, about the interpretation of a regulation is irrelevant to that issue's timeliness because it does not have the effect of ''restarting'' the filing clock. Compare *Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395-96 (1995) (challenge to Staff review adequacy is not basis for litigable contention).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

When good cause, the first and most important element of section 2.714(a)(1), is absent, there must be a compelling showing that it is outweighed by the other four late-filing factors. In analyzing the other four factors, factors two and four — availability of other means to protect the petitioner's interest and extent of representation of the petitioner's interest — are to be given less weight than factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (ASSISTANCE IN SOUND RECORD DEVELOPMENT)

Under late-filing factor three — assistance in developing a sound record — although the proffered affidavit of a party's witness is short on the details of his supporting testimony relative to a late-filed contention, what otherwise could be a significant deficiency may be of less moment for a legal issue. *See* LBP-99-7, 49 NRC 124, 128-29 (1999).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

An applicant's exemption request need not invoke 10 C.F.R. § 2.758 as its basis ''unless (1) the exemption request is directly related to a pending contention, or (2) the interpretation or application of a regulation to specific facts is questioned.'' LBP-99-21, 49 NRC 431, 436 (1999).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The Commission ''has made it clear that, in the absence of a contrary Commission directive, exemption requests falling outside the ambit of section 2.758 are not subject to challenge in an adjudicatory proceeding,'' LBP-99-21, 49 NRC at 438, leaving question certification and/or a referred ruling under 10 C.F.R. §§ 2.718(i), 2.730(f), as the only avenues by which the Board could consider an exemption issue, albeit after receiving Commission permission.

MEMORANDUM AND ORDER
(Denying Request for Admission of Late-Filed Bases for Contention Utah S)

With its pending January 26, 2000 motion, Intervenor State of Utah (State) seeks to add two so-called late-filed bases to its admitted contention Utah S, Decommissioning. Specifically, the State wishes to litigate the issue of the timing of the payment of escrowed funds to cover the estimated costs of decommissioning the individual storage casks that will be stored at the proposed 10 C.F.R. Part 72 Skull Valley, Utah independent spent fuel storage installation (ISFSI) of Applicant Private Fuel Storage, L.L.C. (PFS). PFS opposes both issues as failing to meet the 10 C.F.R. § 2.714(a)(1) test for late-filed admission and the additional section 2.714(b), (d) standards governing the substantive showing required to admit contentions. The NRC Staff, on the other hand, claiming that only the second new issue does not meet section 2.714(a)(1) late-filing standards, objects to the admission of both items under the contention admissibility requirements of section 2.714(b), (d).

For the foregoing reasons, we deny the State's late-filed contention Utah S admission request.

I. BACKGROUND

Contention Utah S was among a number of State issues we accepted into this proceeding in our April 1998 order granting intervention and admitting issues. In pertinent part it provides:

> The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(e).

LBP-98-7, 47 NRC 142, 255, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).[1] With its January 26, 2000 late-filed admission motion, the State now seeks to add two additional issue statements, which it numbers twelve and thirteen, relative to contention Utah S. These provide:

> *Basis 12*: The Staff's proposed acceptance ([Safety Evaluation Report] at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations is in violation of the requirements of 10 CFR § 72.30(c)(1).
>
> *Basis 13*: The Staff's proposed acceptance ([Safety Evaluation Report] at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations improperly grants to the Applicant an exemption to 10 CFR § 72.30(c)(1), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

[State] Request for Admission of Late-Filed Bases for Utah Contention S (Jan. 26, 2000) at 3 [hereinafter State Motion]. As is apparent from these issue statements, the genesis of these concerns is the Staff's December 15, 1999 Safety Evaluation Report (SER) for the site-related aspects of the PFS ISFSI licensing proposal. There, the Staff provided the following discussion regarding the PFS plan for storage cask decommissioning costs (as opposed to facility decommissioning costs):

> The estimated decommissioning cost for each storage cask is $17,000, which will be prepaid into an externalized escrow account under the Service Agreement with each Customer prior to shipment of each spent fuel canister to the Facility. PFS plans to place the full amount estimated for decommissioning the casks in a segregated escrow account for this purpose. The Staff notes that PFS'[s] proposal to secure payment prior to shipment of the cask to the Facility constitutes a departure from the language in 10 CFR 72.30(c)(1), which indicates that if an applicant selects prepayment as the method of decommissioning funding, payment should be made ''prior to the start of operation.'' Notwithstanding this difference, however, the PFS proposal assures that (a) reasonable assurance of adequate funding to decommission the Facility will be provided prior to the commencement of operations . . . , as required in 10 CFR 72.30(c); and (b) funding to decommission the casks will be provided prior to construction of each cask (i.e., prior to commencement of any operations involving that cask), thus assuring each cask that is constructed will be decommissioned. Accordingly, PFS'[s] decommissioning funding plan provides reasonable assurance that decontamination and decommissioning at the end of Facility operations will provide adequate protection of the public health and safety and satisfies 10 CFR 72.30(c). Although funding for decommissioning the casks will be provided

[1] This contention represented consolidated portions of contentions Utah S and Castle Rock 7. *See* LBP-98-17, 47 NRC at 196-97, 214-15. Upon the later withdrawal of sponsoring Intervenors Castle Rock Land and Livestock, L.C., and Skull Valley Co., Ltd., the Board removed the reference to Castle Rock 7 from the contention's designation, although its substance remained unchanged. *See* LBP-99-6, 49 NRC 114, 121 (1999).

prior to cask construction rather than prior to the commencement of Facility operations, since the decommissioning funding plan provides reasonable assurance of adequate funding, an exemption from strict compliance with the language in 72.30(c)(1) would be issued as part of the license, if necessary, to authorize implementation of the PFS plan.

[SER] of the Site-Related Aspects of the [PFSF ISFSI] at 17-5 to -6 (Dec. 15, 1999, as revised Jan. 4, 2000).

In its motion, the State first declares that both its issues are admissible under the five late-filing criteria in section 2.714(a)(1). Relative to the first and most important factor — good cause for late filing — the State maintains that, notwithstanding the December 15 issuance of the SER, it has met the Board's earlier directive to submit late-filed issues within 30 days of SER issuance because it did not receive the 15-day advance notice requested by the Board and did not actually receive a copy of the SER until December 27, 1999. Additionally, it contends the other four factors weigh in its favor. *See id.* at 6-8.

Relative to the admissibility of its new issues under section 2.714(b), (d), the State argues that its concerns are admissible because they challenge the legal and factual basis for the PFS and Staff positions that the PFS proposal to prepay cask decommissioning costs at the time a cask is accepted is appropriate under the directive in section 72.30(c)(1) that such costs must be paid ''prior to the start of operation.'' According to the State, the PFS proposal is inconsistent with this regulatory requirement, and the Staff's SER proposal to grant PFS an exemption from this requirement violates agency rules. Relative to the latter item, the State declares the Staff cannot grant PFS an exemption without a PFS request for such action and without meeting the exemption standards of section 2.758 or section 72.7. Moreover, the State asserts that even if it were appropriate to grant an exemption to section 72.30(c)(1) in some instances, that is not the case here because (1) the cost per cask is based on a ''best case'' scenario; (2) decommissioning costs are subject to escalation over time, for which PFS has made no provision; and (3) PFS will not have the benefit of the time-value of the money it otherwise would receive if it required payment at the time facility operation begins, making decommissioning funds received later in the facility's life inadequate. *See id.* at 3-6.

In response, PFS declares that both the State's late-filed issues are unjustifiably late because, notwithstanding the fact that the PFS June 1997 application fully described the PFS proposal to fund spent fuel cask decommissioning prior to the time each cask was accepted, the State made no mention of any concern about this plan in its original contention. According to PFS, the State's issues are nothing more than an impermissible attempt to gain admission of a contention based on the adequacy of the Staff's application review. Additionally, PFS argues that none of the other four section 2.714(a)(1) factors support admission of its two new issues.

See [PFS] Response to [State] Request for Admission of Late-Filed Bases for Utah Contention S (Feb. 9, 2000) at 2-4 [hereinafter PFS Response].

In connection with the admissibility of the issues under the section 2.714(b), (d) factors, PFS asserts they should not be accepted because they (1) fail to demonstrate a genuine dispute with PFS on a material issue of fact or law; and (2) would be of no consequence to the proceeding, even if proven, because they entitle the State to no relief. According to PFS, the State's reading of the term ''operation'' in section 72.30(c)(1) would lead to an absurd result, given that the facility will operate over a 20-year period. PFS maintains that to accept the State's reading would require that (1) PFS escrow funds for the first and last casks at the same time, even though the last cask will not even be in existence, much less in need of decommissioning, at that time; and (2) put money in escrow for casks that may never exist, given that there is no commitment on the part of PFS or its customers to utilize the entire 4000 cask capacity of the facility. Instead, PFS argues the appropriate reading of the term ''operation'' is operation of the spent fuel storage cask, rather than overall facility operation. *See id.* at 6-7.

Also inadequate to support contention admission, PFS suggests, are the State's allegations about the accuracy of the PFS cask decommissioning cost estimates and the cost escalation potential. Not only are these claims unsupported by adequate basis material because they do not comply with the requirement to show that any decommissioning plan deficiency '' 'has some independent health and safety significance,' '' *id.* at 7-8 (quoting *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 256 (1996)), but they ignore the PFS decommissioning plan, which states that the escrow amount will be reviewed and adjusted annually for inflation and changes in decommissioning scope or costs. Indeed, PFS declares, no exemption or waiver is needed because the PFS plan complies with section 72.30(c)(1) as written. *See id.* at 7-9.

Finally, PFS argues that the State's new issues would not entitle the State to any relief because PFS is entitled to an exemption in that its cask decommissioning funding proposal clearly provides adequate public health and safety protection. Indeed, PFS asserts, under 10 C.F.R. § 72.7, the agency is entitled to grant an exemption without an applicant request, as the Staff has proposed be done in this instance. *See id.* at 9-10.

For its part, the Staff declares that, in light of the June 1997 PFS application, item twelve fails to meet the good cause factor, while item thirteen does not run afoul of that precept. The latter is so, the Staff argues, because the State could not reasonably have known prior to the Staff's SER that the Staff would consider granting an exemption, if necessary, insofar as the PFS cask decommissioning funding plan departs from the requirements of section 72.30(c). The Staff further concludes that a balancing of the other four factors does not outweigh the lack of good cause for admission of issue twelve. *See* NRC Staff's Response to ''State of

Utah's Request for Admission of Late-Filed Bases for Utah Contention S'' (Feb. 9, 2000) at 3-6 & n.3 [hereinafter Staff Response].

Regarding the section 2.714(b), (d) standards for admissibility, the Staff finds that item twelve provides no genuine dispute and would be of no consequence because the Staff issuance of an exemption would eliminate the basis for this issue and any challenge to the Staff's proposed acceptance of the PFS funding plan is an impermissible attack on the adequacy of the Staff's application review. So too, the Staff declares, item thirteen should be dismissed as an impermissible attack on the agency's regulations and for failing to show a genuine dispute exists with PFS on a material legal or factual issue. This State concern, the Staff maintains, directly challenges the provision in section 72.7 that permits sua sponte agency waiver grants. Moreover, the Staff portrays the State's concerns about the adequacy of the PFS prepayment plan as vague, speculative, and unsupported and as ignoring the provision in the PFS plan that allows for annual adjustments in per canister decommissioning costs. *See id.* at 6-10.

With the Board's permission, the State also filed a reply to the PFS and Staff responses. The State declares in connection with the section 2.714(b), (d) issue admissibility question that (1) the reference to ''operation'' in section 72.30(c)(1) should be given its logical meaning, which covers the full range of PFS activities, not just the acceptance of a single cask; (2) the absurd result complained of by PFS is merely its expression of dislike for the regulatory requirement and does not recognize that PFS chose to structure its application to permit the storage of 4000 casks; (3) PFS chose the prepayment option under section 72.30(c)(1), rather than the available surety/insurance or sinking fund methods in section 72.30(c)(2)-(3), and must accept the consequences of that choice; (4) the Commission's *Yankee Rowe* decision requiring a decommissioning funding allegation to demonstrate some ''independent health and safety significance'' is not applicable here because, unlike *Yankee Rowe,* the adequacy of decommissioning funding is in serious doubt in that it is unclear PFS customers will be able to augment their initial decommissioning payments; (5) in light of the Staff's failure to commit to entering an exemption, new issue twelve continues to have an adequate basis; and (6) notwithstanding the fact it may be appropriate for the State at some point to lodge a protest over the exemption with the Commission, it also is appropriate for the State to pursue this matter before the Licensing Board to ensure administrative remedies are exhausted. *See* [State] Reply to [PFS] and NRC Staff's Responses to Late-Filed Bases for Utah Contention S (Feb. 16, 2000) at 1-8 [hereinafter State Reply].

Finally, regarding the question of meeting the late-filing factors in section 2.714(a)(1), the State asserts its timeliness for both issues is based on the Staff SER. According to the State, it had no reason to suppose the Staff would acknowledge the inconsistency of the license application with the regulations, yet proceed to

approve that inconsistent action. Additionally, the State declares that the other four late-filing factors favor admitting the contention. *See id.* at 8-10.

II. ANALYSIS

As we have noted previously, the admission of a late-filed issue, such as the additional matters the State now seeks to add relative to contention Utah S, is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). In seeking admission, the burden of proof is on the petitioner, who must affirmatively address all five factors and demonstrate that, on balance, they warrant overlooking the lateness of the filing. Yet, even if a late-filed contention meets the requirements of section 2.714(a)(1), it also must satisfy the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), in order to receive merits consideration. *See, e.g.,* LBP-99-43, 50 NRC 306, 312 (1999), *petition for interlocutory review denied,* CLI-00-2, 51 NRC 77 (2000).

A. Issue 12

Notwithstanding the State's attempt to link this issue to the Staff's December 15, 1999 SER, it is apparent the storage cask decommissioning funding plan question at the heart of this matter was raised in the June 1997 PFS application. There PFS declared:

> The service agreement with each customer (reactor) shall require at least $17,000 to be deposited into an externalized escrow account prior to shipment of each spent fuel canister to the [PFS facility (PFSF)]. The full amount of potential decommissioning costs will thus be collected in a segregated account prior to the receipt of each spent fuel canister at the PFSF. This method of funding provides for prepayment of the storage cask decommissioning costs prior to any potential exposure of the storage cask to radiation or radioactive material, and therefore prior to the need for any decommissioning. This funding method complies with the requirements of 10 CFR 72.30(c)(1).

[PFS], License Application [PFSF] app. B at 5-1 (rev. 0 July 1997). As a consequence, the submission of this issue now, more than 2 years after the November 1997 deadline for filing contentions based on that application, lacks good cause for late-filing.[2]

[2] Although the Staff appears to ''waffle'' somewhat on whether it, in fact, disagrees with the PFS reading of the section 72.30(c)(1) term ''operation'' as authorizing the PFS proposed payment plan, *see* SER at 17-6 (exemption will be issued, ''if necessary''), to the extent the Staff's SER statement reflects a disagreement with the Applicant's interpretation, issue twelve nonetheless lacks the requisite good cause. As is noted above, the question of how section 72.30(c)(1) should be interpreted clearly was raised in the application. Consequently, the Staff's later SER endorsement or nonendorsement of that viewpoint is irrelevant to that issue's timeliness because it does not have the effect of ''restarting'' the filing clock. Compare *Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395-96 (1995) (challenge to Staff review adequacy is not basis for litigable contention).

When this first and most important element of section 2.714(a)(1) is absent, there must be a compelling showing concerning the other four late-filing factors so as to outweigh the lack of good cause. Moreover, in analyzing the other four factors, factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest — are to be given less weight than factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).

Factors two and four do weigh in favor of the State. There apparently is no other means available to the State to raise this legal question of the proper construction of section 72.30(c)(1) or any other party to represent the State's interests relative to this matter. Concerning factor three, although the proffered affidavit by the State's supporting witness Michael F. Sheehan, Ph.D., is short on the details of his supporting testimony, what otherwise could be a significant deficiency is of less moment for this legal issue. *See* LBP-99-7, 49 NRC 124, 128-29 (1999). And with regard to factor five, the State declares its admission will not cause an ''overall'' delay in this proceeding. State Motion at 8. Yet, with discovery on contention Utah S closed and this issue scheduled to go to hearing in June of this year, this blanket avowal does not address the question of whether admission of this issue will delay that long-scheduled evidentiary presentation and so affect the long-term schedule as well.

In summary, although section 2.714(a)(1) factors two and four, and to a lesser extent factor three, support the admission of this issue, a balancing of these elements with factor five, which apparently does not support admission of this issue, does not provide the compelling showing necessary to surmount the lack of good cause under factor one. As a consequence, this issue cannot be admitted.[3]

B. Issue 13

In contrast to issue 12, we find there was good cause for the late filing of this matter. This concern raises a direct challenge to the adequacy of the Staff's action in the SER in indicating that, ''if necessary,'' an exemption from section 72.30(c)(1) permitting the PFS cask decommissioning funding plan would be appropriate. Given the timing of the Staff's announcement and distribution of the SER, the State complied with the 30-day time frame we previously established as governing timely filing for SER-related late-filed contentions. *See* Licensing

[3] Our ruling on the late-filing criteria means we need not reach the question of this issue's admissibility under the section 2.714(b), (d) criteria. Based on our review of the parties' filings, however, we would have admitted this item as presenting a cognizable legal issue.

Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished).

As to the other four factors, once again criteria two and four weigh in favor of the State, given there apparently is no other comparable means available to the State to raise this legal question of the proper construction of section 72.30(c)(1) or any other party that will represent the State's interests relative to this matter. Concerning factor three, the lack of details in the proffered affidavit by the State's supporting witness Michael F. Sheehan, Ph.D., is a more troublesome omission here because the challenge to the Staff's action mounted by this issue is based, in part, on purported factual difficulties with the Staff's analysis, including the Staff's acceptance of a PFS ''best case'' scenario that does not adequately analyze decommissioning costs and its failure to account for the impact of the loss of the time-value of money. And again, with regard to factor five, the State's conclusory declaration that admission of this issue will not cause an ''overall'' delay in this proceeding does not address the question of whether admission will delay the June 2000 evidentiary presentation on contention Utah S, with potential effects on the long-term schedule as well.

Nonetheless, despite the fact that factors three and five tilt against late-filed admission of this issue, the combined weight of elements one, two, and four on the admissibility side of the balance is sufficient to find the section 2.714(a)(1) factors support late-filed admission of this issue, subject to any finding regarding the admissibility factors set forth in section 2.714(b), (d).

In this regard, we conclude the admission of this issue involves three separate considerations. The first concerns that portion of the issue statement challenging the Staff's SER as it suggests an exemption would be appropriate without a PFS request. As PFS and the Staff point out, the provision in 10 C.F.R. Part 72 that outlines the procedure for granting exemptions from the requirements of that part indicates that exemption requests can be granted by the agency ''upon its own initiative.'' [4] 10 C.F.R. § 72.7. Accordingly, this portion of the issue is not admissible because it seeks to challenge an applicable agency rule. *See* LBP-98-7, 47 NRC at 179.

The second aspect of this issue is its assertion that 10 C.F.R. § 2.758(b), the 10 C.F.R. Part 2 provision that governs how adjudicatory party requests for regulatory exemptions are to be handled, governs the Staff's SER exemption statement. In reviewing a similar claim in this proceeding regarding a pending PFS exemption request from the Part 72 seismic design criteria, we noted that ''prior adjudicatory rulings suggest that section 2.758 need not be invoked unless (1) the exemption

[4] Although the Staff apparently does have the delegated authority to grant exemptions relative to the provisions of Part 72, *see* NRC Manual Chapter 0124-0311 (Oct. 27, 1989) (now NRC Management Directive 9.26), as the Staff suggests in its SER, in this instance the exemption seemingly would be granted by the Commission as part of the ultimate decision on licensing the PFS facility. *See* Staff Response at 8 n.9; *see also* 10 C.F.R. § 72.46(d).

request is directly related to a pending contention, or (2) the interpretation or application of a regulation to specific facts is questioned.'' LBP-99-21, 49 NRC 431, 436 (1999) (citations omitted). In that instance, we found section 2.758 was not applicable because the exemption request was not directly related to the admitted seismic issue — contention Utah L, Geotechnical — and did not question any regulatory interpretation or the application of a regulation to the specific facts implicated in an admitted contention. So too, the exemption in question here does not directly relate to contention Utah S as admitted or raise any questions regarding a regulatory interpretation or the application of a regulatory provision to the specific facts implicated in admitted contention Utah S. As a consequence, the portion of this issue statement that seeks to implicate section 2.758 as a basis for contesting the Staff's action likewise is inadmissible.

This leaves the portion of this issue that seeks to challenge the adequacy of the Staff's apparent endorsement of an exemption from section 72.30(c)(1) for the PFS storage cask decommissioning funding plan to permit fee collection prior to the time each individual spent fuel canister is shipped to the facility, rather than to set aside funds when facility operation begins to cover decommissioning for the planned 4,000 cask capacity of the facility. Again, in LBP-99-21, 49 NRC at 438, relative to a similar claim regarding contention Utah L, we noted that ''[t]he Commission has made it clear that, in the absence of a contrary Commission directive, exemption requests falling outside the ambit of section 2.758 are not subject to challenge in an adjudicatory proceeding,'' leaving question certification and/or a referred ruling under 10 C.F.R. §§ 2.718(i), 2.730(f), as the only avenues by which the Board could consider an exemption issue, albeit after receiving Commission permission.

There, we declined to take any certification/referral action on the late issue on the ground that, because the exemption request was still pending with the Staff, it was not sufficiently concrete to merit current Commission consideration. In this instance, there is the strong suggestion in the SER that the Staff is favorably inclined toward the grant of an exemption, albeit sua sponte, thus presenting us with the question we did not reach in the prior case. Confronting it here, we conclude that such an endeavor would not be worthwhile. As the State itself observes, ''it may be appropriate for it to lodge its dispute with the Staff's proposed exemption with the Commission, in which authority to issue exemptions resides.'' State Reply at 7 (citation omitted). Indeed, the State's action here appears to be footed in its belief ''that it is appropriate to begin with the Licensing Board, in order to ensure that all necessary administrative measures are exhausted.'' *Id.* Given the State's stance in this regard, and our concern that this particular issue does not meet the threshold for a certified question/referred ruling, compare LBP-00-6, 51 NRC 101, 136 (2000); *see also* CLI-00-2, 51 NRC at 79-80, we find that the proper disposition is to dismiss this issue as not appropriate for litigation in this

proceeding, thereby leaving the State free to pursue whatever alternative regulatory avenues it believes are apropos.

III. CONCLUSION

Relative to State's January 26, 2000 request for late-filed admission of contention Utah S issues twelve and thirteen concerning the funding submission timing for the estimated costs of decommissioning the individual storage casks that will be stored at the proposed PFS ISFSI, the Board concludes that (1) issue twelve must be dismissed for failing to merit admission under the five-factor balancing test of section 2.714(a)(1), principally because there is no good cause for its late-filing; and (2) despite the fact its late-filed status is not a bar to its further consideration, issue thirteen nonetheless is not admissible under the contention acceptance standards of section 2.714(b), (d).[5]

[5] Although the State's February 16, 2000 reply filing is marked to indicate it may contain proprietary information, principally on the basis of two attached exhibits that bear PFS confidentiality designations, *see* State Reply exhs. 2-3, we need not afford this decision protected status because we have not made reference to any of the potential proprietary material identified by the State.

For the foregoing reasons, it is, this twenty-first day of March 2000, ORDERED that the State's January 26, 2000 request for admission of late-filed bases for contention Utah S is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD[6]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 21, 2000

This Memorandum and Order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

[6] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of **Docket No. 40-8838-MLA**
(ASLBP No. 00-776-04-MLA)

U.S. ARMY
(Jefferson Proving Ground Site) **March 23, 2000**

In this proceeding for an amendment to the materials license held by the U.S. Army in connection with its Jefferson Proving Ground Site in Madison, Indiana, the hearing request of Save the Valley, Inc., is granted and the NRC Staff directed to furnish the hearing file.

RULES OF PRACTICE: HEARING REQUESTS

In deciding whether to grant a timely hearing request, submitted in connection with an application for an amendment to a materials license, the Presiding Officer must determine whether (1) the request specifies areas of concern that are germane to the subject matter of the proceeding; and (2) the Petitioner has satisfied the judicial standards for standing. *See* 10 C.F.R. § 2.1205(h).

MEMORANDUM AND ORDER
(Granting Hearing Request and Directing the NRC Staff To Furnish Hearing File)

Before me is the January 13, 2000 hearing request of Save the Valley, Inc. (Petitioner), as supplemented on March 9 in accordance with the authorization

contained in my February 24 order (unpublished). The hearing request addresses a proposed amendment to the materials license held by the U.S. Army (Licensee) in connection with its Jefferson Proving Ground Site (JPG), located in Madison, Indiana. The amendment would permit, in accordance with 10 C.F.R. § 20.1403, the restricted release of the site on which there is currently an accumulation of depleted uranium (DU) munitions that had been utilized by the Licensee under the aegis of the license.

On March 17, the Licensee filed a belated answer to the hearing request. It was accompanied by a motion for leave to file it out-of-time that, for good cause shown, is hereby *granted.* In addition, as sanctioned by my March 13 order (unpublished), on March 20 the Licensee responded briefly to the supplement to the hearing request.

A. Under the Commission's Rules of Practice, in deciding whether to grant this timely hearing request as supplemented, I must determine whether (1) the request specifies areas of concern that are germane to the subject matter of the proceeding; and (2) the Petitioner has satisfied the judicial standards for standing. If both of these questions receive affirmative answers, that is the end of the present inquiry. *See* 10 C.F.R. § 2.1205(h).

I do not understand the Licensee to challenge in its recent filings either the Petitioner's specification of a germane area of concern or the sufficiency of the demonstration of standing contained in the supplement to the hearing request. And my independent examination of what the Petitioner has placed before me leaves me in no doubt that the requirements of section 2.1205(h) have been amply satisfied.

To begin with, the hearing request identifies with particularity several areas of concern with regard to the proposed decommissioning of the JPG. No useful purpose would be served by an extended recitation of them here. Suffice it to say that they relate to such issues as the extent of the proposed cleanup of the accumulated DU material; future monitoring requirements; and restrictions upon further use of the area in which the DU material has been stored. These issues are indisputably germane whether or not the Petitioner's articulated concerns are ultimately found to warrant the denial or alteration of the decommissioning plan as now presented.

On the matter of its standing, in the supplement to the hearing request the Petitioner supplied the affidavits of three of its members, including the organization's president who had signed and submitted the request on its behalf. The content of those affidavits is adequately summarized in the March 13 order. As there appears, all three affiants live in close proximity to the JPG and are particularly concerned regarding the potential impact of the decommissioning activity on a waterway that abuts the property of two of them and is used for recreational purposes by the third. In addition, the organization president has been expressly authorized to represent the other affiants. In these circumstances, there likewise can be no doubt that Petitioner, an organization said to be particularly

concerned about the protection of the environment in southeastern Indiana (which includes the JPG), fulfills the requirements for representational standing.

Accordingly, the hearing request is, as it must be, *granted.*

B. The grant of the hearing request is subject to an appeal by the Licensee to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). (For its part, the NRC Staff has elected not to participate in the proceeding and, to this point at least, I find no cause to require it to do so.) Any such appeal must be filed within ten (10) days of the service of this order. Within fifteen (15) days of the service of the appeal brief, the appeal may be opposed by the Petitioner in the manner prescribed in section 2.1205(o).

C. In light of the grant of the hearing request and the provisions of 10 C.F.R. § 2.1231(a), it now becomes incumbent upon the NRC Staff to prepare and to file the hearing file *no later than Monday, April 24, 2000.* That file shall contain a chronologically numbered index of each item contained in it. Moreover, each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three ring binders of no more than 4 inches in thickness.

D. I will enter an order at a subsequent date calling for a telephone conference with the parties to discuss, among other subjects, the scheduling of further proceedings in this matter. I note at this juncture only that how expeditiously the case will move forward obviously will be heavily influenced by, among several other things, the degree of completeness of the hearing file to be submitted by the Staff next month.

In this connection, the Licensee's March 17 answer points to a distinct possibility that the current decommissioning plan will undergo revision in material respects. Indeed, the Licensee explicitly requests (Answer at 6) that further proceedings be held in abeyance pending the outcome of its anticipated further interaction with the NRC Staff with regard to the decommissioning plan. On this score, it is also worthy of note that the Licensee commendably has indicated its willingness ''to work with [Petitioner] on [its] issues, with the goal of addressing these issues in the Revised plan and avoiding the need for a hearing'' (*ibid.*). In short, insofar as concerns the need for and timing of further adjudicatory action, it would appear that at present the situation is quite fluid and that there is thus a real possibility of settlement of any existing differences between the parties. Needless to say, the parties are encouraged to pursue that possibility.

It is so ORDERED.

BY THE PRESIDING OFFICER*

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 23, 2000

This Order is issued pursuant to the authority of the Presiding Officer designated for this proceeding.

*Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to representatives of the Licensee and the Petitioner, as well as counsel for the NRC Staff.

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 Nos. 40-8794-MLA**
40-8778-MLA
(ASLBP No. 99-769-08-MLA)
(Temporary Storage of Decommissioning Wastes)

MOLYCORP, INC.
(Washington, Pennsylvania)

In the Matter of **Docket No. 40-8778-MLA-2**
(ASLBP No. 00-775-03-MLA)
(Site Decommissioning Plan)

MOLYCORP, INC.
(Washington, Pennsylvania) **April 11, 2000**

In a Memorandum and Order dealing with proceedings involving (1) the temporary storage of decommissioning wastes and (2) the decommissioning of a materials processing facility, the Presiding Officer grants two requests for a hearing in the temporary storage proceeding, defers consideration of a hearing request in the decommissioning proceeding, and declines to consolidate the two proceedings.

RULES OF PRACTICE: INFORMAL PROCEEDINGS

In informal proceedings subject to 10 C.F.R. Part 2, Subpart L, a person or entity requesting a hearing must demonstrate the timeliness of its request, that it has standing, and that it has areas of concern ''germane'' to the subject matter of the proceeding. 10 C.F.R. § 2.1205.

RULES OF PRACTICE: STANDING (INFORMAL PROCEEDINGS)

The Commission follows the same standing rules in both formal and informal proceedings. To be granted a hearing, a petitioner must set forth its standing in accord with contemporaneous judicial concepts of standing. It must demonstrate its interest in the proceeding and how its interests may be affected by the results of the proceeding.

RULES OF PRACTICE: STANDING (INFORMAL PROCEEDINGS)

To be granted a hearing, a petitioner must show that it may 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 each of the actions complained of; and that the injury will be redressed by a favorable decision. Further, the complaint arguably must fall within the zone of interests of the governing law. *Bennett v. Spear,* 520 U.S. 154, 167-68, 175 (1997).

RULES OF PRACTICE: STANDING (INFORMAL PROCEEDINGS)

Although petitioners have the burden of establishing their standing in proceedings in which they wish to participate, their statements in support of their standing are to be construed in their favor.

RULES OF PRACTICE: INFORMAL PROCEEDINGS (AREAS OF CONCERN)

Areas of concern need not be set forth in great detail because they only need be ''germane'' to the subject matter of the proceeding, with further detail (if any) not required until following the submission of the Hearing File pursuant to 10 C.F.R. § 2.1231. Areas of concern are not required to be submitted under affidavit.

RULES OF PRACTICE: CONSOLIDATION

A Presiding Officer need not consolidate two related proceedings where the parties are not identical and where potential schedule differences among the two proceedings (caused in part by differing schedules for Staff review) are extensive.

MEMORANDUM AND ORDER

(Granting Requests for Hearing in Storage Proceeding and Deferring Action in Decommissioning Proceeding)

A. Introduction

Pending before me are two requests for hearings filed by Canton Township, Pennsylvania [Canton], in two separate proceedings. The first request, dated June 28, 1999, involves the temporary storage (5-10 years) of decommissioning wastes emanating from the Molycorp, Inc. [Molycorp or Licensee] facility in York, Pennsylvania, at the Molycorp facility in Washington, Pennsylvania [hereinafter, Storage Proceeding]. The second request, dated December 13, 1999, involves a site decommissioning plan for Molycorp's former processing facility located in Washington, Pennsylvania [Decommissioning Proceeding]. Also before me is a single request for hearing in the Storage Proceeding, dated June 28, 1999, filed by the City of Washington, Pennsylvania [Washington].

All three requests seek, pursuant to 10 C.F.R. § 2.1205, informal hearings on proposed amendments to Molycorp's Source Materials License No. SMB-1393. They allege generally that Molycorp fails to comply with applicable NRC regulations, thus allegedly endangering the interests and health and safety of the citizens and environment within their borders. Canton's request in the Decommissioning Proceeding also seeks to have the two proceedings consolidated.

By Memorandum and Order dated August 26, 1999, Administrative Judge Peter B. Bloch, the then-Presiding Officer in the Storage Proceeding,[1] invited the requestors (Canton and Washington) to file supplemental hearing requests defining with more particularity their areas of concern and how they are related to the amendment under review. The Presiding Officer also encouraged the requesters and Licensee to seek to settle their differences.

Following advice to the Presiding Officer that settlement had not been reached, Canton submitted an amended hearing request in the Storage Proceeding on

[1] Judge Bloch was designated Presiding Officer, and Judge Richard F. Cole his Special Assistant, in the Storage Proceeding on July 15, 1999. 64 Fed. Reg. 39,176 (July 21, 1999). Following Judge Bloch's retirement from government service, Judge Charles Bechhoefer on October 7, 1999 was named Presiding Officer in the Storage Proceeding, with Judge Cole continuing as Special Assistant. 64 Fed. Reg. 55,785 (Oct. 14, 1999). On January 13, 2000, Judge Bechhoefer was also named Presiding Officer in the Decommissioning Proceeding, and Judge Richard F. Cole his Special Assistant. 65 Fed. Reg. 3258 (Jan. 20, 2000).

November 12, 1999 [Canton Amended Request]. Washington submitted its amended request on November 15, 1999 [Washington Amended Request].

Molycorp has filed responses to each hearing request, dated July 30, 1999 (separate responses to Canton and Washington in Storage Proceeding) and December 23, 1999 (response in Decommissioning Proceeding). Molycorp submitted timely responses to the amended requests of both Canton and Washington on November 30, 1999 [Molycorp Response].

Molycorp opposes all of the hearing requests. It also opposes consolidation of the two proceedings as sought by Canton. Canton filed a reply, dated August 17, 1999, to Molycorp's response in the Storage Proceeding, and a reply, dated February 18, 2000, to Molycorp's response in the Decommissioning Proceeding. At the same time, Canton filed a supplement to its hearing request in the Decommissioning Proceeding. As authorized by 10 C.F.R. § 2.1213, the NRC Staff has not sought to participate in the Storage Proceeding, but has responded to Canton's hearing request in the Decommissioning Proceeding and has indicated its desire to participate in that proceeding.[2] The Staff opposes consolidation of the two proceedings — in part because of the difference in potential parties caused, to some extent, by its own election not to participate in the Storage Proceeding.[3] The Staff also seeks deferral of the Decommissioning Proceeding pending completion of its safety and environmental reviews of the decommissioning plan.

Molycorp opposes Canton's requests in each proceeding, both for lack of standing and an adequate area of concern. The NRC Staff has expressed no view on these matters in the Storage Proceeding (in which it is not participating). The Staff favors deferral of my ruling on the hearing request in the Decommissioning Proceeding pending the completion of its Safety Evaluation Report (SER) and Environmental Assessment (EA) but concludes that, if I were to rule on Canton's hearing request in the Decommissioning Proceeding, on the present record Canton has failed satisfactorily to demonstrate its standing and has not stated areas of concern germane to the challenged action.

For reasons hereinafter set forth, I am *granting* Canton's hearing request in the Storage Proceeding, as well as that of Washington. (I am consolidating those two parties.) I am *deferring* further action in the Decommissioning Proceeding pending Molycorp's submission of the remainder of its decommissioning plan and Canton's amendment of its petition (as appropriate) to reflect such filing. I am also *denying* at this time Canton's request to consolidate the two proceedings. I plan to hold a prehearing conference, either by telephone or near the Washington, Pennsylvania site, to consider and define more precisely issues to be litigated in

[2] The Staff, in response to a telephone request, has advised the Presiding Officer and his Special Assistant as to the physical location within NRC of Molycorp's license amendment application in the Storage proceeding.

[3] I could, of course, direct the Staff to participate in the Storage Proceeding, thus remedying in part the differing parties in the two proceedings. *See* 10 C.F.R. § 2.1213.

the two proceedings and schedules for further filings, and further to consider the propriety of consolidation.

B. Requirements for a Hearing

In informal proceedings subject to 10 C.F.R. Part 2, Subpart L (such as both of the proceedings with which I am here dealing), a person or entity requesting a hearing must demonstrate the timeliness of its request (satisfied here by all hearing requests in both proceedings[4]), that it has standing (in each proceeding in which it seeks to participate), and that it has areas of concern ''germane'' to the subject matter of the particular proceeding. 10 C.F.R. § 2.1205. I turn to these matters *seriatim.*

1. Standing

The Commission follows the same standing rules in both formal and informal proceedings, including proceedings involving site decommissioning. To be granted a hearing, or leave to intervene, a petitioner must set forth its standing in accord with contemporaneous judicial concepts of standing. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 390 (1999), *appeal pending,* and authorities there cited. To establish its standing, a nonapplicant (such as both Canton and Washington) must demonstrate ''[its] interest . . . in the proceeding'' and ''how [its] interests may be affected by the results of the proceeding, including the reasons why [it] should be permitted a hearing.'' 10 C.F.R. §§ 2.1205(e)(1) and (2).

More explicitly, a petitioner must show (1) that it may suffer an ''injury in fact'' that is ''concrete and particularized'' and ''actual or imminent, not conjectural or hypothetical''; (2) that there is a causal connection between the alleged injury and each of the actions complained of [the proposed license amendments authorizing either temporary storage of waste materials at the site or restricted decommissioning of the site]; and (3) that the injury will be redressed by a favorable decision. Further, the complaint ''arguably'' must fall within the ''zone of interests'' of the governing law, here the Atomic Energy Act and the National Environmental Policy Act (NEPA). *Bennett v. Spear,* 520 U.S. 154, 167-68, 175 (1997).

[4] Molycorp's responses to the two initial hearing requests in the Temporary Storage proceeding were not timely filed but were nonetheless accepted by the then-Presiding Officer. Memorandum and Order (Petitions for a Hearing), dated August 25, 1999 (unpublished).

2. Canton's and Washington's Alleged Injuries

Although Canton and Washington each have the burden of establishing their standing in the proceeding(s) in which they seek to participate, their statements in support of their standing are to be construed in their favor. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Sequoyah Fuels Corp.,* LBP-99-46, 50 NRC at 391; *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 424 (1997). According to Canton, the site proposed for the temporary storage of waste, as well as the site that is to be decommissioned, lies within the municipal boundaries of Canton Township.[5] According to Washington, the territorial limits of the City of Washington are adjacent to the territorial limits of Canton Township, where the site proposed for the temporary storage of waste is located.[6] Perforce, therefore, they have an interest in the sites on which both temporary storage and decommissioning are to occur, and they have standing in the respective proceedings in which they seek to participate to the extent they identify injuries to which they may be subject as a result of the particular proceeding.

Canton states that it would be injured by the temporary storage proposal in that the proposal fails to take into account the close proximity of the temporary storage site to a 16-inch municipal water line serving portions of Canton Township and a significant portion of the Tylerdale section of the City of Washington and fails to provide adequate protection to that water line; and that the proposed temporary storage area will have an adverse and detrimental effect on the nearby residential community, as well as the local economy, by negatively impacting property values.[7] Canton adds that, given the lack of any plan to remove the transferred material after the proposed 5- to 10-year storage period, longer-term storage must accordingly be considered.[8] Canton further asserts (albeit in the context of an area of concern but nonetheless relevant to its claimed injury for standing purposes) that the proposed temporary storage site is located in a flood plain in violation of pertinent regulations of the Pennsylvania Department of Environmental Protection [PaDEP], that PaDEP has stated that the substructures underlying such site consisting of sandstone and other permeable matter are inappropriate for a radioactive waste site, and that the location of such site within 250 feet of a residential neighborhood may result in cancer and other related diseases affecting residents.[9]

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[5] Canton Request for Hearing (Storage Proceeding), dated June 28, 1999; Canton Request for Hearing (Decommissioning Proceeding), dated December 13, 1999 (incorporating by reference the substance of the earlier request).

[6] Request for Hearing of City of Washington, dated June 28, 1999.

[7] Canton June 28, 1999 Request, ¶¶4, 5, 6, 7; Canton Amended Request at 10.

[8] Canton Amended Request, ¶17.

[9] Canton Amended Request at 8.

For its part, Washington also avers that the water pipeline under the Molycorp facility could be affected by the proposed temporary storage of wastes.[10] Further, in its November 15, 1999 Amended Request, it incorporates by reference all of the averments and statements set forth by Canton in its Amended Request, ''as it relates to the CITY OF WASHINGTON and the residents of the CITY OF WASHINGTON.''[11]

In the Decommissioning Proceeding, Canton reiterates all of its claims of standing (particularly injury in fact) made in the Storage Proceeding, incorporating by reference those same earlier claims.

3. Molycorp's Response

Molycorp opposes the standing of Canton (and Washington through its incorporation by reference of Canton's allegations) in the Storage Proceeding for failing, in its opinion, to set forth any injury that might occur as the result of the proposed temporary storage amendment — specifically, for failing to allege in detail that it satisfies the following elements of standing: ''(a) an injury in fact within the scope of this proceeding, (b) that can fairly be traced to the challenged action, and (c) that is redressable through this proceeding.''[12] It characterizes Canton's claims as ''only conclusory, unsupported and largely inaccurate allegations, which pertain almost exclusively to issues other than the subject of this proceeding.''[13]

In particular, Molycorp claims that the scope of the Storage Proceeding includes only the temporary storage proposal and does not incorporate any aspects of decommissioning (which is the subject of the Decommissioning Proceeding), and that Canton's assertions relate in large part to decommissioning (citing explicitly portions of Canton's areas of concern).[14] And it criticizes Canton's response for failing to provide the additional details that Judge Bloch believed were necessary. It also characterizes Canton's complaints of lack of documentation as both contrary to the terms of 10 C.F.R. Part 2, Subpart L, and inaccurate in fact.[15]

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[10] Washington June 28, 1999 Hearing Request, ¶5A.

[11] Washington Amended Request, ¶6 (Caps in original).

[12] Molycorp Response at 1.

[13] *Id.*

[14] Molycorp avers, *inter alia,* that ''[u]sing its petition for a hearing regarding the York material as a bootstrap, Canton lists areas of concern that pertain solely to the decommissioning issue. . . . Canton wishes to merge the two entirely separate proceedings *because it failed to file a timely petition for a hearing regarding the proposed decommissioning project.*'' Molycorp Response, ¶2 (emphasis supplied). Given publication in the *Federal Register* of the Notice of Opportunity for Hearing for the Decommissioning Proceeding on November 16, 1999 (some 2 weeks earlier), with the time for requesting a hearing not yet expired, these comments are puzzling. Indeed, Canton has in fact filed a timely request for hearing in the Decommissioning Proceeding. However, as noted in the text, I agree that the two proceedings should be kept separate, at least for the present.

[15] Molycorp Response at 8-12.

4. Ruling on Standing

In seeking further delineation of areas of concern in the Storage Proceeding, Judge Bloch, in his Memorandum and Order (Petitions for a Hearing), dated August 26, 1999 (unpublished), stated that ''[b]ased on [their] close geographical proximity to the site, I conclude that these governments are likely to be entitled to standing on behalf of their citizens providing that they have a concern that shows how the citizens may be injured.'' I agree. I also believe that Canton (and Washington through incorporation of Canton's assertions) has identified several concerns that demonstrate potential injuries.

First, and most significant, is the potential effect of the temporary storage of waste materials on an underground water line. The lack of detail advanced by Molycorp is undercut by the current regulatory requirement that the concerns need only be ''germane'' to the subject matter of the proceeding, with further detail (if any) not required until following the submission of the Hearing File pursuant to 10 C.F.R. § 2.1231. Molycorp's denial of any such effect — indeed, its statement that the water pipeline will soon be abandoned — are all factual questions to be resolved within the confines of the Storage Proceeding. Abandonment might well moot the pipeline issue that has been advanced in this area of concern, but that should be determined as a factual question. As for now, given the dispute with respect to factual matters, I must accept the assertions of the Petitioner for standing, and I do so here.

Beyond that, Canton's assertion of unknown effects caused by controlled mixing of the thorium in the waste to be transferred to the Washington, PA site with coal tar and other toxic substances already existing at the site also states an appropriate area of concern and, hence, an example of how Canton may be injured by the proposal. Molycorp asserts that this area of concern lacks sufficient detail because it is not supported by affidavits or other forms of evidence, citing *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999).[16] That case's comments on details, however, focus on the question of redressability of the injury in question and whether the injury itself falls within the scope of matters at issue in the proceeding.

Neither Molycorp's comments nor *Shieldalloy* appear to focus on the ''germane'' criterion. Moreover, at issue in *Shieldalloy* was essentially an economic question rather than the health and safety issues involved here. Given Canton's expressed concern over the lack of studies of the interaction between thorium present in the material to be imported and coal tar and other toxic substances on site, Canton has set forth this area of concern in sufficient detail for me to ascertain that it constitutes an adequate showing of injury-in-fact emanating from the proposal.

[16] In that Memorandum and Order, the Commission stated that, although some evidence supporting harm must be proffered, ''[t]he Commission's Subpart L procedures governing this proceeding do not now contain, nor have they ever contained, [an affidavit] requirement.'' 49 NRC at 354 n.4.

Further, as described later in this opinion, it is clearly ''germane'' to the subject matter of the Storage Proceeding.

In short, I find that both Canton and Washington have established their standing (at least through the two areas of concern that I have thus far referenced) to participate in the Storage Proceeding.

As for the Decommissioning Proceeding, Canton clearly would have standing by virtue of its geographical proximity to the site, as long as it had areas of concern germane to the proceeding. The areas of concern that it has advanced, however, essentially reiterate those previously advanced in support of its Storage Proceeding application, modified to some degree to reference permanent rather than temporary storage. Moreover, those areas of concern appear to arise not from the portion of the Decommissioning Plan previously submitted but rather from the portion scheduled to be submitted in the near future. In short, Molycorp's application for site decommissioning is not yet complete. Further, there is no information before me indicating that a further opportunity for hearing will be provided upon Molycorp's submission of the remaining portions of the decommissioning plan. Indeed, the Staff's deferral recommendation suggests the contrary. Thus, there is good reason for me not to rule at this time on Canton's standing and its areas of concern in the Decommissioning Proceeding. Accordingly, I accept the Staff's recommendation that I defer my rulings on these matters, at least until submission by Molycorp of the remainder of its decommissioning plan and an opportunity for Canton to elaborate, as necessary, upon both its standing and its areas of concern for the Decommissioning Proceeding.

5. Areas of Concern

Canton seeks to merge the areas of concern applicable to both the Storage Proceeding and the Decommissioning Proceeding. It relies in part on the joint treatment by the Staff of the two proceedings by its holding of the same public meeting on April 15, 1999, for both proposals. *See* Canton Amended Request at 1-2 (¶ 2); Exhibit A (*Federal Register* notice of meeting). It also relies on the identity of docket numbers of the two proceedings. Further, it cites a number of questions of fact and law assertedly common, in its view, to both proceedings. Finally, it asserts that the logical follow-up to the temporary storage inquiry is ''what happens at the end of the 'temporary' ten-year period'' and that ''[t]he larger long-term issues under the Site Decommissioning Plan are thereby immediately implicated.'' Amended Request at 5-6 (¶¶ 16-17).

On the other hand, as Molycorp points out, the Notice of Opportunity for Hearing in the Storage Proceeding clearly limited the scope of matters under consideration to the temporary-storage proposal. Molycorp also cites Judge Bloch's Memorandum and Order of August 25, 1999, to the same effect. Finally, Molycorp

relies on the initial designation of a Presiding Officer for this proceeding, dated July 15, 1999, as clearly being limited to the temporary storage proposal.

The Commission's separate notices of opportunity for hearing in the two proceedings are dispositive of this question. Indeed, they represent different amendments to the same license, each authorizing its own discrete activities and each giving rise to an opportunity for public hearing. The common docket numbers stem from the Commission's practice of assigning docket numbers to a particular facility or site and not to a particular proceeding. That some factual or legal questions may overlap the two proceedings is fortuitous, not legally controlling. Moreover, given my action in deferring my decision on standing and areas of concern in the Decommissioning Proceeding, the two proceedings will not proceed in parallel. Nor should they, given the Commission's oft-expressed desire to complete proceedings expeditiously. *See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 24 (1998).

For these reasons, I am declining to merge the areas of concern for the two proceedings. For the same reason, I am denying consolidation at this time of the two proceedings. At a later date, after my ruling on standing and areas of concern in the Decommissioning Proceeding, consolidation may be warranted depending on existing facts and circumstances.

With respect only to the Storage Proceeding, Canton has submitted eight areas of concern. I have alluded to two of them in my discussion of injury-in-fact, but I treat all of them here.

a. The Geology and Topography of the Proposed Storage Sites

Canton claims that the proposed temporary storage site is located in a flood plain in violation of pertinent PaDEP regulations and that the substructures underlying the site are inappropriate for a radioactive waste site. Canton states that PaDEP expressed these conclusions in an April 15, 1999 public meeting called primarily to consider decommissioning.[17]

Molycorp claims that these matters are not relevant to the Storage Proceeding in that they have already been decided earlier, during initial site licensing. I disagree. The waste that is to be temporarily stored (including, as it does, thorium) appears to be of a different composition than the waste currently on site. The substructures underlying the site may or may not be appropriate for the proposed waste storage. Thus, this area of concern is germane and hence admissible.[18]

[17] Canton Amended Request at 8.

[18] I note, however, that a document currently of public record, not referenced by any party or petitioner, sets forth the PaDEP position, commenting on the Environmental Assessment for the temporary storage proposal, that ''we agree with the licensee's proposed action.'' Letter dated February 13, 1998, from Roy V. Woods, Radiation Health Physicist, Radiation Protection, PaDEP, to Roy Persons, NRC. Resolution of this area of concern will clearly require consideration of the PaDEP letter.

b. Evidence of Dispersion and/or Migration of Radioactive Material Outside the Current Storage Sites

Canton asserts that Molycorp, as recently as 1996, has been required to reclaim contaminated soil outside the existing storage pile and/or outside of its property, and that such contaminated soil is stored in the 194 roll-off containers currently on site. It cites a 1985 report of Oak Ridge Associated Universities to the effect that radioactive waste was found within the public right-of-way at locations where such material was not initially placed or stored. It adds that, although Molycorp has released testing results of water samples from nearby Chartiers Creek, Molycorp has never released results of analyses of the Charters Creek stream beds. Canton states that it currently is taking tests of the stream beds and will present the results at the full hearing.

Molycorp criticizes Canton for failing to provide evidence in support of this area of concern and, specifically, for failing to provide reports of the ongoing scientific research. Molycorp specifically includes this area as one that arose out of the initial licensing of the facility.[19] Molycorp adds that its Site Characterization Report, which it provided to Canton in 1997, addresses ''stream bottom sediment samples'' taken from Chartiers Creek, indicating no significant site-related impact to the sediment.[20]

In my view, Canton has not adequately supported this area of concern. In particular, it cites a 1985 Oak Ridge study in support of an event that allegedly did not occur until 1986. It also does not explain why prior reviews of this question were deficient. Moreover, it only asserts that Canton ''is currently in the process of taking such soil tests for the Chartiers Creek stream beds,'' without providing any further description of the studies that are assertedly under way. If those studies should provide evidence in support of this area of concern, Canton can seek to introduce the results of such studies as a basis for a late-filed area of concern. Absent such new information, this area of concern lacks adequate support and is accordingly rejected.

c. Unknown Effects Caused by Uncontrolled Mixing of the Thorium Produced and Stored at Molycorp with Coal Tar and Other Toxic Substances Already Existing at the Site

This area of concern is one that I reviewed in conjunction with my discussion of potential injury for standing purposes. The impact needed for standing purposes may well be less than for demonstration of an adequate area of concern. *Cf. Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-

[19] Molycorp Response, ¶ 17.
[20] Molycorp Response, ¶¶ 13, 33.

10, 9 NRC 439, 445-48 (1979), *aff'd on other grounds,* ALAB-549, 9 NRC 644 (1979). Molycorp has denominated this description (along with those of other areas of concern) as brief and lacking in detail but does not set forth any assertion, much less proof, that the area is not ''germane.'' Clearly it is germane, and I accept it on that basis. Following its receipt of the Hearing File, Canton will be required to specify in more detail the scope of its areas of concern.

d. Proximity of Water Line and Chartiers Creek Watershed to Proposed Storage Site

This area of concern was also reviewed in conjunction with my discussion of standing. Clearly it is germane to the proposed amendment. If, as Molycorp claims, the water line does not underlie or come close to the temporary storage site and, in any event, is to be abandoned, those are factual matters that may lead to at least a portion of this area of concern becoming moot. Those matters may be resolved through litigation. I accept this area as germane to the proceeding.

e. Inappropriate and/or Inadequate Design Features of Proposed Permanent Storage Sites

By its terms, this area of concern relates, if at all, to the Decommissioning Proceeding, not to the Storage Proceeding. I have, of course, deferred ruling on areas of concern for the Decommissioning Proceeding, pending submission by Molycorp of the remainder of the site decommissioning plan. For now, I hold this area of concern not to be germane to the Storage Proceeding and reject it in that context.

f. Close Proximity to Residents

This area of concern objects to the location of a waste storage site within 250 feet of residential neighborhoods. It is clear, however, that this general question has already been resolved, prior to the initial licensing of the waste storage site. In addition, in no way does Canton specify how, if at all, the proposed temporary storage will produce effects different from those already considered. As such, this area is not germane to the Storage Proceeding and is accordingly rejected.

g. Safety of Employees of Molycorp and Neighboring Industries

This area of concern questions the safety of all workers in Canton Township on the basis of a belief that there has been a high incidence of cancer and other related diseases to the employees of Molycorp and neighboring industries. Canton

states that complete studies of such issues have not been completed but ''will be developed pursuant to full hearing procedures.''[21]

As set forth earlier, under Commission rules an area of concern must be ''germane'' to the subject matter of the particular proceeding under review. 10 C.F.R. § 2.1205(h). This area of concern does not focus on the temporary storage proposal — indeed, it does not even reference it. Moreover, it has no basis whatsoever. Prior to acceptance of an area of concern, there must at least be a reference to some authority giving rise to the concern. ''Information and belief'' is patently inadequate. This area of concern has not been shown to be germane to the Storage Proceeding and hence is rejected.

Should Canton complete the studies to which it has generally alluded prior to the conclusion of the presentations by parties of their written presentations under 10 C.F.R. § 2.1233, it can, of course, proffer the results as a basis for a late-filed area of concern, subject to evaluation under late-filed procedures comparable to those set forth at 10 C.F.R. § 2.1205(*l*)(1).

h. Threats to Wildlife and Ecosystem

Similar to the previous area of concern, Canton states that it is ''developing evidence'' of physical defects occurring in wildlife populating the undeveloped portions of the Molycorp site, which defects cannot be attributable to natural causes, and of damage to the ecosystem of the site and neighboring areas. Molycorp deems this area to have been adequately explored prior to initial site licensing.[22] Until Canton provides more detailed references to the studies on which it is relying, showing such studies adequately to support an area or areas of concern, the basis or foundation is inadequate. This area of concern is thus rejected. Should Canton wish to offer a late-filed area of concern (subject to the late-filed criteria referenced earlier) following completion of the studies in question or development of other adequate sources, it is, of course, free to do so.

6. Conclusion

I have found both that Canton Township and the City of Washington have standing to become parties to the Storage Proceeding and that three of their jointly proffered areas of concern are admissible. Accordingly, both Canton and Washington have fulfilled all of the requirements for a hearing, and their respective requests for a hearing are being granted. Canton and Washington thus become formal parties to the Storage Proceeding. A Notice of Hearing with respect only

[21] Canton Amended Request at 11.
[22] Molycorp Response, ¶ 17.

to the Storage Proceeding will be issued in the near future. I am also at this time denying Canton's request that the Storage Proceeding and the Decommissioning Proceeding be consolidated. Further, I am adopting the filing schedules set forth below (which may be modified for good cause shown).

C. Filing Schedules

1. Pursuant to 10 C.F.R. § 2.1231(a), the NRC Staff should file (mail) the Hearing File to the Presiding Officer, his Special Assistant, and the parties by Friday, May 19, 2000.

2. Canton and Washington shall file (mail) a further specification of issues, derived solely from the admitted areas of concern, by Friday, June 23, 2000.

3. A prehearing conference, either by telephone or near the site in question, for the primary purpose of further specifying issues for consideration and developing further schedules, is tentatively scheduled for the third or fourth week of July 2000, with the time and place to be announced at a later date.

D. Service/Filing Requirements

The preferred method for serving documents in this proceeding is by same-day electronic transmission (i.e., by e-mail), with a paper copy mailed the same day to each party or entity served (e.g., the NRC Office of the Secretary). (Because the Hearing File likely includes many documents not created electronically, this preference does not extend to the filing of hearing-file documents.) Electronic copies may be in their native wordprocessing format (e.g., WordPerfect or Word). Service by e-mail will be considered timely if sent no later than 5:00 p.m. ET of the date due under NRC's rules.

Notwithstanding such electronic service, parties under current rules must continue to file signed hard copies of any pleadings with the Rulemaking and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, Maryland 20852. The fax number for the Secretary is (301) 415-1101 and the e-mail address is *hearingdocket@nrc.gov*. Courtesy e-mail copies should be provided at the time of filing with the Secretary to the Presiding Officer at *cxb2@nrc.gov* and his Special Assistant at *rfc1@nrc.gov*.

As an aid to the Presiding Officer, parties are requested to place the date for each pleading (i.e., the date it is filed and served) on the first page of the document (not the cover letter transmitting the document.)

E. Order

Based on the foregoing, it is, this 11th day of April 2000, ORDERED:

1. The requests for a hearing of Canton Township and the City of Washington, Pennsylvania, in the Storage Proceeding are hereby *granted.* Canton and Washington, which thus become parties to the Storage Proceeding, are hereby *consolidated* as a party.

2. The Hearing File is to be distributed on May 19, 2000.

3. The following areas of concern are found germane: (a) geology and topography; (c) effects of uncontrolled mixing; (d) proximity of water line and Chartiers Creek.

4. The following areas of concern are not germane: (b) dispersion and/or migration offsite; (e) design features of permanent storage site; (f) proximity to residents; (g) employee safety; and (h) threats to wildlife and ecosystem.

5. Specific issues for litigation (based on areas of concern I have found germane) are to be filed by Friday, June 23, 2000.

6. Canton's request to consolidate these two proceedings is *denied.*

7. Proceedings in the Decommissioning Proceeding are hereby *deferred.* Canton may file an amendment to its request for a hearing within 30 days of the submission by Molycorp of the remainder of its site decommissioning plan.

8. This Memorandum and Order is subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Memorandum and Order. The appeal may be supported or opposed by any party by filing a counterstatement within fifteen (15) days of the service of the appeal brief.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 11, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

G. Paul Bollwerk, III, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of **Docket No. 40-8681-MLA-5**
(ASLBP No. 99-756-02-MLA)

INTERNATIONAL URANIUM (USA) CORPORATION
(Receipt of Additional Material from Tonawanda, New York) **April 27, 2000**

In this 10 C.F.R. Part 2, Subpart L informal proceeding concerning the application of International Uranium (USA) Corporation (IUSA) for an amendment of its 10 C.F.R. Part 40 source materials license to allow uranium-bearing material from the Ashland-1 and Seaway Area D Formerly Utilized Sites Remedial Action Program (FUSRAP) sites located near Tonawanda, New York, to be received and processed at IUSA's White Mesa, Utah uranium mill, the Presiding Officer grants the unopposed motion of the sole remaining intervening party to withdraw from this action and terminates the proceeding.

RULES OF PRACTICE: WITHDRAWAL OF INTERVENOR

In a proceeding in which a hearing is not required in the absence of a hearing/intervention petition, when only a single intervenor is participating, ''its withdrawal serves to bring the proceeding to an end.'' *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985).

MEMORANDUM AND ORDER
(Granting Motion to Withdraw and Terminating Proceeding)

Pending before the Presiding Officer is the March 13, 2000 unopposed motion of Intervenor State of Utah (State) to withdraw from the pending action. For the foregoing reasons, the State's motion is granted. Moreover, because the State is the only remaining Intervenor to this proceeding, with its withdrawal this proceeding is at an end.

I. BACKGROUND

In this cause, the State challenges a 1998 source materials license amendment request that would allow uranium-bearing material from the Ashland-1 and Seaway Area D Formerly Utilized Sites Remedial Action Program (FUSRAP) sites located near Tonawanda, New York, to be received and processed at Applicant International Uranium (USA) Corporation's (IUSA) White Mesa, Utah uranium mill.[1] Subsequently, at the parties' request, the Presiding Officer placed the proceeding in abeyance pending the outcome of an appeal to the Commission of the Presiding Officer's February 9, 1999 decision in a related case regarding White Mesa mill processing of materials from the Ashland-2 FUSRAP site, *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-99-5, 49 NRC 107 (1999). *See* Presiding Officer Memorandum and Order (Hearing Held in Abeyance) at 1 (Feb. 22, 1999) (unpublished). At that time, the parties maintained that placing this proceeding on hold was appropriate because of ongoing party negotiations which might resolve the State's hazardous waste concerns such that it would not be necessary for them to be included in this proceeding following the outcome of the related case appeal.

In a February 10, 2000 decision, the Commission affirmed both the Presiding Officer's decision and the NRC Staff's grant of a license amendment to IUSA for the receipt and processing of Ashland-2 materials. *See International Uranium (USA) Corp.,* CLI-00-1, 51 NRC 9 (2000). In response to this Commission decision, the Presiding Officer issued a February 29, 2000 memorandum and order requesting that ''the parties provide a joint report outlining (1) the status of the negotiations referenced in their February 18, 1999 joint motion [to place the hearing in abeyance]; and (2) their views as to whether there is cause to continue holding this proceeding in abeyance.'' Presiding Officer Memorandum and Order

[1] Previously, the Presiding Officer had dismissed Envirocare of Utah, Inc., as a party to this proceeding based on its lack of standing, a determination that recently was affirmed by the Commission. *See* LBP-99-11, 49 NRC 153 (1999), *aff'd,* CLI-00-4, 51 NRC 88 (2000). Accordingly, this leaves the State as the sole intervening party to this proceeding.

(Requesting Joint Status Report) (Feb. 29, 2000) at 2 (unpublished). The State's March 13, 2000 motion for withdrawal from this proceeding comes in response to this request.

According to the State, both issues that remain before the Presiding Officer have been resolved. First, the State's concerns over identifying whether hazardous waste will be present in alternate feed material have been addressed in a November 16, 1999 ''Protocol for Determining Whether Alternate Feed Materials Are Listed Hazardous Wastes'' jointly developed by the State and IUSA. Second, the Commission's decision in CLI-00-1 addressed the State's concern that mill owners will process alternate feed material simply as a device to reclassify material as Atomic Energy Act § 11e(2) byproduct material instead of requiring such material to be disposed of in an appropriate regulated low-level or mixed waste facility. *See* [State] Motion to Withdraw from This Proceeding (Mar. 13, 2000) at 2-3. As a result of this resolution, the State declares it no longer sees any purpose in proceeding with its action. Moreover, its withdrawal request is not opposed by either Applicant IUSA or the NRC Staff. *See id.* at 3.

II. ANALYSIS

In a proceeding such as this one in which a hearing is not required in the absence of a hearing/intervention petition, when only a single intervenor is participating, ''its withdrawal serves to bring the proceeding to an end.'' *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985). In light of the resolution of the State's concerns and the lack of opposition to its motion for withdrawal, there are no longer any issues for the Presiding Officer to resolve. Therefore, the State's motion for withdrawal is granted and, in turn, this proceeding is terminated.

III. CONCLUSION

For the reasons set forth above, the State of Utah's unopposed motion to withdraw from this proceeding is granted. And with that withdrawal, the proceeding is concluded.

For the foregoing reasons, it is, this twenty-seventh day of April 2000, ORDERED that:

1. The State's March 13, 2000 motion to withdraw from this proceeding is *granted*; and
2. This proceeding is *terminated.*

In accordance with 10 C.F.R. §§ 2.1251(a), 2.1253, absent Commission sua sponte review, this decision will become final agency action on the first business day falling on or after the thirtieth day from the date of its issuance, i.e., *Tuesday, May 30, 2000.*

BY THE PRESIDING OFFICER[2]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 27, 2000

[2] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant IUSA; (2) Intervenor State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of **Docket No. 50-247**
(License No. DPR-26)

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
(Indian Point, Unit 2) **April 13, 2000**

The Petitioner requested that the NRC modify or suspend the Indian Point Unit 2 (IP2) operating license to prevent restart until the seven identified issues as follows are resolved. In lieu of license modification or suspension, the Petitioner requested issuance of a Confirmatory Action Letter or Order requiring the Petitioner's identified issues be addressed prior to restart. Additionally, the Petitioner requested that a public hearing on the petition be conducted in the vicinity of the plant prior to restart. The petition identified the following seven issues: (1) the apparent violation of station battery design and licensing bases; (2) the apparent failure to adequately correct circuit breaker problems; (3) the apparent unreliability of emergency diesel generators; (4) the potential unjustified license amendment for undervoltage and degraded voltage relay surveillance intervals; (5) the apparent errors and nonconservatisms in individual plant examination; (6) the ability of IP2 to cope with a station blackout scenario with current procedures; and (7) the incorporation of licensing commitments into plant procedures.

This Director's Decision acknowledges that several of the issues raised in the petition need to be resolved before unit restart, and in response to the August 31, 1999 event, the Staff performed special inspection and evaluation efforts. These efforts included dispatching an Augmented Inspection Team (AIT), supplementing the resident inspector staff with regional specialist inspectors prior to and during restart, and an AIT follow-up inspection team that was also present prior to and after unit restart. The scope of the inspection and evaluation effort included event cause determination and corrective actions, review of Con Ed's recovery plan,

control of the station load tap changer, and Con Ed's initial extent of condition review. The Staff found that Con Ed's corrective actions and recovery plan were adequate for ensuring that the underlying root causes were identified and resolved prior to restart. Therefore, this Director's Decision concludes that, although the issues raised by the Petitioner had merit, the confirmatory action letter and/or order preventing restart was not necessary to ensure that the Licensee adhered to the requirements of its license, and the Licensee had taken prudent actions to address the key concerns contained in the petition.

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

I. INTRODUCTION

By letter dated September 15, 1999, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (Petitioner), pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) take action with regard to the Indian Point Nuclear Generating Unit No. 2 (IP2), owned and operated by the Consolidated Edison Company of New York, Inc. (Con Ed). The Petitioner requested that the NRC take enforcement action to modify or suspend the operating license for the IP2 to prevent the reactor from resuming operation until the five issues identified in the attachment to the petition had been fully resolved. As an acceptable alternative in lieu of a suspension or modification of the license, the Petitioner requested that the NRC issue a confirmatory action letter or an order requiring these issues to be fully resolved before unit restart. The five issues that were raised in the petition are (1) the apparent violation of station battery design and licensing bases, (2) the apparent failure to adequately correct circuit breaker problems, (3) the apparent unreliability of emergency diesel generators (EDGs), (4) the potentially unjustified license amendment for undervoltage and degraded voltage relay surveillance intervals, and (5) the apparent errors and nonconservatisms in individual plant examination (IPE). Along with the last issue, the Petitioner stated that the event on August 31, 1999, at IP2 revealed potential problems with the plant-specific risk assessment developed by the Licensee and now used to establish priorities for maintenance and inspections. Additionally, the Petitioner requested that a public hearing on this petition be conducted in the vicinity of the plant before its restart is authorized by the NRC. In a transcribed telephone conversation between the Petitioner and the members of the NRC's Petition Review Board on September 22, 1999, the Petitioner clarified two of the issues in the petition. First, the Petitioner stated that because of an apparent failure to accomplish the commitment in the NRC's safety evaluation for the

license amendment mentioned in the petition, the Petitioner was concerned that past licensing commitments may not have been implemented. Second, the Petitioner questioned whether the amount of time the Licensee took to perform certain actions during the event on August 31, 1999, was consistent with the times expected if a station blackout (SBO) had occurred since many of the procedures and processes in response to an SBO event were used.

II. BACKGROUND

As a basis for the requests described above, the Petitioner stated that the issues, if valid, have clear and direct safety implications because they involve equipment explicitly required to function to mitigate accidents. With regard to the IPE issue, the Petitioner states that, if valid, it has indirect safety implications because it involves information used by the plant's owner to schedule maintenance and inspections of equipment implicitly required to function to mitigate an accident. The Petitioner also stated that the specific problems revealed by the event on August 31, 1999, were caused by systematic process breakdowns, including inadequate procedures, inadequate training, and plant configuration errors, and that the Licensee's plan does not contain sufficient activities that provide reasonable assurance that problems in other safety systems are being identified and corrected.

The Commission informed the Petitioner in a letter dated October 8, 1999, that the request for the NRC to take enforcement action to modify or suspend the operating license for IP2 to prevent the reactor from resuming operation until the five issues identified in the attachment to the petition had been fully resolved or, in lieu of a suspension or modification of the license, the NRC issue a confirmatory action letter or an order requiring these issues to be fully resolved before unit restart was not necessary. The Staff found that Con Ed's corrective actions and Recovery Plan were adequate for ensuring that the underlying root causes were identified and resolved prior to restart. Although some of the actions entailed long-term corrective actions, the Staff found that the Licensee's short-term actions addressed the issues that needed to be accomplished before restart.

III. DISCUSSION

Issue 1: Apparent Violation of Station Battery Design and Licensing Bases

The Petitioner stated that the event on August 31, 1999, appears to violate the design and licensing bases for the station batteries because (1) the unit is licensed with an 8-hour SBO coping duration but it took 10 1/2 hours to restore power to the 6A safety bus; (2) although Licensee calculations determined that there is

sufficient battery capacity for 1 hour, after which time the alternate AC (AAC) source (gas turbine) will be available to power the battery charger, the Licensee failed to connect the AAC source to the 24-Vdc battery before it fully discharged; (3) the Licensee operated the 24-Vdc battery for nearly 5 hours longer than the design duration of 2 hours specified in the updated final safety analysis report (UFSAR), section 8.2.3.5, and did not prevent the excessive discharge; and (4) the loss of the dc feed disabled some engineered safeguards equipment.

In a transcribed telephone conversation between the Petitioner and the NRC's Petition Review Board on September 22, 1999, the Petitioner further clarified the issue. The Petitioner stated that the August 31 event showed that there were not even any procedures in place for recovering a 480-volt safety bus. The Licensee, in performing the fault analysis to ensure that there was no problem on the bus, took what seemed to be an inordinate amount of time to megger the bus. Even after the megger results were found to be successful, or showed that there was no problem with the bus, it still took several hours before the bus was reenergized. The Petitioner, therefore, questioned whether that result is consistent with the amount of time it takes this Licensee to perform certain actions in case of an SBO. Recognizing that the August 31 event was not an SBO, the Petitioner stated that many of the same procedures and processes would have been invoked if there had been an SBO.

The Petitioner stated that it is questionable whether the Licensee could have met the 8-hour duration, given the procedures it had in place. So, the Petitioner stated that he has doubts about whether in case of a true SBO the Licensee would be able to do all the things it needs to do within the time frames it has established, i.e., the 1 hour for starting the gas turbines and the 8 hours for restoring power from some source.

Response

As stated in the Staff's letter of October 8, 1999, the conditions associated with an SBO were not present during the subject event. The Petitioner is accurate, the Licensee operated Station Battery 24 beyond the 2-hour duration discussed in the UFSAR. Section 8.2.3.5 of the UFSAR states that each station battery is sized to carry its expected shutdown load without battery terminal voltage falling below 105 volts for a period of 2 hours following a plant trip and a loss of all AC power. Station Battery 24 supplied its shutdown load for more than 11 hours. For approximately 7 ½ hours of the 11 hours, voltage was maintained above 105 volts. The battery was allowed to continue discharging until power was restored to Bus 6A from EDG 23. The minimum terminal voltage decreased to approximately 35 volts during the entire discharge period (Inspection Report 50-247/99-08). The Licensee provided its corrective action for restoration of the battery to the NRC by letter dated September 24, 1999. To restore the battery to an operable

condition, the Licensee (a) performed a thorough engineering review of the effects of the battery discharge, (b) developed and performed special procedures with the technical advice and support of the battery manufacturer and industry experts for recharging and testing the battery, and (c) replaced one of the fifty-eight cells on the basis of the test. After establishing the proper recharge on the battery, the Licensee declared the battery to be operable. The NRC conducted an inspection and agreed with the Licensee that Station Battery 24 had been restored to the operable condition and was satisfactory to support safe plant restart and operation. (NRC Inspection Report 50-247/99013.)

The Staff does not characterize the August 31 event as an SBO event. Therefore, the Licensee was not required to use nor did they use their SBO procedures. However, the Staff does believe the absence of a procedure to recover from the loss of a single 480-volt safety bus did contribute to the inordinate recovery time associated with this event. In this regard, the Licensee prepared new operational procedures for a loss of 480-volt buses, including providing for the supply of alternate power to vital loads on those buses, and operator training was conducted on the use of the procedures. The inspectors reviewed the Licensee's action to implement temporary facility changes (TFCs) that are needed to support the Loss of a 480-Volt Bus procedure. The TFCs provide a method for operators to defeat the undervoltage relays for Buses 5A and 6A and provide alternate power supply to Battery Chargers 21, 22, 23, and 24. The inspectors reviewed the TFCs and the associated safety evaluations and independently verified that the methods described in the TFCs were technically adequate by review of the associated electrical schematics and plant drawings. The procedures and operator training were completed on October 13, 1999, to support reactor restart.

Issue 2: Apparent Failure to Adequately Correct Circuit Breaker Problems

In addition to the problem with the overcurrent trip setting on the EDG 23 output breaker that was identified because of the August 31 event, the Petitioner stated that the plant has experienced an inordinately high number of breaker problems in recent years. Furthermore, the Petitioner noted that the overcurrent protection setting was caused by personnel error, and a post-calibration test procedure, which is commonly used throughout the nuclear industry, was not performed. Thus, these breaker problems provided ample opportunity for the Licensee to benchmark its practices against industry norms, yet those opportunities were wasted.

Response

As stated in the Staff's letter of October 8, 1999, the results of the root-cause investigation for the EDG 23 output breaker revealed that the Amptector device was improperly set at too low of a value. To correct this, the Licensee developed new calibration procedures. The NRC Staff reviewed the procedures and other activities to evaluate and correct the overcurrent trip of the twenty-three emergency diesel output breakers on August 31, 1999, and found them to be acceptable for safe restart and operation of the reactor plant. The Staff also concluded that an appropriate sample of circuit breakers was selected for recalibration and the review was properly expanded when additional breaker-setting problems were identified. The revised methodology used by Con Ed confirmed the setpoints for the Amptectors and ensured that susceptible breakers would not trip below the minimum value specified for the short-time overcurrent trip. (NRC Inspection Report 05000247/99013.)

The issue of inadequate calibration of the EDG output breaker short-time overcurrent trip setting, which caused the de-energization of the vital bus, resulted in a violation. This violation was one of three violations cited in the Staff's February 25, 2000 letter to the Licensee forwarding a notice of violation and proposed imposition of civil penalty ($88,000).

Issue 3: Apparent Unreliability of the EDGs

In support of this issue, the Petitioner stated that there have been at least four EDG failures, including at least one failure upon demand, in the past 13 months at IP2. Further, the Petitioner noted that the plant was licensed with an 8-hour SBO coping duration that was based, in part, on an EDG reliability of 95% and that the actual performance of the EDGs may now be less than 95%. In each of the examples provided in the petition, the EDG experienced a problem after the engine started because of a breaker failure or, in one instance, a broken fuel oil line. Other than during the August 31 event, the problems were found during the performance of scheduled surveillance testing.

Response

The Staff shares the Petitioner's concerns with the reliability of the IP2 EDGs. However, we have reviewed the recent EDG performance and determined that neither the performance nor the condition of the EDGs degraded below margins to support safe plant operation.

The August 31 failure of the #23 emergency diesel generator output breaker caused the Maintenance Rule (MR) performance criteria for the 480-Vac switchgear system to be exceeded. Exceeding these criteria required the Licensee to establish a

corrective action plan and establish goals to return this equipment to an acceptable level of performance. We will continue to monitor the Licensee's progress in implementing this plan. The intent of the MR is to highlight equipment performance deficiencies prior to these deficiencies having a significant adverse impact on plant safety.

The revised reactor oversight process includes a performance indicator (PI) for the EDGs. The method used to calculate the EDG PI combines both reliability and unavailability performance data by including the fault exposure time unavailabilty. The PI for the IP2 EDGs is in the increased regulatory response band. Therefore, the NRC will continue to focus inspection resources on the Licensee's corrective actions for improving EDG performance.

While the Staff acknowledges and shares the Petitioner's concern regarding EDG performance at IP2, the Staff does not believe that the performance of the EDGs has degraded the margins of safety to a point where the plant is no longer safe. Both the MR and PI's are designed to identify degrading equipment performance prior to its having a significant adverse effect on plant safety. In this case, the Staff believes the MR and PI have identified this performance problem prior to having a significant impact on safety. The basis for this conclusion is our review of recent EDG reliability and unavailability data as described below.

In an October 6, 1999 letter to the NRC, the Licensee stated that the 2-year rolling average (as of October 1, 1999) reliability of the #21, #22, and #23 EDG, was 96.83% (one failure to start in March 1998 and one breaker failure in July 1998), 100%, and 98.48% (output breaker failure in August 1999), respectively. The number of demands (tests and actual demands) that this reliability data was based on for the #21, #22, and #23 EDGs was 64, 56, and 66, respectively. As Petitioner stated in his September 15, 1999 letter to the NRC, the target reliability for EDGs as stated in Regulatory Guide 1.155, ''Station Blackout'' is 95% for the last 100 demands. The Licensee's EDGs have recently performed better than the 95% target reliability; therefore, we do not believe that there currently exists a significant safety problem with the reliability of the IP2 emergency diesel generators.

We have also reviewed the EDG unavailability data from February 1999 to the present. The unavailability data indicate that the three EDGs have met the MR unavailability performance criteria since April 1999 (unavailability data do not include fault exposure time because reliability data are explicitly included in the MR performance criteria). Prior to this date, the #23 EDG had exceeded its MR performance criteria. Therefore, the Staff does not believe there is a significant safety problem with EDG unavailability.

In conclusion, both the maintenance rule equipment performance monitoring and PI data indicate that there is a need to improve EDG performance at IP2. The Staff will continue to monitor Con Ed's actions to improve performance. Based on our review of the EDG reliability and unavailability performance data, the

Staff believes that the EDG performance meets the licensing basis for SBO and is acceptable to support safe plant operation.

The specific concerns with the EDG output breakers are addressed in the response to Issue 2, Apparent Failure to Adequately Correct Circuit Breaker Problems.

Issue 4: Potentially Unjustified License Amendment for Undervoltage and Degraded Voltage Relay Surveillance Intervals

The Petitioner stated that it was possible that the problem that caused the auxiliary transformer tap changer configuration error (i.e., it was in manual rather than in automatic control) would have been identified and fixed during a surveillance test. If so, the reduction of the testing interval in the 1994 Technical Specification (TS) amendment that extended the surveillance interval from 18 to 24 months for the loss of power undervoltage and degraded voltage relays also reduced safety margins at the plant.

On the basis of the tap changer commitment issue, the Petitioner asked whether there are any other such commitments that were made by the Licensee to the NRC that undermined plant safety margins because the commitments were not carried out.

Response

The Petitioner's issues regarding indentification of the tap changer configuration error and the concern of other NRC commitments not being implemented were addressed in the Staff's October 8, 1999 letter. The issues of failure to (1) translate the correct reset values for the eight undervoltage relay requirements into procedures when a modification was made to the 480-volt vital bus degraded voltage relays in 1995, which caused the loss of offsite power to the vital buses, and (2) not correctly translate, into the design basis, the requirement for automatic operation of the station auxiliary transformer load tap changer resulted in a violation. These violations combined to form the basis for one of three violations cited in the Staff's February 25, 2000 letter to the Licensee forwarding a notice of violation and proposed imposition of civil penalty ($88,000).

Issue 5: Apparent Errors and Nonconservatisms in Individual Plant Examination (IPE)

In August 1992, the Licensee submitted to the NRC an IPE for IP2. The petition stated that the NRC's evaluation of this IPE, sent to the Licensee on August 14, 1996, contains statements and conclusions that appear to be invalidated

by the August 31 event. Specifically, the Petitioner listed items regarding (a) the availability of the gas turbines and (b) the failure probabilities of the motor-driven auxiliary feedwater (MDAFW) pumps and turbine-driven auxiliary feedwater (TDAFW) pump, 480-volt or 13.8-kilovolt circuit breakers, ac buses, EDGs, high-head safety injection (HHSI) pumps, and component cooling water (CCW) pumps. If the IPE results are nonconservative, the Petitioner stated that the NRC and the Licensee may be improperly allocating resources to inspections. Likewise, the Licensee may be improperly allocating resources to scheduled repairs.

Response

The Petitioner's concerns regarding the use of IPE data by both the NRC and the Licensee were addressed in the Staff's letter of October 8, 1999. In summary, the Staff concluded that the IPE met the intent of Generic Letter 88-20 to identify ''severe accident vulnerabilities,'' and the August 31 event did not appear to invalidate the IPE. Nevertheless, the calculated risk data for the event indicate, from a risk perspective, that it is important for the Licensee's corrective actions from the event ensure a reliable source of power after a reactor trip. Further, the maintenance rule requires the Licensee to monitor equipment performance. The rule also requires that any changes in equipment performance be evaluated and the maintenance program be adjusted accordingly.

IV. CONCLUSION

For the reasons discussed above, the NRC Staff concludes that although the issues the Petitioner raised have merit, the immediate action requested was not necessary to ensure that the Licensee adhered to requirements of their license. The NRC Staff also concludes that a meeting with the public to discuss the issues raised in the petition is not warranted. Therefore, the Staff's efforts regarding this petition are complete.

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

25 days after the date of issuance of the Decision 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 13th day of April 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 50-219-LT**

GPU NUCLEAR, INC.,
JERSEY CENTRAL POWER & LIGHT COMPANY, and
AMERGEN ENERGY COMPANY, LLC
(Oyster Creek Nuclear Generating Station)

May 3, 2000

The Commission concludes that Petitioner has demonstrated standing, but has proffered no admissible issues in this license transfer proceeding. We therefore deny the petition to intervene and request for hearing, and terminate this proceeding.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its ''interest may be affected by the proceeding,'' i.e., it must demonstrate ''standing.'' *See* AEA § 189a, 42 U.S.C. § 2239(a). For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

(1) identify an interest in the proceeding by
(a) alleging a concrete and particularized injury (actual or threatened) that

(b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and

(c) is likely to be redressed by a favorable decision, and

(d) lies arguably within the ''zone of interests'' protected by the governing statute(s).

(2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority).

Moreover, an organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-48 (1979); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-97 (1979). Regarding the preference for an affidavit, see *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 & n.4 (1999); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 23 (1996).

The Commission has found sufficient for purposes of standing a claim of insufficient funds to ensure safe operation and shutdown, posing a threat of radiological harm to a co-owner's interest in a facility, as a result of thin capitalization, inability to fund operations because of potential litigation liability, and financial insulation of shareholders from potential costs. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994). In *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993), the Commission found standing where the petitioner established regular residence near the facility and asserted that he could suffer an increased risk of radiological injury from the transfer of responsibility for safe operations of the facility to a corporate management alleged to be lax on safety because of violations of agency regulations and submissions of false information to the NRC. In the instant case, Petitioner has provided sufficient information to meet the minimum standing requirements under these prior Commission holdings. It alleges that the transfer will threaten the health and safety of individuals living within 1-2 miles of the plant, and that the transferee is inexperienced, inadequately funded, and, like its corporate affiliate, will lower staffing levels and deliberately cut corners in safety, causing degraded operations which could affect those living nearby. This suffices for standing.

RULES OF PRACTICE: ADMISSIBILITY OF ISSUES; INTERVENTION (ADMISSIBILITY OF ISSUES)

The Commission's rules for license transfer proceedings require that a petition to intervene raise at least one admissible issue. *See* 10 C.F.R. § 2.1306. To demonstrate that issues are admissible under Subpart M, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point,* CLI-99-30, 50 NRC at 342 (and cited authority).

These standards do not allow mere ''notice pleading''; the Commission will not accept ''the filing of a vague, unparticularized'' issue, unsupported by alleged fact or expert opinion and documentary support. *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (citation and internal quotation marks omitted). General assertions or conclusions will not suffice. This is not to say that the Commission's threshold admissibility requirements should be turned into a ''fortress to deny intervention.'' *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported. *See, e.g., Seabrook, supra.*

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)(2)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Pledges from AmerGen's co-owners to cover operating and maintenance expenses are not part of AmerGen's financial qualifications showing under NRC regulations, but are merely an additional demonstration of financial assurance offered by the Applicants. Its adequacy is therefore not an issue in the Commission's license transfer inquiry and, consequently, it cannot constitute a basis for granting

a hearing. *See* 10 C.F.R. § 2.1306(b)(2). Furthermore, even assuming *arguendo* that the financial guarantee were a partial basis (in addition to the sources of funds identified by the Applicant to cover the first 5 years of operating costs, pursuant to 10 C.F.R. § 50.33(f)(2)) for the NRC's determination concerning the financial qualifications of AmerGen, NIRS has not presented any support (by factual affidavits, expert testimony, or documentary evidence) for its assertion that the amount is insufficient or unavailable to AmerGen for the stated purpose.

LICENSE TRANSFER

PRICE-ANDERSON ACT

RULES OF PRACTICE: COLLATERAL ATTACK

10 C.F.R. PART 140

Petitioner argues that, with only $110 million (now $200 million) spread over multiple plants and a potentially limited revenue stream from Oyster Creek's electricity sales, AmerGen may be unable to meet its obligations under the Price-Anderson Act and 10 C.F.R. §§ 140.21 & 140.92, art. VIII ($10 million per year per reactor, up to a maximum $63 million per reactor) in the event of a major nuclear accident. According to Petitioner, this financial risk is particularly high if a nuclear accident were to occur either early in AmerGen's operation of Oyster Creek or when Oyster Creek and/or other AmerGen nuclear plants are in extended shutdown or undergoing major repairs or modifications. In the Commission's view, NIRS is attempting to impose on AmerGen a requirement more stringent than the one imposed by the regulations (i.e., an acceptable guarantee of payment of deferred annual premiums in an amount of $10 million for each reactor — 10 C.F.R. § 140.21) — an attempt that constitutes an impermissible collateral attack on our regulations. *See Seabrook,* CLI-99-6, 49 NRC at 217 n.8, 220-21.

PRICE-ANDERSON ACT

10 C.F.R. PART 140

10 C.F.R. § 50.54(w)

AmerGen meets the Commission's Price-Anderson rule. It has explicitly affirmed its intention to obtain the required nuclear property damage insurance and nuclear energy liability insurance required under 10 C.F.R. § 50.54(w) and Part 140, respectively, and has likewise recognized its responsibility to enter into an indemnity agreement with the NRC for a guarantee of the deferred premiums, pursuant to 10 C.F.R. §§ 140.22 and 140.92 (Form of Indemnity Agreement), art. VIII. The transfer will not occur until AmerGen has submitted the financial

protection documents required under AEA § 170 and 10 C.F.R. Part 140, as well as the property insurance required under 10 C.F.R. § 50.54(w). For these reasons, the Commission sees no Price-Anderson questions that merit an NRC hearing.

Petitioner predicts that Congress will increase the regulatory amounts if it renews the Price-Anderson Act in 2002. Alternatively, if Congress does not renew the Act, NIRS asserts that AmerGen would be subject to unlimited liability for a nuclear accident — a burden for which it is alleged to be financially unprepared. NIRS's concerns are misplaced. A congressional decision not to renew the Price-Anderson Act would affect only *new* reactors, not existing ones (like Oyster Creek) built under the current statute. Those latter reactors would continue to enjoy the Act's protections.

LICENSE TRANSFER

FINANCIAL QUALIFICATIONS

10 C.F.R. § 50.33(f)(2)

An applicant's mere proffering of 5-year cost and revenue projections will not be sufficient in the face of plausible and adequately supported claims that those projections are inaccurate or otherwise do not provide adequate assurance of financial qualifications. *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-21 (1999). However, NIRS's issue does not meet this standard, as NIRS has proffered no documentary evidence or expert opinion supporting its conclusion that AmerGen will be unable either to produce meaningful amounts of electricity at Oyster Creek or sell that electricity at market rates.

Petitioner asserts that AmerGen's almost-complete reliance on operating revenue to meet costs will require the company to value power production above safety. The Commission disagrees. The Commission's regulations permit reliance on operating revenues, 10 C.F.R. § 50.33(f)(2), and Petitioner has offered no support beyond speculation why the level of Oyster Creek's revenues will lead AmerGen to cut corners in safety. Moreover, Petitioner's argument simply ignores the Commission's inspection and enforcement programs. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 306-07 (1997) (''in the end, NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements''). Petitioner also fails to offer documentary support for its argument that AmerGen is likely to violate our safety regulations. Absent such support, this agency has declined to assume that licensees will contravene our regulations. *See, e.g., Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 400 (1995); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974); *Virginia*

Electric and Power Co. (North Anna Power Station, Units 3 and 4), LBP-74-56, 8 AEC 126, 148 (1974).

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

Petitioner asserts that even the combination of the $110 million (now $200 million) guarantee and the operating revenue will be insufficient to cover Oyster Creek's major anticipated expenses such as the replacement of its Thermo-Lag fire barrier material, the installation of a new, non-single-failure-proof crane for heavy load movement, and the costs associated with addressing numerous spent fuel storage issues. Petitioner has again failed to provide the Commission with data or analysis supporting its position and has given no basis on which to question AmerGen's ability to pay for these expenses through its projected income. Consequently, the Commission must reject this line of argument. The Commission stands ready to hold a hearing in license transfer cases where petitioners proffer plausible and fact-based claims that a new reactor owner or operator lacks sufficient financing to run the reactor safely. *See Seabrook,* CLI-99-6, 49 NRC at 219-21. Here, however, Petitioner has offered no tangible information, no experts, no substantive affidavits. Instead, it has provided bare assertions and speculation. This is not enough to trigger an adversary hearing on AmerGen's financial qualifications.

FINANCIAL QUALIFICATIONS

LIMITED LIABILITY COMPANIES

10 C.F.R. § 50.40(b)

Petitioner asserts that a limited liability company is ''inherently unqualified to own and operate'' a nuclear power plant such as Oyster Creek pursuant to 10 C.F.R. § 50.40(b). The Commission has issued reactor licenses to limited liability organizations for decades and Petitioner has given the Commission no reason to depart from that practice.

FINANCIAL QUALIFICATIONS

NEWLY FORMED ENTITIES

10 C.F.R. § 50.33(f)(3) AND (4)

Petitioner asserts that, because both AmerGen and its parent British Energy are less than 5 years old, the Commission should treat them as ''newly formed entities'' subject to the stricter financial requirements of 10 C.F.R. § 50.33(f)(3)

and (4). Petitioner's argument fails to recognize that the Applicants have both acknowledged AmerGen's status as a ''newly formed entity'' and provided data responding to the stricter financial requirements of the above two regulatory provisions. Petitioner also has not explained why that information fails to satisfy those financial requirements.

ENFORCEMENT

10 C.F.R. § 50.54(m)

For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then the agency can and will take the necessary enforcement action to ensure the public health and safety.

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

LICENSE TRANSFER

Petitioner's reliance on purported staffing problems at other plants is unavailing. Petitioner's comments regarding Clinton are too vague to satisfy our standards of specificity for issues in license transfer proceedings. Nor has Petitioner demonstrated that any personnel cuts at Clinton resulted in health and safety problems at that facility. British Energy's staffing decisions at its UK reactors are likewise unavailing. Because AmerGen does not manage those UK facilities, any relevance of UK decisions to this proceeding is both remote and speculative.

LICENSE TRANSFER: ANTITRUST

ANTITRUST: LICENSE TRANSFER

The Commission recently determined that NRC antitrust review of post-operating license transfers (such as the one at issue here) is unnecessary from both a legal and policy perspective. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999).

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

FINANCIAL QUALIFICATIONS

The disposition of any money remaining in the Trust Fund after completion of decommissioning is far beyond the scope of this proceeding. The question of who receives such money not only is irrelevant to the health and safety findings that the Commission must make in this proceeding, but also is a rate question well outside the Commission's jurisdiction. (The proper forum for such an argument is the Federal Energy Regulatory Commission and/or New Jersey's Board of Public Utilities.) Moreover, the Commission considers Applicants' request to withhold the contents of a certain portion of the application to be understandable on the ground that the section deals with the tax treatment of decommissioning fund transfers — clearly a matter involving confidential commercial information. Were any aspect of that portion of the application material to the license transfer, the Commission could order its disclosure to Petitioner subject to a protective order. *See* 10 C.F.R. § 2.740(c)(6). Petitioner has neither demonstrated materiality nor sought a protective order in this proceeding.

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioner argues that the proposed license transfer would result in changes to Oyster Creek's license conditions or physical changes to the facility. The Commission rejects this line of argument on the general ground that it is beyond the scope of this proceeding. The changes to which Petitioner refers would have to be made by any licensee operating this plant, regardless of whether the current license is transferred to AmerGen.

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioner's argument that Oyster Creek should file a license amendment application to expand its spent fuel pool or should take other action to make spent fuel storage available is an issue appropriately addressed in a license amendment proceeding rather than a license transfer case. A license transfer proceeding is not a forum for a full review of all aspects of current plant operation. Similarly, the need for amendments to support the next outage and continued operation thereafter

is irrelevant to the license transfer proceeding in that no amendments are necessary for the sale to occur or the transfer to proceed. As noted above, a license transfer proceeding is not a forum for a full review of all aspects of current plant operation.

MEMORANDUM AND ORDER

This proceeding involves a November 5, 1999 joint application by AmerGen Energy Company, LLC (''AmerGen''),[1] GPU Nuclear, Inc. (''GPUN,'' a wholly owned subsidiary of GPU, Inc.), and Jersey Central Power & Light Company (''Jersey Central,'' also a wholly owned subsidiary of GPU, Inc.) seeking authorization for the transfer to AmerGen of both GPUN's facility operating license for the Oyster Creek Nuclear Generating Station (''Oyster Creek'') and Jersey Central's 100% ownership in Oyster Creek. AmerGen, GPUN, and Jersey Central (jointly ''Applicants'') submitted their application pursuant to section 184 of the Atomic Energy Act of 1954 (''AEA'')[2] and section 50.80 of the Commission's regulations.[3] On December 16, 1999, the Commission published a notice of this application in the *Federal Register.* 64 Fed. Reg. 70,292.

On January 5, 2000, the Nuclear Information and Resource Service (''NIRS'') filed a petition to intervene and request for hearing, seeking to oppose the proposed Oyster Creek license transfer. NIRS asserts that the application is deficient in five different respects. On January 13, 2000, pursuant to 10 C.F.R. § 2.1307(a), the Applicants filed an answer to the NIRS petition. NIRS submitted no reply to the Applicants' response, although entitled to do so under our rules. *See* 10 C.F.R. § 2.1307(b). The Staff, as is its usual practice in license transfer cases, has chosen not to participate as a party in the adjudicatory portion of the proceeding. We consider the NIRS petition under Subpart M of our procedural rules. 10 C.F.R. §§ 2.1301 *et seq.*

I. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its ''interest may be affected by the proceeding,'' i.e.,

[1] AmerGen is a limited-liability corporation owned in equal shares by PECO Energy Company and British Energy Inc. (a wholly owned subsidiary of British Energy plc). *See* Applicants' Answer to Petition for Leave to Intervene of Nuclear Information and Resource Service, dated Jan. 13, 2000, at 2 n.1.

[2] 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

[3] 10 C.F.R. § 50.80. This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

it must demonstrate ''standing.'' *See* AEA § 189a, 42 U.S.C. § 2239(a). The Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. *See* 10 C.F.R. § 2.1306. For the reasons set forth below, we conclude that NIRS has demonstrated standing, but has proffered no admissible issues. We therefore deny NIRS's petition to intervene and request for hearing, and terminate this proceeding.

A. Standing

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

> (1) identify an interest in the proceeding by
> (a) alleging a concrete and particularized injury (actual or threatened) that
> (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
> (c) is likely to be redressed by a favorable decision, and
> (d) lies arguably within the ''zone of interests'' protected by the governing statute(s).
> (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority). Moreover, an organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member.[4]

The Commission has found sufficient for purposes of standing a claim of insufficient funds to ensure safe operation and shutdown, posing a threat of radiological harm to a co-owner's interest in a facility, as a result of thin capitalization, inability to fund operations because of potential litigation liability, and financial insulation of shareholders from potential costs. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).[5] In *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-

[4] *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-48 (1979); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-97 (1979). Regarding the preference for an affidavit, see *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 & n.4 (1999); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 23 (1996).

[5] The Commission concluded that while ''[i]t may well be that the two actions [restructuring of Gulf States Utilities and the transfer of operating control] cannot be shown to have an impact on the safety of River Bend or that our regulations require no more demonstration of financial qualifications than that already found adequate by the Staff . . . , such findings would require us to reach beyond the minimum threshold for standing.'' *River Bend,* CLI-94-10, 40 NRC at 49.

93-16, 38 NRC 25 (1993), the Commission found standing where the petitioner established regular residence near the facility and asserted that he could suffer an increased risk of radiological injury from the transfer of responsibility for safe operations of the facility to a corporate management alleged to be lax on safety because of violations of agency regulations and submissions of false information to the NRC.

Here NIRS has provided sufficient information to meet the minimum standing requirements under these prior Commission holdings. NIRS alleges that the transfer to AmerGen will threaten the health and safety of individuals living within 1-2 miles of the plant, and that AmerGen is inexperienced, is inadequately funded, and, like its corporate affiliate, will lower staffing levels and will deliberately cut corners in safety, causing degraded operations which could affect those living nearby. This suffices for standing.

B. Admissibility of Issues

To demonstrate that issues are admissible under Subpart M, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point,* CLI-99-30, 50 NRC at 342 (and cited authority). These standards do not allow mere ''notice pleading''; the Commission will not accept ''the filing of a vague, unparticularized'' issue, unsupported by alleged fact or expert opinion and documentary support. *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (citation and internal quotation marks omitted). General assertions or conclusions will not suffice. This is not to say that our threshold admissibility requirements should be turned into a ''fortress to deny intervention.'' *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported. *See, e.g., Seabrook, supra.*

NIRS proffers five issues, which we discuss below seriatim. None, we conclude, is admissible. All of NIRS's proposed issues are either immaterial to license transfer, too conclusory, or both. When the transfer Applicants' answer pointed

out these defects, NIRS filed no reply, although Subpart M authorized it to do so. *See* 10 C.F.R. § 2.1307(b). NIRS's unelaborated petition is plainly deficient under the detailed issue-pleading requirements of Subpart M.

1. Whether AmerGen Is Financially Qualified To Own and Operate Oyster Creek

NIRS proffers four general lines of argument to support its position that AmerGen is financially unqualified to own and operate Oyster Creek: the $110 million amount pledged by AmerGen's two parent corporations is insufficient to ensure safe operation, maintenance, and decommissioning of Oyster Creek;[6] AmerGen's revenue from Oyster Creek will likewise be insufficient to ensure safe operation and maintenance of the plant; limited liability companies such as AmerGen are inherently unqualified to own and operate nuclear power plants; and AmerGen, as a newly formed entity, should be subject to financial qualification standards more stringent than those applied to established companies. The Applicants' general responses are that AmerGen's submission of financial information (in particular, AmerGen's 5-year financial projections) complies with the Commission's ''Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance,'' NUREG-1577 (Rev. 1) (March 1999) (''SRP''); that NIRS raises no specific challenges to these projections; and that NIRS's general arguments are unsupported by the requisite facts, expert opinion, or supporting documents. Answer at 11-12.

a. Insufficiency of $110 Million (Now $200 Million) Pledge from Parent Corporations

I. OPERATING AND MAINTENANCE EXPENSES

NIRS expresses concern that AmerGen apparently has only $110 million (now $200 million) in assets (pledges from AmerGen's co-owners to cover operating and maintenance expenses). NIRS questions whether this amount is sufficient to cover such expenses for not only Oyster Creek but also five other facilities that AmerGen either currently owns (Clinton and Three Mile Island, Unit 1) or wishes

[6] Petition at 1-2. By letter dated March 30, 2000, after the pleadings in this proceeding, AmerGen informed the Commission that its parent corporations had increased the amount of the guarantee to $200 million. On April 26, 2000, NIRS submitted a letter in response, stating that its arguments applied to the $200 million figure just as they had to the $110 million amount.

NIRS makes only passing reference to the alleged inadequacy of decommissioning funding for Oyster Creek. NIRS's remaining discussion focuses on operation and maintenance expenses. We reject the cursory argument regarding decommissioning expenses on the ground that it is completely unsupported by fact or analysis. We further note that the fair market value of the Oyster Creek decommissioning fund at the time of transfer will be approximately $430 million and that AmerGen has committed to maintaining that value at a minimum of $400 million, net of taxes and expenses — a figure that substantially exceeds our minimum requirements for decommissioning funding.

to buy (Vermont Yankee and Nine Mile Point, Units 1 and 2). Petition at 2, 3, 4, 5, 9-11, and Attachments B, C, D, & E.[7] In this respect, NIRS asserts that, if Oyster Creek, Clinton, and TMI-1 were all out of operation for 6 months, the costs would far exceed AmerGen's resources.

Also in this same respect, NIRS draws an analogy between AmerGen and another limited liability organization — Louisiana Energy Services — which an NRC licensing board found financially unqualified due to insufficient parental underwriting and inadequate plans to raise additional construction funds. *See* Petition at 5-6, citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996).

We disagree with this line of argument. Applicants point out that the availability of the $110 million (now $200 million) is not part of AmerGen's financial qualifications showing under NRC regulations, but is merely an additional demonstration of financial assurance offered by the Applicants.[8] Its adequacy is therefore not an issue in our license transfer inquiry and, consequently, it cannot constitute a basis for granting a hearing. *See* 10 C.F.R. § 2.1306(b)(2). Furthermore, even assuming *arguendo* that the financial guarantee were a partial basis (in addition to the sources of funds identified by the Applicant to cover the first 5 years of operating costs, pursuant to 10 C.F.R. § 50.33(f)(2)) for the NRC's determination concerning the financial qualifications of AmerGen, NIRS has not presented any support (by factual affidavits, expert testimony, or documentary evidence) for its assertion that the amount is insufficient or unavailable to AmerGen for the stated purpose. In addition, NIRS's reference to LES is misplaced, as we reversed the LES decision. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 303-08 (1997).

II. PRICE-ANDERSON LIABILITY

NIRS also argues that, with only $110 million (now $200 million) spread over multiple plants and a potentially limited revenue stream from Oyster Creek's electricity sales (see next section of this Order), AmerGen may be unable to meet its obligations under the Price-Anderson Act and 10 C.F.R. §§ 140.21 and 140.92, art. VIII ($10 million per year per reactor, up to a maximum $63 million per reactor)

[7] One news article (appended to NIRS's petition) includes a quotation from British Energy's chief executive to the effect that AmerGen may eventually own 10 or more nuclear facilities (Petition, Attachment D (*Scotland Sunday,* dated July 25, 1999)), and a recent *New York Times* article quotes an AmerGen spokesman as saying the company ''would like to buy as many as 20 reactors.'' ''Safety Is Issue in Sales of Reactors,'' *New York Times,* dated Feb. 22, 2000. Along similar lines, NIRS raises the specter of AmerGen's parent corporations ''spreading themselves thin'' internationally — pointing to AmerGen's and/or British Energy's efforts to purchase Canada's two Bruce reactors. Petition at 3-4 and Attachment A.

[8] Answer at 12. The Commission recognizes that the NRC Staff has been including conditions requiring a parent company guarantee in the orders approving license transfers as additional assurance of financial qualifications, when such a guarantee has been offered by the applicant.

in the event of a major nuclear accident.[9] According to NIRS, this financial risk is particularly high if a nuclear accident were to occur either early in AmerGen's operation of Oyster Creek or when Oyster Creek and/or other AmerGen nuclear plants are in extended shutdown or undergoing major repairs or modifications. *See* Petition at 4, 11-12.

In our view, NIRS is attempting to impose on AmerGen a requirement more stringent that the one imposed by the regulations (i.e., an acceptable guarantee of payment of deferred annual premiums in an amount of $10 million for each reactor — 10 C.F.R. § 140.21), an attempt that constitutes an impermissible collateral attack on our regulations. *See Seabrook,* CLI-99-6, 49 NRC at 217 n.8, 220-21. AmerGen meets our Price-Anderson rule; it has explicitly affirmed its intention to obtain the required nuclear property damage insurance and nuclear energy liability insurance required under 10 C.F.R. § 50.54(w) and Part 140, respectively, and AmerGen has likewise recognized its responsibility to enter into an indemnity agreement with the NRC for a guarantee of the deferred premiums, pursuant to 10 C.F.R. §§ 140.22 and 140.92 (Form of Indemnity Agreement), art. VIII. *See* Answer at 18-19. The transfer will not occur until AmerGen has submitted the financial protection documents required under AEA § 170 and 10 C.F.R. Part 140, as well as the property insurance required under 10 C.F.R. § 50.54(w). For these reasons, we see no Price-Anderson questions that merit an NRC hearing.

b. Insufficiency of Operating Revenue

NIRS doubts that AmerGen will be able to earn enough operating revenue from Oyster Creek electricity sales to cover all its operating, maintenance, and capital expenses — especially were the plant to shut down for an appreciable period. *See* Petition at 3. More specifically, NIRS contends that AmerGen has provided inadequate estimates for Oyster Creek's total annual operating costs and revenue for each of the next 5 years. *See id.* at 7-8. Similarly, NIRS argues that ''there is no reason to believe'' that Oyster Creek will ''produce meaningful amounts of electricity'' prior to March 31, 2003 (the expiration date for AmerGen's contract to supply electricity to Jersey Central). In support, NIRS points to what it describes as ''Oyster Creek's checkered history'' which, according to NIRS, supports its prediction that the plant will produce electricity at 65% or less of capacity, and may produce no electricity at all, given the plant's as-yet-unaddressed safety issues.

[9] The Commission recently adjusted the $63 million amount for inflation, increasing it to $83.9 million. 10 C.F.R. § 140.11(a)(4); Final Rule, ''Adjustment of the Maximum Retrospective Deferred Premium,'' 63 Fed. Reg. 39,015 (July 21, 1998). NIRS predicts that Congress will increase the regulatory amounts if it renews the Price-Anderson Act in 2002. Alternatively, if Congress does not renew the Act, NIRS asserts that AmerGen would be subject to unlimited liability for a nuclear accident — a burden for which it is alleged to be financially unprepared. Petition at 12. NIRS's concerns are misplaced. A congressional decision not to renew the Price-Anderson Act would affect only *new* reactors, not existing ones (like Oyster Creek) built under the current statute. Those latter reactors would continue to enjoy the Act's protections.

See id. at 9. Likewise, NIRS argues that Oyster Creek is unlikely to sell electricity after March 31, 2003, given the expiration of AmerGen's contract with Jersey Central and the plant's history of charging more than its competitors for electricity. *See id.* at 9.

The Commission has held that an applicant's mere proffering of 5-year cost and revenue projections will not be sufficient in the face of plausible and adequately supported claims that those projections are inaccurate or otherwise do not provide adequate assurance of financial qualifications. *See Seabrook,* CLI-99-6, 49 NRC at 219-21. However, NIRS's issue does not meet this standard, as NIRS has proffered no documentary evidence or expert opinion supporting its conclusion that AmerGen will be unable either to produce meaningful amounts of electricity at Oyster Creek or sell that electricity at market rates. For example, NIRS does not provide any documentation or citation supporting its 65% capacity figure, nor is it supported by any information of which we are aware. NIRS's 65% figure is contradicted by recent NRC data — 87.3% in 1993, 67.8% in 1994, 95.8% in 1995, 79.8% in 1996, 93.6% in 1997, and 74.3% in 1998, for an average of 92.2% for nonrefueling outage years, 74.0% for refueling outage years, and an overall average of 83.1%.[10]

Next, NIRS asserts that AmerGen's almost-complete reliance on operating revenue to meet costs will require the company to value power production above safety. *See* Petition at 12-13. We again disagree. Our regulations permit reliance on operating revenues, 10 C.F.R. § 50.33(f)(2), and NIRS has offered no support beyond speculation why the level of Oyster Creek's revenues will lead AmerGen to cut corners in safety. Moreover, NIRS's argument simply ignores the Commission's inspection and enforcement programs. *See Claiborne,* CLI-97-15, 46 NRC at 306-07 (''in the end, NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements''). NIRS also fails to offer documentary support for its argument that AmerGen is likely to violate our safety regulations. Absent such support, this agency has declined to assume that licensees will contravene our regulations. *See, e.g., Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 400 (1995); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974); *Virginia Electric and Power Co.* (North Anna Power Station, Units 3 and 4), LBP-74-56, 8 AEC 126, 148 (1974).

Finally, NIRS asserts that even the combination of the $110 million (now $200 million) guarantee and the operating revenue will be insufficient to cover Oyster Creek's major anticipated expenses such as the replacement of its Thermo-Lag fire barrier material, the installation of a new, non-single-failure-proof crane for heavy load movement, and the costs associated with addressing numerous spent

[10] NUREG-1350, *USNRC Information Digest,* Vol. 11, at 96 (November 1999). Some of these averages are too low if one takes into account the 95.28% figure for 1999, reported in *Nucleonics Week* at 22 (Feb. 10, 2000).

fuel storage issues. *See* Petition at 8 (alluding to the safety arguments in its Issue VI, discussed below at pp. 211-14). Applicants respond that AmerGen will pay for these expenses through projected income and will not need to draw upon the $110 million (now $200 million) guarantee from its parent companies. *See* Answer at 16. Again, NIRS has failed to provide us with data or analysis supporting its position and has given us no basis on which to question AmerGen's ability to pay for these expenses through its projected income. Consequently, we must reject this line of argument.

We certainly stand ready to hold a hearing in license transfer cases where petitioners proffer plausible and fact-based claims that a new reactor owner or operator lacks sufficient financing to run the reactor safely. *See Seabrook,* CLI-99-6, 49 NRC at 219-21. Here, however, NIRS has offered no tangible information, no experts, no substantive affidavits. Instead, it has provided bare assertions and speculation. This is not enough to trigger an adversary hearing on AmerGen's financial qualifications.

c. Miscellaneous Arguments

NIRS asserts that a limited liability company is ''inherently unqualified to own and operate'' a nuclear power plant such as Oyster Creek pursuant to 10 C.F.R. § 50.40(b). *See* Petition at 5. We disagree. The Commission has issued reactor licenses to limited liability organizations for decades and NIRS has given us no reason to depart from that practice.

NIRS also asserts that, because both AmerGen and its parent British Energy are less than 5 years old, the Commission should treat them as ''newly formed entities'' subject to the stricter financial requirements of 10 C.F.R. § 50.33(f)(3) and (4). *See* Petition at 11. NIRS's argument fails to recognize that the Applicants have both acknowledged AmerGen's status as a ''newly formed entity'' and provided data responding to the stricter financial requirements of the above two regulatory provisions. NIRS also has not explained why that information fails to satisfy those financial requirements.

2. Whether AmerGen (and Its Parent British Energy) Are Fit, on Public Health and Safety Grounds, To Own and Operate Oyster Creek or Any Other U.S. Nuclear Reactor[11]

NIRS asserts that AmerGen has neither owned nor operated a nuclear plant and lacks the necessary base of employees and knowledge to handle nuclear safety issues. According to NIRS, AmerGen is relying entirely on the abilities of its

[11] Although NIRS presents ownership of Oyster Creek and ownership of other U.S. reactors as two separate issues (numbered II and III), they are sufficiently similar that we have consolidated our analysis of them.

two parents to enable it to operate its reactors safely. *See* Petition at 13. NIRS has provided no factual basis for its assertions and, indeed, the current record supports Applicants on both points. AmerGen currently owns two other nuclear plants: TMI-1 and Clinton. Moreover, AmerGen is acquiring most of the existing organization at Oyster Creek and therefore can hardly be said to rely entirely on its parents' abilities to operate the Oyster Creek reactor. Finally, NIRS does not explain why the NRC inspection oversight process is insufficient to monitor the effects of AmerGen management's staffing decisions on the public health and safety.

NIRS next draws the Commission's attention to various statements by AmerGen employees indicating in a variety of contexts that, to cut costs, AmerGen would reduce both personnel and salaries. As an example, NIRS points to AmerGen's comments prior to purchasing Clinton that it would reduce the workforce by more than 20%. *See* Petition at 14 and Attachment F. As another, NIRS identifies British Energy's alleged history of massive cost-cutting, layoffs of key safety personnel, and hiring of outside contractors with little or no knowledge of the company's nuclear facilities — actions that, according to NIRS, have run afoul of the laws and regulations of the United Kingdom (''UK'') and its Nuclear Installations Inspectorate and have also resulted in numerous safety-related incidents at the company's UK reactors. *See id.* at 14-19 and Attachments G and H. NIRS says that the only reason PECO would ally itself with British Energy is to take advantage of the latter's cost-cutting expertise. *See id.* at 15, 17. Finally, according to NIRS, British Energy's numerous safety-significant events and its violations of the UK's nuclear power regulations deprive the Commission of the requisite ''reasonable assurance that the applicant will comply with the [Commission's] regulations . . . and that the health and safety of the public will not be endangered.'' *See id.* at 17, quoting 10 C.F.R. § 50.40(a).

NIRS's line of argument is flawed in several respects. For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then (as noted above) the agency can and will take the necessary enforcement action to ensure the public health and safety. The Oyster Creek application does not on its face suggest any likelihood of a cost-driven lapse in compliance with NRC safety rules.

NIRS's reliance on purported staffing problems at other plants is unavailing. NIRS's comments regarding Clinton are too vague to satisfy our standards of specificity for issues in license transfer proceedings. *See* p. 203, *supra.* Nor has NIRS demonstrated that any personnel cuts at Clinton resulted in health and safety problems at that facility. British Energy's staffing decisions at its UK reactors are

likewise unavailing. Because AmerGen does not manage those UK facilities, any relevance of UK decisions to this proceeding is both remote and speculative.

3. Whether the NRC has Adequately Examined the Public Health, Safety, Financial, and Antitrust Implications of AmerGen's Parent Companies' Owning and Operating Nearly 40 Nuclear Reactors Worldwide, with Ambitions To Purchase and Operate More

NIRS is troubled by the possibility that PECO and British Energy could control 10% of the world's nuclear capacity and more than 25% of the nuclear capacity in the United States, with ambitions to control even more. NIRS asserts that Commission approval of the transfer should await a full antitrust review of the transfer request and a full health-and-safety review regarding whether these two corporations may be ''stretched too thin in their ability to operate a multitude of nuclear reactors.'' *See* Petition at 19-21.

As NIRS itself recognizes, the Commission recently determined that NRC antitrust review of post-operating license transfers (such as the one at issue here) is unnecessary from both a legal and policy perspective. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). NIRS has offered no reasons for the Commission to reconsider the position it adopted in *Wolf Creek.* We therefore reject NIRS's antitrust argument.

Moreover, because AmerGen is not the operator of the plants owned by its parents or their affiliates and because NIRS has provided no expert opinion, references, or other information supporting its assertion that AmerGen is at risk of being ''stretched too thin,'' we find that there is no basis for that assertion. AmerGen will of course continue to be subject to our inspection and enforcement programs and, if necessary, we can and will take the appropriate measures to protect the public health and safety.

4. Whether AmerGen Improperly Withheld from the Public Important Information About Its Decommissioning Trust Fund

NIRS asserts that AmerGen has improperly withheld from the public the entire section on the Decommissioning Trust Fund (§ 6.12) in its October 15, 1999 Oyster Creek Purchase and Sale Agreement. NIRS is concerned that AmerGen will try to keep any money remaining in the trust fund after completion of decommissioning. NIRS therefore asks the Commission to withhold approval of the license transfer until AmerGen ''openly and fully states its intentions about the ratepayer-funded Decommissioning Trust Fund'' and discloses the contents of section 6.12 of the Purchase and Sale Agreement. *See* Petition at 22-24.

The disposition of any money remaining in the Trust Fund after completion of decommissioning is far beyond the scope of this proceeding. The question of who receives such money not only is irrelevant to the health and safety findings that the Commission must make in this proceeding, but also is a rate question well outside the Commission's jurisdiction. (The proper forum for such an argument is the Federal Energy Regulatory Commission and/or New Jersey's Board of Public Utilities.) Moreover, we consider Applicants' request to withhold the contents of section 6.12 to be understandable on the ground that the section deals with the tax treatment of decommissioning fund transfers — clearly a matter involving confidential commercial information.[12] Were any aspect of section 6.12 material to the license transfer, we could order its disclosure to Petitioner subject to a protective order. *See* 10 C.F.R. § 2.740(c)(6). NIRS has neither demonstrated materiality nor sought a protective order in this proceeding.

5. Whether the Proposed License Transfer Would Result in Either Changes to Oyster Creek's License Conditions or Physical Changes to the Facility

NIRS argues that, in three respects (Issues VI.A, B, and C), the proposed license transfer would result in changes to Oyster Creek's license conditions or physical changes to the facility. *See* Petition at 23-40. We reject this set of issues on the general ground that they are beyond the scope of this proceeding. The changes to which NIRS refers would have to be made by any licensee operating this plant, regardless of whether the current license is transferred to AmerGen. We also reject the individual issues on the grounds set forth below.

a. Issue VI.A

NIRS asserts that GPUN, from early 1997 until entering into the sales agreement in 1999, intended to shut the plant down in the year 2000 and was therefore pursuing a cost-containment strategy. According to NIRS, if AmerGen intends to continue operating Oyster Creek after the date (later this year) on which GPUN had intended to shut down the plant, then AmerGen will need to reactivate corrective action programs that GPUN had deferred. Given the extensive corrective actions that NIRS anticipates, NIRS questions the accuracy of both AmerGen's and the NRC's statements that the license transfer would result in no physical changes and would necessitate no changes in the plant's license conditions. *See* Petition at 23-27 and Attachments I, J, and K. NIRS argues that it would be inappropriate (i) for GPUN to transfer the license of a reactor that requires substantial safety-related work, (ii) for AmerGen to purchase Oyster Creek unless AmerGen intends to shut

[12] The NRC Staff issued a letter on March 7, 2000, determining to withhold this information on the ground that it constituted proprietary information. *See* ADAMS Accession Number ML003690178.

the reactor down pending completion of those deferred safety projects, and (iii) for the Commission to make the requisite findings under 10 C.F.R. § 50.80(c)(2) (that the transfer is consistent with applicable laws, regulations, and orders) and approve the transfer unless the agency intends to require a shutdown of the reactor until completion of the projects. *See* Petition at 29-31.

NIRS's line of argument suffers from several deficiencies. The items to which NIRS refers are nothing out of the ordinary for the operation and maintenance of a plant and are not relevant to the license transfer. NIRS has failed to show otherwise, or to demonstrate either that the plant is currently unsafe or that the work would not be completed.[13] More specifically, NIRS fails to address both section 7.1(p) of the Purchase and Sale Agreement (Enclosure 3 to the Application), requiring GPUN to complete certain operational recovery work prior to closing, and the Applicants' agreement to an outage plan. This latter plan, according to Applicants, includes all items that are scheduled for completion in the upcoming outage as well as an evaluation of the costs. *See* Answer at 29. (Jersey Central has agreed to fund the upcoming outage, with AmerGen reimbursing the money over the next 9 years.) NIRS fails to explain why the Oyster Creek license cannot be transferred in advance of this scheduled work or why the NRC inspection oversight process is insufficient to monitor Oyster Creek's progress in these respects. *See id.*

b. Issue VI.B

NIRS next contends that, contrary to the assumption that the transfer would lead to no physical changes at Oyster Creek, GPUN has filed with the Commission a license amendment request for expansion and reconfiguration of Oyster Creek's spent fuel pool (Tech Spec Change Request 261, dated June 18, 1999). This expansion would increase the maximum storage capacity from 2645 to 3035 irradiated fuel assemblies, thereby restoring full core offload capability. Absent the expansion, says NIRS, the reactor would have to be shut down in 2000 and would thus be of no use to AmerGen. Consequently, argues NIRS, this expansion results directly from, and is a necessary element of, the proposed license transfer. NIRS claims that the expansion poses significant health and safety concerns which it believes the Commission should address prior to approving the transfer. *See* Petition at 31-33, 34, and Attachment L. NIRS relies on a study from Brookhaven National Laboratory which concluded that ''there are potential and significant risks associated with spent fuel configurations under a combination of storage geometry, decay times, and reactor type.''[14] NIRS questions what it considers GPUN's management decision not to use its available (and licensed) NUHOMS-

[13] Indeed, GPUN indicates that it has already completed most of the work. *See* Answer at 27.

[14] *See* Petition at 35-36, relying on Attachment M. The Brookhaven study is a general study and is not specific to Oyster Creek.

52B independent spent fuel storage installation (''ISFSI''). According to NIRS, this management decision enabled GPUN to reduce its capital improvement costs by avoiding the need to install a single-failure-proof crane. *See* Petition at 33-34.

NIRS's argument is outside the scope of this license transfer proceeding. NIRS's argument relates to the issue whether Oyster Creek should file a license amendment application to expand its spent fuel pool or should take other action to make spent fuel storage available.[15] That is a matter appropriately addressed in a license amendment proceeding rather than a license transfer case.[16] A license transfer proceeding is not a forum for a full review of all aspects of current plant operation.

c. Issue VI.C

NIRS's final argument is that GPUN management is placed under conditions so adverse as to constitute ''a significant change to the 'day-to-day operation of [Oyster Creek]' and is [therefore] vulnerable to the inadequate systematic review of issues associated with the risk to the public health and safety.'' *See* Petition at 36-37. In support, NIRS relies on the collective effect of the following developments: the proposed license transfer, the deferral of numerous safety issues over a lengthy time period, the attrition of GPUN management staff, and GPUN's need to expedite numerous license amendment applications to meet the schedules associated with the sale of Oyster Creek. *See id.* at 36.

More specifically, NIRS is concerned that the shift in corporate strategy from early closure (contemplated by GPUN) to continued operation (contemplated by AmerGen) has resulted in an inadequate assessment of the risks associated with that shift. NIRS's concern is underscored by the attrition of GPUN management and the purportedly uncertain future of remaining management under the plant's new ownership. NIRS also focuses on the need for six additional license amendments

[15] The spent fuel pool currently contains 2420 fuel assemblies and has room for an additional 225. A typical offload at Oyster Creek is about 184 to 188 fuel assemblies. Therefore, Oyster Creek has sufficient capacity for a one-third offload for the upcoming outage (though not for the next one).

[16] GPUN filed a license amendment application on June 18, 1999, seeking to rerack its spent fuel pool. A notice of opportunity for hearing on the application was published in the *Federal Register,* but neither NIRS nor any other entity sought a hearing. 64 Fed. Reg. 44,757 (Aug. 17, 1999). The NRC Staff is currently reviewing that application.

(technical specification changes)[17] before the plant can operate safely again, and worries that the quality and degree of the safety analyses associated with those amendment requests will be inadequate — especially given the concurrent reactivation of the deferred corrective action and maintenance programs. *See id.* at 36-39.

NIRS has failed to demonstrate that any significant work remains unperformed, that the work scheduled for the upcoming outage cannot be properly completed, or that the attrition from the plant will prevent proper completion of any remaining work. Regarding attrition, NIRS relies on a 1997 statement regarding greater-than-average attrition. However, the 1997 statement does not support the argument that Oyster Creek suffers 3 years later from a staffing problem. Indeed, no attrition problems have surfaced during the last 3 years of staff evaluations. In any event, the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff. Once again, NIRS does not explain why the NRC inspection oversight process is insufficient to monitor the health-and-safety ramifications of AmerGen's management decisions.

Finally, the need for amendments to support the next outage and continued operation thereafter is irrelevant to the license transfer proceeding in that no amendments are necessary for the sale to occur or the transfer to proceed. As noted above, a license transfer proceeding is not a forum for a full review of all aspects of current plant operation.

II. CONCLUSION

For the reasons set forth above, the Commission:

(1) concludes that NIRS has demonstrated standing;
(2) concludes that NIRS's issues are not admissible;
(3) denies NIRS's request for hearing and petition to intervene; and
(4) terminates this proceeding.

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[17] The six specified changes that, according to NIRS, require an amendment are:

1. Technical Specification Change Request for Integrated Leak Rate Testing with an adopted methodology;
2. Technical Specification Change Request for charcoal filters;
3. Technical Specification Change Request for the deferral and reduction of ISI Inspections;
4. Technical Specification Improvements had been deferred because of the closure strategy and were being reactivated for the sale agreement and would include several items being rolled into one submittal;
5. The 18th Refueling Outage Work Order is currently under review for Technical Specification Change Request with a submittal by approximately March 2000; and
6. The Core Analysis for the Reload Submittal is currently behind schedule as a result of deferral to the early closure and decommissioning mode and only recently GPUN decided to order fuel for the 18th Refueling as a result of the sale.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of May 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 40-3453-LT**

MOAB MILL RECLAMATION TRUST **May 3, 2000**

This license transfer proceeding involves a challenge by Mr. John Francis Darke to a Staff order transferring Source Material License SUA-917 from Atlas Corporation to the Moab Mill Reclamation Trust. The Commission denies Mr. Darke's request for hearing and terminates the proceeding.

RULES OF PRACTICE: SUBPART M

LICENSE TRANSFER

BANKRUPTCY

10 C.F.R. § 2.1300

Although there was not a formal application for license transfer in the usual sense, Atlas did propose, in the bankruptcy settlement context, that the Moab site and assets be transferred to a trust and that the trust proceed to implement the surface reclamation and groundwater cleanup required by the NRC license. As a practical matter, this was an ''application'' (or ''license transfer request'' — 10 C.F.R. § 2.1300), and the substance of this ''application'' was reflected in the Notice of Order and Opportunity for Hearing and in the Order Transferring License that were published in the *Federal Register*.

LICENSE TRANSFER

RULES OF PRACTICE: SUBPART M (ADMISSIBILITY OF ISSUE); INTERVENTION (ADMISSIBILITY)

To intervene as of right in a Subpart M license transfer proceeding, a petitioner like Mr. Darke must raise at least one admissible issue (and must also demonstrate standing). To demonstrate that issues are admissible under Subpart M, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 342 (1999) (and cited authority).

LICENSE TRANSFER

RULES OF PRACTICE: SUBPART M (STANDING, ADMISSIBILITY OF ISSUE, APPLICABILITY); INTERVENTION (ADMISSIBILITY)

10 C.F.R. § 2.1300

Petitioner's request for a hearing turns largely, if not exclusively, on a claim that only ''applications,'' not Staff transfer orders, can trigger the Subpart M hearing process. The Commission rejects this position. The hearing notice in this case both explained that the NRC was acting in accordance with the court-approved settlement agreement and made it clear how and when a petitioner could seek a hearing.

Although this case admittedly arises from a Staff order acting on a licensee proposal in a bankruptcy proceeding rather than a standard, formal license transfer application, this fact hardly suspends, or even calls into question the applicability of, the procedural rules requiring a demonstration of standing and a proffer of at least one admissible issue. The intent of the Commission in promulgating Subpart M was to provide a set of procedures to be used in hearings on license transfers. Subpart M was intended to apply to *all* license transfer proceedings unless the Commission directed otherwise in a case-specific order. 10 C.F.R. § 2.1300. The presence or absence of a standard, formal application for license transfer is irrelevant.

PART 40

LICENSE TRANSFER

10 C.F.R. § 40.4

Petitioner suggests that Part 40 cannot apply to this license transfer case because the Trust ''may not be a person to which . . . Part 40 would apply, if the trustee were an NRC contractor.'' Petitioner ignores the fact that the definition of ''person'' in 10 C.F.R. § 40.4 includes ''trust.''

LICENSE TRANSFER

10 C.F.R. § 40.20

Petitioner criticizes the Staff order for failing to indicate whether the license at issue was ''general'' or ''specific.'' Petitioner considers this omission relevant because 10 C.F.R. § 40.20 permits general licenses to become effective without the filing of applications but requires that specific licenses be issued upon the filing of an application. The Commission disagrees. This case does not involve a grant of an initial license; it involves only the transfer of an existing one. Moreover, a formal application is not required for an approval of a transfer.

LICENSE TRANSFER

PART 40: APPLICABILITY

Petitioner asserts generally that the repeated references in Part 40 to '' 'application' [and] 'applicant,' . . . provoke[ ] the question whether or not such parts of [Part 40] would apply.'' But the fact that the license transfer is not the result of an application does not negate the fact that the license itself was issued under Part 40. Further, the new Licensee is subject to both the terms of the license and the applicable sections of Part 40.

LICENSE TRANSFER

BANKRUPTCY

Under the circumstances in which one of the Commission's licensees files for bankruptcy, there is no question that the Commission may step in to secure, to the maximum extent possible, assets to be used eventually to remediate a contaminated site, including intervening in bankruptcy proceedings and entering into settlements. As is typically the situation in bankruptcy proceedings, there were many creditors vying for Atlas's limited assets. *See* AEA § 184 (''The Commission may give

consent to the creation of a mortgage, *pledge,* or other lien upon any property . . . owned . . . by a licensee, and the rights of creditors so secured may be enforced by any court order subject to the rules and regulations established by the Commission to protect public health and safety and promote the common defense and security'') (emphasis added). At any rate, the Commission's actions with respect to the bankruptcy proceeding, including the terms of the Settlement, are simply not at issue in this proceeding. As a signatory to the Settlement Agreement — an agreement blessed by a United States Bankruptcy Court — the Commission is obliged to implement those conditions of the agreement that fall within the Commission's charge.

MEMORANDUM AND ORDER

This license transfer proceeding involves a challenge by Mr. John Francis Darke to a Staff order transferring Source Material License SUA-917 from Atlas Corporation (''Atlas'') to the Moab Mill Reclamation Trust (''the Trust''). Neither Atlas nor the Trustee (PricewaterhouseCoopers, LLP) has filed a response to Mr. Darke's request for hearing,[1] nor has the NRC Staff sought to become a party. Consequently, we have before us only Mr. Darke's initial request, together with his supplements to those documents. For the reasons set forth below, we deny Mr. Darke's request for hearing and terminate the case.

I. BACKGROUND

The instant case differs from prior license transfer proceedings in that it was initiated by an agency notice and Staff order acting on a licensee's proposal made in a separate bankruptcy proceeding rather than by a standard, formal application for a license transfer. This peculiar procedural posture stems from the fact that, on September 22, 1998, Atlas filed for Chapter 11 bankruptcy protection and subsequently reached a Settlement Agreement with the NRC, the State of Utah, and other entities to transfer its Moab Mill Site to the newly established Trust. Under that agreement, the NRC was obliged to transfer Atlas's License SUA-917

[1] Given that Mr. Darke is unrepresented by counsel, we will assume that his Request for Hearing was also intended to be construed as a petition to intervene. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), *rev'd in part on other grounds,* CLI-85-2, 21 NRC 282 (1985); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576-77 (1975); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). For this same reason, as well as for the personal reasons set forth in Mr. Darke's Request for Hearing at 8 and Exhibit B, we grant his request for additional time to supplement his initial request and admit his four supplemental submissions into the record.

to the Trust, and the Trust was in turn obliged to carry out the remediation of the site consistent with the terms of that license. The United States Bankruptcy Court for the District of Colorado approved the Settlement Agreement on December 1, 1999.[2]

In accordance with its obligations under the Settlement Agreement, and pursuant to the Atomic Energy Act (''AEA'') and Commission regulations,[3] the NRC Staff issued the transfer order on December 27, 1999, and published in the *Federal Register* a notice of the issuance of that order as well as an opportunity for a hearing, under 10 C.F.R. Part 2, Subpart M, on the question whether the order transferring the license should be sustained. The notice explained that the agency had agreed to accept the Settlement Agreement in satisfaction of Atlas's regulatory responsibilities for remediation of the Moab site, to transfer the license to the Trust, and to limit the Trustee's liability to certain of Atlas's assets that had been or would be transferred to the Trust. The notice concluded that the Trustee's maintenance and remediation of the site would adequately protect the public health and safety and provide reasonable assurance of compliance with the Commission's regulations. On January 24, 2000, Mr. Darke filed a timely Request for Hearing under our Subpart M procedural regulations and subsequently supplemented that request on February 9th, 11th, 22d, and March 8th.

II. ANALYSIS

To intervene as of right in a Subpart M license transfer proceeding, a petitioner like Mr. Darke must raise at least one admissible issue (and must also demonstrate standing). To demonstrate that issues are admissible under Subpart M, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

[2] Although there was not a formal application for license transfer in the usual sense, Atlas did propose, in the bankruptcy settlement context, that the Moab site and assets be transferred to a trust and that the trust proceed to implement the surface reclamation and groundwater cleanup required by the NRC license. As a practical matter, this was an ''application (or ''license transfer request'' — 10 C.F.R. § 2.1300), and the substance of this ''application'' was reflected in the Notice of Order and Opportunity for Hearing and in the Order Transferring License that were published in the *Federal Register* on January 3, 2000. 65 Fed. Reg. 138.

[3] Sections 62, 63, 81, 84, 161b, 161i, 161o, and 184 of the AEA; 10 C.F.R. Part 40.

See 10 C.F.R. § 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 342 (1999) (and cited authority).

We conclude that Mr. Darke has failed to proffer an admissible issue.[4] His request for a hearing turns largely, if not exclusively, on a claim that only ''applications,'' not Staff transfer orders, can trigger the Subpart M hearing process. We reject Mr. Darke's position. The hearing notice in this case both explained that the NRC was acting in accordance with the court-approved settlement agreement and made it clear how and when a petitioner could seek a hearing.

Before reaching the admissibility of Mr. Darke's issues, we first examine his efforts to avoid our regulatory requirements to demonstrate standing and to proffer at least one admissible issue. Mr. Darke's argument appears to be that the case's peculiar procedural posture (described above) excuses him from satisfying these two requirements. Mr. Darke appears to reach this conclusion by pointing both to the fact that this proceeding was initiated by a Staff order rather than a license transfer application[5] and to the Staff's purported failure to support its order with ''full information.''[6] Mr. Darke apparently assumes that these two factors combine to prevent him from fulfilling his obligation to satisfy the filing (standing and issue) requirements of Subpart M (particularly 10 C.F.R. § 2.1306) and at the same time support his argument that the order should not be sustained.[7]

Mr. Darke's argument places form over substance. Although this case admittedly arises from a Staff order acting on a licensee proposal in a bankruptcy proceeding rather than a standard, formal license transfer application, this fact hardly suspends, or even calls into question the applicability of, the procedural rules requiring a demonstration of standing and a proffer of at least one admissible issue. The intent of the Commission in promulgating Subpart M was to provide a set of procedures to be used in hearings on license transfers. Subpart M was intended to apply to *all* license transfer proceedings unless the Commission directed other-

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[4] Based on Mr. Darke's assertions regarding his many activities in the immediate vicinity of the Moab facility, he appears to have satisfied the agency's requirements for standing in license transfer proceedings. However, because we rest our decision on the patent inadmissibility of the issues Mr. Darke seeks to raise, we need not inquire closely into the question of his standing.

[5] Request for Hearing at 2-3; Third Supplement, dated Feb. 22, 2000, *passim.*

[6] *See* Request for Hearing at 3, 4, 6; Third Supplement at 7 [misnumbered as page 4]. Mr. Darke's Request for Hearing (at 3, 4) quotes both the Proposed Subpart M Rule, 63 Fed. Reg. 48,644 (Sept. 11, 1998), and section 184 [miscited as section 84] of the Atomic Energy Act, 42 U.S.C. § 2234, to the effect that ''no license . . . shall be transferred . . . unless the Commission shall, after securing *full information,* find that the transfer is in accordance with the provisions of this Act.'' (Emphasis added.) Mr. Darke attributes this purported failure to the absence of an application. Request for Hearing at 4.

[7] Request for Hearing at 2 (''Apparently, [section] 2.1306(a) does not apply''), 3 (''Apparently, [section] 2.1306(b)(2)(i) does not apply''), 4 (the Staff order ''should reflect, via its findings, 'full information' . . . . The . . . order does not reflect such and, thus, should not be sustained''), 6 (''That order was not based on ''full information'' . . . and, thus, does not provide the information required to address the interrogatories contained in 10 C.F.R. § 2.1306''), 7 (sections ''2.1308(a) . . . and 2.1306(b)(3) *both* presuppose an application and . . . [t]hus I cannot fully connect the perceived harm done with the proposed NRC action except in general terms despite the fact that I have shown above why the . . . order should not be sustained (no 'full information' as required by Sec. 84 [*sic*])''), 7 (sections ''2.1306(c)(1) and (2) would not apply given the apparent absence of an application'').

wise in a case-specific order. 10 C.F.R. § 2.1300. The presence or absence of a standard, formal application for license transfer is irrelevant.

Nor does the absence of a standard license transfer application render compliance with such rules impossible, as Mr. Darke suggests. Indeed, Mr. Darke has pointed to no filing requirement in 10 C.F.R. § 2.1306 with which he could not comply. The Staff's order provides sufficient information to formulate issues pursuant to section 2.1306 and, thus, as a practical matter, Mr. Darke was in the same position as a petitioner confronted with a typical license transfer application, i.e., he could challenge the Staff order on the same grounds that a petitioner could have challenged a typical license transfer application.

Nor does the absence of a formal application support Mr. Darke's assertion that the transfer order should not be sustained. Although Subpart M and Part 40 (as the latter applies to specific licenses) assume that an ''application'' has been filed, nothing in the AEA or our regulations actually *requires* that a transfer be implemented through the grant of an ''application.'' *See* AEA § 184; 10 C.F.R. § 40.46. Rather, the requirements for approving a transfer provide merely that the Commission, after securing ''full information'' and determining that the order is in compliance with the regulations and the AEA, ''shall give its consent in writing.'' *See* AEA § 184; 10 C.F.R. § 40.46. Here, the Staff order detailed the reasons and bases for granting the transfer. Specifically, the order described the provisions of the trust and pointed out that the remediation of the Moab Mill site will be conducted in accordance with the terms and conditions of License SUA-917. The Staff order also set out the current assets and receivables available to the trustee for site remediation. In sum, the order provided sufficient information to put the public on notice of the named trustee, the amount of the trust, and the requirements and duties of the trustee. The form in which the details of the transfer were set out, i.e., in documents other than a formal application, is irrelevant for purposes of determining whether the transfer order at issue here should be sustained. Mr. Darke points to nothing specific that would lead us to a different conclusion.

Having disposed of Mr. Darke's threshold argument, we turn now to the three issues he raises.

A. Inexperience of New Management Imposes Increased Risk

Mr. Darke claims that he is more reluctant than before to enter the Moab facility's 1.5-mile wide exclusion zone for fear of both radiological and nonradiological exposure. He believes that the Settlement Agreement's installation of inexperienced new management has increased the danger of such exposure:

> ''[i]f the NRC does it [i.e., transfers the license,] I will be excluded from the exclusion zone described herein without due process. . . . [T]he proposed *new management* at the Moab, Utah, facility and site would be responsible to a ''learning curve'' where stepping into the

> Atlas Corporation's shoes, as a trustee. Such a learning curve would allow added risk to myself if I were to sojourn in the exclusion zone. . . . [T]he radiological and non-radiological exposure pathways found at the exclusion zone will be under new management if the . . . order is sustained. . . . The resultant added incremental risk of exposure I find forbidding, not reassuring. Learning curves have their ways.[8]

However, the only factual, expert, or documentary support (as required by 10 C.F.R. § 2.1306(b)(2)(iii)) that Mr. Darke offers for his concern about the new management's ''learning curve'' is a recent letter from this agency's Office of Nuclear Material Safety and Safeguards (''NMSS'') transmitting a Notice of Violation and an Inspection Report to the Trustee. The NMSS letter states in relevant part that:

> The NRC has determined that two violations . . . occurred. The first violation involved your failure to take corrective actions within 30 days to repair erosion damage on the tailings impoundment. This finding was a concern . . . because of the potential for further degradation and subsequent release of licensed material outside of the confines of the restricted area. It appears that the onsite staff could not repair the damaged interim cover because you do not have earth-moving equipment needed to perform these types of repairs.
>
> The second violation involved your failure to implement the lower limits of detection specified in the license for environmental and effluent monitoring program samples. This issue is of concern . . . because the same problem was identified and cited during a previous inspection. Long-term corrective actions taken in response to the previous violation were not effective in preventing a repeat of the problem.
>
> * * * *
>
> [Moreover,] the NRC inspectors could not confirm whether or not you have adequately demonstrated compliance with the dose limit for individual members of the public as required by 10 CFR 20.1302.

See Second Supplement at 2-3, *quoting* NMSS Letter, dated Feb. 4, 2000.

The NMSS letter does not support the admissibility of this issue. The inspection on which Mr. Darke relies was conducted December 14-15, 1999, prior to the December 30 date on which the Trustee became the licensee of the Moab facility. The asserted violations were thus clearly attributable to Atlas rather than the Trustee. Consequently, we cannot conclude that the violations asserted by the NRC Staff in the Notice of Violation (and in the cover letter quoted by Mr. Darke) reflect in any way on the competence of the Trustee. Given the absence of any other support for Mr. Darke's issue, we find it inadmissible.

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[8] Request for Hearing at 7-8 (emphasis in original). *See also* Request for Hearing, Exhibit A; Second Supplement, dated Feb. 11, 2000, at 1 (''the learning curve would allow added [incremental] risk to myself if I were to sojourn in a [hazardous] exclusion zone. I don't dare go to the hazard.'' (internal quotation marks omitted; brackets in original)), 2 (''The [Staff] order proposes, in that it allows new management at the exclusion zone, a *new* incremental risk that aggravates the present hazard'').

B. Inapplicability of Part 40

Mr. Darke next asserts that Part 40 is inapplicable to this proceeding. *See* Third Supplement at unnumbered page 1 and *passim.* In this regard, he first suggests that Part 40 cannot apply to this case because the Trust ''may not be a person to which . . . Part 40 would apply, if the trustee were an NRC contractor.'' *See* Third Supplement at unnumbered page 3. Mr. Darke ignores the fact that the definition of ''person'' in 10 C.F.R. § 40.4 includes ''trust.'' Moreover, Mr. Darke never explains the relevance of this argument, nor do we see any.

Second, Mr. Darke criticizes the Staff order for failing to indicate whether the license at issue was ''general'' or ''specific.'' Mr. Darke considers this purported omission relevant because 10 C.F.R. § 40.20 permits general licenses to become effective without the filing of applications but requires that specific licenses be issued upon the filing of an application. *See* Third Supplement at unnumbered page 4. Mr. Darke's second argument fails. This case does not involve a grant of an initial license; it involves only the transfer of an existing one. Moreover, as we stated above, a formal application is not required for an approval of a transfer.

Third, Mr. Darke asserts generally that the repeated references in Part 40 to '' 'application' [and] 'applicant,' . . . provoke[ ] the question whether or not such parts of [Part 40] would apply.'' *See* Request for Hearing at 13 (handwritten addition); First Supplement, dated Feb. 9, 2000, at 2; Third Supplement at unnumbered page 1. But the fact that the license transfer is not the result of an application does not negate the fact that the license itself was issued under Part 40. Further, the new licensee is subject to both the terms of the license and the applicable sections of Part 40.

C. Legal Bar to Implementing the Settlement Agreement

In his final argument, Mr. Darke asserts that implementation of the Settlement Agreement is unauthorized by law. *See* Fourth Supplement at 3. We disagree. Under the circumstances in which one of our licensees files for bankruptcy, there is no question that we may step in to secure, to the maximum extent possible, assets to be used eventually to remediate a contaminated site, including intervening in bankruptcy proceedings and entering into settlements. As is typically the situation in bankruptcy proceedings, there were many creditors vying for Atlas's limited assets. *See* AEA § 184 (''The Commission may give consent to the creation of a mortgage, *pledge,* or other lien upon any property . . . owned . . . by a licensee, and the rights of creditors so secured may be enforced by any court order subject to the rules and regulations established by the Commission to protect public health and safety and promote the common defense and security'') (emphasis added).

At any rate, our actions with respect to the bankruptcy proceeding, including the terms of the Settlement, are simply not at issue in this proceeding. As a

signatory to the Settlement Agreement — an agreement blessed by a United States Bankruptcy Court — the Commission is obliged to implement those conditions of the agreement that fall within the Commission's charge.

D. Procedural Irregularities

Subpart M clearly mandates that hearing requests, intervention petitions, answers, replies, and accompanying documents in a license transfer adjudication must be served on the applicant or licensee, the NRC's General Counsel, the Secretary of the Commission, and any participants and that proof of service must accompany the filing. *See* 10 C.F.R. § 2.1313(a), (b), (d). The NRC Staff's December 27, 1999 order (which was both noticed and published in the *Federal Register*) reiterated this service requirement and provided a specific listing of the identities and addresses of those who must be served. By letter dated February 10, 2000, the Commission's Office of the Secretary reminded Mr. Darke of these service-related obligations and provided him with a copy of a complete service list. (The Office of the Secretary also served Mr. Darke's Request for Hearing and First Supplement on those entities that were on the official service list.)

Despite these repeated notices of his obligations, Mr. Darke failed to provide proof of service of his Second, Third, and Fourth supplements. Indeed, we have no basis to believe that he ever served these supplements on any of the required entities other than the Office of the Secretary. Moreover, Mr. Darke not only failed to provide proof of service for a Freedom of Information Act (''FOIA'') Request that he submitted into the record by letter dated March 11, 2000, but he also went so far as to ask the Office of the Secretary to serve the last of these documents for him (which that Office has done, albeit with some reluctance).[9]

This is not the first proceeding in which this agency has admonished Mr. Darke regarding service. The NRC's Licensing Board in an earlier adjudication involving the same Moab facility instructed Mr. Darke ''that henceforth each filing he submits in this proceeding should be accompanied by a certificate of service (such as the certificate of service attached to this Memorandum and Order) that lists all those served with the document and states when and how service was made.'' *See Atlas Corp.* (Moab, Utah Facility), Docket No. 40-3453-MLA, unpublished Memorandum and Order (Initial Order) at 4 n.2 (Feb. 12, 1997). Because of Mr. Darke's *pro se* status, the Board admitted the unserved pleadings (just as we have in this proceeding). *Id.* However, our patience with Mr. Darke's consistent

[9] In the FOIA request, Mr. Darke sought a copy of the Bankruptcy Court's December 1st order and an April 29, 1999 ''Moab Uranium Mill Transfer Agreement.''

flouting of our service regulations is at an end.[10] We are instructing the Office of the Secretary to reject and return to Mr. Darke any filings in any future proceedings that do not comply with our service requirements.

III. CONCLUSION

For the reasons set forth above, the Commission

(1) grants Mr. Darke's request for additional time to supplement his initial Request for Hearing,
(2) admits his four supplemental submissions into the record,
(3) concludes that he has proffered no admissible contentions,
(4) denies his request for hearing, and
(5) terminates the proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of May 2000.

[10] We note that Mr. Darke has ignored other instructions from this agency in the past. *See Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4 (1997), *aff'd,* CLI-97-8, 46 NRC 21 (1997):

> In my initial order, I also advised Petitioner Darke that it generally is the practice for participants making factual claims regarding the circumstances that establish standing to do so in affidavit form that is notarized or includes a declaration that the statements are true and are made under penalty of perjury. *See* Initial Order at 3. As Licensee Atlas notes, Petitioner Darke apparently has made no effort to comply with this guidance. *See* Atlas Response at 5. Providing this assurance of the accuracy of factual representations about standing is important; nonetheless, because Petitioner Darke appears pro se and generally is making representations about himself (rather than about other individuals), I am not dismissing this case because of his failure to comply with this instruction.

Cf. Atlas Corp., CLI-97-8, 46 NRC at 22:

> Here, we see no legal error or abuse of discretion in the Presiding Officer's refusal to grant standing to Mr. Darke, given his failure to offer more than general responses to the Presiding Officer's reasonable and clearly articulated requests for more specific information about Mr. Darke's proximity-based standing claims. The four opportunities that Mr. Darke had to specify his claims were entirely adequate.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120) **May 25, 2000**

The Commission concludes that the NRC Staff's review and approval of the financial assurance plan and its cost estimates most logically should come prior to, or be part of, the issuance of a license, and that this was not done here. Nonetheless, given the current posture of this adjudication, the Commission sees no need to set aside HRI's already-granted license. Instead, it has decided to impose an additional condition on the license, in order to correct the effects of HRI's failure to submit, and obtain NRC Staff review of, the required financial information. The new condition prohibits use of the license until the required information is submitted and a financial assurance plan approved by the NRC Staff is in place. The Commission also lays out the framework for Intervenors' pursuit of a hearing on financial assurance plan issues and addresses a number of miscellaneous matters.

MATERIALS LICENSE: FINANCIAL ASSURANCE

10 C.F.R. PART 40, APPENDIX A, CRITERION 9

A plan for decommissioning including cost estimates should have been submitted prior to issuance of the license. The NRC Staff should have reviewed and approved the plan as part of the license-issuance process. While the Commis-

sion recognizes that Criterion 9 is not without ambiguity, it does clearly require submission of a financial assurance plan that includes cost estimates, and most significantly, it explicitly provides that this submission must be made ''in conjunction with'' an environmental report. Under the Commission's regulatory scheme, environmental reports are to be filed prior to issuance of a materials license (and, indeed, are to be filed with the license application itself). *See* 10 C.F.R. § 51.60. Beyond the wording of Criterion 9, it makes a good deal of policy sense, in the context of *in situ* mining, for the NRC to consider a license applicant's cost estimates for cleaning up the mining site, and its plan to pay for cleanup, prior to issuing a license.

The ambiguity of Criterion 9 comes from its use of the term ''licensee'' rather than ''applicant'' in referring to the submission of the environmental report. The Staff and HRI argue that the plain language of Criterion 9 requires only "licensees" to submit, and obtain approval for, the required plan and cost estimates. And, according to the Staff and HRI, the submission and approval need not take place prior to licensing, but only prior to approval of a surety and commencement of operation. However, the Commission has found, and still finds, substantial ambiguity with regard to the requirements of Criterion 9. *See* CLI-99-22, 50 NRC 3, 18-19 (1999). This is particularly true with regard to ''what constitutes 'a plan' at early stages of licensing'' and when NRC approval of the plan and cost estimates is first required. *Id.*

The rulemaking history of Appendix A, Criterion 9, supports the Commission's conclusion that Criterion 9 is best interpreted as requiring submission and approval of a financial assurance plan and cost estimates prior to licensing. The Commission's ''Final Generic Environmental Impact Statement on Uranium Milling,'' which was issued in conjunction with the promulgation of Appendix A, offered the following explanation of Criterion 9: ''A plan for decommissioning of the mill buildings and site, and for disposing of the tailings, in accordance with requirements delineated above, must be *proposed by applicants, and approved by appropriate agencies, before issuance or renewal of licenses.*'' *See* NUREG-0706, at p. 12-5 (1979) (emphasis added). In addition, the Commission notes that 10 C.F.R. § 40.31(h) places heavy emphasis on the requirement that license applicants show how the requirements and objectives of Appendix A, which includes Criterion 9, will be achieved. Indeed, ''[f]ailure to clearly demonstrate how the requirements and objectives in appendix A have been addressed shall be grounds for [even] refusing to accept an application.'' The Commission, therefore, believes that the most reasonable interpretation of Criterion 9 is that an applicant must submit the plan for the NRC Staff's review prior to the license's issuance.

MATERIALS LICENSE: FINANCIAL ASSURANCE

RULES OF PRACTICE: OPPORTUNITY FOR HEARING

Not only is this interpretation sensible from the perspective of sound regulatory policy, but also it ensures a meaningful hearing opportunity on all substantive issues material to the agency's licensing decision. Under 10 C.F.R. Part 2, Subpart L, a hearing may, and frequently does, take place *after* the license is issued, as in fact is the case here. *See* 10 C.F.R. § 2.1205(m). In such situations, Intervenors are logically entitled to *prehearing* receipt of all information critical to the license, including the full terms of the license itself and its associated financial assurance plan. This does not mean that some matters may not be left for post-licensing action, particularly activities that are simply ministerial or by their very nature require post-licensing verification by our Staff, but the Commission does not consider the financial assurance plan among them.

The Commission disagrees with the Presiding Officer (and with both HRI and the NRC Staff) that questions about the financial assurance plan can be left for later resolution or for a second round of hearings closer to the time of operation. A sensible and efficient process requires the Commission to insist that those questions be addressed in connection with the initial application and license. The Commission, as it held in CLI-99-22, does not believe that the Staff needed to withhold the license until receiving HRI's actual surety arrangement. *See* 50 NRC at 18. Surety arrangements are matters appropriately addressed after issuance of the license, and even after completion of a hearing. Criterion 9 makes clear that a surety arrangement is necessary as a prerequisite to *operating,* not as a prerequisite to *licensing.*

MATERIALS LICENSE: FINANCIAL ASSURANCE

NUREG-0706

10 C.F.R. PART 40, APPENDIX A, CRITERION 9

The Commission does not accept the argument that NUREG-0706 is irrelevant to the questions before us due in part to the NUREG's focus on mill tailings. The express inclusion of, and emphasis on, management and disposal of uranium mill tailings does not eliminate the broader scope of Criterion 9 or the NUREG. Although *in situ* leach mining produces no conventional mill tailings, the scope of the cost-estimates and related plan to be approved by the Commission under Criterion 9 includes ''decontamination and decommissioning of mill buildings and the milling site to levels which allow unrestricted use of these areas upon decommissioning'' as well as ''the reclamation of tailings *and/or waste areas.*'' Appendix A, Criterion 9 (emphasis added). These latter aspects of decontamination, decommissioning, and reclamation are directly applicable to *in situ* leach mining.

MATERIALS LICENSE: FINANCIAL ASSURANCE

RULES OF PRACTICE: OPPORTUNITY FOR HEARING

10 C.F.R. § 40.31

The NRC Staff, although stating that HRI submitted sufficient information to issue a license, has continued to request and receive extensive information related to cost estimates. As a result, Intervenors cannot be said to have had an opportunity to address the adequacy of the final cost estimates and financial assurance plan. 10 C.F.R. § 40.31 requires that ''[e]ach application must clearly demonstrate how the requirements and objectives set forth in appendix A of this part have been addressed,'' and the Commission has determined that Criterion 9 of Appendix A does apply to this application. This case involves NRC Staff requests that HRI provide missing information that is required under our regulations, not simply, as in *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341 (1999), an NRC Staff request that the license applicant ''further describe or explain specific technical issues.''

The long and short of the matter is that, at this writing, the record before the Commission reveals no final estimates, no final plan, and no final NRC Staff review. The NRC Staff's suggestion that the Intervenors will have the opportunity to contest the issues associated with the financial assurance plan in "an adjudicatory hearing" at some ill-defined future time amounts, in effect, to an acknowledgment that (a) an adequate financial assurance plan is material to licensing (as, in our view, it assuredly is), and (b) the NRC Staff itself has not yet resolved all issues material to licensing.

RULES OF PRACTICE: OPPORTUNITY FOR HEARING

MATERIALS LICENSE: FINANCIAL ASSURANCE

In these circumstances, the Commission could, in theory, simply invalidate HRI's license, and call upon the Staff to reissue the license only after the Staff has obtained, and is satisfied with, the requested cost-estimate information. However, as a matter of the Commission's equitable discretion to fashion sensible remedies, the Commission declines to impose a draconian remedy when less drastic relief will suffice. The Commission chooses instead to impose the following condition on HRI's license: the company is prohibited from using its license until the NRC Staff has approved its decontamination, decommissioning, and reclamation plan, including the requisite financial-assurance plan and cost estimate. This condition will protect Intervenors' interest by placing them in the same position they would have been in if the Staff had approved the financial assurance plan, including cost estimates, prior to issuing the license.

HRI has indicated that its purpose in obtaining a license now is not to enable it immediately (or even in the near future) to conduct mining and milling operations, but rather to gain a valuable asset (the license) that would increase the net worth of the company, enable it to attract new capital, and position it to take advantage of future uranium mining opportunities if and when they arise. Invalidating the HRI license would return this protracted proceeding to the beginning and presumably require HRI to start over again. This is unnecessary, given the posture of the case and the nature of the financial assurance issue. The NRC Staff's error in issuing HRI a license prematurely was procedural. It is not yet clear whether any substantive defect defeating the license exists. The Commission need not invalidate the license. Conditioning HRI's actual *use* of the license on obtaining NRC Staff approval of a financial assurance plan, subject to a subsequent hearing, leaves intact Intervenors' ability to demonstrate substantive defects in HRI's financial assurance submission.

RULES OF PRACTICE: SCOPE OF PROCEEDING

Nothing forces the Commission and the parties to continue down the somewhat tortured path created by addressing a multisite license in a single proceeding, if HRI itself intends to use just one site. Therefore, if HRI requests, the Commission specifically authorizes the Presiding Officer on remand to allow a reduction in the scope of the license to less than the four sites currently included.

RULES OF PRACTICE: MOTIONS TO STRIKE

The Commission grants HRI's motion to strike a portion of Intervenors' Brief and seven of the twelve attachments to that brief. In the offending portion of their brief and supporting documents, Intervenors argue that the Staff applied a less rigid standard when reviewing and approving HRI's application than when reviewing and approving other *in situ* leachate uranium mining applications. The Commission grants the motion to strike. Intervenors failed to raise this issue before the Presiding Officer and are precluded from supplementing the record as of right before us. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996) (and authority cited).

MATERIALS LICENSE: STAFF REVIEW

Intervenors argue that the Staff applied a less rigid standard when reviewing and approving HRI's application than when reviewing and approving other *in situ* leachate (ISL) uranium mining applications. In support, Intervenors cite three *in situ* licenses issued in 1987, 1989, and 1990. However, the Staff issued those three

cited licenses before the NRC's 1994 adoption of a performance-based licensing approach for ISL sites. This change in practice undermines the three licenses' relevance to the issues in this proceeding.

RULES OF PRACTICE: CITATION FORMAT

Counsel is reminded that references to an order's LBP, ALAB, and CLI numbers are a necessary part of any such citation.

RULES OF PRACTICE: MOTIONS TO STRIKE; MOTIONS FOR SANCTIONS; SANCTIONS

HRI moved to strike Intervenors' September 13th Reply Brief on the ground that it had exceeded by six pages the page limit imposed by the Commission in CLI-99-22. HRI also moved for sanctions against both the Intervenors and their counsel in the amount of HRI's costs to prepare its motion to strike. On September 15th, Intervenors withdrew the September 13th version of their Reply Brief and substituted in its stead a Reply Brief that presented shorter versions of the same arguments proffered in the September 13th Reply Brief. Intervenors' September 15th filing complied with the Commission's page limit. The Commission denies the motion to strike. Intervenors' withdrawal of the offending brief rendered moot HRI's motion to strike. The Commission also denies HRI's motion for sanctions. The Commission has never ruled on its authority to assess costs against a party under these circumstances. However, even assuming that it has such authority, the Commission hardly considers the exceeding of a page limit to be an error so great as to merit such a sanction — especially when the offending counsel immediately corrected the error once attention was brought to it.

RULES OF PRACTICE: ORAL ARGUMENT

Although the Commission acknowledges that the record in this Subpart L proceeding is indeed voluminous (nearly 500 documents, excluding attachments), the Commission's resolution of this petition for review — essentially a postponement of the merits-related financial assurance questions — renders an oral argument unnecessary.

MEMORANDUM AND ORDER

This complex adjudicatory proceeding concerns a Part 40 source and byproduct materials license (SUA-1508) that the NRC Staff issued to Hydro Resources, Inc.

(''HRI''), on January 5, 1998. The license authorizes HRI to construct and operate *in situ* leach (''ISL'') mining facilities[1] for a 5-year period at certain sites in Church Rock and Crownpoint, New Mexico, after meeting certain license conditions.[2] This project (known as the ''Crownpoint Uranium Project'') involves uranium mining and processing activities at four sites — Church Rock Section 8, Church Rock Section 17, Unit 1, and Crownpoint. In the course of this adjudicatory proceeding, HRI has indicated that in the foreseeable future it plans to operate only at the Section 8 site. Due to current conditions in the uranium market, HRI thus far has undertaken no activities even at Section 8.

The Eastern Navajo Diné Against Uranium Mining (''ENDAUM''), the Southwest Research and Information Center (''SRIC''), Marilyn Morris, and Grace Sam sought and were granted intervenor status to oppose the grant of HRI's license. *See* LBP-98-9, 47 NRC 261 (1998), *rev'd in part on other grounds,* CLI-98-16, 48 NRC 119 (1998). During the course of this adjudication, the Presiding Officer has issued seven partial initial decisions.[3] Each has led to a petition for review before the Commission.[4]

The March 9, 1999 partial initial decision that we review here (LBP-99-13, 49 NRC 233 (1999)) resolved decommissioning financial assurance questions in favor of HRI. The Presiding Officer rejected SRIC's and ENDAUM's argument that HRI had failed to comply with the decommissioning financial assurance requirements of 10 C.F.R. § 40.36 and Part 40, Appendix A, Criterion 9. On July 23, 1999, the Commission issued a decision that, *inter alia,* agreed with the Presiding Officer

[1] ''*In situ* leach mining'' (also called injection mining or borehole leaching) involves the injection of a leach solution (lixiviant — in HRI's case, local groundwater fortified with either oxygen or air and either carbon dioxide or sodium bicarbonate (License Condition 10.1)) through lined wells into a uranium-bearing ore body to form a chemical compound with the uranium; the dissolving of the uranium from the host rock into the lixiviant, forming pregnant lixiviant; the mobilization of the uranium complex formed; and the surface recovery of the solution bearing the uranium complex via production wells. The uranium is then separated from the pregnant leach solution and processed into yellowcake by milling unit operations at the surface. Unlike conventional milling operations, *in situ* extraction requires no ore mining, transportation, crushing, or grinding, and it produces no conventional mill tailings. It does, however, produce solid and liquid wastes similar to those of conventional processes. Generally, the most serious environmental impact associated with this kind of uranium operation is the potential for groundwater contamination — specifically, elevated levels of trace metals in the groundwater. Following completion of *in situ* leach mining, licensees are required to restore the affected groundwater to appropriate standards (which, in HRI's case, are set forth in License Condition 10.21). In this ''financial assurance'' portion of the *HRI* proceeding, Intervenors are particularly concerned about HRI's financial ability to restore the groundwater to the required standards.

[2] The license contains Condition 9.5 (regarding financial assurance) requiring HRI to submit an ''NRC-approved surety arrangement'' for decommissioning, reclamation, and groundwater restoration costs before it can operate under the license. *See* License No. SUA-1508 at 2.

[3] *See* LBP-99-1, 49 NRC 29 (1999) (waste disposal); LBP-99-9, 49 NRC 136 (1999) (Historic Preservation Act); LBP-99-10, 49 NRC 145 (1999) (performance-based licensing); LBP-99-13, 49 NRC 233 (1999) (financial assurance); LBP-99-18, 49 NRC 415 (1999) (technical qualifications); LBP-99-19, 49 NRC 421 (1999) (radioactive air emissions); and LBP-99-30, 50 NRC 77 (1999) (groundwater, cumulative impacts, NEPA, environmental justice). Separately, the Presiding Officer issued a decision holding in abeyance further proceedings on issues that do not involve the Section 8 site. *See* LBP-99-40, 50 NRC 273 (1999).

[4] We addressed petitions for review of LBP-99-1, -9, -10, and part of -13 in CLI-99-22, 50 NRC 3 (1999). Still before the Commission are pending petitions for review of LBP-99-18, -19, -30, and -40. Those petitions remain under active consideration. *Cf.* 65 Fed. Reg. 7074 (Feb. 11, 2000) (appointing two members of the NRC Staff as ''Commission adjudicatory employees''). We will address them in a subsequent decision.

''that the surety requirement in 10 C.F.R. § 40.36 does not apply to this license,'' and pointed out that ''by its own wording'' the rule that *is* applicable, Criterion 9 of Appendix A to Part 40, requires no surety arrangement ''until operations begin.'' CLI-99-22, 50 NRC 3, 18 (1999). The Commission found the agency's ''rules on financial assurance *plans* . . . much less clear'' and called for further briefs ''to clarify whether and when HRI submitted a plan in this case and the extent to which Intervenors may contest that plan.'' *Id.*

Based on our review of LBP-99-13, the briefs filed in response to CLI-99-22, and other germane portions of the record, we conclude that HRI has failed thus far to submit an adequate financial assurance plan and that, until it does, it cannot use the license it has received from the NRC. We therefore add an additional condition to HRI's license prohibiting use of the license until an NRC-approved financial assurance plan is in place.

I. BACKGROUND

A. The Regulatory Requirements Governing Financial Assurance for Decommissioning

Part 40 of 10 C.F.R. governs the domestic licensing of source material such as uranium. Part 40 addresses decommissioning financial assurance in two places. The first is section 40.36 which provides, in relevant part, that:

> Except for licenses authorizing the receipt, possession, and use of source material for uranium or thorium milling, or byproduct material at sites formerly associated with such milling, for which financial assurance requirements are set forth in appendix A of this part, criteria for providing financial assurance for decommissioning are as follows:
>
> (a) Each applicant for a specific license authorizing the possession and use of more than 100 mCi of source material in a readily dispersible form shall submit a decommissioning funding plan as described in paragraph (d) of this section.
>
> * * * *
>
> (d) Each decommissioning funding plan must contain a cost estimate for decommissioning and a description of the method of assuring funds for decommissioning from paragraph (e) of this section, including means for adjusting cost estimates and associated funding levels periodically over the life of the facility. The decommissioning funding plan must also contain a certification by the licensee that financial assurance for decommissioning has been provided in the amount of the cost estimate for decommissioning and a signed original of the financial instrument obtained to satisfy the requirements of paragraph (e) of this section.
>
> (e) Financial assurance for decommissioning must be provided by one or more of the following methods:
>
> * * * *
>
> (2) *A surety method, insurance or other guarantee method.* . . .

The second portion of Part 40 addressing decommissioning financial assurance is comprised of Criteria 9 and 10 in Appendix A, ''Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material from Ores Processed Primarily for Their Source Material Content.''[5] Criterion 9 provides, in relevant part, that:

> Financial surety arrangements must be established by each mill operator prior to the commencement of operations to assure that sufficient funds will be available to carry out the decontamination and decommissioning of the mill and site and for the reclamation of any tailings or waste disposal areas. The amount of funds to be ensured by such surety arrangements must be based on Commission-approved cost estimates in a Commission-approved plan for (1) decontamination and decommissioning of mill buildings and the milling site to levels which allow unrestricted use of these areas upon decommissioning, and (2) the reclamation of tailings and/or waste areas in accordance with technical criteria delineated in Section I of this appendix. The licensee shall submit this plan in conjunction with an environmental report . . . .

(When the parties or this Memorandum and Order refer to the ''financial assurance plan'' we understand the phrase to mean the financial portion of the referenced decontamination, decommissioning, and reclamation plan.)

Finally, a third regulatory provision in Part 40 tracks the language of the Atomic Energy Act (''AEA'') by providing generally that a license application cannot be approved if it is inimical to the public health and safety. *See* 10 C.F.R. § 40.32(d), implementing section 69 of the AEA, 42 U.S.C. § 2099.[6]

B. LBP-99-13

In LBP-99-13, the Presiding Officer issued five rulings relevant to this appeal. First, he ruled that the substances at issue (pregnant lixiviant and the yellowcake extracted from it) fall under an exception to 10 C.F.R. § 40.36 covering ''the receipt, possession, and use of source material for uranium . . . milling,'' and that HRI's operation therefore did not fall within section 40.36's detailed financial assurance requirements. *See* 49 NRC at 235.

Second, the Presiding Officer rejected Intervenors' argument that the issuance of the HRI license without a demonstration of financial assurance is inimical to the public health and safety under 10 C.F.R. § 40.32. He reasoned that this argument was undermined by both the inapplicability of section 40.36 and also the fact that HRI will not be permitted to commence operations until it has complied with 10 C.F.R. Part 40, Appendix A, Criterion 9. *See* 49 NRC at 235 (apparently alluding to License Condition 9.5, *supra*).

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[5] Criterion 10 is not at issue in this proceeding.

[6] ''The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such a person for such purpose would be inimical to the . . . health and safety of the public.''

Third, he rejected Intervenors' argument that HRI must not be permitted to defer the establishment of its surety until after completion of the Church Rock restoration demonstration project. He concluded that the license already expressly prohibits such delay and that the record supports the conclusion that HRI intends to comply with the license requirement. *See* 49 NRC at 236.

Fourth, the Presiding Officer rejected Intervenors' argument that the application of the informal hearing rules of 10 C.F.R. Part 2, Subpart L, deprived Intervenors of a fair hearing. He concluded that 10 C.F.R. § 2.1239(a) precluded him from considering a challenge to the validity of the Commission's regulations. *See* 49 NRC at 236.

Fifth, the Presiding Officer rejected Intervenors' challenge to the NRC Staff's determination that proper restoration of groundwater will require only nine pore volumes[7] — a determination that affects the amount of surety funds HRI will be required to set aside. He found nothing in the record that would support the Intervenors' position, and he also noted that the surety amount can be increased at any time if the NRC Staff determines that well-field restoration requires greater pore volumes or a higher cost. *See* 49 NRC at 236-37.

C. CLI-99-22

In CLI-99-22, we resolved a number of then-pending challenges to HRI's license, including waste disposal, historic preservation, and performance-based licensing claims. On financial assurance we agreed with the Presiding Officer that section 40.36 by its terms does not apply to licenses for *in situ* mining. *See* 50 NRC at 18. We then turned to the rule that *does* apply — Criterion 9 of Appendix A[8] — and found that while it does not require license applicants to provide an actual surety arrangement prior to licensing, it does call for a financial assurance ''plan'' based on NRC-approved cost estimates. *See id.*

Commenting that ''[c]onfusion . . . permeates th[e] issue'' of financial assurance, we requested all parties to file briefs on the questions (1) whether the financial assurance information submitted by HRI adequately met the requirements for licensing, and (2) ''if HRI is correct in its assertion that an approved finan-

[7] ''Pore volume'' (also known as ''total porosity'') refers to the volume of water that will completely fill all of the void space in a given volume of porous matrix. The rate of decrease in the concentration of contaminants in a given volume of contaminated porous media is directly proportional to the number of pore volumes that are exchanged (i.e., circulated) through the same given volume of porous media. Hence, the phrase ''nine pore volumes'' refers to the volume of water that the NRC Staff would require HRI to circulate through the aquifer in Church Rock Section 8, in order to expel lixiviant from that aquifer.

[8] We stated that ''[t]he Staff has acknowledged that the financial assurance requirements in Criterion 9 of Appendix A to Part 40 do in fact apply to HRI.'' 50 NRC at 18. In the NRC Staff's brief responding to the questions posed in CLI-99-22, the Staff correctly points out that it has gone only so far as to acknowledge the applicability of some portions of Criterion 9, but not all of it. *See* NRC Staff's Response Brief on Financial Surety Issues, dated Sept. 3, 1999, at 10 n.13. *See also* NRC Staff's Response to Presentations on Technical Qualification, Financial, and Decommissioning Issues, dated Feb. 18, 1999, at 5.

cial assurance plan is not a prerequisite to the issuance of a license, what is the meaning of the Staff's assertion in its response that 'the issue is thus not yet ripe for . . . [the Presiding Officer's] . . . review?' '' 50 NRC at 19-20. We also indicated that ''[f]urther proceedings are necessary to clarify whether and when HRI submitted a [financial assurance] plan in this case [as required by Criterion 9] and the extent to which Intervenors may contest that plan.'' *See* 50 NRC at 18. Finally, we asked the parties to address the issues raised in the Intervenors' petition for review.[9]

II. DISCUSSION

Intervenors, in their briefs before the Commission, advance three interrelated lines of argument. First, they claim that HRI's failure to submit a financial assurance plan with cost estimates renders its application in violation of Criterion 9, sections 40.36 and 40.32 of our regulations, and section 69 of the AEA. Second, they argue that both the scope and content of the financial information HRI has submitted fail to satisfy the requirements of Criterion 9. Third, they maintain that the adequacy of HRI's plan is ripe for litigation now because a later hearing for resolution of the financial assurance question would violate their statutory hearing rights.

As we stated in CLI-99-22, questions have arisen here because ''Criterion 9 does not specify what constitutes 'a plan' at early stages of licensing or *when* the Licensee must receive NRC approval for its plan.'' 50 NRC at 18. Criterion 9 is clear enough on what the applicant must *ultimately* provide to demonstrate financial assurance — i.e., a financial assurance plan, including NRC-approved cost estimates, and ''prior to the commencement of operations,'' an actual surety arrangement based on the cost estimates. Where Criterion 9 is unclear is on timing questions surrounding the financial assurance plan: (1) when must the license applicant submit the plan, (2) when must our Staff review and approve it, and (3)

[9] These issues were: Did the Presiding Officer err by (1) failing to address Intervenors' argument that HRI had failed to submit to the NRC a financial assurance plan that complies with the agency's requirements for decommissioning financial assurance; (2) failing to address Intervenors' argument that a surety is required for the entire licensed operation, not just for Section 8; (3) ruling on Intervenors' claims without allowing them the opportunity to reply to what Intervenors consider late-filed new information submitted by the NRC Staff; (4) ruling that, because lixiviant is source material, the entire Crownpoint Project is exempt from section 40.36; (5) concluding that ''HRI will not be permitted to commence operations until it has complied with . . . Criterion 9''; (6) denying Intervenors' claim that the NRC Staff's deferral of an evaluation of HRI's financial surety until after licensing violated their right to a hearing; (7) dismissing Intervenors' health and safety concerns by determining that section 40.36 does not apply and that HRI will be required to comply with Criterion 9 prior to operations; (8) stating that ''[i]ntervenors claim, without citation to the record or to any document, that HRI plans to establish surety only after completion of the Churchrock restoration demonstration project''; and (9) stating that Intervenors did not provide any analysis or expert testimony casting doubt on the NRC Staff's estimates that it will take 9 pore volumes for proper restoration of groundwater. *See* Petition for Review at 3-9.

when may Intervenors raise, and obtain a hearing on, alleged deficiencies in the plan?

Given that this is the agency's first *in situ* uranium leach mining case, it is perhaps not surprising that some confusion has developed. The confusion arises in part because our general regulatory scheme governing uranium milling, Part 40, ''specifically addresses ISL mining only to a limited extent,'' leaving us ''no choice but to follow the case-by-case approach taken by our Staff in issuing HRI's license.'' CLI-99-22, 50 NRC at 9. The Commission today provides clarifications that should allow this and future proceedings to reach an orderly conclusion.

As we explain in detail below, we conclude that the NRC Staff's review and approval of the financial assurance plan and its cost estimates most logically should come prior to, or be part of, the issuance of a license. This was not done here. Nonetheless, given the current posture of this adjudication, we see no need to set aside HRI's already-granted license. Instead, we have decided to impose an additional condition on the license, in order to correct the effects of HRI's failure to submit, and obtain NRC Staff review of, the required financial information. The new condition prohibits *use* of the license until the required information is submitted and a financial assurance plan approved by the NRC Staff is in place. We also lay out the framework for Intervenors' pursuit of a hearing on financial assurance plan issues and address a number of miscellaneous matters.

A. Sufficiency of Application

According to Intervenors, the absence of an NRC-approved cost estimate for the decommissioning of the Crownpoint uranium project precludes the requisite findings that HRI's license application both satisfies the requirements of Criterion 9 and section 40.36 and provides reasonable assurance of public health and safety as required by the AEA and section 40.32. Consequently, argue Intervenors, the NRC Staff should not have issued HRI a license. *See* Intervenor Brief at 8. We find the Criterion 9 argument decisive and concentrate our discussion on it.[10]

Intervenors assert that the Presiding Officer's ruling ignores the language of Criterion 9, the regulatory history underlying that criterion, and the NRC Staff's established practice of requiring approval of cost estimates as part of its licensing review. *See* Intervenor Brief at 8. Intervenors argue that Criterion 9 establishes a two-step process for ensuring adequate surety for milling operations: first, at the time when a license applicant submits an environmental report, the applicant also must file ''Commission-approved cost estimates in a Commission-approved [decontamination, decommissioning, and reclamation] plan''; and second, surety arrangements consistent with the approved plan must be in place prior to com-

[10] Consequently, we need not reach Intervenors' arguments regarding 10 C.F.R. § 40.36 and section 69 of the AEA.

mencement of the facility's operation. *See id.* at 9. Intervenors assert that HRI filed neither the requisite cost estimates nor a financial assurance plan along with its environmental report, that none of HRI's environmental filings has contained such a plan or cost estimates, and that the few financial documents HRI has submitted into the record have likewise failed to provide the requisite information. *See id.* at 10.

We agree with Intervenors' general argument that a plan for decommissioning including cost estimates should have been submitted prior to issuance of the license;[11] we also conclude that NRC Staff should have reviewed and approved the plan as part of the license-issuance process. While we recognize that Criterion 9 is not without ambiguity, it does clearly require submission of a financial assurance plan that includes cost estimates, and most significantly, it explicitly provides that this submission must be made ''in conjunction with'' an environmental report.[12] Under our regulatory scheme, environmental reports are to be filed prior to issuance of a materials license (and, indeed, are to be filed with the license application itself).[13] Beyond the wording of Criterion 9, it makes a good deal of policy sense, in the context of *in situ* mining, for the NRC to consider a license applicant's cost estimates for cleaning up the mining site, and its plan to pay for cleanup, prior to issuing a license.

As Intervenors argue, the rulemaking history of Appendix A, Criterion 9, supports our conclusion that Criterion 9 is best interpreted as requiring submission and approval of a financial assurance plan and cost estimates prior to licensing. *See* Intervenor Brief at 9. Our ''Final Generic Environmental Impact Statement

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[11] As the Commission noted in discussing the cost estimates in CLI-99-22, ''this plan must be submitted by the Applicant along with its environmental report, prior to licensing.'' 50 NRC at 18.

[12] Criterion 9's ambiguity comes from its use of the term ''licensee'' rather than ''applicant'' in referring to the submission of the environmental report. The Staff and HRI argue that the plain language of Criterion 9 requires only ''licensees'' to submit, and obtain approval for, the required plan and cost estimates. And, according to the Staff and HRI, the submission and approval need not take place prior to licensing, but only prior to approval of a surety and commencement of operation. However, we have found, and still find, substantial ambiguity with regard to the requirements of Criterion 9. *See* CLI-99-22, 50 NRC at 18-19. This is particularly true with regard to ''what constitutes 'a plan' at early stages of licensing'' and when NRC approval of the plan and cost estimates is first required. *Id.* The parties advance competing theories on the significance of Criterion 9's reference to a ''licensee.'' The NRC Staff and HRI observe that the Commission could have expressly referred to ''applicant or licensee'' as it did elsewhere in Appendix A. *See* NRC Staff Brief at 7, 10-11; HRI Brief at 5. Intervenors make the point that the reference to ''licensee'' merely makes clear that existing licensees at the time of promulgation of Appendix A were also required to comply with requirements of Criterion 9. *See* Intervenor's Aug. 13, 1999, Brief at 9 n.4.

[13] 10 C.F.R. § 51.60 Environmental Report–Materials licenses:

> (a) *Each applicant for a license* or other form of permission, or an amendment to or renewal of a license or other form of permission *issued pursuant to Part*s 30, 32, 33, 34, 35, 36, 39, *40,* 61, 70 and/or 72 of this chapter, and covered by paragraphs (b)(1) through (b)(5) of this section, *shall submit with its application* to the Director of Nuclear Material Safety and Safeguards the number of copies, as specified in § 51.66, of *a separate document, entitled ''Applicant's Environmental Report''* or ''Supplement to Applicant's Environmental Report,'' as appropriate.

(Emphasis added). *Cf.* 10 C.F.R. §§ 50.30(f), 51.45(a), 51.50, 51.53(b), 51.53(c)(1), 51.54, 51.61, 51.62(a), 52.17(a)(2), 52.79(a)(2), 54.23, 61.10, 61.28(b), 70.21(f), 70.21(h), 72.16(c), 72.34; 10 C.F.R. Part 50, Appendix M, ¶ 3; 10 C.F.R. Part 52, Appendix M, ¶ 3 — all of which require that an Environmental Report be submitted contemporaneous with an application.

on Uranium Milling,'' which was issued in conjunction with the promulgation of Appendix A, offered the following explanation of Criterion 9: ''A plan for decommissioning of the mill buildings and site, and for disposing of the tailings, in accordance with requirements delineated above, must be *proposed by applicants, and approved by appropriate agencies, before issuance or renewal of licenses.*'' *See* NUREG-0706, at p. 12-5 (1979) (emphasis added).[14] In addition, we note that 10 C.F.R. § 40.31(h) places heavy emphasis on the requirement that license applicants show how the requirements and objectives of Appendix A, which includes Criterion 9, will be achieved. Indeed, ''[f]ailure to clearly demonstrate how the requirements and objectives in appendix A have been addressed shall be grounds for [even] refusing to accept an application.'' We, therefore, believe that the most reasonable interpretation of Criterion 9 is that an applicant must submit the plan for the NRC Staff's review prior to the license's issuance.

Not only is our interpretation sensible from the perspective of sound regulatory policy, but also it ensures a meaningful hearing opportunity on all substantive issues material to the agency's licensing decision. Under 10 C.F.R. Part 2, Subpart L, a hearing may, and frequently does, take place *after* the license is issued, as in fact is the case here. *See* 10 C.F.R. § 2.1205(m). In such situations, Intervenors are logically entitled to *prehearing* receipt of all information critical to the license, including the full terms of the license itself and its associated financial assurance plan. This does not mean that some matters may not be left for post-licensing action, particularly activities that are simply ministerial or by their very nature require post-licensing verification by our Staff, but we do not consider the financial assurance plan among them.

We simply do not agree with the Presiding Officer (or with HRI and the NRC Staff) that questions about the financial assurance plan can be left for later resolution or for a second round of hearings closer to the time of operation. A sensible and efficient process requires us to insist that those questions be addressed in connection with the initial application and license.[15]

The NRC Staff, although stating that HRI submitted sufficient information to issue a license, has continued to request and receive extensive information related

[14] The Staff and HRI argue against any relevance of NUREG-0706 to the questions before us by emphasizing, in part, the NUREG's focus on mill tailings. *See* NRC Staff Brief at 6-11; HRI Brief at 6 n.1 But the express inclusion of, and emphasis on, management and disposal of uranium mill tailings does not eliminate the broader scope of Criterion 9 or the NUREG. Although *in situ* leach mining produces no conventional mill tailings, the scope of the cost-estimates and related plan to be approved by the Commission under Criterion 9 includes ''decontamination and decommissioning of mill buildings and the milling site to levels which allow unrestricted use of these areas upon decommissioning'' as well as ''the reclamation of tailings *and/or waste areas.*'' Appendix A, Criterion 9 (emphasis added). These latter aspects of decontamination, decommissioning, and reclamation are directly applicable to *in situ* leach mining.

[15] As we held in CLI-99-22, however, we do not believe that the Staff needed to withhold the license until receiving HRI's actual surety arrangement. *See* 50 NRC at 18. Surety arrangements are matters appropriately addressed after issuance of the license, and even after completion of a hearing. Criterion 9 makes clear that a surety arrangement is necessary as a prerequisite to *operating,* not as a prerequisite to *licensing.*

to cost estimates. As a result, Intervenors cannot be said to have had an opportunity to address the adequacy of the final cost estimates and financial assurance plan. We cannot agree with HRI's argument that information it has already provided to the NRC Staff amounts to the requisite financial assurance plan, with cost estimates.[16] As suggested in the Staff's August 31, 1999, Request for Additional Information (''RAI''), much information required by Criterion 9 is simply missing. The Staff specifically indicates in the RAI that it needs further cost information on the ''restoration and decommissioning efforts associated with the Crownpoint processing facility [and] the proposed evaporation ponds in Section 8'' of Church Rock (RAI, item 7) and, more generally, that it expects to receive from HRI further information on restoration and reclamation costs (RAI, items 1 and 6).[17]

The long and short of the matter is that, at this writing, the record before us reveals no final estimates, no final plan, and no final NRC Staff review. The NRC Staff's suggestion that the Intervenors will have the opportunity to contest the issues associated with the financial assurance plan in ''an adjudicatory hearing'' at some ill-defined future time amounts, in effect, to an acknowledgment that (a) an adequate financial assurance plan is material to licensing (as, in our view, it assuredly is), and (b) the NRC Staff itself has not yet resolved all issues material to licensing. *See* Staff Brief at 20.

In these circumstances, we could, in theory, simply invalidate HRI's license, and call upon our Staff to reissue the license only after it has obtained, and is satisfied with, the requested cost-estimate information. However, as a matter of our equitable discretion to fashion sensible remedies, we decline to impose a draconian remedy when less drastic relief will suffice.[18] We choose instead to impose the

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[16] *See* HRI Brief at 3-4, 6. The four financial submissions on which HRI relies are: its application package which, according to HRI, included ''detailed plans addressing the full cycle economics of the project''; HRI's 1996 response to NRC Staff's Request for Additional Information (''RAI-92''); the surety material that HRI submitted to the Staff on June 25, 1997; and additional surety material submitted to the Staff on December 11, 1998.

[17] *See* Letter from John J. Surmeier, NRC, to Richard F. Clement, Jr., HRI, dated Aug. 31, 1999, *attached to* Intervenors' Reply Brief, dated Sept. 15, 1999. *See also* NRC Staff's Response Brief on Financial Surety Issues, dated Sept. 3, 1999, at 20-21:

> Since HRI's 1997 financial plan *does not* form an adequate basis on which to estimate what it would cost a third party to decommission HRI's Section 8, restore the groundwater there, and perform land reclamation efforts, step one of the final approval process has not been completed, and HRI's financial assurance plan has not been approved by the Staff. If adequate cost-estimate information is received from HRI, the Staff *would then* be able to determine the initial amount of surety which HRI will be required to provide.

(Emphasis added.) As noted earlier in this order, 10 C.F.R. § 40.31 requires that ''[e]ach application must clearly demonstrate how the requirements and objectives set forth in appendix A of this part have been addressed,'' and we have determined that Criterion 9 of that Appendix does apply to this application. This case involves NRC Staff requests that HRI provide missing information that is required under our regulations, not simply, as in *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341 (1999), an NRC Staff request that the license applicant ''further describe or explain specific technical issues.''

[18] HRI has indicated that its purpose in obtaining a license now is not to enable it immediately (or even in the near future) to conduct mining and milling operations, but rather to gain a valuable asset (the license) that would

(Continued)

following condition on HRI's license: the company is prohibited from using its license until the NRC Staff has approved its decontamination, decommissioning, and reclamation plan, including the requisite financial-assurance plan and cost estimate. This condition will protect Intervenors' interest by placing them in the same position they would have been in if the Staff had approved the financial assurance plan, including cost estimates, prior to issuing the license.[19]

We next turn to the case-management question of how best to proceed with the adjudication on financial assurance plan questions. Keeping both expedition and fairness in mind, we provide the following schedule: within 180 days after service of this order, HRI must submit a decontamination, decommissioning, and reclamation plan with cost estimates on which a surety will be based. The plan in the first instance need only address the Section 8 site where HRI plans to begin operations first.[20] In the meantime, consistent with the Commission-imposed license condition, HRI is prohibited from using its license until the cost estimates are approved by the Staff. Within 30 days of service of HRI's financial assurance plan, Intervenors must submit a written presentation, pursuant to 10 C.F.R. § 2.1233, pointing out any deficiencies that they see in HRI's submittal. The NRC Staff and HRI shall respond within 30 days after service of the Intervenors' presentation. The Intervenors' presentation shall not exceed 45 pages and the responses shall not exceed 30 pages.

This matter will be remanded to the Presiding Officer for further proceedings on financial assurance issues. Intervenors' presentation and the responses by the NRC Staff and by HRI should be filed before the Presiding Officer.

We now turn to one final point. This case involves an unusual license that covers four separate sites even though the Licensee, HRI, has acknowledged that it has no immediate intent to develop any of them other than the Section 8 site. Indeed, at HRI's request, the Presiding Officer issued an order holding the adjudication in abeyance with respect to all sites except Section 8. *See* LBP-99-40, 50 NRC 273 (1999). His abeyance order, as well as his related decision to ''bifurcate''

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increase the net worth of the company, enable it to attract new capital, and position it to take advantage of future uranium mining opportunities if and when they arise. *See* HRI's Response to Intervenors' Brief with Respect to HRI's Technical and Financial Qualifications and Financial Assurance for Decommissioning, dated Feb. 11, 1999, at 13-15 and Exh. F at unnumbered page 2.

Invalidating the HRI license would return this protracted proceeding to the beginning and presumably require HRI to start over again. This is unnecessary, given the posture of the case and the nature of the financial assurance issue. The NRC Staff's error in issuing HRI a license prematurely was procedural. It is not yet clear whether any substantive defect defeating the license exists. As further explained in the text, therefore, we need not invalidate the license. Conditioning HRI's actual *use* of the license on obtaining NRC Staff approval of a financial assurance plan, subject to a subsequent hearing, leaves intact Intervenors' ability to demonstrate substantive defects in HRI's financial assurance submission.

[19] As noted in note 2, *supra,* Condition 9.5 of the license already prohibits HRI from actually *operating* the facility until this agency has approved its surety arrangement.

[20] If, as discussed below, the Commission determines in its subsequent opinion that bifurcation is improper, HRI will have to supplement the plan with financial information on the remaining three sites unless HRI chooses to reduce the scope of the license.

litigation of site-specific issues (including financial assurance issues) between the Section 8 site and the other sites, remains before the Commission on petitions for review, as does Intervenors' claim that the Presiding Officer improperly allowed ''segmented'' review of their NEPA claims. ''To ensure a unified review'' of these complex and interrelated matters, we intend to address them together in a subsequent opinion. *See* CLI-99-22, 50 NRC 3, 7 (1999). Nothing, however, forces the Commission and the parties to continue down the somewhat tortured path created by addressing a multisite license in a single proceeding, if HRI itself intends to use just one site. Therefore, if HRI requests, we specifically authorize the Presiding Officer on remand to allow a reduction in the scope of the license to less than the four sites currently included.

B. Miscellaneous Matters

1. HRI's First Motion To Strike

On September 3, 1999, HRI moved to strike a portion of Intervenors' Brief (pages 11-13) and seven of the twelve attachments to that brief. *See* HRI's Response Brief, dated Sept. 3, 1999, at 9-12.[21] In the offending portion of their brief and supporting documents, Intervenors argue that the Staff applied a less rigid standard when reviewing and approving HRI's application than when reviewing and approving other ISL uranium mining applications. In support, Intervenors cite three *in situ* licenses issued in 1987, 1989, and 1990.

We grant the motion to strike. Intervenors failed to raise this issue before the Presiding Officer and are precluded from supplementing the record as of right before us. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996) (and authority cited). Moreover, the Staff issued the three cited licenses before the NRC's 1994 adoption of a performance-based licensing approach for ISL sites. This change in practice undermines the three licenses' relevance to the issues in this proceeding.

2. HRI's Second Motion To Strike, and Motion To Impose Sanctions

On September 14, 1999, HRI moved to strike Intervenors' September 13th Reply Brief on the ground that it had exceeded by six pages the page limit imposed by the Commission in CLI-99-22. HRI also moved for sanctions against both the Intervenors and their counsel in the amount of HRI's costs to prepare its motion to strike. On September 15th, Intervenors withdrew the September 13th version of their Reply Brief and substituted in its stead a Reply Brief that presented

[21] In that brief, counsel for HRI uniformly failed to include the LBP, ALAB, and CLI numbers in the citations to NRC adjudicatory decisions. Counsel is reminded that such references are a necessary part of any such citation.

shorter versions of the same arguments proffered in the September 13th Reply Brief. Intervenors' September 15th filing complied with the Commission's page limit. On September 29th, the NRC Staff filed a brief stating that it considered HRI's September 14th motion to strike moot and recommended against imposing sanctions.

We agree with the Staff that Intervenors' withdrawal of the offending brief rendered moot HRI's motion to strike, and we deny the motion on that ground. We also deny HRI's motion for sanctions. The Commission has never ruled on its authority to assess costs against a party under these circumstances. However, even assuming that we have such authority, we hardly consider the exceeding of a page limit to be an error so great as to merit such a sanction — especially when the offending counsel immediately corrected the error once attention was brought to it.

3. Request for Oral Argument

Intervenors assert that oral argument would assist the Commission in understanding the complex procedural history of this case and the voluminous hearing record. *See* Intervenor Brief at 30. Although we acknowledge that the record in this Subpart L proceeding is indeed voluminous (nearly 500 documents, excluding attachments), our resolution of this petition for review — essentially a postponement of the merits-related financial assurance questions — renders an oral argument unnecessary.

4. Board's Ruling Regarding Groundwater Restoration

Intervenors contend that LBP-99-13 incorrectly chastises Intervenors for failing to provide analysis or expert testimony casting doubt on the NRC Staff's estimate that groundwater could be restored by using nine pore volumes. Intervenors point to their expert Dr. Sheehan's testimony that nine pore volumes seriously underestimates the number of pore volumes required for restoration. *See* Intervenor Brief at 22-23, quoting Sheehan Direct Testimony at 15 n.6, appended to ENDAUM's and SRIC's Brief in Opposition to HRI's Application for a Materials License with Respect to: Financial Assurance for Decommissioning, dated Jan. 11, 1999.

We interpret the Presiding Officer's language not as chastisement, but merely as a finding that Intervenors' analysis and expert testimony were not as convincing as those of the Staff on the issue of groundwater restoration. We agree with the Presiding Officer that Dr. Sheehan's testimony is unconvincing. Dr. Sheehan's attempt to establish the insufficiency of nine pore volumes is comprised of nothing more than a brief footnote alluding summarily to the fact that two other ISL projects required significantly more pore volumes. Dr. Sheehan does not indicate why the

two other ISL projects were geologically analogous to the Crownpoint Uranium Project, nor does he address the pore volumes needed to restore the aquifers at any other ISL projects. (There are currently six ISL projects: Crow Butte, Cogema, Pathfinder North Butte, HRI, PRI, and Rio Algom Smith Ranch.) Finally, we note that the Presiding Officer pointed out that the Staff could, prior to HRI's beginning operations, increase the required number of pore volumes and the surety amount. *See* LBP-99-13, 49 NRC at 236-37, *citing* License Condition 9.5.

5. Remaining Proceedings

We still are considering Intervenors' pending petitions for review of four decisions by the Presiding Officer: LBP-99-18, 49 NRC 415 (1999); LBP-99-19, 49 NRC 421 (1999); LBP-99-30, 50 NRC 77 (1999); and LBP-99-40, 50 NRC 273 (1999). *See* note 4, *supra.* And, as we indicated above, we are reserving for ''unified review'' all abeyance, bifurcation, and segmentation issues raised by Intervenors, and will discuss those issues in a subsequent opinion.

III. CONCLUSION

The Commission therefore orders:

1. The ruling in LBP-99-13 regarding financial assurance is modified in part; the license is conditioned, as set forth above; and the case is remanded to the Presiding Officer for further proceedings consistent with the findings and conclusions in this order.
2. HRI's September 3d Motion to Strike is granted.
3. HRI's September 14th Motion to Strike is denied as moot.
4. HRI's September 14th Motion for Sanctions is denied.
5. Intervenors' request for oral argument is denied.

IT IS SO ORDERED.

For the Commission[22]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of May 2000.

[22] Commissioner Dicus was not available for affirmation to this Memorandum and Order. Had she been present, she would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Frederick J. Shon
Dr. Peter S. Lam

In the Matter of **Docket No. 50-400-LA**
(ASLBP No. 99-762-02-LA)

CAROLINA POWER & LIGHT COMPANY
(Shearon Harris Nuclear Power Plant) **May 5, 2000**

In this 10 C.F.R. Part 2, Subpart K spent fuel pool (SFP) expansion proceeding, in accordance with 10 C.F.R. § 2.1115, the Licensing Board denies the request of Intervenor Board of Commissioners of Orange County, North Carolina (BCOC), to designate for an evidentiary hearing either of the two admitted technical contentions regarding SFP criticality and SFP cooling system piping quality assurance. The Board concludes that (1) BCOC has failed to show there is a genuine and substantial dispute of fact or law that can be resolved only by the introduction of evidence at an evidentiary hearing; and (2) Applicant Carolina Power and Light Company (CP&L) has met its burden to establish that its proposed licensing action is in compliance with the requirements of the Atomic Energy Act and the agency's implementing regulations.

RULES OF PRACTICE: BURDEN OF PROOF (SUBPART K PROCEEDING)

Notwithstanding the agency's rules of practice that place the ultimate burden of proof on the license applicant with respect to a merits disposition of any

substantive matter at issue, relative to the central 10 C.F.R. Part 2, Subpart K issue of the existence of disputed material facts requiring an evidentiary hearing, ''the burden . . . [is] on the party requesting adjudication.'' 50 Fed. Reg. 41,662, 41,667 (1985) (statement of considerations for final rule adopting 10 C.F.R. Part 2, Subpart K).

REGULATORY CONSTRUCTION OR INTERPRETATION: REGULATORY HISTORY

When regulatory language is ambiguous, it is appropriate to resort to the regulatory history of the provision to see what light, if any, it sheds on the question. *See Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 456 (1999) (ambiguity in statutory language requires resort to legislative history).

RULES OF PRACTICE: DISCOVERY (AVAILABILITY IN SUBPART K PROCEEDING AFTER CONTENTION DESIGNATED FOR EVIDENTIARY HEARING)

Nothing in 10 C.F.R. Part 2, Subpart K, suggests that additional discovery is available if an evidentiary hearing is found to be necessary in accordance with 10 C.F.R. § 2.1115.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (REQUIREMENT TO ADDRESS LATE-FILING STANDARDS)

Because a claim not part of an admitted contention can only be considered if it fulfills the 10 C.F.R. § 2.714(a) late-filing standards, a petitioner's failure to address those standards precludes further consideration of the issue. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-68 (1985).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: quality assurance; spent fuel pool cooling systems; spent fuel pool criticality.

MEMORANDUM AND ORDER
(Ruling on Designation of Issues for an Evidentiary Hearing)

Pending before the Licensing Board in this 10 C.F.R. Part 2, Subpart K proceeding are the parties' pleadings addressing the question whether, in accordance with 10 C.F.R. § 2.1115, to designate for an evidentiary hearing either of the two admitted issues of Intervenor Board of Commissioners of Orange County, North Carolina (BCOC). With these contentions — Technical Contention 2 (TC-2), Inadequate Criticality Prevention, and Technical Contention 3 (TC-3), Inadequate Quality Assurance — BCOC challenges Carolina Power and Light Company's (CP&L) December 23, 1998 application to amend the operating license for its Shearon Harris Nuclear Power Plant (Harris or HNP) to permit the addition of rack modules to spent fuel pools (SFPs) C and D and to place those pools in service. BCOC asserts that it has established there are disputed material facts relative to each of the contentions that warrant further exploration in an evidentiary hearing. In contrast, CP&L and the NRC Staff declare that BCOC has failed to establish there is any need for such an additional proceeding and, as a consequence, the portion of this proceeding relating to these contentions should be dismissed.

For the reasons set forth below, we find relative to the issues raised by contentions TC-2 and TC-3 that (1) BCOC has failed to show there is a genuine and substantial dispute of fact or law that can be resolved only by the introduction of evidence at an evidentiary hearing; and (2) based on the record before us, Applicant CP&L has met its burden to establish that its proposed licensing action is in compliance with the requirements of the Atomic Energy Act and the agency's implementing regulations, warranting disposition of these issues in its favor.

I. BACKGROUND

A. Procedural Matters

In the Board's ruling in LBP-99-25, 50 NRC 25 (1999), in which we found that Intervenor BCOC had standing and had presented admissible contentions so as to warrant its admission as a party to this proceeding, we described the circumstances surrounding the CP&L license amendment request as follows:

> In its December 1998 license amendment request, CP&L indicated that the fuel handling building (FHB) at the Harris site was originally designed and constructed with four separate spent fuel pools to accommodate the four reactor units that were planned for the site. Pools A through D were anticipated to serve Units 1 through 4, respectively. Although three of the units were canceled in the early 1980s, the FHB, the four pools (with liners), and the cooling and cleanup system to support pools A and B were completed and turned over to CP&L. Construction on the cooling and cleanup system for pools C and D, however, was

not completed. CP&L also declared that because a Department of Energy high-level waste repository is not expected to be available in the foreseeable future, it has been shipping spent fuel from its three other nuclear facilities for storage in the Harris pools in order to maintain full core offload capability for those facilities. According to CP&L, the present amendment request to utilize pools C and D is designed to provide storage capacity for all four CP&L units — Harris, Brunswick Steam Electric Plant, Units 1 and 2, and H.B. Robinson, Unit 2 — through the end of their current operating licenses.

Id. at 27-28 (citation omitted). Relative to the CP&L amendment request, we admitted contentions TC-2 and TC-3. As admitted, TC-2 provides:

Storage of pressurized water reactor (''PWR'') spent fuel in pools C and D at the Harris plant, in the manner proposed in CP&L's license amendment application, would violate Criterion 62 of the General Design Criteria (''GDC'') set forth in Part 50, Appendix A. GDC 62 requires that: ''Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.'' In violation of GDC 62, CP&L proposes to prevent criticality of PWR fuel in pools C and D by employing administrative measures which limit the combination of burnup and enrichment for PWR fuel assemblies that are placed in those pools. This proposed reliance on administrative measures rather than physical systems or processes is inconsistent with GDC 62.

Id. at 35. In doing so, we found that this contention was adequately supported by two bases, which were summarized as follows:

Basis 1 — CP&L's proposed use of credit for burnup to prevent criticality in pools C and D is unlawful because GDC 62 prohibits the use of administrative measures, and the use of credit for burnup is an administrative measure.

* * * *

Basis 2 — The use of credit for burnup is proscribed because Regulatory Guide 1.13 requires that criticality not occur without two independent failures, and one failure, misplacement of a fuel assembly, could cause criticality if credit for burnup is used.

Id. at 35, 36. So too, we admitted contention TC-3, which provides:

CP&L's proposal to provide cooling of pools C & D by relying upon the use of previously completed portions of the Unit 2 Fuel Pool Cooling and Cleanup System and the Unit 2 Component Cooling Water System fails to satisfy the quality assurance criteria of 10 C.F.R. Part 50, Appendix B, specifically Criterion XIII (failure to show that the piping and equipment have been stored and preserved in a manner that prevents damage or deterioration), Criterion XVI (failure to institute measures to correct any damage or deterioration), and Criterion XVII (failure to maintain necessary records to show that all quality assurance requirements are satisfied).

Moreover, the Alternative Plan submitted by Applicant fails to satisfy the requirements of 10 C.F.R. § 50.55a for an exception to the quality assurance criteria because it does not describe any program for maintaining the idle piping in good condition over the intervening years between construction [and] implementation of the proposed license amendment, nor does it describe a program for identifying and remediating potential corrosion and fouling.

> The Alternative Plan submitted by Applicant is also deficient because 15 welds for which certain quality assurance records are missing are embedded in concrete and inspection of the welds to demonstrate weld quality cannot be adequately accomplished with a remote camera.
>
> Finally, the Alternative Plan submitted by Applicant is deficient because not all other welds embedded in concrete will be inspected by the remote camera, and the weld quality cannot be demonstrated adequately by circumstantial evidence.

Id. at 36-37.

Following the Board's ruling on standing and contentions, as was its right pursuant to 10 C.F.R. § 2.1109, Applicant CP&L filed a timely request that the procedural construct of 10 C.F.R. Part 2, Subpart K, be utilized to conduct this proceeding. As a consequence, in accordance with section 2.1111, the Board gave the parties a limited period within which to conduct discovery regarding these contentions.[1] Thereafter, as is provided for in section 2.1113(a), on January 4, 2000, the parties submitted written summaries of the facts, data, and arguments on which they intended to rely at an oral argument intended to provide them with an opportunity to discuss whether or not there were any genuine and substantial factual or legal disputes that merited further exploration in an evidentiary hearing. Then, on January 21, 2000,[2] the Board conducted a day-long proceeding in which it entertained the parties' oral presentations on the question whether there were disputed factual or legal issues relative to either of the admitted contentions that merited further consideration in an evidentiary hearing with live witnesses and party cross-examination. *See* Tr. at 190-442.

B. Technical/Regulatory Matters

As it is relevant to this proceeding and is described in the NRC Staff's January 4, 2000 written summary, the December 23, 1998 CP&L license amendment request at issue in this proceeding contains two parts:[3]

> 1. A revision to Technical Specification (TS) 5.6 to identify pressurized water reactor (PWR) burnup restrictions, boiling water reactor (BWR) enrichment limits, pool capacities, heat load limitations and nominal center-to-center distances between fuel assemblies in the racks to be

[1] Although the original discovery period was limited to the 90 days specified in section 2.1111, the Board granted an unopposed 4-day extension to permit several depositions to be completed. *See* Licensing Board Order (Granting Discovery Extension Request) (Oct. 18, 1999) at 1-2 (unpublished).

[2] Although section 2.1113(a) provides that the parties' oral presentations should occur within 15 days of the filing of the parties' written summaries, the 17-day interval here was arrived at after consultation with the parties in response to a Staff request to extend the deadline originally set for the filing of written summaries. *See* Licensing Board Memorandum and Order (Extending Time for Written Summaries and Oral Argument) (Dec. 13, 1999) at 1-3 (unpublished).

[3] The application also addresses a safety issue regarding the additional heat load on the component cooling water system, which is not part of the current controversy before the Board. *See* NRC Staff Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on Technical Contentions 2 and 3 (Jan. 4, 2000) at 7.

installed in SFPs ''C'' and ''D.'' CP&L proposed to use higher density fuel racks in SFPs C and D than are currently used in SFPs A and B. The use of the higher density racks requires additional administrative controls on PWR burnup and BWR enrichment to ensure [K-effective (Keff)] less than or equal to 0.95.

2. An alternative plan in accordance with the requirements of 10 CFR 50.55a to demonstrate an acceptable level of quality and safety in completion of the component cooling water (CCW) and SFPs ''C'' and ''D'' cooling and cleanup system piping. In order to activate SFPs C and D, it is necessary to complete construction of the cooling and cleanup system for these pools and to install tie-ins to the existing HNP Unit 1 [CCW system] to provide heat removal capabilities. Approximately 80% of the SFP cooling and cleanup system piping and the majority of the CCW piping was installed during the original plant construction. At the time that construction on the SFP cooling system was discontinued following cancellation of HNP Unit 2, a formal turnover of the partial system was not performed and CP&L has since discontinued its N Certificate program. Also, some of the field installation records for the completed piping are no longer available. As a result, the system when completed will not satisfy [American Society of Mechanical Engineers (ASME)] Section III code requirements (i.e., will not be N stamped). Therefore, CP&L submitted an Alternative Plan in accordance with 10 CFR 50.55a(a)[(3)] to demonstrate that the completed system will provide[] an acceptable level of quality and safety.

NRC Staff Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on Technical Contentions 2 and 3 (Jan. 4, 2000) at 5-6 [hereinafter Staff Summary].

Relative to these revisions, the scope and interpretation of several regulatory provisions are at issue. In the case of contention TC-2, which concerns the issue of criticality control,[4] a measure of significant concern is General Design Criterion (GDC) 62, which provides:

Prevention of criticality in fuel storage and handling. Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.

[4] In its January 4, 2000 summary, the Staff provides the following discussion of criticality that outlines the basic technical principals involved relative to contention TC-2:

Criticality is the achievement of a self-sustaining nuclear chain reaction. The chain reaction proceeds as atoms of a fissile material absorb slow (thermal) neutrons and split (fission) into new light atoms (i.e., fission products) and additional neutrons that, in turn, interact with additional fissile atoms. Neutrons resulting from fission have high energy and are called ''fast'' neutrons. Fast neutrons are not readily captured in U-235, the fissile material originally present in fresh fuel. Rather, a neutron must lose energy and ''slow down,'' or become ''thermalized'' (a thermal neutron), in order to be readily captured in U-235 and cause fission.

In order for fast neutrons to slow down, they must collide with, and transfer energy to, atoms. This process is called ''moderation.'' A light element (such as hydrogen) is an effective moderator because the mass of its nucleus is on the same order as that of a neutron. Therefore, upon initial collision, the neutron imparts most of its energy to the hydrogen nucleus and becomes thermalized. Water, with its high hydrogen content, is the moderator in a light water reactor (LWR) such as Harris.

After being created through fission, during the process of moderation, and after reaching thermal energy levels, a neutron may undergo several events. It may be absorbed by nonproductive capture in the fuel, the moderator, or the structural materials. It may leak from the reactor system and either be reflected back into the system or be lost. Finally, it may be absorbed by the U-235, cause fission, and produce more fast neutrons.

(Continued)

10 C.F.R. Part 50, App. A, Criterion 62. Also at issue is the so-called ''double contingency principle'' (DCP) of Staff draft Regulatory Guide 1.13, App. A, at 1.13-9 (proposed rev. 2, Dec. 1981) (emphasis in original), which states:

> At all locations in the [light water reactor (LWR)] spent fuel storage facility where spent fuel is handled or stored, the nuclear criticality safety analysis should demonstrate that criticality could *not* occur without at least two unlikely, independent, and concurrent failures or operating limit violations.

In connection with contention TC-3 and the so-called Alternative Plan submitted by CP&L to show that its cooling and cleanup system piping meets agency regulatory requirements, several different provisions of 10 C.F.R. § 50.55a are potentially relevant, including the following:

> (a)(1) Structures, systems, and components must be designed, fabricated, erected, constructed, tested, and inspected to quality standards commensurate with the importance of the safety function to be performed.
>
> * * * *
>
> (3) Proposed alternatives to the requirements of . . . this section or portions thereof may be used when authorized by the Director of the Office of Nuclear Reactor Regulation. The Applicant shall demonstrate that:
>
> (i) The proposed alternative would provide an acceptable level of quality and safety . . . .

In particular, BCOC contends that the CP&L Alternative Plan proposal fails to satisfy three of the quality assurance (QA) criteria of Appendix B to 10 C.F.R. Part 50. In describing these criteria, the Staff correctly notes:

When the process continues on its own, the system of atoms of fissile material is said to be critical. The measure of criticality is the effective neutron multiplication factor, *k*-effective, or k_{eff}. The multiplication factor is the ratio of the rate of neutron production to neutron loss due to fission, nonproductive capture, and leakage. *K*-infinity, or k_{inf}, is the infinite multiplication factor, which refers to the neutron muliplication of an infinite system. For a given system or array of fuel, k_{inf} is always greater than k_{eff} because k_{inf} does not include loss of neutrons from leakage. Criticality is achieved when k_{eff} is equal to 1.0. When k_{eff} is less than 1.0, the system is subcritical. Criticality can only occur in an array of LWR fuel if sufficient fissile material is available in a near-optimum geometry and a moderator (water) is present. No array of LWR fuel can achieve criticality without water moderation present in the array. Well-developed mathematical models (equations) exist in present-day computer codes and are used to compute k_{eff}.

''Reactivity'' is defined as $(k_{eff} - 1)/k_{eff}$. When fuel is irradiated in a reactor as a result of operation and power generation, the reactivity of the fuel decreases over the design life of the fuel assembly. This reduction of reactivity with irradiation is called ''burnup.'' Burnup is caused by the change in fissile content of the fuel (i.e., depletion of U-235 and production of Pu-239 and other fissile actinides), the production of actinide absorbers, and the production of fission product neutron absorbers. Before each reactor operating cycle, a licensee performs a reload analysis that predicts the burnup of each fuel assembly during the cycle. These calculations are confirmed during the cycle by measurements of various operating characteristics, such as boron concentration and power distribution. After every operating cycle (typically 1 to 2 years), approximately $^1/_3$ of the fuel in a reactor is removed because its reactivity is too low to effectively contribute to power generation in the reactor environment. This irradiated (or spent) fuel is generally placed in a spent fuel pool at the reactor site and is replaced in the reactor by fresh (unirradiated) fuel.

Staff Summary at 20-22 (citations omitted).

> Appendix B requires the development and application of a [QA] program for the design, fabrication, construction, and testing of the structures, systems, and components of the facility at the construction permit stage, and a QA program for man[a]gerial and administrative controls at the operating license stage. Appendix B establishes the QA requirements for such structures, systems and components.
>
> Criterion XIII provides, as pertinent here, that ''[m]easures shall be established to control the handling, storage, shipping, cleaning and preservation of material and equipment in accordance with work and inspection instructions to prevent damage or deterioration.''
>
> Criterion XVI provides that ''[m]easures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. . . .['']
>
> Criterion XVII provides that ''[s]ufficient records shall be maintained to furnish evidence of activities affecting quality. . . . Records shall be identifiable and retrievable.['']

Staff Summary at 11.

II. ANALYSIS

A. Standards Governing 10 C.F.R. § 2.1115 Determination Regarding the Need for an Evidentiary Hearing to Resolve Admitted Issues

The procedures in 10 C.F.R. Part 2, Subpart K, were established in response to a congressional mandate found in the Nuclear Waste Policy Act of 1982 (NWPA). Specifically, NWPA § 134(a)-(b), 42 U.S.C. § 10154(a)-(b), states that for any reactor operating license amendment ''to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor,'' the Commission is to provide parties to any hearing proceeding on the expansion amendment with the opportunity to present facts, data, and arguments, by way of written summaries and sworn testimony, and an oral argument. Based on the summaries and the argument, the Commission then is to designate ''any disputed questions of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing'' if the Commission finds that ''there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence at an adjudicatory hearing,'' and ''the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.'' Sections 2.1113 and 2.1115 of 10 C.F.R. incorporate these requirements. In addition, section 2.1115(a)(1)-(2) provides that the presiding officer shall ''[d]esignate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing,'' and ''[d]ispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.'' Moreover, as we have previously noted, notwithstanding the agency's rules of practice that place the ultimate burden of proof on CP&L, as the license Applicant, with respect to a merits disposition

of any substantive matter at issue in this proceeding (i.e., the admitted BCOC contentions), relative to the central Subpart K issue of the existence of disputed material facts requiring an evidentiary hearing, '' 'the burden . . . [is] on the party requesting adjudication.' '' Licensing Board Memorandum and Order (Subpart K Oral Argument Procedures) (Jan. 13, 2000) at 2 (quoting 50 Fed. Reg. 41,662, 41,667 (1985) (statement of considerations for final rule adopting 10 C.F.R. Part 2, Subpart K)) (unpublished).

It is against these standards that we review the parties' filings and oral argument presentations.

B. Contention TC-2

1. Basis One

DISCUSSION: Detailed Summary of Facts, Data and Arguments and Sworn Submission on Which [BCOC] Intends to Reply at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with [CP&L] Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Harris Nuclear Power Plant with Respect to Criticality Prevention Issues (Contention TC-2) (Jan. 4, 2000) at 19-41 [hereinafter BCOC TC-2 Summary]; Summary of Facts, Data, and Arguments on Which Applicant Proposes to Rely at the Subpart K Oral Argument (Jan. 4, 2000) at 29-55 [hereinafter CP&L Summary]; Staff Summary at 31-40; Tr. at 218-32, 254-62, 276-78, 285-86, 287-92, 296-98, 305-08.

a. BCOC Position

Regarding basis one of contention TC-2, referencing the supporting affidavit of Institute for Resource and Security Studies executive director Dr. Gordon Thompson, BCOC asserts that the CP&L license application is inadequate because it places impermissible reliance on administrative procedures and controls for criticality prevention. Instead, according to BCOC, CP&L should be relying entirely on physical systems or processes as required by the proper interpretation of GDC 62. Noting that under Part 50, Appendix A, GDCs are considered principal reactor design criteria minimum requirements, *see* 10 C.F.R. Part 50, App. A, Introduction, BCOC declares that the requirement of GDC 62 that criticality in a facility's fuel storage and handling system must be prevented by ''physical systems or processes, preferably by use of geometrically safe configurations,'' clearly precludes the use of administrative controls, such as the burnup/enrichment level controls and SFP soluble boron presence that are being relied upon by CP&L to avoid criticality problems. According to BCOC, this follows from the plain language of GDC 62, which specifies physical systems or processes and provides the example of safe fuel bundle geometrical configurations.

Moreover, BCOC declares, notwithstanding the fact that any physical measure has some administrative component, there is a basic difference between a physical and administrative measure in that the latter requires continuing human interaction and concomitantly is subject to human error.

Relative to the first point, BCOC asserts that the rulemaking history of GDC 62 supports its plain language argument, including Atomic Energy Commission (AEC) pre-rulemaking documents; the June 1967 AEC draft GDC, which (like the pre-rulemaking documents) stated that ''[s]uch means as geometrically safe configurations shall be emphasized over procedural controls''; September 1967 Oak Ridge National Laboratory (ORNL) comments on the draft criticizing the reference to procedural controls; and the AEC February 1971 final rule, which provided the present GDC 62 language without any reference to procedural controls. BCOC further maintains that other relevant NRC criticality standards, including (1) 10 C.F.R. § 70.24, regarding criticality monitoring for significant special nuclear material quantities; (2) section 50.68, which establishes a blanket exemption from section 70.24 for those agreeing to follow specified criticality accident prevention requirements; and (3) section 72.124, which establishes criticality control measures for independent spent fuel storage installations (ISFSIs), do not contradict this plain language meaning.

Against this backdrop, BCOC concludes it is clear that the CP&L license amendment proposal to restrict the burnup/enrichment of the fuel being placed in the pools to suppress criticality, which relies on ongoing administrative controls to maintain those limits, violates the language and intent of GDC 62. Nor does Staff draft Regulatory Guide 1.13, which allows fuel enrichment and burnup limits for spent fuel pool criticality control, permit a different result given that this Staff guidance document cannot modify or circumvent a regulatory requirement like GDC 62. Finally, according to BCOC, the Staff's willingness to permit CP&L (and numerous others) to use burnup/enrichment controls under Regulatory Guide 1.13 without performing any kind of a systematic safety analysis is inconsistent with its public health and safety responsibilities, particularly in light of several reported incidents involving SFP assembly mispositioning and a boron dilution event that are described in Appendix C to the BCOC January 4, 2000 summary.

b. CP&L Position

CP&L first asserts that BCOC has impermissibly changed its position regarding basis one from the assertion that no administrative measures are allowed under GDC 62 to a declaration that there are appropriate administrative measures and that the burnup/enrichment controls sought by CP&L fall into the impermissible category because those measures must be maintained on an ongoing basis. Additionally, referencing the affidavit of Holtec International Senior Vice President and Chief Nuclear Scientist Dr. Stanley E. Turner, CP&L declares that the Staff's con-

sistent interpretation of GDC 62 to allow burnup/enrichment limits is appropriate because (1) every practical spent fuel pool criticality control measure — geometric separation, solid neutron absorbers, soluble neutron absorbers, fuel reactivity, and fuel burnup — is a physical process or system involving some administrative measures; (2) the regulatory history of GDC 62 shows that administrative measures have always been understood to be part of criticality control physical systems or processes; (3) the recently adopted section 50.68 explicitly contemplates and permits criticality control administrative measures, including fuel enrichment and burnup limits; (4) the Staff's two-decades-old interpretation of GDC 62 should be accorded considerable weight; and (5) the new BCOC interpretation highlights the absurdity of its original, ''no administrative measures'' position.

On the initial point, CP&L declares that BCOC has admitted in discovery that the five criticality control measures listed above are physical systems or processes and that each is implemented using administrative measures. CP&L also maintains there is nothing in GDC 62 that differentiates between criticality controls based on the timing or duration of the implementing administrative measures involved. In connection with the regulatory history of GDC 62, CP&L maintains that the metamorphosis from the July 1967 draft standard referenced by BCOC to the final language establishes that the reference to ''physical procedures or processes'' includes administrative controls like enrichment/burnup credits while the stated preference for the ''use of geometrically safe configurations'' is not intended to foreclose the use of such administrative controls.

Regarding 10 C.F.R. § 50.68, which provides requirements intended to prevent criticality accidents in instances when a section 70.24 monitoring system is not utilized, CP&L asserts that this recently adopted provision also establishes the viability of administrative controls under GDC 62. Noting that, like GDC 62, section 50.68 is intended to prevent inadvertent criticality events, CP&L discusses various Staff and Commission statements in the context of the 1998 rulemaking regarding section 50.68 that it contends establish these administrative controls are permissible under GDC 62. CP&L also relies on the language of section 50.68(b)(4) regarding the effects of fuel burnup, which it finds implies the fuel burnup limits are a permitted criticality control method, and of section 50.68(b)(7) permitting the use of fuel enrichment limits for criticality control, as evidence that these control measures are within the confines of GDC 62.

Also compelling, CP&L declares, is the consistent Staff interpretation of GDC 62 to include the use of fuel enrichment and burnup limits for criticality control, which goes back to the adoption of draft Regulatory Guide 1.13 in 1981, and includes some twenty Staff license amendment approvals of the use of fuel enrichment and burnup limits as criticality controls. Also relevant, CP&L asserts, is the Staff's August 1998 Criticality Guidance document, which CP&L declares effectively replaces Regulatory Guide 1.13 and approves fuel enrichment and burnup limits as criticality control measures.

Finally, CP&L disparages what it labels BCOC's attempt to change its admitted contention during discovery by outlining a position that some administrative measures are permitted under GDC 62, but not those proposed by CP&L relative to its SFP expansion request. In addition to being impermissibly late, CP&L asserts, there is nothing in the text of GDC 62 that differentiates between criticality control methods based on the timing and duration of administrative measures implementation. It also finds inapposite the BCOC Summary Appendix C incidents involving SFP assembly mispositioning and a boron dilution event. According to CP&L, of the nineteen incidents specified, only six apparently involve fuel misplacement, as would be relevant to the BCOC contention, and of those, five involve fuel loading in a checkerboard pattern that is not applicable to the Harris facility. The sixth, involving a failure to verify independently fuel move sheets, also is not applicable, according to CP&L, because, as is explained in the accompanying affidavit of CP&L Spent Pool Project Supervisor R. Steven Edwards, CP&L has a series of redundant checks that will prevent such an incident from occurring.

c. Staff Position

According to the Staff, the language of GDC 62, its regulatory history, Staff practice under that provision, and agency adjudicatory and rulemaking action authorizing the use of administrative controls to prevent criticality, all support the CP&L position relative to this portion of contention TC-2. Like CP&L, the Staff finds that the change in the language of GDC 62 from the original AEC proposal to the present wording does not preclude the use of administrative controls, but instead reflects a preference for geometrical configurations as a criticality control measure. The Staff also notes that because GDC 62 applies to both fuel handling and fuel storage systems and because the former necessarily requires the use of administrative controls as single fuel assemblies are moved, to adopt the BCOC reading of that provision would undermine the imposition of fuel handling criticality requirements. In addition, the Staff declares that over the past 18 years under GDC 62 it consistently has authorized the administratively controlled criticality measure of burnup credit without an accident, permissions that in several instances were subjected to unsuccessful adjudicatory challenges. Also, the Staff points out, several agency adjudicatory decisions appear to accept the Staff-endorsed concept of administrative controls to prevent SFP criticality, including *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 564-65, 571 (1983), and *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-89-12, 29 NRC 441, 454-56, *aff'd on other grounds,* ALAB-921, 30 NRC 177 (1989). Moreover, according to the Staff, in adopting section 50.68 in 1998, the agency endorsed the use of administrative controls relative to the criticality control measure of soluble boron credit (section 50.68(b)(2)-(4)). Finally, the Staff rejects the BCOC assertion that the absence

of human actions and administrative controls makes dry cask storage safer than SFP storage as beyond the scope of the contention and not reflective of the Commission's determination that both storage methods are safe.

d. Board Ruling

Although BCOC declares the language of GDC 62 to be clear, we find it considerably less than so in the context of this dispute. As the shifting debate between the parties over the scope of the term ''physical procedures or processes'' illustrates, there is no clear-cut demarcation to differentiate the administrative and nonadministrative aspects of the criticality control procedure/processes at issue here so as to place any of them either inside or outside this label.[5] As such, we think it appropriate to resort to the regulatory history of this provision to see what light, if any, it sheds on the question of whether the enrichment/burnup/boron solubility measures proposed by CP&L fall within the confines of those criticality control measures sanctioned by GDC 62. *See Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 456 (1999) (ambiguity in statutory language requires resort to legislative history).

CP&L and the Staff have the better of the argument here. The critical item is the action of the AEC, the NRC's regulatory predecessor, in response to the comments of ORNL to the 1967 proposed rule version. At that juncture, the proposed GDC provided:

> Criticality in new and spent fuel storage shall be prevented by physical systems or processes. Such means as geometrically safe configurations shall be emphasized over procedural controls.

CP&L Summary, exh. 16A (32 Fed. Reg. 10,213, 10,217 (1967)). From this formulation, it is clear that with the term ''physical systems or processes,'' the first sentence defines the scope of the appropriate methods of criticality control, while the second expresses the agency's preference among those methods, i.e., geometries over other controls. In response to this proposed rule, the Commission received a comment from ORNL that expressed uncertainty over the implications of the reference to ''processes'' at the end of the first sentence and declared that ''nor do we believe that it is practical to depend upon procedural controls to prevent accidental criticality in storage facilities of power reactors.'' *Id.* exh. 17A (Sept. 6, 1967 Letter from William B. Cottrell, Director, ORNL Nuclear Safety information Center, to H.L. Price, AEC Director of Regulation, encl. at 11)). ORNL thus suggested that the last sentence be changed to read '' '[s]uch

[5] Indeed, the fact that none of the parties seems to be able to define a criticality control procedure that falls wholly inside of or outside of the realm either of the ''physical'' or the ''administrative'' strengthens our resolve on this point. *See* Tr. at 226-28, 261-62.

means as geometrically safe configurations shall be used to insure that criticality cannot occur.' '' *Id.* Albeit without discussion, the agency revised the final rule to its present configuration by incorporating the second suggestion, i.e., to indicate that geometric configuration is a preference, but without deleting the reference to ''processes'' or, it seems apparent, the administrative measures they encompass.

While this arguably is dispositive of the matter at issue in this portion of contention TC-2, we also agree with CP&L and the Staff that further support for this conclusion comes from recent agency adoption of section 50.68 and the longstanding Staff interpretation embodied in draft Regulatory Guide 1.13 and prior adjudicatory treatment of criticality-related matters. The language of section 50.68(b)(2), (4), (7) seems to contemplate the use of enrichment, burnup, and soluble boron as criticality control measures.[6] So too, the Staff's nearly 20-year-old interpretation in the context of draft Regulatory Guide 1.13, albeit not dispositive, nonetheless reinforces our conclusion that this is the appropriate construction of this provision, see *Petition for Emergency and Remedial Action,* CLI-78-6, 7 NRC 400, 406-07 (1978), as do the adjudicatory decisions cited by the Staff.

Finally, the ''problem'' cases discussed by BCOC in Appendix C to its written summary as evidence of the Staff need to require an additional analysis are wholly inadequate as a basis for further adjudicatory proceedings relative to this concern. As CP&L correctly notes, the fuel mispositioning cases are not relevant to the Harris configuration and, as is apparent from the discussion of boron control measures in the affidavit of Mr. Stevens, *see* CP&L Summary, exh. 1, at 15-17, the boron dilution incident cited by BCOC has little relevance in the context of the Harris facility.[7]

In sum, in accordance with 10 C.F.R. § 2.1115(a), we conclude relative to this portion of contention TC-2 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based upon the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

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[6] In connection with this provision, we note that section 50.68(b)(4) uses the term ''maximum fuel assembly reactivity.'' Although it does not affect our determination regarding this provision, we note that ''reactivity'' is generally considered to be a property of the entire SFP rather than an individual fuel assembly. Individual assemblies are considered to have ''reactivity worth,'' a value influenced by parameters such as original enrichment, burnup, irradiation history, element design, and pool position, that is imparted to the pool's reactivity value upon insertion.

[7] When questioned about the seeming lack of ''significance'' of these incidents, BCOC's response was to promise more information after further discovery. *See* Tr. at 242; *see also* Tr. at 439-41. Putting aside the fact that nothing in Subpart K suggests that additional discovery is available if an evidentiary hearing is found to be necessary, this response is not one likely to provide an impetus for the Board to convene such a hearing.

2. Basis Two

DISCUSSION: BCOC TC-2 Summary at 41-46; CP&L Summary at 55-74; Staff Summary at 26-29, 40-44; Tr. at 232-39, 245-46, 262-85, 292-304, 308-15, 318-24.

a. BCOC Position

BCOC has provided four interrelated arguments regarding basis two of contention TC-2. Among other things, the BCOC summary is supported by the affidavit of Dr. Gordon Thompson and Appendix C to its January 4, 2000 summary, discussed above, that describes some incidents it believes are relevant to the potential for criticality in spent fuel pools.

Relative to this portion of contention TC-2, BCOC first asserts that draft Regulatory Guide 1.13 calls for the analysis of situations under the double contingency principle involving ''at least'' two failures or violations of operating limits. According to BCOC, for an analysis to meet this requirement, it must identify the sets of failures or violations that might cause criticality, and then evaluate these failures or violations in combinations of at least two, to determine which combinations will cause criticality. This process will yield an envelope of criticality that bounds the combinations of failures and violations that produce criticality. BCOC states that such an envelope cannot be identified if failures or violations are evaluated one at a time. When the envelope has been identified, the DCP can be applied, with consideration as to whether the failures or violations are unlikely, independent, or concurrent. BCOC argues that CP&L has not gone through this process, but has only considered a single failure, limited to the mispositioning of one fresh PWR fuel assembly.

BCOC also argues that, when the envelope of criticality has been determined for a particular situation, such as the storage of PWR fuel in Harris pools C and D, application of the DCP requires a determination, for each failure or violation represented in the envelope, about whether that failure or violation is unlikely, and whether it is independent of and concurrent with the other failures or violations represented in the envelope. BCOC believes that, for Harris pools C and D, the most significant failures or violations will be fuel mispositioning events and boron dilution events. BCOC asserts that CP&L has failed to determine if these events are unlikely, independent, or concurrent.

BCOC further declares that, in considering possible criticality accidents at Harris pools C and D, CP&L assumes that the mispositioning of fuel is an unlikely event, but CP&L offers no evidence to support this assumption. BCOC maintains that, as shown in Appendix B and discussed in Appendix C of its January 4, 2000 filing, experience shows that fuel mispositioning is likely. Moreover, BCOC believes that, in a criticality accident involving fuel mispositioning and soluble boron dilution,

these events will typically be consecutive rather than concurrent. High-reactivity fuel could be mispositioned in a fuel pool prior to or after a boron dilution event, or during both periods if an event sequence involving mispositioning of multiple fuel assemblies spans a time period during which boron dilution occurs. BCOC argues that, were CP&L to treat fuel mispositioning as a likely occurrence, then the criticality analysis would necessarily consider fuel mispositioning in combination with a complete absence of soluble boron. Indeed, BCOC asserts, this would be so even employing the allegedly invalid, nonconservative version of the DCP that is articulated in the so-called Kopp Memorandum, an August 19, 1998 memorandum providing guidance on regulatory requirements relating to SFP criticality analysis authored by Staff witness Dr. Laurence Kopp, an NRC senior reactor engineer. Similarly, were CP&L to consider mispositioning and soluble boron dilution as consecutive occurrences, the criticality analysis would necessarily consider these occurrences in combination. BCOC states that calculations by CP&L and the Staff, summarized in Appendix C to its January 2000 summary, show that mispositioning of a single fresh PWR fuel assembly in Harris pools C or D would, in the absence of soluble boron, cause the *k*-effective to exceed the regulatory limit of 0.95. Therefore, BCOC believes that mispositioning of more than one assembly could result in a potentially serious supercritical configuration.

In addition, BCOC maintains that, in considering the role of fuel mispositioning as a potential cause of criticality, CP&L has limited its attention to the mispositioning of only one PWR fuel assembly. Underlying this restriction is an assumption that a single failure or violation will lead to the mispositioning of only one fuel assembly. BCOC asserts that Appendices B and C to its January 2000 summary demonstrate that a single error can lead to the mispositioning of multiple fuel assemblies. BCOC thus claims that, in addition to its improper reliance on administrative measures for criticality control, CP&L's misapplication of the DCP in the manner discussed above has yielded a criticality analysis that is nonconservative and inadequate to provide reasonable assurance that public health and safety will be protected in the event of an accident.

To support this position, referencing the December 1998 CP&L license amendment application, the affidavit of Staff witness Dr. Kopp, and an October 1983 American National Standards Institute (ANSI) Standard 57.2-1983, entitled ''Design Requirements for Light Water Reactor Spent Fuel Storage Facilities at Nuclear Power Plants,'' BCOC asserts that the *K*-effective value for SFP criticality must be less than 0.95, with a 95% probability at a 95% confidence level, under all conditions. More specifically, BCOC asserts that this requirement of keeping *K*-effective below 0.95 applies even under the scenario in which a fresh fuel assembly is misplaced concurrent with the accidental loss of all soluble boron. BCOC thus maintains that all the analyses CP&L and the Staff have performed and provided in their January 4, 2000 summaries only demonstrate that CP&L has not resolved

the factual dispute as to whether a single misplaced spent assembly would result in criticality above acceptable levels under applicable NRC and industry standards.

b. CP&L Position

CP&L supports its January 4, 2000 summary on this matter with the affidavits of Dr. Everett L. Redmond II, a nuclear engineer with Holtec International with responsibility for performing nuclear criticality analyses for spent fuel storage systems, and Michael J. DeVoe, a CP&L nuclear engineer responsible for performing the CP&L review of the nuclear criticality analyses for Harris spent fuel pools C and D. Regarding this portion of the contention, CP&L first asserts that basis two raises a question of fact, i.e., will a single misplaced fuel assembly, involving a fuel element of the wrong burnup or enrichment, cause criticality in Harris SFPs C and D? According to CP&L, disposition of this question requires the resolution of two additional queries: (1) Did CP&L perform a criticality analysis of a single fuel assembly misplacement, involving a fresh fuel assembly with the maximum permissible reactivity at Harris, for the spent fuel storage racks in Harris pool C and D; and (2) does that criticality analysis demonstrate that a single fuel assembly misplacement, involving a fresh fuel assembly with the maximum permissible reactivity at Harris, will not cause criticality in Harris pools C and D? CP&L claims the Board should dispose of basis two in its favor because these two questions can be answered in the affirmative.

CP&L declares that following the admission of basis two, it performed an analysis to evaluate the misplacement of a single fuel assembly in the spent fuel storage racks for Harris SFPs C and D. The results of this analysis are documented in Holtec Report No. HI-992283, Evaluation of Fresh Fuel Assembly Misload in Harris Pools C and D (rev. 0 Sept. 20, 1999), which CP&L refers to as the Harris Misplacement Analysis. The analysis, performed by Dr. Redmond, evaluates a fuel assembly misplacement specifically for the spent fuel storage racks for Harris pools C and D using the specific fuel assembly characteristics and spent fuel storage rack designs for Harris spent pools C and D. The analysis uses the same methodology, including the assumptions and modeling of the storage rack design and fuel assembly characteristics, as was developed for — and used in — the so-called Harris Base Criticality Analysis that was generated initially for the CP&L license amendment application.

According to CP&L, the misplacement analysis evaluates a single fresh fuel assembly mispositioning of the maximum permissible enrichment for Harris in a spent fuel storage rack that is otherwise loaded with fuel of the maximum permissible reactivity allowable under the burnup and enrichment curve. A maximum reactivity fresh fuel assembly for Harris would be a Westinghouse 15 $\times$ 15 PWR fuel assembly enriched to 5% (by weight) uranium-235. The analysis considered the presence of 2000 parts per million (ppm) of soluble boron in the

pool water, as required by Harris operating procedures. Furthermore, the analysis also evaluates criticality safety for two additional boron concentrations: (a) 400 ppm of soluble boron to confirm CP&L statements in its June 14, 1999 response to a Staff requests for additional information (RAI); and (b) 0 ppm of soluble boron. While not considered a credible scenario, CP&L states this analysis for zero boron concentration was performed to render moot any further discussion of the loss of soluble boron relative to this issue.

CP&L asserts that the results of this analysis demonstrate that a single fuel assembly misplacement, involving a fuel element of the wrong burnup or enrichment, will not cause criticality in Harris spent fuel pools C and D.[8] The analysis demonstrates that the spent fuel in the storage racks, with the required 2000 ppm of soluble boron in the SFP water, will remain subcritical at a *k*-effective of 0.7783 following the misplacement of a fresh fuel assembly with the maximum permissible enrichment at Harris. The analysis also demonstrates that the spent fuel in the storage racks will remain subcritical, with a *K*-effective of 0.9352, following a misplacement event assuming only 400 ppm of soluble boron is present in the SFP water. Finally, CP&L claims the analysis demonstrates that the spent fuel in the storage racks for Harris pools C and D will remain subcritical following a fresh fuel assembly misplacement event even if no soluble boron is present in the spent fuel pool water, with a *K*-effective of 0.9932.

CP&L states that these results affirmatively demonstrate that (1) CP&L has performed a criticality analysis of a single fuel assembly misplacement, involving a fresh fuel assembly with the maximum permissible reactivity at Harris, for the spent fuel storage racks in Harris pools C and D; and (2) the criticality analysis demonstrates that a single fuel assembly misplacement, involving a fresh fuel assembly fuel element with maximum permissible reactivity at Harris, will not cause criticality in Harris pools C and D. CP&L concludes that because the two questions it posed have been answered affirmatively, and BCOC does not dispute those answers, the Board should dispose of basis two of contention TC-2 in its favor.

Additionally, CP&L makes the following observations to bolster its argument that the likelihood of misplacement of a single fuel assembly is very small: (1) fresh fuel assemblies are first handled dry, in open air, and only then are positioned in pool A, which is located near Harris Unit 1 some distance from SPFs C and D; (2) due to financial considerations, there are usually only fifty-seven fresh assemblies on site at anytime; (3) proposed Harris technical specifications will prohibit loading of fresh fuel assemblies in pools C and D; and (4) information on

[8] CP&L states that the methodology, assumptions, and results of the Harris Misplacement Analysis were reviewed and approved under the quality assurance requirements of both Holtec and CP&L. CP&L argues that these quality assurance reviews of the analysis by qualified nuclear criticality analysts provide reasonable assurance that the analysis results are valid. It also notes that Dr. Thompson, as BCOC's expert, did not challenge the validity of the analysis.

fresh fuel movements is independently verified through two sources and is also tracked in a QA computer database.

CP&L also disputes BCOC's assertions that *K*-effective should be kept below 0.95 for all conditions according to applicable NRC and industry standards. CP&L asserts that 10 C.F.R. § 50.68(b)(4) should be the ultimate guidance on this subject and it permits a *K*-effective value above 0.95 (at a 95% probability, 95% confidence level), as long as it remains below 1.0, when credit is taken for soluble boron and when the spent fuel pool is accidentally flooded with pure water.

Finally, CP&L asserts that several new issues were raised by BCOC that should be dismissed. As has already been discussed, even though CP&L believes the first issue — the need for an evaluation of the loss of all soluble boron in the pool water concurrent with a fuel assembly misplacement — is not required under NRC regulations, it notes it has performed an analysis that demonstrates the spent fuel storage racks for Harris pools C and D will remain subcritical (*K*-effective of 0.9932) for this scenario. CP&L maintains this issue is resolved.

The same is true for the second issue — need to evaluate the concurrent misplacement of multiple fuel assemblies. While maintaining such a study is not required under NRC regulations, CP&L cites the results of a November 1999 Staff analysis demonstrating that, at a boron concentration of 2000 ppm, the spent fuel storage racks for Harris SFPs C and D will remain subcritical (*K*-effective of 0.98) when the storage racks are filled entirely with misloaded fresh fuel assemblies. Therefore CP&L maintains this issue is now resolved as well.

The third new issue — the need to analyze the universe of scenarios involving two or more unlikely, independent, or concurrent events — also is without substance according to CP&L. CP&L asserts that, as with the first two new issues, BCOC's requested analysis is not required under the DCP. Moreover, according to CP&L, in light of the criticality analyses CP&L and the Staff have already performed, BCOC has admitted that the only scenario missing from its ''universe'' of scenarios of two or more failures is multiple fuel assembly misplacement. Thus, BCOC's narrowing of the remaining universe of scenarios down to multiple fuel assembly misplacement renders the third new issue, as a practical matter, identical to the second issue, which the Staff's additional criticality analysis renders moot by demonstrating that the spent fuel storage racks for Harris SFPs C and D will remain subcritical following a misplacement that involves all fresh fuel assemblies.

c. Staff Position

The Staff's January 4, 2000 summary is supported by the affidavits of Dr. Kopp and NRC nuclear engineer Anthony P. Ulses. In general the Staff agrees with CP&L that there is no genuine and substantial factual dispute relating to basis two of contention TC-2.

According to the Staff, it has reviewed the criticality calculations performed by CP&L, including the Harris Misplacement Analysis, and found them adequate. The Staff notes that Holtec International, which performed the CP&L analysis of reactivity effects for the proposed use of Harris pools C and D, analyzed reactivity effects of fuel storage in the Harris spent fuel racks using CASMO-3, which is a two-dimensional transport theory code. Holtec also used CASMO-3 for burnup calculations and for evaluating small reactivity increments associated with manufacturing tolerances. On the other hand, Holtec used the MCNP-4A Monte Carlo code to determine reactivity effects, to calculate the reactivity for fuel misloading outside the racks, and to determine the effect of having PWR and BWR racks adjacent to each other. Holtec also used MCNP-4A for independent verification calculations against CASMO-3.

According to the Staff, the CASMO-3 and MCNP-4A codes are widely used for analyzing fuel rack reactivity and have been benchmarked (i.e., compared to known values to evaluate their predictions) against results from numerous criticality experiments. The Staff declares that these individual analysis methods, which attempt to simulate the Harris spent fuel racks as realistically as possible for important parameters such as enrichment, assembly spacing, and absorber thickness, showed good agreement with each other. The Staff also maintains that comparison of different analytical methods is an acceptable technique for validating calculational methods for nuclear criticality safety. Moreover, these methods have been used and approved by the Staff in numerous other SFP criticality analyses.

Like CP&L, the Staff indicated it considers a fuel assembly misplacement unlikely, citing several reasons that generally agree with the CP&L arguments. First, the Staff notes that proposed Technical Specification 5.6.1.2 will control fuel storage limitations, and Harris selection procedure NFP-NGGC-0003 will be in place to control fuel assembly selection and avoid mispositioning errors. The Staff also observes that fresh fuel assemblies have a bright metallic color and are distinguishable from spent fuel assemblies, which have a darker, reddish color due to oxidation of the cladding, thereby providing a visual distinction that will help avoid misplacement errors. Third, the Staff notes that the proposed burnup limit curve is conservatively based on a minimum required burnup. Accordingly, unless a fuel assembly is prematurely discharged from the reactor, it will have a higher burnup than the burnup requirements and, therefore, a lower reactivity.

Also like CP&L, the Staff considers boron dilution events in pools C or D unlikely. Initially, the Staff argues that Harris Chemistry and Radiochemistry Procedure CRC-001 requires that boron concentration be kept at between 2000 and 2600 ppm, and that confirmation be done by monthly surveillance. Further, according to the Staff, Harris technical specification 3.9.11 requires a minimum of 23 feet of water above the top of the fuel rods, which provides adequate margins against water leakage or overfill. Additionally, in place to avoid boron dilution incidents are high and low water level alarms at the pools, as indicated by section

9.1.3 of the Harris final safety analysis report (FSAR). Finally, the Staff notes that a visual inspection of SFP water is done during each Harris operating shift.

Also significant, according to the Staff, is the November 1999 independent analysis it performed to assess the impact of misloading spent fuel pools C and D entirely with fresh fuel assemblies. For purposes of this analysis, the Staff assumed that soluble boron concentration was 2000 ppm, the pool water temperature was 4° Celsius, and there would be the worst conceivable misloading, consisting of Westinghouse 15 × 15 assemblies enriched to 5% U-235 without burnable poisons, which would be bounding as the highest allowed enrichment for commercial power reactor fuel. The Staff further states that it modeled the rack, fuel, and poison plate geometry using their nominal dimensions.

The Staff declares that it used the SCALE code system to perform the analysis, which it claims without dispute from BCOC has been validated for these types of calculations. According to the Staff, it further assumed that the storage racks were filled entirely with misloaded assemblies. The Staff asserts that such misloading, which could result only from multiple unlikely events requiring multiple errors, results in a predicted maximum *k*-effective of 0.98. The Staff concludes that because this configuration, which represents the worst possible series of misloading events, resulted in a *k*-effective of less than 1.0, the misloading of an entire rack of fresh fuel in spent fuel pools C or D will not lead to criticality.

d. Board Ruling[9]

The Board observed that basis two of contention TC-2 raised the following question of fact:

> Will a single fuel assembly misplacement, involving a fuel element of the wrong burnup or enrichment, cause criticality in the fuel pool, or would more than one such misplacement or a misplacement coupled with some other error be needed to cause such criticality?

LBP-99-25, 50 NRC at 36. BCOC has suggested that, in making this statement, we misspoke relative to the DCP. In this regard, we note that as the basis for

[9] BCOC proffered Dr. Gordon Thompson as its expert witness for this contention. Citing various agency precedents regarding the qualifications of expert witnesses, the Staff maintains that Dr. Thompson does not qualify as an expert witness by virtue of his knowledge, skill, experience, training, or education. According to the Staff, because Dr. Thompson is no more qualified to render an expert technical opinion on criticality than any layperson, any conclusions he makes, opinions he renders, or other testimony related to this contention should be stricken. *See* Staff Summary at 14-19.

After hearing party presentations regarding this objection during the January 21, 2000 oral argument, *see* Tr. at 207-18, the Board ruled from the bench that it would not declare Dr. Thompson ineligible to be the BCOC expert on this matter, but would assign his testimony appropriate weight commensurate with his expertise and qualifications, *id.* at 441. In this regard, we note that by reason of his experience and training, his expertise relative to reactor technical issues seems largely policy-oriented rather than operational.

its contention, after quoting the DPC provision of draft Regulatory Guide 1.13, BCOC stated:

> CP&L's proposed administrative controls on criticality would not satisfy this requirement because only one failure or violation, namely placement in the racks of PWR fuel not within the ''acceptable range'' of burnup, could cause criticality.

[BCOC] Supplemental Petition to Intervene (Apr. 5, 1999) at 13. Relative to BCOC's concern, although we believe our statement is a fair characterization of its position at that time, we will not, as CP&L and the Staff suggest, reject any consideration of a multiple fuel misplacement scenario.

Be that as it may, the Board finds that the analyses performed by CP&L and the Staff have adequately answered the question posed by this portion of the contention, namely, would fuel assembly misplacement, involving fuel assemblies with the maximum permissible enrichment, cause SFP criticality. Specifically, the CP&L SFPs C and D criticality calculations involving the misplacement of a fresh fuel assembly with the maximum permissible reactivity, the technical details and computational accuracy of which BCOC has not contested, demonstrate that with respective *K*-effectives of 0.7783 and 0.9352, the pools would not go critical when the boron concentration in the water is at the required minimum level of 2,000 ppm or at a significantly lower level of 400 ppm. Moreover, as the study demonstrates, this is true even if there were no boron in the spent fuel pools, which produces a *K*-effective of 0.9932. This clearly provides an upper bound for the criticality analyses of misplacement of a single fuel assembly concurrent with an accidental loss of some or all of the SFP's soluble boron.

The Staff also performed a further independent analysis that shows that, with boron at the minimum required level, even misplacing all fuel assemblies in the pool would cause a *K*-effective of 0.98, which would not cause spent fuel pools C or D to go critical. Again, BCOC has not disputed the technical details and computational adequacy of the Staff's calculations for this postulated scenario.

BCOC did advance a theory in its oral argument that *K*-effective must be kept at or below 0.95 under all conditions, including the scenario in which a fresh fuel assembly is misplaced concurrent with an accidental loss of all soluble boron. Such a theory is meritless, however, in the face of 10 C.F.R. § 50.68(b)(4), which states in pertinent part:

> If credit is taken for soluble boron, the k-effective of the spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with borated water, and the k-effective must remain below 1.0 (subcritical), at a 95 percent probability, 95 percent confidence level, if flooded with unborated water.

The intent of this requirement is unambiguous. *K*-effective must be kept at 0.95 or below when credit for soluble boron is taken; if, however, there is the accidental loss of boron, the SFP still cannot go critical, i.e., it must remain below a *K*-effective of 1.0. Thus, there is no requirement that *K*-effective must be kept at or below 0.95 under all conditions, including the scenario involving a fresh fuel assembly misplacement concurrent with the loss of soluble boron.

Additionally, though they are not central to the resolution of basis two, the Board also finds credible (a) the evaluation proffered by CP&L and the Staff indicating a low likelihood of a fresh fuel assembly misplacement in SFPs C and D; and (b) the evaluation provided by CP&L and the Staff indicating a small probability that boron dilution will occur in spent fuel pools C or D. Supporting our conclusion relative to item (a), above, is the combination of (1) measures involving technical specifications requirements and procedural controls; (2) the use of independent verification for fuel movement; and (3) the visual differentiation of spent fuel and fresh fuel assemblies, all of which lead to a low likelihood of misplacing a fresh fuel assembly. And for item (b) above, based on (1) the technical specification requirements and procedural controls regarding SFP boron concentration, (2) the margins inherent in the 23 feet of water above the fuel assemblies, (3) the existence of high and low water level alarms, and (4) the visual checks during each shift of operation, the Board similarly is satisfied that the probability of a boron dilution event is small.

Finally, relative to the ''new'' issues raised by BCOC during discovery as delineated by CP&L in its January 4, 2000 filing and addressed in detail by both CP&L and BCOC during the January 21, 2000 oral argument, involving (a) the loss of all soluble boron concurrent with the misplacement of a fuel assembly, (b) concurrent misplacement of multiple fuel assemblies, and (c) the analysis of scenarios of two or more unlikely, independent, concurrent events, we find that each has been adequately resolved or rendered moot by the analyses performed by CP&L and the Staff.

As a consequence, in accordance with 10 C.F.R. § 2.1115(a), we find relative to this portion of contention TC-2 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing. As such, based on the record before us, we dispose of this portion of the contention as being resolved in favor of CP&L.

B. Contention TC-3

The substance of Contention TC-3 consists of disputes over five matters:

1. What equipment within the spent fuel pool cooling and cleanup system (SFPCCS) and the component cooling water system (CCWS) is covered relative to BCOC's quality assurance concerns?

2. Whether the proposed activation of equipment complies with the requirements of 10 C.F.R. Part 50, Appendix B?

3. Whether the CP&L proposed Alternative Plan is adequate to meet the requirements of 10 C.F.R. § 50.55a(a)(3)?

4. What are the consequences of a failure of the equipment covered?

5. Does the nature of the proposed change to the facility require that a construction permit be issued?

We treat each issue below.

1. Scope of the Equipment Covered by the Contention

DISCUSSION: CP&L Summary at 76-77; Staff Summary at 49-50; Tr. at 325-26, 346-47, 382.

a. Parties' Positions

In its January 4, 2000 written statement, referencing the deposition of Union of Concerned Scientists nuclear safety engineer and BCOC supporting expert David Lochbaum, the Staff noted Mr. Lochbaum's agreement that the only equipment issues in contention were the fifteen welds in the piping embedded in concrete so as not to be subject to inspection from the outside. CP&L likewise noted that Mr. Lochbaum had ''conceded that the SFPCCS heat exchangers, pumps, and accessible piping . . . are not at issue in Contention [TC-]3.'' CP&L Summary at 76. BCOC had not addressed this matter directly in its written statement; however, at the January 21, 2000 oral argument BCOC asserted that ''the scope of the equipment that has not been kept in an appropriate lay-up condition at Harris over the last 15 or so years is broader than the scope of equipment as defined in [BCOC]'s contention.'' Tr. at 325. BCOC also argued ''that, in fact, other equipment was not kept in an appropriately laid-up condition'' and asserted that ''we are planning to file a request for an amendment of the contention to seek restoration of that part of the contention that was dropped.'' *Id.* at 326.

b. Board Ruling[10]

BCOC has not filed a request to amend its contention to seek to further define the scope of equipment covered. Accordingly, in light of the statements of BCOC

[10] As with Dr. Thompson, *see supra* note 9, the Staff initially sought to disqualify Mr. Lochbaum as an expert witness and have his testimony relative to contention TC-3 stricken or limited. *See* Staff Summary at 65-66. At the oral argument, however, the Staff amended its motion to request that the Board assign his testimony appropriate

(Continued)

witness Mr. Lochbaum, the Board limits its consideration of this contention to the condition of the fifteen welds and associated piping that are inaccessible because they are embedded in concrete.

Thus, in accordance with 10 C.F.R. § 2.1115(a), we find relative to this portion of contention TC-3 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based on the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

2. Compliance with 10 C.F.R. Part 50, Appendix B.

DISCUSSION: Detailed Summary of Facts, Data and Arguments and Sworn Submission on Which [BCOC] Intends to Reply at Oral Argument To Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with [CP&L] Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Harris Nuclear Power Plant with Respect to Quality Assurance Issues (Contention TC-3) (Jan. 4, 2000) at 16-24 [hereinafter BCOC TC-3 Summary]; Staff Summary at 51-53; Tr. at 330-32, 356-58, 396-97.

a. Parties' Positions

As we noted in Section I.B above, this contention challenges CP&L's compliance with the requirements of 10 C.F.R. Part 50, App. B, the Commission's quality assurance regulation, and in particular its adherence to Criteria XIII, XVI, and XVII governing, respectively, storage and preservation of equipment, measures to correct damage or deterioration, and record keeping. Indeed, in admitting the contention the Board stated:

> It is also clear from the positions of all the participants that some of the piping and equipment have not been properly stored and proper records regarding its quality during that period have not been maintained. Whether such storage and maintenance are necessary as a matter of law and fact is clearly a subject of dispute among the participants. The argument concerning this point is not a simple one . . . .

LBP-99-2, 50 NRC at 37.

The Staff argues that the requirements of Appendix B only apply during construction and operation and that, in effect, since the Harris construction permit expired and the SFPCCS for pools C and D was never part of an operating plant

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weight commensurate with his expertise and qualifications, Tr. at 393-95. We do so here, noting that in this context his qualifications appear to run to facility procedures and operations, e.g., whether a particular procedure to detect microbiologically induced corrosion (MIC) was properly utilized, rather than substantive knowledge of the underlying technical subject involved with the procedure, e.g., whether a claimed piping defect was MIC. *See* Tr. at 334.

''CP&L does not have to demonstrate compliance with Appendix B during the lay-up period.'' Staff Summary at 52. CP&L takes the same position, namely that at the time Harris Unit 2 construction was abandoned, the piping and welds were no longer under construction, were not in operation, and had no safety-related function. As a consequence, CP&L maintains, by its own terms Appendix B did not apply during the post-abandonment period. CP&L and the Staff thus would have us find that the lack of compliance with Appendix B during the layup period is of no consequence. Instead, in their view, all that matters is whether CP&L's Alternative Plan, submitted under 10 C.F.R. § 50.55a(a)(3) as offering an alternative to the code requirements therein, is sufficient to provide an acceptable level of quality and safety.

In contrast, BCOC maintains that CP&L's preparation of an alternative plan to conform to the requirements of section 50.55a simply goes to the question of the pedigree of the piping, i.e., to compensate for the fact that the original quality assurance documentation has been lost in a number of instances. It does not, however, excuse CP&L from a showing of compliance with the terms of Appendix B for that piping during the period of abandonment.

b. Board Ruling

In the Board's view, in the context of this amendment request, the evident purpose of both regulatory provisions is so closely parallel that we can regard compliance with section 50.55a as affording compliance with Appendix B. If the CP&L Alternative Program complies with section 50.55a, it is acceptable under Appendix B as well.

We thus will proceed to analyze the extent to which the CP&L Alternative Plan represents a proper alternative under the requirements of section 50.55a, confident that if its coverage is appropriate, compliance with Appendix B will have been achieved.[11]

Pursuant to 10 C.F.R. § 2.1115(b), we find relative to this portion of contention TC-3 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary

[11] Relative to the specifics of compliance with 10 C.F.R. Part 50, App. B, BCOC argues that CP&L has failed to meet Criterion XIII, requiring measures to control handling, shipping, and storage. *See* BCOC TC-3 Summary at 16-19. We note, however, that a substantial portion of the Alternative Plan is devoted to showing that deterioration did not occur during the layup period as a substitute for this requirement, and BCOC presents no expert testimony showing why the Alternative Plan has not demonstrated adequate evidence of this equivalence. Similarly, BCOC alleges that appropriate corrective actions have not been taken in accord with Criterion XVI of Appendix B, but presents no expert testimony as to what corrective actions are necessary. *See id.* at 20-23. BCOC further states that the Alternative Plan does not describe what criteria are to be used in inspecting piping and welds, and that the reader of the Alternative Plan ''reasonably presumes that the criteria must relate to the piping pedigree, not to its condition.'' *Id.* at 22. In fact, the BCOC summary subsequently cites such criteria. *See id.* at 41.

hearing and, based on the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

3. Adequacy of the Alternative Plan To Meet the Requirements of 10 C.F.R. § 50.55a(a)(3)

DISCUSSION: BCOC TC-3 Summary at 24-51; CP&L Summary at 78-89; Staff Summary at 55-65; Tr. at 339-43, 360-75, 397-405.

a. BCOC Position

BCOC's attack on the CP&L amendment request under this portion of contention TC-3 centers on both the notion that CP&L has only a ''snapshot'' of the conditions under which storage took place and what BCOC describes as the Staff's ''Sleeping Beauty'' notion, i.e., that the ''CP&L went to sleep for 15 years'' and that, once it awakened from its slumber, it was as if all those years had never passed relative to the piping systems at issue. Tr. at 329. With Mr. Lochbaum as its supporting witness, BCOC challenges the crux of the CP&L and Staff reasoning that a combination of construction period QA (to the extent that QA can now be verified) and present-day inspection and testing of the interior of the piping at issue can serve as a substitute for a QA program carried out with continuity throughout the construction and operation of the equipment at bar. In this regard, BCOC questions whether the construction period QA can be proven adequate absent certain construction era documentation and whether the current inspection of the embedded welds is complete and sufficient.

b. CP&L Position

CP&L observes that ''[t]he 50.55a Alternative Plan addresses the existing situation where [the Harris facility] is no longer under construction, CP&L no longer maintains its ASME N-Stamp certification program, and certain quality documentation was discarded concerning field welds.'' CP&L Summary at 78. Further, CP&L asserts that ''BCOC has not challenged the adequacy of the Supplemental QA requirements as an alternative to ASME N-Stamp certification.'' *Id.* at 79.[12]

[12] In a footnote to that statement, CP&L asserts that the only facts that BCOC presents attacking the Harris facility QA program for the construction period are four NRC inspection reports from 1981, which are mentioned by Mr. Lochbaum in his affidavit. CP&L points out, however, that in his deposition, Mr. Lochbaum asserted that the minor infractions that these reports addressed ''wouldn't lead me to believe that the quality assurance program at Shearon Harris was deficient or had a programmatic breakdown.'' CP&L Summary at 79 n.202 (quoting *id.* exh. 10, at 129-30 (Lochbaum Deposition (Oct. 24, 1999))).

Accordingly, at the outset, CP&L's position is that ''[t]he acceptability of the embedded welds in 1983 . . . has been demonstrated by the implementation of the 'Piping Pedigree Plan.' '' *Id.* at 81. To buttress this position, CP&L offers the affidavits of CP&L spent fuel project manager Edwards, and of CP&L employees David L. Shockley, Charles H. Griffith, and William T. Gilbert. The latter three affiants, who worked at the Harris plant during the construction period and attest to familiarity with quality assurance matters relating to the embedded piping and associated welding at issue, assert that the procedures in effect during construction made certain that the fifteen welds in question were, in fact, completed in accordance with the QA program then in effect. They base their conclusions on procedures in effect at the time that required certain inspections to be completed before concrete pours and hydrostatic tests, signatures of authorized nuclear inspectors, and on the presence of their own signatures on certain documents from the construction period. Mr. Edwards states that current walkdowns and inspections, when combined with reviews of available documentation and interviews with personnel who were part of the process provide reasonable assurance that the fifteen welds in question were completed according to QA requirements.

CP&L also contends, however, that the test and inspection procedures it has recently performed, the so-called Equipment Commissioning Plan, complete the QA cycle in a manner sufficient to meet the ''acceptable level of quality and safety'' criterion of 10 C.F.R. § 50.55a(a)(3)(ii). In support of this position, CP&L references the affidavits of Mr. Edwards and Mr. Griffin, as well as the affidavits of CP&L senior engineer and corrosion scientist Dr. Ahmad A. Moccari and Structural Integrity Associates, Inc. (SIA), metallurgical engineer George J. Licina, who describe different aspects of the recent CP&L efforts to ascertain the quality of the embedded piping and the associated welds, including sampling of water in the pipes and video camera inspection of the condition of the interior of the pipes.

Further, relative to the sufficiency of the embedded piping and welds, CP&L also notes that the installation of all four fuel pools was completed at the same time and by the same team of construction personnel, welders, and inspectors; that the work was done at all four pools in accordance with the same ASME code; and that spent fuel pools A and B have operated without incident since startup of Unit 1. CP&L maintains that these items, in combination with the information provided by the affiants, are sufficient to establish compliance with the requirements of section 50.55a(a)(3).

c. Staff Position

The Staff finds the Alternative Plan adequate. According to the Staff, BCOC has not shown any legitimate, substantial issues about the quality of the original construction, and the Alternative Plan presents an alternative to the section 50.55a

ASME Code requirements sufficient to demonstrate that the welds and piping are acceptable for service. Referencing the affidavits of Mr. Heck and Mr. Naujock, the Staff outlines the results of its review process regarding existing construction records. Mr. Heck asserts that the sequential QA requirements and signatures of QA personnel at various hold points in the process, such as hydrostatic testing and concrete placement, give confidence that all welds were done in compliance with ASME and other QA requirements, concluding ''the subject welds were completed with an acceptable level of quality and safety.'' Staff Summary, Affidavit of Kenneth C. Heck in Support of NRC Staff's Written Summary (Jan. 10, 2000) at 27. The Staff's affiant Naujock also concludes that the welds made on SFPs C and D piping ''were made by qualified personnel using qualified procedures in accordance with the objectives of [ASME Code] Section III requirements.'' *Id.* Affidavit of Donald G. Naujock in Support of Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on Technical Contention 3 (Jan. 4, 2000) at 9. Moreover, relative to the current state of the embedded piping and welds, citing the affidavits of Mr. Naujock and Dr. Davis, the Staff declares that its review of the procedures used for and the results of the CP&L video inspection process led it to conclude that ''a sufficient basis exists to state with reasonable assurance that the welds were completed with an acceptable level of quality and safety and no degradation of the welds and pipes occurred during the layup [period].'' Staff Summary at 65. Finally, like CP&L, the Staff notes that the Unit 1 fuel pools have supported Unit 1 operation since startup without ''significant problems.'' *Id.* at 63.

d. Board Ruling

This issue lies at the heart of contention TC-3. While it may be true that BCOC has not directly assailed the Alternative Plan, it is clear that BCOC does dispute its adequacy. Yet, despite its objections, BCOC presents no real evidence that the absence of certain weld documentation would suggest that the welds were not completed in accordance with appropriate QA requirements. Instead, BCOC's evidence consists largely of its own review of CP&L and Staff documentation regarding activities relating to SFPs C and D. Indeed, BCOC's chief witness in support of this contention,[13] David Lochbaum, at his October 1999 deposition agreed that the only facts he could put forth were those gleaned from his perusal of discovery material supplied by the Staff and CPL. Moreover, we see no indication that Mr. Lochbaum's review of the documentation on the welds suggests that any of the missing weld data could be indicative of specific flaws in the original

[13] While the caption of his declaration in support of BCOC specifies contention TC-2, the body of the declaration addresses contention TC-3. Because Mr. Lochbaum was put forth by BCOC only as a witness for contention TC-3, the Board assumes the caption contains a typographical error.

construction, nor does it seem that he has any independent knowledge of such flaws.

Thus, on the matter of the adequacy of the original construction, the record before us fully supports the conclusion that the piping and associated welds at issue were completed in accordance with the agency QA regulations and applicable ASME code requirements.

This brings us to the question embodied in BCOC's ''snapshot'' and ''Sleeping Beauty'' allegations: Will the assurance that the original QA program was adequate, when coupled with the present-day procedures and tests embodied in the Alternative Plan, give assurance that the present piping/weld quality is adequate, despite the long period when the equipment was not subject to storage and inspection conditions that were strictly in accordance with QA procedures.

We have accepted CP&L's positions that the fuel pool piping was built to agency QA and ASME Code requirements and that the contention at bar relates only to the fifteen welds and associated piping that are inaccessible because they are embedded in concrete. Bearing in mind these findings, to answer the question posed above we must review the adequacy of the current tests and procedures relating to the embedded material. In this regard, CP&L points out that ''[t]he tests and inspections included testing of the water in the SFPCCS piping, a complete walk-down and visual inspection of all accessible piping, welds, components and equipment, re-inspection of all accessible welds, testing the weld filler material in the accessible welds'' and inspection of the surface of the spent fuel pool walls and concrete in which the piping is embedded to detect any evidence of outside chemical attack on the external surface of the piping. CP&L Summary at 93.

Looking to these activities, several points stand out. Regarding the water that has been in the SFPCCS during the layup period, it was analyzed by Harris chemists for chemical content and by Dr. Ahmad Moccari for microbiological content. The water turned out to be of high purity and did not contain any bacteria capable of causing microbiologically induced corrosion (MIC). The results of this testing indicated a highly unlikely potential for chemically or microbiologically induced corrosion according to CP&L's expert on corrosion, Dr. Ahmad Moccari. *See* CP&L Summary at 93-94.

Additionally, all fifteen embedded welds and their associated piping were inspected using a high resolution camera, taking high quality pictures of everything inside the piping, longitudinal welds, circumferential welds, and piping surfaces. *See id.* at 94-95. Some general discoloration of welds and piping was noted. Reddish brown deposits were observed on welds and piping, as were shallow indications on a weld and seam, and incomplete melting of some consumable inserts. *See id.* at 95-96. Samples of the reddish brown deposits were taken and the remaining deposits were removed with high pressure water and the surface reinspected. While Mr. Licina noted what appeared to be two small pits under the deposit, both he and Dr. Moccari agreed that these pits would have no

impact on the integrity of the piping. *See id.* at 96. The deposit material was analyzed with a scanning electronic microscope and found to consist of iron oxide, similar in appearance to that introduced into the spent fuel pool water during the transshipment of fuel from other CP&L plants. The material, however, neither results from, contributes to, nor is otherwise associated with corrosion or degradation of the piping. *See id.* at 97. The deposits simply represent places at which crud accumulated. *See id.* at 98. The incomplete melting of the consumable inserts was not viewed by CP&L's experts as cause for concern. *See id.* at 99-100.

The largest of the shallow indications mentioned above was about ½ inch long. Since the chemical and temperature conditions are not aggressive and the line was not exposed to thermal or loading cycling, the specific cause of this indication could not be determined. *See id.* at 101-02. However, CP&L's contractor SIA independently evaluated the implication of such indications for the structural integrity of the piping and concluded that they did not pose any challenge to that integrity or to the piping's suitability for service. *See id.* at 102.

The Staff has also evaluated CP&L's Alternative Plan, the analyses and examinations it calls for, and the environment and present condition of the embedded pipes and welds. *See* Staff Summary at 63. The Staff's evaluation was conducted by Mr. Naujock and Dr. Davis, whose affidavits are proffered as a foundation for the conclusion that ''the welds and piping are acceptable for service and that the Alternative Plan provides an[] acceptable level of quality and safety.'' *Id.* at 65. A significant element in this conclusion, it seems apparent, was the CP&L summer 1999 visual inspection of the interior surface of the embedded welds using a high resolution remote camera capable of detecting a 1-mil diameter wire and demonstrated to be capable of detecting small flaws consistent with ASME Code requirements. The Staff notes that enhanced visual inspection has been approved in previous cases for reactor vessel internals. *See id.* at 63-64.

Staff expert Dr. Davis reviewed the videotapes resulting from the remote camera examinations of ten of the fifteen embedded welds and observed no evidence of MIC, no degradation of the welds, and nothing that required corrective action. This Staff expert noted that five of the welds required further evaluation and that these welds were analyzed by SIA. From the review and analysis of the videotapes, and from the available documentation, the Staff concluded that the piping and welds are conservatively designed; are several times thicker than required by ASME Code; are generally in good condition with some minor, but no major, defects; and have leaktight integrity. The Staff also concluded that there were no viable mechanisms for longitudinal cracking such as intergranular stress corrosion cracking, transgranular stress corrosion cracking, or localized corrosion. The only mechanism the Staff could find viable for corrosion was MIC, and the water sampling and sampling of deposits on one weld produced no evidence of that. Further, no leaks consistent with MIC were observed on any of the accessible piping. The Staff thus determined that the welds were completed with an acceptable

level of quality and safety and that no degradation of the welds and pipes occurred during the layup period. *See id.* at 64-65.

For its part, BCOC would have us find that the videotapes revealed evidence of degradation and that evidence was not adequately investigated. *See* BCOC TC-3 Summary at 4. In this regard, BCOC relies on a deposition statement by its expert witness, Mr. Lochbaum, concerning certain details from the remote camera videotapes for the proposition that there were ''shop welds'' present in addition to the ''field welds'' and that fact represents some sort of deficiency in the entire procedure. *See id.* at 44-45. BCOC argues that a shop weld was discovered by accident, and that only that one weld, and none of the many other shop welds, was examined. *Id.* At oral argument, CP&L pointed out that the remark cited by Mr. Lochbaum was, later in the videotape, found to pertain to a field weld, and that the camera operator, who was not an expert in interpreting the results, was not criticizing the condition of the weld but was simply making an irrelevant remark because of a mistake in the position of the camera. Further, Staff witness Dr. Davis and CP&L witness Mr. Edwards examined the weld in question and found no fault with it. *See* Tr. at 368-69. And, in addressing this point, CP&L also declared that the pedigree of every shop weld was available (because, of course, that pedigree had been established at the fabricator's plant and was not part of the documentation discarded after suspension of construction). And shop welds are, in any event, less susceptible to corrosion than field welds. *See* Tr. at 432-34.

In sum, CP&L and the Staff again have the better of the argument. Those with expertise in the fields of corrosion, welding, and ASME Code requirements attest on behalf of these two parties that the procedures that were used to substitute for construction records and examination during layup are adequate to assure a level of safety as required by the regulations. *See* Tr. at 404-05. Moreover, even BCOC's witness Mr. Lochbaum, when asked what he would require in the Alternative Plan to satisfy his concerns replied, ''[a] complete visual inspection of the interior piping surfaces, all of the welds of the embedded portions, and some evaluation, analysis or inspection of the exterior piping surfaces.'' CP&L Summary, exh. 10, at 218-19 (Lochbaum Deposition). The record established that is just what has been done to document the Alternative Plan's compliance with section 50.55a.

We find, therefore, that the Alternative Plan is adequate to satisfy the applicable requirements of the regulations including those of 10 C.F.R. § 50.55a(a)(3), and 10 C.F.R. Part 50, App. B. Further, in accordance with 10 C.F.R. § 2.1115(a), we find relative to this portion of contention TC-3 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based on the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

4. Consequences of Piping or Weld Failure

DISCUSSION: CP&L Summary at 104; Staff Summary at 66-69; Tr. at 375-81, 411-14, 431.

a. Parties' Positions

In its written summary, BCOC did not address the question of the safety implications of piping or weld leakage. Nor did BCOC's technical witness, Mr. Lochbaum, postulate any complete scenario that would lead to loss of cooling, damage to safety equipment, or releases to the environment during his October 1999 deposition or otherwise. Indeed, when questioned about the possible consequences of leakage, Mr. Lochbaum could not point to any precise scenario in which leakage could be large enough to interfere seriously with system function or release contaminants to the environment. At oral argument, however, BCOC briefly addressed the matter, arguing that tritium leakage has occurred from spent fuel pools at other facilities and that all equipment should conform to quality requirements.

CP&L asserts that since the piping is embedded in reinforced concrete, there is no way for a leak to result in loss of water that even approaches the normal evaporation rate from the pool, that there is an entirely redundant run of piping to carry water in the event of a broken pipe, and that there is no pathway to the environment. When, at oral argument, the Board pursued the question of possible leakage into sensitive equipment, CP&L explained there was no equipment that pool water could leak into that would compromise the safety of the plant. Further, during oral argument CP&L showed diagrams of the fuel pool building that indicated that leakage would not have any path to the environment, but would be captured by floor drains and diverted to the plant's waste processing system. And under Board questioning concerning a historical incident in which pool water contaminated the environment by leakage, CP&L explained how the instant circumstances were substantially different in matters involving pool and building design from those mentioned by the Board.

For its part, the Staff offered the affidavit of NRC reactor systems engineer Christopher Gratton addressing the question of whether the failure of the welds or piping could result in a hazard affecting public health and safety. The Staff argues that such a result is unlikely and concludes whether or not leakage is able to flow out of the pool's concrete structure, a break in the embedded piping or welds whose leakage is within the coolant systems makeup capacity would have a minimal effect on the operation of the system, the coolant inventory, or the safety of the stored fuel. *See* Staff Summary at 67. Moreover, according to the Staff, even if substantial leakage were to occur, the position of the pools' piping penetrations is such that only forced cooling would be lost, the pool level would

remain well above the stored fuel, and the rate of boil-off would be well within the capacity of available coolant makeup systems. The Staff thus concludes that the stored fuel would remain covered and cooled with only a minimal impact on safety.

b. Board Ruling

In theory, the leakage from a spent fuel pool could be so severe that the cooling system would become inoperable, either from low water level or ruptured pipes; the leakage could result in the release of pool water (presumably contaminated at least with tritium) to the environment; or the leakage could penetrate safety-related equipment and cause it to malfunction. Based on the record now before us, however, it is clear that the result of any weld or piping failure at Harris could have only a limited number of effects on the integrity of the plant and the health and safety of the public.

The Board has already found that the CP&L Alternative Plan offers quality assurance and safety equivalent to the requirements of the regulations. And for its part, BCOC has offered no reason to suggest that a leak from the welds or piping at issue would in any way parallel the SFP leakage situations it relied upon at the January 21, 2000 oral argument. Indeed, upon Board inquiry regarding one of the pools mentioned by BCOC, CP&L described in some detail the reasons why that leakage situation differed from circumstances at the Harris plant.

To be sure, BCOC accuses CP&L and Staff of ignoring the health significance of continuous small leaks in nuclear power plant piping. Yet, from the record before us, we have no reason to believe that small amounts of leakage, such as those which could occur from pinholes or hairline cracks in pipes embedded in concrete, would lead to any hazard to the plant or the public.

Consequently, in accordance with 10 C.F.R. § 2.1115(a), we find relative to this portion of contention TC-3 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based on the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

5. Need for a Construction Permit

DISCUSSION: BCOC TC-3 Summary at 16; Tr. at 200-01, 327-32, 348-53, 391-93, 417-18.

a. Parties' Positions

Although BCOC first raised this issue of whether a construction permit is needed to prepare and activate the spent fuel pool C and D systems in its written

statement, it denies the question is a ''new contention,'' asserting it was clearly embodied in contention TC-3 as admitted. Tr. at 327. According to BCOC, the need for a construction permit is connected to its assertion that the Applicant had not complied with 10 C.F.R. Part 50, App. B.

CP&L, however, claims that this issue is a new contention that has not been shown to meet the late-filing standards of 10 C.F.R. § 2.714(a)(1). CP&L also argues that it is not seeking either a construction permit or conversion of such a permit into an operating license, but rather a change in its operating license pursuant to 10 C.F.R. §§ 50.59, 50.90. Further, to CP&L's knowledge, no construction permit has been required for any of the large post-Three Mile Island accident changes or, indeed, for replacement of steam generators or power upgrades, and that there has never been a construction permit required for a change in an operating license applying to a commercial operating plant. In this regard, CP&L relies upon 10 C.F.R. § 50.92(a) that states ''[i]f the application involves the material alteration of a licensed facility, a construction permit will be issued before the issuance of the amendment to the license.''

CP&L further argues that this ''material alteration'' test has been interpreted as a change in the type of major components at an existing facility, a change that would introduce significant new issues relating to the function and nature of the facility and to the public health and safety. CP&L cites as precedent a Director's Decision, *Virginia Electric and Power Co.* (Surry Power Station, Units 1 and 2), DD-79-19, 10 NRC 625, 654-61 (1979), in which the Director of Nuclear Reactor Regulation found that the replacement of reactor steam generator internals did not rise to the significance of a ''material alteration'' to the plant. CP&L, in reply to a Board question, went so far as to say that even if the additional spent fuel pools had to be constructed ''from scratch,'' that would not constitute a material alteration under the regulations. *See* Tr. at 351-52.

The Staff also regards the question of the requirement for a construction permit as embodying a new contention and as a matter that did not come out in discovery. The Staff agreed with CP&L that the amendment at issue does not represent a material alteration of the facility, noting that the Staff's review of the case law generally is in accord with CP&L's. Although the Staff equivocated somewhat on whether building new pools would require a construction permit, it agreed that steam generator replacement or the construction of new buildings does not require a construction permit, but rather could be accomplished by an amendment under 10 C.F.R. § 50.59.

b. Board Ruling

BCOC's claim that a construction permit is required for the CP&L request was not a part of the admitted contention. As such, it can only be admitted if it fulfills the section 2.714(a) late-filing standards, which BCOC has made no effort to

address. This precludes further consideration of the issue. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-68 (1985). Even if this claim had been within the scope of contention TC-3, however, under the circumstances here, we are skeptical that the amendment before us is a ''material alteration'' in the sense intended by the regulations so as to require a construction permit.

Once again, pursuant to 10 C.F.R. § 2.1115(b), we find relative to this portion of contention TC-3 that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based on the record before us, dispose of this portion of the contention as being resolved in favor of CP&L.

III. CONCLUSION

With respect to contention TC-2, Inadequate Criticality Prevention, the Board concludes that (1) Applicant CP&L's request to utilize credit for burnup and enrichment as criticality control measures is consistent with the requirements of 10 C.F.R. Part 50, App. A, GDC 62; and (2) the use of credit for burnup and enrichment does not violate the double contingency principle of draft Regulatory Guide 1.13. In connection with contention TC-3, Inadequate Quality Assurance, we conclude relative to the embedded welds and piping at issue, the CP&L Alternative Plan is sufficient under 10 C.F.R. § 50.55a(a)(3) and 10 C.F.R. Part 50, App. B, to provide an acceptable level of quality and safety. Further, as to both contentions, based on the record before us, pursuant to 10 C.F.R. § 2.1115(a), the Board further concluded that there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing and, based on the record before us, we dispose of those contentions as resolved in favor of CP&L.[14]

For the foregoing reasons, it is, this fifth day of May 2000, ORDERED that with respect to BCOC contentions TC-2, Inadequate Criticality Control, and TC-3, Inadequate Quality Assurance, in accordance with 10 C.F.R. § 2.1115(a), the Board concludes (1) there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an

[14] Although this ruling completes action regarding all the technical contentions before us relative to the December 1998 CP&L amendment request, because the admissibility of four BCOC late-filed environmental contentions is yet to be resolved, this proceeding is not subject to dismissal in accordance with 10 C.F.R. § 2.1115(a)(2).

evidentiary hearing; and (2) contentions TC-2 and TC-3 are disposed of as being *resolved* in favor of CP&L.

THE ATOMIC SAFETY AND
LICENSING BOARD[15]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 5, 2000

[15] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant CP&L, (2) Intervenor BCOC, and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of **Docket No. 40-9027-MLA**
(ASLBP No. 99-757-01-MLA)

CABOT PERFORMANCE MATERIALS
(Reading, Pennsylvania) **May 16, 2000**

In this proceeding concerning a source material license amendment proposal submitted by a Licensee in the form of a site decommissioning plan (SDP), the Presiding Officer denies a hearing request of two Petitioners for lack of standing.

RULES OF PRACTICE: MATERIALS LICENSE HEARING REQUESTS

Section 2.1205(e) of 10 C.F.R. spells out the required content of a hearing request submitted in a proceeding under Subpart L of the Commission's Rule of Practice. The request must describe ''in detail'' (1) the interest of the requestor in the proceeding; (2) how the interest might be affected by the results of the proceeding, with particular reference to the factors set out in subparagraph (h) of the section; and (3) the requestor's area of concern about the licensing activity that is the subject matter of the proceeding.

RULES OF PRACTICE: MATERIALS LICENSE HEARING REQUESTS

Section 2.1205(h) of 10 C.F.R. charges the Presiding Officer in a materials licensing proceeding with the duty of determining both that the areas of concern specified in the hearing request are germane to the subject matter of the proceeding

and that the ''judicial standards for standing'' have been met by the hearing requestor. With respect to the standing requirement, that subsection goes on to stipulate that three factors, among others, must be considered: (1) the nature of the requestor's right under the Atomic Energy Act 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.

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

The existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). *See, e.g., Bennett v. Spear,* 520 U.S. 154, 157 (1997); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

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

In order to establish judicial standing, the asserted injury-in-fact must be something more than an ingenious academic exercise in the conceivable. It must be particular and concrete as opposed to conjectural or hypothetical. When future harm is asserted, it must be real and immediate. *United States v. SCRAP,* 412 U.S. 669, 688-89 (1973); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993).

MEMORANDUM AND ORDER
(Denying a Hearing Request for Lack of Standing)

Cabot Performance Materials (Licensee) is the possessor of a source material license entitling it to possess contaminated material (uranium and thorium) on two sites within the Commonwealth of Pennsylvania, one of those sites being located in the City of Reading. In 1998, the Licensee submitted a site decommissioning plan (SDP) for the contaminated material at the Reading site, which consists of slag and soil deposited on a slope.

The NRC Staff considered the submittal to constitute a license amendment application and, accordingly, published a Notice of Consideration in the *Federal Register* that included providing an opportunity for hearing. 63 Fed. Reg. 57,715

(Oct. 28, 1998). As the Notice reflected, the SDP contained the conclusion that, at their current levels, the long-term doses from the contaminated material were such that, without additional decommissioning, the site could be released for unrestricted use consistent with NRC regulatory requirements. (In that connection, it appears from one of the NRC filings with me that the onsite buildings have been decontaminated and released.)

In response to the notice, two hearing requests were timely filed. One of them was presented by the City of Reading and the Redevelopment Authority of that City (the Reading request). The other was submitted by Jobert, Inc. (Jobert) and Metals Trucking, Inc. (MTI) (the Jobert/MTI request).

By virtue of the grant of a succession of uncontested motions filed by the Licensee to accommodate ongoing studies that might produce a resolution of the concerns of the hearing requestors, the time for the filing of its answer to the two hearing requests was several times extended — ultimately to April 3, 2000. (As a consequence of the extensions granted the Licensee, the time for the filing of the NRC Staff's response to the hearing requests was automatically also extended.) On March 31, the Licensee filed an unopposed motion for a further enlargement to May 30, 2000, of the time within which to respond to the Reading request. Unlike the prior extension motions, however, that motion, granted on April 3, in terms did not apply as well to the Jobert/MTI request. Instead, on April 3 and April 13, respectively, the Licensee and the NRC Staff filed their answers to the latter request. Both urged that it be denied on several independent grounds.

As authorized by me, the Jobert/MTI requestors supplemented their request in an April 14 filing to which the Licensee and Staff responded on May 1. (On the same date, also with my approval, the requestors tendered a one-page additional submission.) The May 1 filings brought the parties' submittals on the Jobert/MTI request to a conclusion and the viability of that request is now ripe for decision.

For the reasons that follow, I conclude that the Jobert/MTI requestors have not satisfied all of the conditions precedent for the grant of a hearing that are set forth in the Commission's Rules of Practice. Accordingly, their hearing request must be denied.

I. BACKGROUND

The Jobert/MTI request, filed on December 10, 1998, recited (at 1-2) that the slag pile on which the contaminated material is currently located was a part of a larger (10.48-acre) parcel of land containing several former industrial buildings that were then unused or underused (hereafter "property" or "site"). This property was said to be in an area providing many attractive redevelopment possibilities so long as, among other things, ''the environmental conditions of the [p]roperty,

including but not limited to the [slag pile in question] are properly addressed.'' *Id.* at 2.

The request went on to state that MTI was the owner of the property. For its part, Jobert was a former owner that had sold the property to MTI in April 1998, taking in return as part of the transaction a purchase money mortgage. When it had been its owner, Jobert had in mind either developing the property or selling it to another entity that contemplated taking such action. As a consequence of its purchase of the property, the intent to pursue one of those courses had been transferred to MTI. The City of Reading and its Redevelopment Authority were identified in the request as among those who had previously expressed an interest in obtaining the property from MTI. *Id.* at 2-3.

As the request went on to make clear, the interest that MTI and Jobert sought to vindicate in a hearing on the acceptability of the submitted SDP was purely economic in nature. Specifically, pointing to its ''obvious current property interest'' stemming from ownership of the site, MTI stressed its desire to protect that interest. In this connection, it expressed concern that NRC action on the SDP might restrict the use or redevelopment of the property, adding that, even in the absence of NRC-imposed use restrictions, the slag pile's presence on the site might limit and reduce redevelopment alternatives and, thus, the attractiveness of the property to potential lenders. MTI also made passing reference to concerns it had regarding the possible imposition of liability upon it because of the condition of the slag pile. As its basis for seeking a hearing, Jobert referred to a desire to protect its security interest in the property. *Id.* at 3-4.

In its April 3 answer to the request (at 3), the Licensee called attention to the fact that, on March 13, 2000, the Reading Redevelopment Authority had filed in the appropriate Pennsylvania state court a Declaration of Taking and Notice to Condemnee (i.e., MTI) that related to the entire site in issue. A copy of those documents was attached to the Licensee's answer as Exhibit A.

It appears from the Declaration (at 2) that the Authority was condemning the property ''in fee simple title'' for the stated purpose of ''eliminating blight and redeveloping the area pursuant to the Redevelopment Plan.'' The Declaration also recited that, pursuant to a provision of the Pennsylvania Eminent Domain Code, the Authority had executed and attached to the Declaration as an exhibit its bond in an unlimited amount and without surety. The bond was said to have been made payable to the Commonwealth of Pennsylvania and was filed for the use of the owner or owners of the condemned property interests.

According to the Notice to Condemnee provided to it along with the Declaration of Taking, MTI had a period of 30 days in which to challenge the condemnation action by the filing of Preliminary Objections to it. Absent such filing, any objections or defenses would be deemed waived.

As is not in dispute, MTI did not file objections within the prescribed 30-day period. Consequently, the exercise of the Redevelopment Authority's eminent

domain powers with respect to the property seemingly is now complete under Pennsylvania law, subject simply to the determination and payment of just compensation.

In taking note of the Declaration of Taking in their April 14 supplemental filing, the hearing requestors asserted, however, that the condemnation of the property by the Redevelopment Authority did not serve to destroy their interest in the outcome of the matter now at hand. On that score, they maintained (at 9) that the possibility existed that the amount of the compensation that MTI would be entitled to receive from the Authority (as representing fair market value) might be adversely affected as the result of the NRC's ultimate action on its review of the Licensee's SDP (which has now undergone revision).

In addition, in their concluding one-page May 1 submission, those entities asserted that, under the provisions of the relevant Pennsylvania statute, MTI retains the right of possession until such time as it receives its just compensation or a written offer of same. Moreover, I was told, under the governing statute MTI might recover title to the property were the Redevelopment Authority to relinquish the condemnation within 1 year. I was also referred to a statutory provision to the effect that, should the Authority abandon the redevelopment project alluded to in the Declaration of Taking, ''in certain conditions [MTI would retain] a right of first refusal for up to three years.''

II. DISCUSSION

A. This matter is subject to the provisions of Subpart L of the Commission's Rules of Practice, which sets out the informal hearing procedures governing the adjudication of materials licensing proceedings. 10 C.F.R. § 2.1201 *et seq.* Section 2.1205(e) spells out the required content of a hearing request submitted in a Subpart L proceeding. The request must describe ''in detail'' (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by the results of the proceeding, with particular reference to the factors set out in subparagraph (h) of the section; and (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding.

For its part, section 2.1205(h) of Subpart L charges the Presiding Officer with the duty of determining both that the areas of concern specified in the hearing request are germane to the subject matter of the proceeding and that the ''judicial standards for standing'' have been met by the hearing requestor. With respect to the standing requirement, that subsection goes on to stipulate that three factors, among others, must be considered: (1) the nature of the requestor's right under the Atomic Energy Act 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 specifying these factors, the Commission likely had in mind that, as is now well settled, the existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). *See, e.g., Bennett v. Spear,* 520 U.S. 154, 157 (1997); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

What constitutes an adequate showing of injury-in-fact has received considerable judicial attention. For present purposes, it suffices to point to the Supreme Court's observation in a related context some years ago:

> Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973).

A like note has been struck many times in NRC adjudicatory decisions. As summarized by a Licensing Board some 8 years ago following its scrutiny of numerous prior Supreme Court holdings on the point:

> Although variously described, the asserted injury must be ''distinct and palpable'' and ''particular [and] concrete,'' as opposed to being '' 'conjectural...[,] hypothetical,' '' or ''abstract.'' The injury need not already have occurred but when future harm is asserted, it must be ''threatened,'' '' 'certainly impending,' '' and '' 'real and immediate.' ''

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992) (footnotes omitted), subsequently quoted in *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993).[1]

B. At the time of the 1998 filing of their hearing request, MTI owned the site on which the slag pile is located and former owner Jobert possessed a security interest in it. Had that state of affairs continued to the present time, there would have been several questions that I might have had to confront in determining whether the hearing request satisfied the requirements set forth in section 2.1205(e) and (h) of the Commission's Rules of Practice. For one thing, the NRC Staff maintains that the economic interest of an owner of real estate in redeveloping the property itself or, alternatively, selling the property to someone else for that purpose

[1] While the Commission reversed the Licensing Board's determination in *Perry* that standing was lacking in the circumstances of that case, it did so on a ground that is inapplicable here and, moreover, did not manifest disagreement with the Board's summary quoted in the text. *See* CLI-93-21, 38 NRC 87 (1993).

does not ''arguably come within the zone of interests'' protected by either the Atomic Energy Act of 1954 or the National Environmental Policy Act. For another, both the Staff and the Licensee insist that the hearing request, even as supplemented, did not set forth a cognizable area of concern regarding the licensing activity at hand.

As seen, however, a very significant change in circumstances recently occurred. Because of the condemnation action instituted by the Redevelopment Authority, an action that MTI concededly elected not to challenge within the period for doing so provided to it by state law, neither MTI nor Jobert continues to possess any legally cognizable interest in the property. To the contrary, MTI does not dispute that, as of the date of the filing of the Declaration of Taking (March 13, 2000), fee simple title was transferred to the Redevelopment Authority. All that apparently remains to be accomplished with regard to the condemnation is the payment to MTI of the amount that is determined to be the property's fair market value and thus to constitute just compensation for the taking. While it may well be that, as it asserts, MTI can retain physical possession until it has at least received a just compensation offer from the Authority, once payment has been made to it MTI's ties to the property will have been severed.

In light of the action taken by the Redevelopment Authority and its legal effect, it would seem beyond cavil that there is no longer any basis on which MTI and Jobert can meet the injury-in-fact requirement. In reaching this conclusion, I am not unmindful of their assertion that MTI might regain title to the property were the Redevopment Authority to relinquish the condemnation or to abandon its redevelopment project. The hearing requestors have assigned no reason, however, to believe that there is any degree of likelihood that the Authority might elect to pursue either of those options. To the contrary, on this record there is absolutely no basis for bringing into the slightest question the resolve of the Authority — stated in the Declaration of Taking — to undertake the redevelopment of the site itself under an apparently already existing Plan. In the words of *SCRAP, supra,* the speculation offered by the hearing requestors amounts to nothing more than an ''exercise in the conceivable'' and should be dismissed as such.

Nor does a better footing undergird MTI's professed fear that the action taken on the SDP might impact adversely the amount of the compensation it will receive or subject it to possible liability because of the condition of the slag pile. Once again, no cogent reasons are offered as to why either of these concerns has a solid foundation. Indeed, as the Licensee has noted with a citation to the applicable Pennsylvania statutory provision (May 1 filing at 6), the amount of MTI's compensation will be determined by the fair market value of the property immediately prior to the taking. That being so, it is difficult to comprehend how any action later taken by the NRC with regard to the slag pile could influence the amount that MTI will receive from the Redevelopment Authority. In sum, on this score as well, MTI has indulged in what, at best, is unsubstantiated

conjecture falling far short of the fulfillment of its burden to establish a ''distinct and palpable'' — or as otherwise characterized ''particular and concrete'' — present or threatened injury-in-fact. *Perry, supra.*

For the foregoing reasons, I determine that the Jobert/MTI hearing request must fail because it has not been adequately established, as mandated by the Commission's Rules of Practice, that action taken by the NRC on the license amendment sought in this matter might cause injury-in-fact to the requestors. Without reaching any other issues raised by the Licensee or NRC Staff in opposition to it, on that basis the request therefore must be, and hereby is, *denied* for want of standing.

If so inclined, the hearing requestors may appeal this Order to the Commission within ten (10) days of its service in the manner prescribed in 10 C.F.R. § 2.1205(o).

It is so ORDERED.

BY THE PRESIDING OFFICER*

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 16, 2000

*Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to representatives of the Licensee and the Petitioners, as well as counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	**Docket Nos. 50-220** **50-410**
NIAGARA MOHAWK POWER CORPORATION, **NEW YORK STATE ELECTRIC & GAS CORPORATION, and** **AMERGEN ENERGY COMPANY, LLC** **(Nine Mile Point Nuclear Station, Units 1 and 2)**	**June 13, 2000**

In this Order, the Commission grants a motion to dismiss this proceeding on the ground that the Applicants for a license transfer have withdrawn their application for NRC approval of the proposed transfer.

RULES OF PRACTICE: MOOTNESS

Withdrawal of application for license transfer moots adjudicatory proceeding on the proposed transfer.

ORDER

On May 24, 2000, the Applicants, Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, and AmerGen Energy Company, LLC,

withdrew their application for the Commission's approval of the transfer of the ownership and operating license with respect to the Nine Mile Point nuclear generating facility in Oswego County, NY. On that same date, the parties filed a motion to dismiss this proceeding. The withdrawal of the application moots this proceeding, which is, accordingly, dismissed.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of June 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. SSD 99-27**

GRAYSTAR, INC.
(200 Valley Road, Suite 103,
Mt. Arlington, NJ 07856) **June 13, 2000**

In this Order, the Commission refers a request for a hearing on the NRC Staff's denial of an application for registration of a sealed source and irradiator to the Atomic Safety and Licensing Board Panel. The Commission directs the Chief Judge of the Panel to designate a presiding officer under 10 C.F.R. Part 2, Subpart L, to handle the hearing.

RULES OF PRACTICE: SUBPART L

Irradiator licensing under Part 36 of NRC rules is a form of materials licensing, and thus falls under Subpart L when hearings are requested, even though Part 2 does not specify which of the Commission's several hearing processes governs irradiator licensing.

MEMORANDUM AND ORDER

On May 24, 2000, the NRC Staff denied an application by GrayStar, Inc., for registration of its Model GS-42 sealed source and the Model 1 irradiator. The Staff found GrayStar's Model GS-42 source design ''not acceptable for registration and

licensing under 10 C.F.R. 32.210 and 10 C.F.R. 36.21.'' The Staff offered GrayStar an opportunity for a hearing pursuant to 10 C.F.R. § 2.103(b).[1] On June 1, 2000, GrayStar asked the Staff to reconsider its denial decision and, in the alternative, sought an agency hearing. The Staff recently declined to reconsider its denial decision. This renders GrayStar's hearing request ripe for consideration.

Although the NRC Staff's denial of the application for registration relates to Part 32 of our rules, the Staff denial decision and GrayStar's request for a hearing appear to arise as well under Part 36, which covers the licensing of irradiators, a form of materials licensing. Part 36 does not specify which of the several hearing processes set out in 10 C.F.R. Part 2 applies to irradiator adjudications. Part 2 itself also contains no provision on what hearing process to apply to Part 36 cases. Under our agency's general regulatory scheme, however, the ''informal'' hearing process set out in Part 2's ''Subpart L'' ordinarily governs materials licensing cases, including NRC Staff denials of requested agency approvals. *See Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992). It is sensible to apply Subpart L to Part 36 cases as well. Like the general run of Subpart L cases, Part 36 involves materials licenses. Moreover, Part 36 specifically refers to Part 30 of our rules and provides that Part 30's general requirements on byproduct material remain applicable. *See* 10 C.F.R. § 36.1(a). Subpart L expressly covers agency licensing actions ''subject to'' Part 30. *See* 10 C.F.R. § 2.1201(a).

For the foregoing reasons, we refer GrayStar's request for a hearing to the Chief Judge of the Atomic Safety and Licensing Board Panel, and direct him to designate a member of the panel to rule on GrayStar's request for a hearing, and if necessary to serve as presiding officer to conduct the hearing itself, pursuant to Subpart L. *See* 10 C.F.R. § 2.1207(a).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of June 2000.

[1] Section 2.103(b) provides that when the NRC Staff denies an application it must give the applicant notice of the reasons for the denial and inform the applicant of its ''right . . . to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.''

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 50-400-LA**

CAROLINA POWER & LIGHT COMPANY
(Shearon Harris Nuclear Power Plant) **June 20, 2000**

In this Order, the Commission declines to entertain an appeal of Licensing Board rulings against Intervenors on two contentions in a case involving an Independent Spent Fuel Storage Facility under 10 C.F.R. Part 2, Subpart K, and where the Board had resolved some but not all issues in the case. The Commission holds that it ordinarily will not review interlocutory, or nonfinal, Board rulings, even ones characterized as ''important and novel.''

RULES OF PRACTICE: INTERLOCUTORY APPEALS

Under 10 C.F.R. § 2.115(e), appeals in Subpart K cases do not lie from Board decisions disposing of some but not all issues.

RULES OF PRACTICE: INTERLOCUTORY APPEALS

Boards have authority to refer to the Commission certain interlocutory rulings, and the Commission itself has discretion to review interlocutory Board decisions, but the Commission's decision to do so in particular cases stems from its inherent

supervisory authority, not from a right of litigants to immediate review of important and novel issues.

RULES OF PRACTICE: INTERLOCUTORY APPEALS

Claims that a Board made substantive and procedural error do not constitute grounds for interlocutory appeal.

RULES OF PRACTICE: INTERLOCUTORY APPEALS

After a Board issues a final decision, litigants may resubmit on appeal their arguments that the Board had made errors in prior, interlocutory rulings.

MEMORANDUM AND ORDER

This proceeding involves a December 1998 license amendment application filed by Carolina Power & Light Company (''CP&L'') to increase the spent fuel storage capacity at its Shearon Harris Nuclear Power Plant (''Shearon Harris''). The Board of Commissioners of Orange County [NC] (''Orange County'') sought and was granted intervenor status to challenge the application. In granting Orange County intervenor status, the Licensing Board admitted two contentions involving the adequacy of CP&L's proposed criticality prevention measures and quality assurance program. *See* LBP-99-25, 50 NRC 25 (1999).

Following a hearing (held pursuant to 10 C.F.R. Part 2, Subpart K) that included both the submittal of written presentations and oral argument, the Atomic Safety and Licensing Board issued LBP-00-12, 51 NRC 247 (2000). That order concluded that, at least as to these two issues, Orange County had presented no genuine and substantial dispute of fact or law requiring further exploration at an evidentiary hearing. The Licensing Board then resolved the merits of these two issues in favor of CP&L. However, the Board also explained that ''the admissibility of four [Orange County] late-filed environmental contentions is yet to be resolved'' and that therefore ''this proceeding is not subject to dismissal in accordance with 10 C.F.R. § 2.1115(a)(2).'' *See* 51 NRC at 282 n.14.

Orange County has filed with us a petition for interlocutory review of LBP-00-12. In its petition, Orange County challenges the Board's substantive rulings on the merits of Orange County's two contentions, but does not challenge the Board's procedural ruling regarding the need for an evidentiary hearing. Both the NRC Staff and CP&L oppose Orange County's petition. We dismiss the petition without prejudice to Orange County reraising the same issues at the end of the Licensing Board's proceeding.

Earlier this year, the Commission reiterated its longstanding general policy disfavoring interlocutory appeals. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). Section 2.1115(e) of our Subpart K regulations clearly applies this general policy to cases, such as this one, involving expansion of spent fuel storage capacity at nuclear power plants. That section declares that ''[u]nless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's orders disposing of issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding.'' 10 C.F.R. § 2.1115(e).[1] As the Board expressly stated, it has *not* dismissed this proceeding. Consequently, under section 2.1115(e), Orange County's petition for review is interlocutory in nature and therefore premature.[2]

Orange County argues that the Board decision addresses important and novel issues. *See* Petition at 9. However, neither our regulations nor our case law authorize interlocutory appeals solely on such grounds. *See, e.g., Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994) (''the mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding'') (citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 & nn.16-17 (1985)). Licensing boards, of course, may refer interlocutory rulings to the Commission when ''necessary to prevent detriment to the public interest or unusual delay or expense.'' *See* 10 C.F.R. § 2.730(f). And the Commission itself may exercise its discretion to review a licensing board's interlocutory order if the *Commission* wants to address a novel or important issue. *See generally Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 *passim* (1998). However, the Commission's decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and in no way implies that parties have a right to seek interlocutory review on that same ground. Here, there has been neither a Licensing Board referral nor a Commission determination that immediate review is necessary or desirable.

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[1] In contrast, where the Board has denied all contentions and thereby precluded a would-be intervenor from participating, or where the applicant argues that all intervenor's contentions should have been denied, thereby barring the intervenor from the litigation, the adversely affected party may appeal as of right. *See* 10 C.F.R. § 2.1115(e). *See generally Private Fuel Storage,* 51 NRC at 80 n.1 (citing 10 C.F.R. § 2.714a(b) and (c)).

[2] We have never ruled on the question whether the two regulatory exceptions to the prohibition against interlocutory appeals in Subpart G proceedings also apply in Subpart K proceedings. *See* 10 C.F.R. § 2.786(g)(1) and (2) (permitting such appeals only where a licensing board decision either threatens ''immediate and serious irreparable harm'' or ''affect[s] the basic structure of the proceeding in a pervasive and unusual manner''). Nor have we ruled on the analogous applicability of the case law that preceded (and provided the basis for) the 1991 promulgation of those exceptions in section 2.786(g). *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Even were we to conclude that these two exceptions do apply to a Subpart K proceeding (an issue we need not decide here), Orange County still has not demonstrated — or even alleged — that the Board order created circumstances that would trigger either of these regulatory exceptions, and our review of the record likewise reveals no such circumstances.

Orange County also argues that the Board ignored certain portions of the record, improperly refused to consider one of Orange County's arguments, and misinterpreted a relevant General Design Criterion. *See* Petition at 5-10. These arguments are essentially no more than assertions that the Board made substantive and procedural legal error — an interlocutory review ground that our regulations and case law do not recognize. *See, e.g., Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 & n.4 (1998); *Dr. James E. Bauer,* CLI-95-3, 41 NRC 245, 246-47 (1995).

For these reasons, we dismiss without prejudice Orange County's petition for review on the ground that it was prematurely filed. After the Board ultimately rules on Orange County's environmental contentions and issues a final decision, Orange County may then resubmit to us its arguments that the Board erred in rejecting the merits of the two contentions concerning criticality prevention and quality assurance.

IT IS SO ORDERED

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June 2000.

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) **June 1, 2000**

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 the request of Intervenor State of Utah (State) to admit late-filed amended contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, relating to Table S-4 of 10 C.F.R. Part 51, finding that (1) a balancing of the five late-filing factors in 10 C.F.R. § 2.714(a)(1) does not support admitting the contention; and (2) to the degree the State requests reconsideration of the Board's previous determination to deny the admission of portions of contention Utah V, that request is untimely without good cause shown.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The first and most important factor under a balancing of the five 10 C.F.R. § 2.714(a)(1) criteria governing the admission of late-filed contentions is whether

good cause exists for the late filing. *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 (GOOD CAUSE FOR DELAY)

When good cause is lacking for a late-filed issue, a compelling showing is required on the four remaining section 2.714(a)(1) late-filing factors. *See id.* at 244.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTERESTS)

Of the four remaining factors, elements two and four — availability of other means to protect petitioner's interest and the extent to which other parties will represent petitioner's interest — are less important. *See id.* at 245.

RULES OF PRACTICE: MOTION FOR RECONSIDERATION (UNTIMELY)

A reconsideration request that is grossly out of time without good cause shown can be rejected.

MEMORANDUM AND ORDER
(Denying Request for Admission of Late-Filed Amended Contention Utah V)

Intervenor State of Utah (State) requests the admission of a late-filed amended contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, in which it challenges the reliance of Applicant Private Fuel Storage, L.L.C. (PFS), on the current Table S-4 of 10 C.F.R. Part 51 to assess the regional impacts of spent fuel transportation in the area of the proposed PFS Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). A substantial portion of an earlier version of this same State contention was rejected by the Licensing Board because, among other things, it impermissibly challenged applicable Commission regulations, including Table S-4. Citing the agency's recent addendum to NUREG-1437, the generic environmental impact statement (EIS) for power reactor license renewals, *see* Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, NUREG-1437, Vol. 1, Add. 1,

Generic Environmental Impact Statement for License Renewal of Nuclear Plants (Final Report Aug. 1999) [hereinafter August 1999 NUREG-1437 Addendum], the State now offers an amended form of the contention relative to the use of Table S-4 to assess PFS ISFSI-area transportation impacts. PFS and the NRC Staff both oppose the admission of this issue statement.

For the reasons set forth below, we deny the State's request to admit its late-filed amended contention Utah V.

I. BACKGROUND

As part of its November 1997 intervention petition supplement, the State submitted contention Utah V asserting that the environmental report (ER) accompanying the PFS application failed to give adequate consideration to the transportation-related environmental impacts of its proposed Skull Valley ISFSI. *See* [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 144 [hereinafter State Contentions]. As subsequently rewritten by the State and PFS, that issue statement read:

> CONTENTION: The Environmental Report (''ER'') fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that:
>
> 1. In order to comply with NEPA, PFS and the NRC Staff must evaluate all of the environmental impacts, not just regional impacts, associated with transportation of spent fuel to and from the proposed ISFSI, including preparation of spent fuel for transportation to the ISFSI, spent fuel transfers during transportation to the ISFSI, transferring and returning defective casks to the originating nuclear power plant, and transfers and transportation required for the ultimate disposal of the spent fuel.
>
> 2. PFS's reliance on Table S-4 is inappropriate and inadequate. 10 C.F.R. § 51.52 applies only to light-water-cooled nuclear power plant construction permit applicants, not to offsite ISFSI applicants. Even if 10 C.F.R. § 51.52 applied, PFS does not satisfy the threshold conditions for using Table S-4, and its reliance on NUREG-1437 is misplaced. Since the conditions specified in 10 C.F.R. § 51.52(a) for use of Table S-4 are not satisfied, the PFS must provide ''a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor'' in accordance with 10 C.F.R. § 51.52(b).
>
> 3. The SAR is inadequate to supplement Table S-4 in that:
>
>   a. The Applicant fails to adequately address the intermodal transfer point in that the analysis utilizes unreasonable assumptions regarding rail shipment volume and its associated effects.
>
>   b. The Applicant fails to calculate impacts of the return of substandard or degraded casks to the originating nuclear power plant licensees, including additional radiation doses to workers and the public.

c. The Applicant fails to address the environmental impacts of any necessary intermodal transfer required at some of the originating nuclear power plants due to lack of rail access or inadequate crane capability.

4. New information shows that Table S-4 grossly underestimates transportation impacts in that:

a. WASH-1238, which is the basis for Table S-4, uses poor and outdated data, and hence the Applicant's reliance on WASH-1238 and Table S-4 is inadequate to demonstrate compliance with NEPA;

b. WASH-1238 does not quantify the risks of spent fuel transportation. 10 C.F.R. § 51.45(c) requires that, to the extent practicable, the cost and benefits of a proposal should be quantified;

c. WASH-1238 does not address accidents caused by human error or sabotage;

d. WASH-1238 does not include up-to-date analyses of maximum credible accidents;

e. WASH-1238 does not address the potential for degradation of fuel cladding caused by dry fuel storage;

f. WASH-1238 does not address the greater release fraction from severe accident consequences demonstrated in recent analyses;

g. WASH-1238 does not address specific regional characteristics of impacts on the environment from transportation and therefore is inadequate to satisfy 10 C.F.R. § 72.108.

h. WASH-1238 does not address circumstances and consequences of a criticality event of a representative rail transportation cask with a large capacity (capacity greater that a critical mass of fuel);

i. WASH-1238 does not contain information from the more recent and more accurate dose modeling RADTRAN computer program;

j. WASH-1238 does not address a representative transportation distance for the shipment of spent fuel from the originating nuclear power plants. WASH-1238 assumes an approximate distance of 1000 miles. The PFS acknowledges that the distance may be more than twice that amount. ER at 4.7-3.

LBP-98-7, 47 NRC 142, 199-200, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

In our April 1998 decision on the admission of contentions, we declared that, with one exception,[1] contention Utah V and its supporting bases were inadmissible on the grounds that they

[1] The only portion of this contention that we admitted addressed the question of whether the weight for a loaded PFS shipping cask is outside the parameters of 10 C.F.R. § 51.52 (Table S-4). *See* LBP-98-7, 47 NRC at 200-01.

> fail to establish with specificity any genuine dispute; impermissibly challenge the applicable Commission regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.52 [(Table S-4)], 72.108, and . . . WASH-1238 (Dec. 1972), as supplemented, NUREG-75/038 (Supp. 1 Apr. 1975); lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

Id. at 200-01.

On October 4, 1999, the State submitted what it labeled a late-filed amended contention Utah V. *See* [State] Request for Admission of Late-Filed Amended Utah Contention V (Oct. 4, 1999) [hereinafter State Request]. This revised version states:

> AMENDED CONTENTION V: The ER for the PFS facility fails to give adequate consideration to the transportation-related environmental impacts of the proposed [ISFSI] in that it relies on Table S-4, which neglects to consider the impacts of converging many spent fuel shipments on the Wasatch Front region, including the impact of a severe and foreseeable accident on Salt Lake City and its environments, and including economic as well as physical impacts. Therefore, the ER is inadequate to satisfy 10 C.F.R. § 72.108. The impacts on the Wasatch Front must also be considered cumulatively with the impacts on high population areas in Nevada, such as Las Vegas.

Id. at 2. As the basis for this revised version of the contention, the State relies upon an August 1999 addendum to NUREG-1437, the generic environmental impact statement (EIS) for nuclear plant license renewal, that analyzes the question

> whether the environmental impacts of the transportation of higher enrichment and higher burnup spent nuclear fuel are consistent with the values of 10 CFR 51.52, Table S-4 as applicable to license renewal, continue to be applicable given that it is likely that spent fuel will be shipped to a single destination, such as the proposed repository at Yucca Mountain in Nye County, Nevada, . . .''

August 1999 NUREG-1437 Addendum at 1. According to the State, because NUREG-1437 questions the adequacy of generic Table S-4 to address the impacts of the convergence of shipments of spent fuel in the region of the Yucca Mountain repository in Nevada, in particular the Las Vegas area, the Commission also has ''implicitly question[ed] the adequacy of Table S-4 to address the impacts of the convergence of fuel on Salt Lake City and the PFS facility.'' State Request at 2. Also, according to the State, in response to a State comment on the need to address the impacts of the convergence of spent fuel in the Salt Lake City region, the agency declared such an analysis beyond the scope of the license renewal generic EIS, but did state that '' 'the NRC currently is reviewing a site-specific application for construction and operation of the proposed [PFS] Facility at Skull Valley in a separate regulatory action. A site-specific study of the cumulative impacts of transportation is part of that review.' '' *Id.* at 9 (quoting August 1999

NUREG-1437 Addendum at A1-8). According to the State, the upshot of these statements is that

> It is now clear from NUREG-1437 that the Commission does not consider Table S-4 to constitute an adequate analysis of spent fuel transportation impacts involving convergence of a large number of shipments on a single site; and that it contemplates that these issues will be addressed in the instant licensing proceeding. In effect, after having been sent by the Board to a generic proceeding, the State has now been returned to the Board for resolution of this issue. Accordingly, the State is seeking reconsideration of the Licensing Board's previous decision rejecting the contention.

Id.

Recognizing, however, that to gain admission of a late-filed issue it must address the five factors of 10 C.F.R. § 2.714(a)(1), the State contends that it has satisfied the initial good cause requirement because the Board's original basis for rejecting the contention, i.e., that it impermissibly challenged Commission generic determinations, has been overruled by the agency determination in NUREG-1437. The State further claims that its amended contention is timely because its admission request was filed within 30 days after the issuance of the August 1999 final version of the NUREG-1437 addendum. Also, according to the State, it has satisfied the other late-filing requirements of section 2.714(a)(1) because (1) the testimony of its expert witness, Dr. Marvin Resnikoff, will assist in the development of a sound record; (2) there is no other forum in which the State can raise its concerns regarding the inadequacy of Table S-4; (3) the State's interest in this matter will not be represented by another party; and (4) although this issue may somewhat broaden the proceeding, it will not delay it because National Environmental Policy Act (NEPA) issues presently are not scheduled to go to hearing until 2001. *See id.* at 10-12.

PFS opposes the admission of amended contention Utah V, arguing initially that the State's contention is nothing more than a motion for reconsideration of the Board's April 1998 ruling on contention Utah V that is grossly out of time. Additionally, PFS declares that the State has not established good cause for accepting a late-filed contention under section 2.714(a)(1) since the so-called Wasatch Front convergence issue, i.e., the ''convergence'' of spent fuel shipments in the Wasatch Front area of Utah, was not based upon new information and could have been included with the State's November 1997 contentions. PFS also claims that the other factors of section 2.714(a)(1) do not overcome the State's lack of good cause because the State has other means available to protect its interests, including commenting on the draft EIS that will be published for the PFS ISFSI. PFS additionally claims that the inclusion of this contention will broaden and delay this proceeding by expanding its scope, thus establishing that the section 2.714(a)(1) five-factor balancing exercise does not support admission

of the amended contention. *See* [PFS] Response to [State] Request for Admission of Late-Filed Amended Utah Contention V (Oct. 18, 1999) at 5-10.

The Staff also opposes admission of the State's late-filed amended contention. The Staff claims that the State lacks good cause for the late-filed contention because it could have raised the ''regional cumulative impact issue'' prior to the September 3, 1999 *Federal Register* publication of the final version of the NUREG-1437 addendum, *see* 64 Fed. Reg. 48,496 (1999), and that, in fact, this notice was only the culmination of an extensive rulemaking proceeding in which the State took an active part. According to the Staff, the ''convergence'' issue relative to the Yucca Mountain site actually was made evident as early as 1996 in the rulemaking proceeding that resulted in the original adoption of NUREG-1437 as the generic EIS for reactor license renewal proceedings, *see* 61 Fed. Reg. 66,537 (1996), and in the proposed rule regarding the adoption of Addendum 1 for NUREG-1437, which was published on February 26, 1999, 64 Fed. Reg. 9884 (1999). Both rulemaking items recognized that, notwithstanding Table S-4, in the absence of the generic EIS rulemaking, individual reactor license renewal applicants were required to discuss the generic and cumulative impacts associated with transportation infrastructure in the vicinity of the Yucca Mountain high-level waste repository site. The Staff further maintains that while late-filing factors two and three support the State's admission request, given that no other party can represent the State's interests and its participation arguably may assist in developing a sound record, factors four and five do not. According to the Staff, these two factors fail to support late admission of amended contention Utah V because this proceeding will be delayed by its inclusion and there are other means available to protect the State's interest, such as the State's opportunity to comment on the Staff's draft EIS relative to any discussion of transportation issues. *See* NRC Staff's Response to [State] Request for Admission of Late-Filed Amended Utah Contention V (Oct. 18, 1999) at 5-12.

In addition to its analysis of the section 2.714(a)(1) late-filing factors, the Staff also claims that certain portions of amended contention Utah V should be excluded as lacking a factual and legal basis as required by section 2.714(b)(2). The Staff asserts in this regard that to the degree the contention suggests the agency found in NUREG-1437 that Table S-4 is inadequate to address the State's ''convergence'' concern, the issue statement lacks an adequate basis in light of the finding in the 1999 NUREG-1437 addendum that the Table S-4 environmental impact values are appropriate for reactor license renewal review even if spent fuel is transported to a single destination such as the proposed Yucca Mountain high-level waste geologic repository. Also lacking foundation, the Staff declares, is the State's assertion that the Staff will consider the specific issue of the impacts of spent fuel transportation through the Salt Lake City area in the upcoming EIS for the PFS Skull Valley facility. Finally, according to the Staff, without basis is the State's conclusion that, because the agency failed to do so in NUREG-1437, the ER for the PFS facility must address the cumulative economic and other impacts of spent fuel shipments

through both Utah and Nevada to provide a context for assessing the validity of other alternatives, such as leaving spent fuel at the reactor sites until a high-level waste repository is constructed. *See id.* at 13-16.

Thereafter, in an October 28, 1999 reply to the PFS and Staff responsive filings, the State declares the Staff's concerns about the bases for its amended contention inapposite in light of the discussion in NUREG-1437 regarding shipment ''convergence'' in Las Vegas and the State's unresolved comments regarding its similar concern relative to the Salt Lake City area. Also, the State challenges the PFS assertion that its request is merely an untimely reconsideration request. According to the State, its request fell well within the recognized parameters of new information/changed circumstances that are sufficient to support such a request. Finally, the State declares relative to the five-factor balancing test of section 2.714(a)(1) that (1) the language of contention Utah V makes it clear the State did attempt to litigate the spent fuel transportation issue in its original contention so that, contrary to PFS's assertion, its concern is not late-filed; (2) contrary to the Staff's assertion, nothing in the ongoing reactor license renewal generic EIS rulemaking prior to the September 1999 final version of NUREG-1437 addressing its comments was sufficient to support the admission of its amended contention so that its issue statement is not late-filed; and (3) a balancing of the other section 2.714(a)(1) late-filing factors supports admission of its amended contention Utah V. *See* [State] Reply to [PFS] and Staff Oppositions to Late-Filed Amended Utah Contention V (Oct. 28, 1999) at 2-9 [hereinafter State Reply].

II. ANALYSIS

As was outlined above, in its admission request, the State has suggested both that amended contention Utah V should be admitted as appropriately late-filed and because its subject matter requires that the Board reconsider its April 1998 ruling that, for the most part, the contention was inadmissible. PFS and the Staff have argued that the State is wrong on both counts. We discuss both theories below.

A. The Late-Filing Criteria

Because the deadline for filing timely contentions in this proceeding passed in November 1997, the State's amended contention Utah V must be shown to be admissible under a balancing of the five late-filing criteria of 10 C.F.R. § 2.714(a)(1). The first and most important factor is whether good cause exists for the late filing. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). The other factors include the availability of other means whereby the petitioner's interest will be protected (factor two); the extent to which the petitioner's participation may reasonably be

expected to assist in the development of a sound record (factor three); the extent to which the petitioner's interests will be represented by existing parties (factor four); and the extent to which the petitioner's participation will broaden the issues or delay the proceeding (factor five).

We conclude amended contention Utah V fails to meet the criteria for late-filed contentions. Our determination in this regard is based on the fact that, from the record before us, it is apparent that the particular issue at the heart of the State's amended contention — the need for a site-specific consideration of spent fuel transportation ''convergence'' impacts in the Salt Lake City area in the PFS facility EIS rather than reliance on the generic impacts outlined in Table S-4 — could reasonably have been raised as early as 1997 when contention Utah V initially was filed. In endorsing the NUREG-1437 reactor license renewal GEIS, the December 1996 statement of considerations for the final license renewal environmental review rule declared ''because Table S-4 does not take into account the generic and cumulative (including synergistic) impacts of transportation infrastructure construction and operation in the vicinity of the Yucca Mountain repository site, such information would have to be provided by [license renewal] applicants.'' 61 Fed. Reg. at 66,538. In essence, this was an acknowledgment that, relative to the impacts of high-level waste transportation in the Yucca Mountain environs, including the Las Vegas area, the generic impact analysis in Table S-4 was not enveloping without a further EIS analysis directed to that question. And this is precisely the assertion now being made by the State in the context of the PFS spent fuel storage facility and the Salt Lake City area. Accordingly, to the degree this analogous situation provided a basis for the State's contention, it was available as a supporting consideration at the time the contention originally was filed. Although the State considers the 1999 NUREG-1437 addendum rulemaking to be the trigger point for its late-filed amended contention, what that proceeding did was to establish, based on a site-specific analysis, that the Table S-4 generic determination was indeed a bounding analysis for the Yucca Mountain area, thereby relieving license renewal applicants of the need for the previously required case-by-case, site-specific determination that the State maintains still is necessary relative to the PFS ISFSI facility and the Wasatch Front area. As a consequence, we do not see that the 1999 rulemaking relative to NUREG-1437 Addendum 1, and particularly the September 1999 final rule, brought ''anything new to the table'' relative to the State's concerns such that it is the informational trigger for a good cause finding here.[2]

[2] Relative to the February 1999 proposed rule and the September 1999 final rule regarding the NUREG-1437 addendum, since both acknowledged the central point that additional analysis was necessary before the Table S-4 generic impacts could be considered bounding relative to high-level waste repository-related transportation convergence impacts, reasonable support for any State contention regarding PFS facility-related high-level waste convergence

(Continued)

Because good cause thus is lacking for the State's late-filed issue, a compelling showing is required on the four remaining section 2.714(a)(1) late-filing factors. *See Braidwood,* CLI-86-8, 23 NRC at 244. Albeit the less important of the four, *see id.* at 245, elements two and four seemingly favor the State. Regarding factor two, the only other means available to protect the State's interest in having its concerns considered and addressed — its ability to comment on the draft EIS evaluation of transportation issues for the EIS evaluation — appears not to be on a par with the opportunity afforded by the adjudicatory procedures that govern this proceeding. And as to factor four, no other party appears to be in a position to represent the State's interests relative to this issue. On the other hand, factor three does little to add to the State's side of the balance given that the proffer of the State's expert witness, Dr. Resnikoff, lacks the specificity demanded by the Commission if this factor is to be accorded any significant weight in favor of admitting the contention. *See* LBP-99-43, 50 NRC 306, 315 (1999). And as to factor five, the extent to which this contention will broaden the issues or delay the proceeding, this weighs somewhat against the State. Notwithstanding the fact that under the current schedule discovery on this contention may not significantly delay the proceeding, admission of this contention would introduce a new issue and thus extend the duration of the case by adding some additional hearing time to the proceeding.

On balance, therefore, the lateness factors in section 2.714(a)(1) weigh against admitting amended contention Utah V. As a consequence, as a late-filed issue, this contention cannot be admitted.[3]

B. The Reconsideration Criteria

In addition to the late-filing aspect of this contention, PFS makes a point that, to the extent this ''convergence'' issue was a part of the original contention Utah V, the State seems to be requesting untimely reconsideration of our ruling denying its admission other than on the Table S-4 truck weight issue.[4] Assuming for argument's sake that the State is correct that it previously requested admission of this question

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transportation impacts was available in the earlier document. *Compare* 64 Fed. Reg. 9884, 9885 (1999) (proposed rule) *with id.* at 66,538 (final rule). Thus, even assuming this addendum rulemaking was the appropriate late-filing trigger, there would not be good cause for the filing of amended contention Utah V in October 1999, some 7 months after the February 1999 proposed rule was issued.

[3] While our ruling on the late-filing criteria means we need not reach the question of the contention's admissibility under the section 2.714(b) criteria, based on our review of the parties' filings, we would have admitted the contention except for the last sentence, which lacks an adequate factual or legal basis.

In this regard, we also note that our ruling here is without prejudice to any additional challenge the State may wish to interpose on this transportation impact ''convergence'' issue based on any discussion in the soon to be issued Staff draft EIS for the PFS facility. *See* 10 C.F.R. § 2.714(b)(2)(iii).

[4] In filing its amended contention Utah V, the State makes no mention of the admitted ''truck weight'' portion of this contention. Nevertheless, nothing we do here negates or otherwise affects our earlier admission of that issue.

— a matter that is not altogether clear[5] — and we rejected it, then the PFS reconsideration argument merits further consideration.

To counter this PFS assertion, the State seeks to invoke what it describes as Commission precedent permitting reconsideration whenever there is new information or changed circumstances. *See* State Reply at 6 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-7, 29 NRC 395, 398 & n.8 (1989)). As our discussion in section II.A above makes clear, however, we do not consider the basis put forth by the State in support of admission of amended contention Utah V to involve either new information or changed circumstances.[6] Given that our original contention admission order set a May 4, 1998 time limit on reconsideration motions, *see* LBP-98-7, 47 NRC at 249, the State's request is grossly out of time without good cause shown, and so must be rejected.

III. CONCLUSION

For the reasons set forth above, we deny the State's October 4, 1999 request for admission of a late-filed amended contention Utah V challenging the adequacy of Table S-4 to assess convergent transportation impacts in the Wasatch Front region based on our findings that (1) a balancing of the five factors in 10 C.F.R. § 2.714(a)(1) does not support admitting this contention; and (2) to the degree the State's pleading asks for reconsideration of our April 1998 determination denying admission of portions of contention Utah V, that request is untimely.

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[5] A review of the record relating to the contention Utah V as originally proposed reveals that although there were separate references to the NUREG-1437 environmental analysis and the possibility of a spent fuel shipment accident in Salt Lake City, *see* State Contentions at 146, 159, as well as a possible transportation bottleneck at the proposed Rowley Junction intermodal transfer point located approximately 25 miles north of the PFS ISFSI, *see* Tr. at 583-84, there was never any connection made between these elements so as clearly to present the ''convergence'' theory upon which amended contention Utah V now rests.

[6] In this regard, the State quotes NUREG-1437, Addendum 1 as stating:

> ''There were . . . *changed* circumstances, not accounted for in the original analyses supporting Table S-4 and not adequately treated in the 1996 amendment for license renewal.''

State Reply at 3 (quoting August 1999 NUREG-1437 Addendum at 3) (emphasis supplied). In fact, the passage reads:

> There were, however, *certain* circumstances not accounted for in the original analyses supporting Table S-4 and not adequately treated in the 1996 amendment for license renewal.

August 1999 NUREG-1437 Addendum at 3 (emphasis supplied).

For the foregoing reasons, it is this first day of June 2000, ORDERED, that the State's October 4, 1999 request for admission of an amended late-filed contention Utah V is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD[7]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 1, 2000

[7] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

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)

June 1, 2000

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 State of Utah's motion to admit late-filed amended contention Utah L, Geotechnical, finding that the proposed modification to address the pending 10 C.F.R. § 72.2 request of Applicant PFS for an exemption from the seismic design criteria of 10 C.F.R. Part 100, App. A, is not ripe for admission in the absence of a favorable Staff ruling on the PFS exemption request.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY; FACTUAL CONCRETENESS AND PROCEDURAL RIPENESS)

The question of when a new or amended contention must be filed in order to meet the section 2.714(a)(1) late-filing criteria, specifically the critical ''good cause'' criterion, ''calls for a judgment about when the matter is sufficiently

factually concrete and procedurally ripe to permit the filing of a contention.'' LBP-99-21, 49 NRC 431, 437 (1999).

MEMORANDUM AND ORDER
(Denying Request for Admission of Late-Filed Amended Contention Utah L)

Previously, in LBP-99-21, 49 NRC 431 (1999), we denied as premature a motion by Intervenor State of Utah (State) to amend its contention Utah L, Geotechnical, to permit it to contest a request by Applicant Private Fuel Storage, L.L.C. (PFS), to the NRC Staff for an exemption from the requirements of 10 C.F.R. § 72.102(f)(1) to permit PFS to use a probabilistic rather than a deterministic standard for its seismic hazard analysis relative to the proposed PFS Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). Now before us is another State request to admit a late-filed issue relating to contention Utah L, this time a modification to address a proposal to grant the still-pending PFS exemption request set forth in the Staff's December 1999 safety evaluation report (SER) regarding the PFS application. As before, both PFS and the Staff oppose the State's request, albeit on somewhat different grounds.

For the reasons set forth below, we deny the State's motion for the late-filed modification of contention Utah L.

I. BACKGROUND

In LBP-99-21, we provided the following synopsis of the PFS exemption request at issue in the pending State motion:

> Under the current provisions of 10 C.F.R. Part 72 relating to ISFSI seismic analysis, a facility like that proposed by PFS must meet the same standards applicable to a nuclear power plant under 10 C.F.R. Part 100, Appendix A. *See* 10 C.F.R. § 72.102(f)(1). The Part 100 standard for calculating a safe shutdown or design-basis earthquake uses a deterministic approach. In an April 2, 1999 request directed to the Staff, invoking 10 C.F.R. § 72.7, PFS asked for an exemption from this Part 72 standard to permit the use of a probabilistic seismic hazard analysis along with a consideration of the risk involved to establish the design-basis earthquake at the PFS facility. According to PFS, such a change would have some significance because its own probabilistic analysis indicates that the relative risk at the PFS ISFSI warrants a design-basis earthquake with lower peak ground accelerations than that calculated using the Part 100, Appendix A deterministic methodology.

49 NRC at 434 (citation and footnote omitted). In that decision, we denied the State's request that we either require PFS to frame its exemption request as a rule

waiver petition under 10 C.F.R. § 2.758(b) so as to permit Board consideration of that request in this proceeding or that we permit an amendment to contention Utah L to allow the State to contest the PFS exemption request here. As to the latter State request, we declared:

> the exemption material provided by PFS to the Staff and the State seems to be sufficiently well-defined to provide the information needed to formulate a contention. Considerably less certain, however, is the question of its ripeness. By its nature, an exemption request is atypical. The rules promulgated by the Commission reflect a considered judgment about the requirements necessary to protect the public health and safety and the environment. In contrast to a license application that generally seeks to demonstrate the requester's compliance with agency requirements, an exemption request attempts to show why those regulatory requirements should not be applied to the requester. The latter thus is more problematic in terms of its likely impact on the administrative process. Indeed, the uncertain nature of an exemption request (i.e., that the request may not be granted) counsels that consideration of an exemption-related contention should await Staff action on the exemption. Accordingly, the timeliness of a contention based on an applicant's exemption request is more properly judged from the time of Staff action on the exemption rather than when the exemption request is filed.

Id. at 437-38 (footnote omitted).

Relative to the present State request, we note that while the Part 100, Appendix A, standard applicable under section 72.102(f) remains deterministic, in 1997 the agency amended section 100.23 to permit the optional use of a probabilistic seismic hazards analysis for new 10 C.F.R. Part 52 power reactor early site permit and combined construction permit/operating license applicants. *See* 10 C.F.R. § 100.23(a), (c)-(d); *see also* 61 Fed. Reg. 65,167 (1996). Thereafter, in a 1998 rulemaking plan, *see* SECY-98-126, Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Cask [ISFSIs] (June 4, 1998), the Staff proposed and the Commission approved the institution of a rulemaking proceeding to conform the seismic evaluation standard of section 72.102 to the new section 100.23 probabilistic methodology rather than the Part 100, Appendix A deterministic analysis. Moreover, as part of the rulemaking plan, the Staff proposed requiring that ISFSI systems, structures, and components (SSCs) be designed to withstand either a Frequency Category 1 design basis ground motion, with a 1000-year recurrence interval, or a Frequency Category 2 design basis ground motion with a 10,000-year recurrence interval. In its original exemption request, PFS submitted its design basis ground motion based on a 1000-year interval, but in August 1999 amended its request to substitute a 2000-year interval. Thereafter, in its December 15, 1999 SER, which was received by the State on December 27, 1999, the Staff noted relative to the pending PFS exemption request that it proposed to grant the exemption request using a 2000-year return period interval as requested by PFS. *See* [SER] of the Site-Related Aspects of the [PFS] Facility [ISFSI] at 2-45 (Dec. 15, 1999).

As it was set forth in the November 1997 PFS supplemental intervention petition, basis two to contention Utah L provides:

> **2. Ground motion.** The site may also be subject to ground motions greater than those anticipated by the Applicant due to spatial variations in ground motion amplitude and duration because of near surface traces of potentially capable faults (the Stansbury and Cedar Mountain faults). Sommerville, P.G., Smith, N.F., Graves, R.W., and Abrahamson, N.A., *Modification of empirical strong ground motion attenuation relations to include the amplitude and duration effects of rupture directivity, in* 68 Seismological Research Letters (No. 1) 199 (1997). Failure to adequately assess ground motion places undue risk on the public and the environment and fails to comply with 10 C.F.R. § 72.102(c).

[State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (November 23, 1997) at 82-83. In the pending motion filed following issuance of the Staff SER, the State declares that with the December 1999 SER, the Staff has now granted the PFS exemption request to allow the use of a probabilistic seismic hazard analysis with a 2000-year interval. As such, the State declares that it wishes to modify its contention to require either the use of a probabilistic methodology with a return period of 10,000 years, as provided in the 1998 Staff rulemaking plan, or compliance with the deterministic analysis requirement of the current section 72.102(f). *See* [State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L (Jan. 26, 2000) at 7.

Relative to the former point, the State sets forth its analysis of why the Staff has acted improperly in failing to follow the June 1998 rulemaking plan, including the Staff's failure to address the radiological consequences of a failed SSC design in accordance with 10 C.F.R. § 72.104(a); the seismic adequacy of the Canister Transfer Building equipment given the possibility of a canister drop during the transfer from the HI-STAR transportation cask to the HI-STORM storage cask; and inadequacies in the PFS design basis accident evaluation and leakage rate methodology, including leak hole diameter calculations based on sabotage accidents. Also challenged by the State are the four reasons set forth in the Staff's December 1999 SER in support of the use of a 2000-year return period, which the State asserts are inadequate to support employing that value. Additionally, the State addresses the five late-filing factors of 10 C.F.R. § 2.714(a)(1), declaring that a balancing of those elements establishes that its late-filed contention modification request should be permitted. *See id.* at 7-23.

In its response to the State's late-filed issue request, PFS declares that the Board should deny the request as seeking to raise an issue outside the scope of this proceeding, namely, a challenge to the Staff's grant of an exemption to an agency rule. Additionally, PFS asserts that, as it relies upon the June 1998 rulemaking plan, the State's request is an impermissible challenge to the agency regulations, specifically 10 C.F.R. § 72.2 that permits the Staff to issue an exemption to the Part 72 requirements. Further, PFS declares that the State's attempt to invoke the

rulemaking plan's provisions ignores the fundamental principle that an exemption does not conform to existing regulations and is not judged against them. Finally, PFS declares that the purported deficiencies in the Staff's determination to permit a 2000-year return period either lack a proper factual basis or are immaterial. *See* [PFS] Response to [State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L (Feb. 14, 2000) at 4-13.

Although agreeing with PFS that the State's request should be denied, the Staff takes at least a partially different route to arrive at that result. Initially, the Staff argues that the State's request is not ripe since, as its December 1999 SER makes clear, the Staff has not yet granted, or decided to grant, the PFS exemption. Also, according to the Staff, the State's assertion that Staff's action on the exemption is improper for failing to follow the June 1998 rulemaking plan does not state a legally cognizable basis for its issue amendment. Besides failing as an impermissible challenge to the adequacy of a Staff activity review, the Staff declares that the rulemaking plan has no status as a binding regulatory requirement. As to the issues regarding Canister Transfer Building equipment and the PFS accident leak rate assumptions, the Staff declares they should be rejected as unrelated to the PFS seismic exemption request or, in the latter instance, as untimely filed. *See* NRC Staff's Response to ''[State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L'' (Feb. 14, 2000) at 5-10.

In its reply to the PFS and Staff filings, the State declares that notwithstanding the Staff's ripeness argument, which PFS did not adopt, the Board should admit its modified issue statement to provide the State with a forum to challenge the 2000-year return period earthquake using a probabilistic approach. Additionally, the State maintains that there is an adequate basis for admission in that PFS cannot meet the existing seismic design standards of Part 72; the admission of the modified basis two is necessary to evaluate properly the State's existing contention and to determine whether the new standard and methodology will protect the public health and safety; and the applicability of the June 1998 rulemaking plan must be considered, including consideration of the contradictory positions of PFS and the Staff regarding its applicability. *See* [State] Reply to [PFS] and NRC Staff's Responses to Late-Filed Bases for Utah Contention L (Feb. 22, 2000) at 3-16.

II. ANALYSIS

In the context of our prior ruling on the admissibility of a State request to amend contention Utah L, we noted that the question of when a new or amended contention must be filed in order to meet the section 2.714(a)(1) late-filing criteria, specifically the critical ''good cause'' criterion, ''calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention.'' LBP-99-21, 49 NRC at 437. In that instance, we found

relative to the PFS exemption request that a contention regarding the validity of the exemption would become ripe when, and if, the Staff granted the exemption. *See id.* at 438.

The State now asserts that the Staff has, in effect, taken that action in connection with the December 1999 SER, a claim PFS apparently chooses not to challenge at this juncture. As the Staff points out, however, the language of the December 1999 SER makes it clear that this has not yet occurred. In pertinent part the Staff SER states:

> [T]he Staff concludes that additional analyses are needed to assess ground vibrations of the Facility and to approve the applicant's request for an exemption to 10 CFR 72.102(f)(1). The Staff agrees that the use of the [probabilistic seismic hazard analysis] methodology is acceptable, however, the SAR analyses need to be revised to consider a 2,000-year return period, rather than a 1,000-year return period.

SER at 2-45. Additionally, the SER lists the facility seismic design and the PFS exemption request as an ''open item.'' *Id.* at 2-52. Thus, although the Staff seems inclined to grant the exemption, it has not yet done so. As a consequence, the ripeness concern upon which we based our earlier ruling continues unabated.

The State, particularly in its reply pleading, provides an extended discussion of its views on its need and right in this proceeding to adjudicate the validity of the PFS exemption request, assuming that request is granted. As we observed previously relative to contention Utah L, based on our reading of the applicable precedent, if and when that contingency comes to fruition, ''to countenance an adjudicatory challenge to the PFS exemption petition, the Board would have to invoke its certified question or referred ruling authority under 10 C.F.R. §§ 2.718(i), 2.730(f) to determine whether the Commission wants the Board to consider the contention.'' LBP-99-21, 49 NRC at 438. As before, this is a bridge we, and the parties, will have to cross only if the Staff rules favorably on the PFS exemption request.

III. CONCLUSION

We deny the State's request to admit a late-filed modification to basis two of contention Utah L. As we did in LBP-99-21, we find that the proposed modification is not ripe for admission in the absence of a favorable Staff ruling on the pending 10 C.F.R. § 72.2 request of Applicant PFS for an exemption from the seismic design criteria of 10 C.F.R. Part 100, App. A.

For the foregoing reasons, it is, this first day of June 2000, ORDERED that the State's January 26, 2000 motion to admit a late-filed modification of basis two of contention Utah L is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD*

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 1, 2000

*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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

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)

June 1, 2000

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 State of Utah's (State) motion to admit late-filed contention Utah JJ, Co-Seismic Fault Rupture, which challenges the adequacy and scope of a recent PFS analysis of a possible co-seismic rupture of the Stansbury fault with the East and/or West faults in the general vicinity of the proposed facility. The Board concludes that the State failed to establish that, on balance, the five elements of the 10 C.F.R. § 2.714(a)(1) late-filing analysis support admission of the contention.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

To admit a late-filed contention, a presiding officer must find that the balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) supports such an action. The burden of proof relative to this analysis is on the contention's sponsor, who must affirmatively address all five factors and demonstrate that, on balance, they

warrant overlooking the lateness of the contention. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Good cause for the petitioner's late filing of a contention is the first, and most important, element of the section 2.714(a)(1) balancing process.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

An intervenor that awaits the formal filing of a license application amendment may lack good cause for a late-filed contention if the information in the amendment was previously put forth in applicant documentation available to the intervenor. *See* LBP-99-43, 50 NRC 306, 313-14 (1999), *petition for interlocutory review denied,* CLI-00-2, 51 NRC 77 (2000).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Without establishing good cause regarding the delay surrounding the filing of its contention, a petitioner must make a compelling showing relative to the other four factors set forth in 10 C.F.R. § 2.714(a)(1). *See id.* at 315.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTERESTS)

Late-filing factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by existing parties — are accorded less weight in the balance than factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding. *See id.*

MEMORANDUM AND ORDER
(Denying Request for Admission of Late-Filed Contention Utah JJ)

In a motion filed April 19, 2000, Intervenor State of Utah (State) requests that the Licensing Board admit a new late-filed contention Utah JJ, Co-Seismic Fault Rupture. According to the State, this contention is related to previously admitted contention Utah L, Geotechnical, in which the State contests various aspects of the geotechnical analysis put forth by Private Fuel Storage, L.L.C. (PFS), in support of its 10 C.F.R. Part 72 application for authority to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah. This issue statement, the State declares, is intended to challenge the adequacy and scope of a recent PFS analysis of a possible co-seismic rupture of the Stansbury fault with the East and/or West faults in the general vicinity of the facility, which it asserts could have important safety implications because of the potential for underestimating the ground motion that the PFS ISFSI systems, structures, and components (SSCs) must withstand. Both PFS and the NRC Staff challenge the admission of this late-filed contention, asserting it fails to meet both the 10 C.F.R. § 2.714 admission standards governing late-filed contentions and contentions generally.

For the reasons set forth below, we deny the State's request for admission of late-filed contention Utah JJ.

I. BACKGROUND

In LBP-98-7, 47 NRC 142, 191, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998), we admitted contention Utah L, which provides:

> The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and [Safety Analysis Report (SAR)] do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

In support of this contention, the State provided a number of different bases, including concerns about surface faulting, ground motion, subsurface soil characterization, and the potential presence of collapsible soils. *See* [State] Contentions on Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 80-95.

As we have described in some detail in our ruling today regarding a State attempt to admit a late-filed revised contention Utah L, *see* LBP-00-15, 51 NRC 313, 315 (2000), while the current Part 72 standard for seismic analysis remains

deterministic, in April 1999 PFS requested that the Staff grant it an exemption to allow it to do a probabilistic seismic analysis along the line permitted for new 10 C.F.R. Part 52 power reactor applicants. As is also discussed in that decision, the State has various concerns about that exemption request, including a proposal to allow PFS to use a 2000-year recurrence interval in its probabilistic analysis.

Contention Utah JJ now proffered by the State declares as follows:

> The Applicant's failure to comply with 10 CFR § 72.102 places undue risk on the public health, safety, and the environment because the Applicant's effort to assess the seismic hazard implications of possible co-seismic rupture of the Stansbury Fault with the East and/or West Fault is erroneous and incomplete.

[State] Request for Admission of Late-Filed Utah Contention JJ (Co-seismic Fault Rupture) (Apr. 19, 2000) at 5 [hereinafter State Request]. According to the State, its request for this additional seismic analysis-related contention was precipitated by Amendment No. 10 to the PFS license application, which the State received on March 20, 2000. This March 17, 2000 amendment added an Appendix 2G to Chapter 2 of the PFS SAR that included a probabilistic analysis for a Stansbury/East-West co-seismic rupture with a 2000-year return period. The State notes that the PFS SAR amendment was a follow-on to a February 23, 2000 PFS commitment resolution letter (received by the State on February 28, 2000) that, in turn, was a response to a February 11, 2000 Staff telephone request to PFS for such a co-seismic analysis, the need for which, the State maintains, it first identified in August 1999 supplemental responses to PFS interrogatories.

According to the State, this analysis has several errors. First, there is an error in the SAR 2000-year return period ground motion computation. Additionally, the State asserts that the PFS co-seismic rupture analysis omitted the deterministic evaluation required under the existing regulatory scheme, including section 72.102(f)(1), as well as a 10,000-year return period ground motion computation required by an agency rulemaking plan under which the Staff is to develop a Part 72 rule revision to permit probabilistic seismic analysis for ISFSIs. *See* State Request at 5-10.

Relative to the five late-filing factors of section 2.714(a)(1), the State maintains that filing its contention within 30 days of receiving Amendment No. 10 to the PFS application established it has met the good cause factor. According to the State, the February 23, 2000 commitment resolution letter was too speculative to be a late-filed contention filing trigger. Relative to the other four factors, the State declares that the experience and qualifications of its expert, Dr. James C. Pechmann, places factor three — assistance in developing a sound record — on the admissibility side of the five-factor balancing test. The same is true for factors two and four in that, according to the State, there are no other parties or forums in which the State's interests can be adequately protected. Finally, relative to factor

five — broadening or delaying the proceeding — the State asserts that this factor does not weigh against admission because litigation on this issue can proceed along the same track as contention Utah L, which is still subject to a limited discovery window and has yet to go to hearing. *See id.* at 10-13.

PFS opposes the admission of this contention both as to the late-filing factors and the substantive standards governing contention admission. On the late-filing factors, PFS declares that the State lacked good cause under element one, given that the March 2000 Appendix 2G included everything that was in the February 23, 2000 commitment resolution letter, thus putting the State's filing some 50 days after the appropriate trigger date. Moreover, PFS asserts the purported failure of PFS to perform a 10,000-year return period analysis and a deterministic co-seismic analysis are clearly late issues, given the former argument could have been raised when PFS filed for an exemption in April 1999 and the latter could have been lodged in the State's original November 1997 contentions based on the PFS analysis in its June 1997 application. Also lacking, PFS declares, is the State's showing regarding the other two significant late-filing factors, three and five. Regarding the former, PFS asserts this element brings little to the admissibility side of the balance, given Dr. Pechmann's expert participation will do little to help resolve the insignificant computational error regarding the 2000-year return period analysis or the legal issue over the need to use a deterministic approach and a 10,000-year return period. Factor five support also is missing, PFS declares, because admission of this contention will inevitably broaden and delay the proceeding. *See* [PFS] Response to [State] Request for Admission of Late-Filed Utah Contention JJ (May 3, 2000) at 4-8.

On the matter of the contention's admissibility under the section 2.714(b), (d) requirements, PFS declares that the computational error was, by the State's own admission, immaterial and, in any event, was corrected in an April 24, 2000 errata to Appendix 2G, rendering this matter insufficient to support the contention's admission. As to the 2000-year return rate and deterministic analysis issues, PFS declares both immaterial given that there is no regulatory requirement imposing a 10,000-year return rate and Staff action granting its exemption request could relieve PFS of any duty to perform a deterministic analysis. *See id.* at 8-10.

The Staff, for its part, takes much the same approach. The Staff likewise finds the February 23, 2000 commitment resolution letter provided sufficient information to act as the trigger point for the State's contention, rendering its filing 50 days later without good cause. Also irrelevant to the good cause showing, the Staff asserts, are the State's reliance on the 10,000-year return rate issue and the State's purported reluctance to act on the commitment letter based on its fear that it would be wasting resources if it acted and there was a revised analysis in any subsequent license amendment. Factor three does not support the State either, the Staff declares, because the State has not made any attempt to indicate what Dr. Pechmann will say to support the contention. Also problematic, the Staff

maintains, is factor five because the admission of this issue is likely to broaden the admitted seismic issue and thereby delay the proceeding. *See* NRC Staff's Response to ''[State] Request for Admission of Late-Filed Utah Contention JJ (Co-seismic Fault Rupture)'' (May 3, 2000) at 5-11.

The Staff does not support admission of the contention relative to the section 2.714(b), (d) factors either. According to the Staff, the purported error is conceded by the State to be insignificant for a 2000-year return rate computation, rendering it immaterial and thus no basis for admitting the contention. The Staff also argues that the purported lack of a deterministic co-seismic analysis is immaterial because it has already concluded that using deterministic methodology for the peak ground acceleration values will exceed the PFS SAR proposed design values and the State has determined that the 10,000-year return period analysis would exceed the SAR proposed design value. *See id.* at 12-15.

II. ANALYSIS

To admit a late-filed contention, such as contention Utah JJ, a presiding officer must find that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) supports such an action. The burden of proof relative to this analysis is on the contention's sponsor, who must affirmatively address all five factors and demonstrate that, on balance, they warrant overlooking the lateness of the contention. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000). Moreover, even if the late-filed contention meets the section 2.714(a)(1) requirements, it must also satisfy the admissibility standards in section 2.714(b), (d), in order to receive merits consideration.

Good cause for the petitioner's late filing is the first, and most important, element of the section 2.714(a)(1) balancing process. In this instance, the State's contention has several different facets that require different analyses. For example, it seems apparent that the State's claim that the PFS SAR does not have an appropriate deterministic co-seismic analysis could have been made in August 1999 when the State raised the question about the need for a co-seismic analysis with PFS and, as such, lacks good cause. The issue of the 10,000-year return rate also appears to lack good cause because the Staff has not yet acted on the PFS probabilistic exemption request. *See* LBP-00-15, 51 NRC at 317-18 (dismissing late-filed revisions to contention Utah L as not ripe).

This leaves the matter of the alleged erroneous co-seismic calculation that was first put forth in the February 23, 2000 commitment letter and was later made a part of the PFS application as Appendix 2G in the March 17, 2000 Amendment No. 10. The State again takes the position that it was not required to act until

PFS formally amended its license application, an assertion we previously have rejected. *See* LBP-99-43, 50 NRC 306, 313-14 (1999), *petition for interlocutory review denied,* CLI-00-2, 51 NRC 77 (2000). In fact, as both PFS and the Staff correctly note, a comparison of Appendix 2G submitted as part of Amendment No. 10 and the PFS February 23, 2000 commitment letter reveals that the substance of the former was in the latter. Consequently, the contention ''trigger'' date for this analysis was February 28, 2000, the date upon which the State alleges, without challenge from either PFS or the Staff, that it received the commitment letter. This, in turn, means that the State took 51 days to lodge the contention.

In the context of this issue, 51 days is too long to provide good cause. As the State's filing of its contention purportedly based on the Appendix 2G information indicates, notwithstanding the technical nature of the information, the State was able to prepare a contention within 30 days. As far as we can determine, there was nothing to preclude the State from doing so relative to the PFS commitment letter, other than its erroneous view that it did not need to act until PFS formally amended its license application.[1] This misjudgement does not, in our view, provide the requisite good cause.

Without establishing good cause regarding the delay surrounding the State's filing of its contention, the State must make a compelling showing relative to the other four factors. *See id.* at 315. It has not done so, however. Factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by existing parties — do weigh in favor of the State, but they are accorded less weight in the balance than factors three and five. *See id.* As to factor three — assistance in developing a sound record — while the State has presented a witness with impressive credentials, it once again has failed to provide us with any specific information about what that witness would say in support of the contention, a showing that appears to fall short of the specificity that has been required by the Commission if this factor is to add any significant weight to the admissibility side of the late-filing balance.[2] Finally, in connection with factor five — broadening the issues/delaying the proceeding — while this factor does not provide a significant drag on admissibility given that there is still some limited time for discovery and the hearing on seismic issues has

[1] Although the State suggests that additional time was necessary to afford an adequate analysis of the technical information involved, it also indicates that because of resource constraints it apparently declined to initiate such an analysis until PFS actually amended its license application. *See* State Request at 11. Putting aside the fact that intervenors are expected to accept the financial and resource burdens that are part of the adjudicatory process, *see Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), as we have already indicated, an application amendment is not necessarily the trigger point for contentions based upon applicant information submitted to the Staff. Certainly, to come forward earlier based on the applicant information seems preferable to having a late-filed contention determined to lack good cause, particularly when an amendment or supplement based on subsequent application information generally would not be a prohibitive burden if the contention, based on the applicant's initial information submission to the Staff, has a solid basis.

[2] In this regard, the State also notes that an additional witness, Dr. Walter Arabasz, may provide testimony on this issue, *see* State Request at 12, but likewise fails to provide any specific information regarding his testimony.

not yet been held, nonetheless it is not sufficient, even with the support afforded by the other factors, to provide the compelling showing necessary to overcome the lack of good cause for the contention's late admission.

Thus, finding that a balancing of the section 2.714(a)(1) factors does not support admission of this late-filed contention, we deny the State's request.[3]

III. CONCLUSION

By waiting to file its contention Utah JJ until 30 days after PFS amended its ISFSI application to incorporate a co-seismic analysis, rather then submitting that new issue statement promptly after PFS provided that same analysis to the NRC Staff some 3 weeks earlier in a commitment resolution letter, the State has failed to establish the requisite good cause for filing the contention late. Nor has the State made a compelling showing that, on balance, the other four elements of the section 2.714(a)(1) late-filing analysis support admission of the contention. Accordingly, the Board finds late-filed contention Utah JJ is not admissible.

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[3] Although our ruling on the late-filing criteria means we need not reach the question of the contention's admissibility under the section 2.714(b), (d) criteria, based on our review of the parties' filings, we would have admitted only that portion of the contention challenging the lack of a deterministic co-seismic analysis. By the State's own admission, for the 2000-year return period co-seismic analysis, the erroneous calculation is immaterial in light of the corrective supplement. *See* State Request at 9. So too, the issue of the use of a 2000-year return period rather than a 10,000-year return period lacks materiality until the Staff has definitively acted on the PFS exemption request. *See* LBP-00-15, 51 NRC at 317-18.

For the foregoing reasons, it is, this first day of June 2000, ORDERED that the State's April 19, 2000 request to admit late-filed contention Utah JJ is *denied.*

THE ATOMIC SAFETY AND
LICENSING BOARD[4]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 1, 2000

[4] 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 of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Dr. Charles N. Kelber, Special Assistant

In the Matter of **Docket No. 55-32443-SP**
(ASLBP No. 99-755-01-SP)

MICHEL A. PHILIPPON
(Denial of Senior Operator License Application) **June 22, 2000**

ORDER
(Approving Settlement Agreement and Terminating Proceeding)

On June 21, 2000, the NRC Staff and Michel A. Philippon filed a joint motion for approval of a settlement agreement in their Subpart L proceeding. The proceeding is currently before the Presiding Officer after remand by the Commission. *See* CLI-00-3, 51 NRC 82 (2000). Pursuant to 10 C.F.R. § 2.1241, the Presiding Officer must approve any settlement.

Upon consideration of the joint motion and the proffered settlement agreement, the Presiding Officer finds that the settlement is fair and reasonable and comports with the public interest. Accordingly, the settlement agreement is approved and its terms incorporated by reference into this Order. Further, the instant proceeding challenging the denial of Mr. Philippon's senior reactor operator license application is dismissed with prejudice and hereby terminated.

It is so ORDERED.

By the Presiding Officer

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 22, 2000

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