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HEARINGS

3.0 HEARINGS

3.1 Licensing Board

3.1.1 General Role/Power of Licensing Board

Normally, the Licensing Board is charged with compiling a factual record in a proceeding, analyzing the record, and making a determination based upon the record. The Commission will assume these functions of the Licensing Board only in extraordinary circumstances. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project, Nos. 3 & 5), CLI-77-11, 5 NRC 719, 722 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1155 (1984).

The Licensing Board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 225 (1995).

A Licensing Board is not merely an evidence-gathering body. Rather, it has the responsibility for appraising ab initio the record developed before it and for formulating the agency's initial decision based on that appraisal. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Licensing Boards have a duty not only to resolve contested issues, but also to articulate in reasonable detail the basis for the course of action chosen. A Board must do more than reach conclusions; it must confront the facts. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). See also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-857, 25 NRC 7, 14 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 533-34 (1988) (a Board is not required to make explicit findings if its decision otherwise articulates in reasonable detail the basis for its determinations). However, a Licensing Board is not required to refer specifically to every proposed finding. Limerick, ALAB-857, 25 NRC at 14.

A decisionmaking body must confront the facts and legal arguments presented by the parties and articulate the reasons for its conclusions on disputed issues; i.e., it must take a hard look at the salient problems. Union Elec. Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 366 (1983), citing Seabrook, ALAB-422, 6 NRC at 41; Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC 819, 836 (1984), aff'g in part LBP-82-70, 16 NRC 756 (1982).

A Licensing Board is not required to do independent research or conduct de novo review of an application in a contested proceeding, but may rely upon uncontradicted Staff and applicant evidence. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 334-35 (1973); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 358 (1972), aff'd, UCS v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

The Licensing Board has the right and duty to develop a full record for decisionmaking in the public interest. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-82-87, 16 NRC 1195, 1199 (1982).

"If the rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy admissions, the Licensing Board should refer or certify such rulings or questions to the Commission on an interlocutory basis." Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 213 (2001).

Licensing Boards are authorized to certify questions or refer rulings to the Commission. 10 C.F.R. §§ 2.319(l), 2.323(f) (formerly §§ 2.718(i), 2.730(f)); cf. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-83-28, 17 NRC 987, 989 n.1 (1983).

When new information is submitted to the Licensing Board, it has the responsibility to review the information and decide whether it casts sufficient doubt on the safety of a facility. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-52, 18 NRC 256, 258 (1983).

A Licensing Board may conduct separate hearings on environmental issues and radiological health and safety issues. Absent persuasive reasons against segmentation, contentions raising environmental questions need not be heard at the health and safety stage of a proceeding, notwithstanding the fact they may involve public health and safety considerations. Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-80-18, 11 NRC 906, 908 (1980).

It is impractical to delay licensing proceedings to await American Society of Mechanical Engineers (ASME) action. The responsibility of the Board is to form its own independent conclusions about licensing issues. Regulations that reference the ASME code were not intended to give over the Commission's full rulemaking authority to a private organization on an ongoing basis; nor is a private organization intended to become the authority concerning criteria necessary to the issuance of a license. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-33, 18 NRC 27, 35 (1983).

As a general principle, multiple Boards should not be established if it would likely result in duplicative work or conflicting rulings. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 312 (2003).

A Board may express its preliminary concerns based on its review of early results from an applicant's intensive review program which seeks to verify the design and construction quality assurance of the facility. The Board's expression of its concerns during an early stage of the program may enable the applicant to modify its program in order to address more effectively the Board's concerns and questions. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-86-20, 23 NRC 844, 845 (1986).

If an intervenor cannot present its case, the proper method to institute a proceeding by which the NRC would conduct its own investigation is to request action under 10 C.F.R. § 2.206. It is not the Board's function to assist intervenors in preparing their cases and searching for their expert witnesses. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982). A

Licensing Board is not an intervenor's advocate and has no independent obligation to compel the appearance of an intervenor's witness. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

Licensing Boards have the authority to call witnesses of their own, but the exercise of this discretion must be reasonable, and like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Contractual disputes among electric utilities regarding, for example, interconnection and transmission provisions, rates for electric power and services, and cost-sharing agreements, are matters that do not fall within the jurisdiction of the Licensing Board and should properly be addressed to the Federal Energy Regulatory Commission (FERC) or state agencies that regulate electric utilities. Gulf States Util. Co. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31; aff'd, CLI-94-10, 40 NRC 43 (1994).

A Licensing Board may appoint a special assistant to act as a settlement judge, consistent with the provisions of 10 C.F.R. § 2.322 (formerly § 2.722). Cameo Diagnostic Ctr., Inc., LBP-94-13, 39 NRC 249 (1994).

Board adjudication of contentions is only appropriate insofar as those contentions present actual, live controversies. If the Board determines that a contention does not, in fact, present a live controversy – for instance, because all parties involved seek the same result – the Board must refrain from adjudicating it. Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), LBP-05-17, 62 NRC 77, 91-92 (2005).

3.1.1.1 Role and Authority of the Chief Judge

The Chief Administrative Judge of the Licensing Board Panel is empowered to: (1) establish two or more Licensing Boards to hear and decide discrete portions of a licensing proceeding; and (2) determine which portions will be considered by one Board as distinguished from another. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-916, 29 NRC 434 (1989); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 311 (1998).

The Commission expects the Chief Administrative Judge to exercise his authority to establish multiple boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple Boards than by a single Board; and (3) the multiple Boards can conduct the proceeding in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C., CLI-98-7, 47 NRC at 311.

3.1.2 Scope of Jurisdiction of Licensing Board

3.1.2.1 Jurisdiction Grant from Commission

A Licensing Board has only the jurisdiction and power which the Commission delegates to it. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station,

Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985); Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), LBP-86-37, 24 NRC 719, 725 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). See also Consol. Edison Co. of N.Y.; Power Auth. of N.Y. (Indian Point Nuclear Generating Unit 2; Indian Point Nuclear Generating Unit 3), LBP-82-23, 15 NRC 647, 649 (1982); Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 680 (1989), vacated and rev'd on other grounds, ALAB-944, 33 NRC 81 (1991), vacated as moot, CLI-96-2, 43 NRC 13 (1996). Nevertheless, it has the power in the first instance to rule on the scope of its jurisdiction when it is challenged. Kan. Gas & Elec. Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980); Kerr-McGee Chem. Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 905 (1987); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-4, 29 NRC 62, 67 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Mass. v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). Once a Board determines it has jurisdiction, it is entitled to proceed directly to the merits. Zimmer, LBP-83-58, 18 NRC at 646, citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 873 (1980).

The presiding officer has only the jurisdiction delegated by the Commission, generally made via a hearing or a hearing opportunity notice. Fansteel Inc. (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96, 100 (2003).

The NRC possesses the authority to change its procedures on a case-by-case basis with timely notice to the parties involved. Nat'l Whistleblower Ctr. v. NRC, 208 F.3d 256, 262 (D.C. Cir. 2000) quoting City of West Chicago v. NRC, 701 F.2d 632, 647 (7th Cir. 1983) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)).

A Licensing Board's jurisdiction is defined by the Commission's Notice of Hearing. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979); Catawba, ALAB-825, 22 NRC at 790. See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987); Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 504, 506 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20-21 (1991).

A Licensing Board generally can neither enlarge nor contract the jurisdiction conferred by the Commission. Catawba, ALAB-825, 22 NRC at 790, citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 647 (1974); Three Mile Island, ALAB-881, 26 NRC at 476; Philadelphia Elec. Co.

(Limerick Generating Station, Units 1 & 2), LBP-89-19, 30 NRC 55, 58, 59-60 (1989).

Where certain issues sought to be raised by an intervenor are not fairly within the scope of the issues for the proceeding as set forth in the Commission's Notice of Hearing, such additional issues are beyond the jurisdiction of the Licensing Board to decide. Union Elec. Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 370-71 (1978); Catawba, ALAB-825, 22 NRC at 790-91. See La. Energy Servs., L.P. (Claiborne Enrichment Ctr.), LBP-91-41, 34 NRC 332, 337-38, 344-45 (1991).

The five notices and orders by which authority may be delegated to a Licensing Board include an order to initiate enforcement action (10 C.F.R. § 2.202); an order calling for a hearing on imposition of civil penalties (10 C.F.R. § 2.205(e)); a Notice of Hearing on an application for which a hearing must be provided (10 C.F.R. § 2.104); a notice of opportunity for a hearing on an application not covered by 10 C.F.R. § 2.104 (10 C.F.R. § 2.105); and notice of opportunity for a hearing on antitrust matters (10 C.F.R. § 2.102(d)(3)).

Absent special circumstances, a Licensing Board may consider ab initio whether it has power to grant relief that has been specifically sought of it. Every tribunal possesses inherent rights and duties to determine in the first instance its own jurisdiction. Perkins, ALAB-591, 11 NRC at 742; Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 116 n.13 (2006).

The regulation permitting the Board to enter protective orders, 10 C.F.R. § 2.705 (formerly § 2.740), is procedural, and may not be read to enlarge the Licensing Board's authority to areas that the Commission has clearly assigned to other offices. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 226 (1995).

The effect of a policy statement of the Commission that deprives a Board of jurisdiction is to prohibit that Board from inquiring into the procedural regularity of the policy statement. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-69, 16 NRC 751 (1982).

When a proceeding is pending both before an ASLB and the Commission (in its reviewing capacity), and where the Licensing Board has previously issued a Notice of Hearing, jurisdiction to consider licensee's motion to withdraw its application and terminate the proceedings lies in the first instance with the Licensing Board. See 10 C.F.R. § 2.107; Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-22, 49 NRC 481, 483 (1999).

A Licensing Board which has been authorized to consider only the question of whether fundamental flaws were revealed by an exercise of an applicant's emergency plan does not also have the authority to retain jurisdiction to determine whether the flaws have been corrected. Shoreham, LBP-88-7, 27 NRC at 291. Challenging a Commission rule falls outside the jurisdiction of the Licensing Board; however, "there are other avenues through which Petitioners may seek relief, including filing an enforcement petition under 10 C.F.R. § 2.206, a rulemaking petition under 10 C.F.R. § 2.802, or a request to the Commission under 10 C.F.R. § 2.335 (formerly § 2.758) to make an exception or waive a rule based upon 'special circumstances with respect to the subject matter of the particular

proceeding…such that…the rule…would not serve the purposes for which [it] was adopted.'" Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), LBP-02-4, 55 NRC 49, 63 (2002).

Where a Licensing Board has already dismissed a case, it no longer has jurisdiction over the matter. Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35 (2006), citing Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-823, 22 NRC 773, 775 (1985).

Even if the Licensing Board's jurisdiction to hear a matter is in question, and has yet to be resolved, nothing prevents the Board from suggesting to the parties that they try to reach a settlement, as such a settlement could involve petitioner withdrawing its initiating papers, thereby rendering moot the issue of the Board's jurisdiction. Oyster Creek, CLI-06-24, 64 NRC at 116 n.13.

3.1.2.1.1 Effect of Commission Decisions/Precedent

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-86-21, 23 NRC 849, 859, 871-72 (1986). Pending future developments that could overrule controlling Commission precedent, Boards have held inadmissible a contention (or portion thereof) relying on an argument that a controlling Commission decision was wrongly decided. See, e.g., Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 113-14 (2006) (ruling on National Environmental Policy Act (NEPA) terrorism contention based on Commission precedent despite the pendency of a Circuit Court of Appeals review of an analogous issue).

Licensing Boards are bound to comply with directives of a higher tribunal, whether they agree with them or not. The same is true with respect to Commission review of Appeal Board action and judicial review of agency action. Any other alternative would be unworkable and would unacceptably undermine the rights of the parties. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983). See also Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), LBP-05-17, 62 NRC 77, 87-88 (2005) (applying "law of the case" doctrine to reach same conclusion with regard to rulings by different tribunals in different phases of a case, though noting that "changed circumstances or public interest factors" may sometimes dictate less rigid adherence to a ruling of a higher tribunal in a previous phase of the case).

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Eng'g Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

Promulgation of new regulations that occurs after a Commission decision based upon the old regulations does not exempt the Board, during a later phase of the same case, from following that Commission decision where the new regulations do not apply retroactively to the issue at hand. Unless the new regulations apply

retroactively – which generally will not be the case – "law of the case" doctrine requires the Board to follow the prior Commission decision. Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), LBP-05-26, 62 NRC 442, 462 (2005).

The Commission has inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before Licensing Boards. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2); Power Auth. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-82-15, 16 NRC 27, 34 (1982). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (directing the Licensing Board to suspend consideration of certain issues), reconsid. denied, CLI-92-6, 35 NRC 86 (1992); Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85 (1992); Exelon Generation Co., LLC; Sys. Energy Res., Inc. (Early Site Permit for Clinton ESP Site; Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 64 NRC 15, 21 (2006), citing Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004).

Pursuant to its inherent supervisory authority, the Commission may issue orders expediting Board proceedings and suggesting time frames and schedules. Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require. Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-15, 48 NRC 45, 52 (1998).

If a licensee files for bankruptcy, 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 settlement. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 224 (2000).

3.1.2.2 Authority in Construction Permit Proceedings Distinguished from Authority in Operating License Proceedings

A Licensing Board's powers are not coextensive with that of the Commission, but are based solely on delegations expressed or necessarily implied in regulation or in other Commission direction. A Licensing Board is not delegated authority to and cannot order a hearing in the public interest under 10 C.F.R. § 2.104(a). The notice constituting a construction permit Licensing Board does not provide a basis for it to order a hearing on whether an operating license should be granted. A construction permit Licensing Board's jurisdiction will usually terminate before an operating license application is filed. Thus, it probably never could be delegated authority to determine whether a hearing on the operating license application is needed in the public interest. Similarly, the general authority of a Licensing Board to condition permits or licenses provides no basis for it to initiate other adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsid., ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

In operating license proceedings, as distinguished from those involving construction permits, the role of NRC adjudicatory boards is quite limited insofar as uncontested matters are concerned. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 366, 370-71 (1978).

A Licensing Board for an operating license proceeding does not have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend the previously issued construction permit. An intervenor wishing to halt such construction must file a petition under 10 C.F.R. § 2.206 with the appropriate Commission official. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1103 (1982). See Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 870-71 (1984). A member of the public may challenge an action taken under 10 C.F.R. § 50.59 (changes to a facility) only by means of a petition under 10 C.F.R. § 2.206. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

3.1.2.2.A Scope of Authority in Construction Permit Proceedings

A Licensing Board is limited in the types of actions it may take in a construction permit proceeding. Although it may impose conditions on the granting of a construction permit, it may not require the applicant to submit a different application. In a review of alternate sites, for example, a Licensing Board is not authorized to suggest or select preferable alternate sites or to require the applicant to reapply for a construction permit at a specified new site. The Board may only accept or reject the site proposed in the application or accept it with certain conditions. Given the limited number of appropriate responses to a construction permit application, a Licensing Board should deny a construction permit on the grounds of availability of preferable alternate sites only when the alternate site is obviously superior to the proposed site. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

In Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582, 589-91 (1977), the Appeal Board determined that a second Licensing Board, constituted after an initial decision in a construction permit proceeding had been issued and the jurisdiction of the original Licensing Board had terminated, lacks authority to grant a petition for untimely intervention unless specifically delegated this authority by the Commission's regulations or one of the five notices or orders discussed in Section 3.1.2.1., supra. The Appeal Board reasoned that Commission regulations providing for the automatic termination of the jurisdiction of the original Licensing Board revealed a policy for reasonable, timely termination of litigation. This policy would be frustrated if the second Licensing Board could, merely by its creation, reactivate and “inherit” the expired authority of the original Board. Since a Licensing Board has no independent authority to initiate adjudicatory proceedings, Id. at 592, and since the requisite authority was neither “inherited” nor specifically granted to the second Board, that Board lacked authority to grant an untimely petition for intervention. Thus, the mere designation of a Licensing Board to entertain a petition does not in itself confer the requisite authority to grant the petition. See Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-389, 5 NRC 727

(1977). As a corollary, a Licensing Board cannot order a hearing in the absence of a pending construction permit or operating license proceeding, or some other proceeding which might arise upon the issuance of one of the five notices or orders listed above. South Texas, ALAB-381, 5 NRC at 592; Fla. Power & Light Co. (St. Lucie Plant, Units 1 & 2; Turkey Point, Units 3 & 4), LBP-77-23, 5 NRC 789 (1977). A Licensing Board is vested with the power to dismiss an application with prejudice. See 10 C.F.R. § 2.107(a); Philadelphia Elec. Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 974 (1981).

A Licensing Board is required to issue an initial decision in a case involving an application for a construction permit even if the proceeding is uncontested. U.S. Dept. of Energy, Project Mgmt. Corp., Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 489 (1984), citing 10 C.F.R. § 2.104(b)(2), (3).

In the context of the Board's mandatory hearing responsibilities, the terms "consider" and "determine" shall be viewed as essentially synonymous. However, the Board's review of contested matters should be different than its review of uncontested matters. Review of contested matters should be much more in depth than review of uncontested matters. With regard to uncontested portions of hearings, a Licensing Board should inquire whether the NRC Staff has performed an adequate review and reached conclusions reasonably supported by logic and fact. The Board's review should not be cursory, but should instead probe the Staff's findings by asking appropriate questions and by requiring additional information when needed. The Staff's technical and factual findings are not open to Board reconsideration unless the Board finds the Staff review inadequate or its findings lacking. Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460, 471 n.19, 473-74 (2006).

10 C.F.R. §§ 51.105(a)(1)(3) and 2.104(b)(3) outline the three NEPA-related matters that Licensing Boards must address. The Commission has stated that Boards should treat the regulatory requirements in these sections as applicable to the uncontested portion of a hearing. The Commission has stated that the Licensing Boards must conduct their own analysis on uncontested, baseline NEPA questions, but Boards should not second-guess the NRC Staff's technical or factual findings. There should be no exceptions to this rule, unless a Licensing Board finds that the Staff's review is incomplete or that the Staff's findings are not supported by the record. Clinton ESP Site, LBP-06-28, 64 NRC at 471-71, 483.

10 C.F.R. § 2.104(b)(2) sets forth safety issues that are relevant to construction permits, but not all of the issues listed are relevant for an ESP proceeding. Clinton ESP Site, LBP-06-28, 64 NRC at 472.

3.1.2.2.B Scope of Authority in Operating License Proceedings

Where the Commission's Notice of Hearing is general and only refers to the application for an operating license, a Licensing Board has jurisdiction to consider all matters contained in the application, regardless of whether the matters were specifically listed in the Notice of Hearing. Duke Power Co.

(Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 791-92 (1985) (application for an operating license contained proposal for spent fuel storage).

A Board can authorize or refuse to authorize the issuance of an operating license. It does not, however, have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend such a previously issued permit. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-82-76, 16 NRC 1029, 1086 (1982), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1102-03 (1982).

A Licensing Board is not authorized to order an applicant for an operating license to pursue options and alternatives to its application, such as the abandonment of an entire unit of a plant. The Board must consider the application as it has been presented. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 884 (1984).

A Licensing Board that has been granted jurisdiction to preside over an operating license proceeding does not have jurisdiction to consider issues which may be raised by potential applications for operating license amendments. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-87-19, 25 NRC 950, 951 (1987), reconsid. denied, LBP-87-22, 26 NRC 41 (1987), both vacated as moot, ALAB-874, 26 NRC 156 (1987).

A Licensing Board for an operating license proceeding is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the Board sua sponte. 10 C.F.R. § 2.340 (formerly § 2.760a); Midland, ALAB-674, 15 NRC at 1102-03, citing Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Units 1, 2, & 3), ALAB-319, 3 NRC 188, 190 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1933 (1982), citing 10 C.F.R. § 2.340 (formerly § 2.760a); Union Elec. Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Dairyland Power Coop. (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 579 (1988). Specifically, the Board's jurisdiction is limited to a determination of findings of fact and conclusions of law on matters put into controversy by the parties to the proceeding or found by the Board to involve a serious safety, environmental or common defense and security question. Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 NRC 1964, 1969-70 (1982); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-830, 23 NRC 59, 60 & n.1 (1986), vacating LBP-86-3, 23 NRC 69 (1986).

There is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application. See Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976). The Commission's regulations limit operating license proceedings to "matters in controversy among the parties" or matters raised on a Licensing Board's own initiative sua sponte. 10 C.F.R. §§ 2.104(c), 2.340 (formerly § 2.760a); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 382 (1985).

A hearing is not mandatory on an operating license, but where a Board is convened it may look at all serious matters it deems merit further exploration. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 229-31 (1980). Where a Licensing Board has jurisdiction to consider an issue, a party to a proceeding before that Board must first seek relief from the Board; if the Licensing Board is clearly without jurisdiction, there is no need to present the matter to it for decision. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443, 446 (1981), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-79-5, 9 NRC 607 (1979).

An operating license proceeding is not intended to provide a forum for the reconsideration of matters originally within the scope of the construction permit proceeding. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-804, 21 NRC 587, 591 (1985).

In an operating license proceeding, the Commission's regulations limit an adjudicatory board's finding to the issues put into contest by the parties. See 10 C.F.R. § 2.340 (formerly § 2.760a). A Board is not required to make – and, under the regulations cannot properly make – the ultimate finding comparable to that required in a construction permit proceeding. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), rev. denied, CLI-83-32, 18 NRC 1309 (1983).

The Licensing Board may assert jurisdiction over Part 70 material licensing issues raised in conjunction with an ongoing Part 50 licensing proceeding where the Part 70 materials license is integral to the project undergoing licensing consideration. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-84-16, 19 NRC 857, 862-65 (1984) (citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976)), aff'd, ALAB-765, 19 NRC 645, 650-51 (1984).

In a previously uncontested operating license proceeding, a Licensing Board has the jurisdiction to entertain a late-filed petition to intervene and to decide the issues raised by it until the Commission exercises its authority to license full-power operation. The Board's jurisdiction is not terminated until the time the Commission issues a final decision or the time expires for Commission certification of record. Miss. Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-82-92, 16 NRC 1376, 1380-81 (1982).

In operating licensing proceedings as to radiological safety matters, the Board is to decide those issues put in controversy by the parties. In addition, the Board must require evidence and resolution of any significant safety matter of which it becomes aware regardless of whether the parties choose to put the matter in controversy. See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524-25 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 362 (1973).

A Licensing Board authorized the issuance of a full-power operating license for the Seabrook facility even though several emergency planning issues remanded

by the Appeal Board and a number of intervenors' motions for the admission of new contentions were still pending before the Licensing Board. The Board believed that the issuance of a full-power operating license prior to the resolution of these open matters was appropriate where none of the open matters involved significant safety or regulatory matters which would undermine the Board's ultimate conclusion that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the facility. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-33, 30 NRC 656, 657-58 (1989), appeal dismissed as moot, ALAB-947, 33 NRC 299, 378 & n.331 (1991), citing Mass. v. NRC, 924 F.2d 311, 330-32 (D.C. Cir. 1991). The Commission conducted an immediate effectiveness review pursuant to 10 C.F.R. § 2.340 (formerly § 2.764), and determined that the Licensing Board's authorization of the issuance of a full-power operating license should be allowed to take effect. The Commission denied the intervenors' motion for relief in the nature of mandamus on the ground that there was no clear, non-discretionary duty on the part of the Licensing Board to delay full-power authorization pending the completion of remand proceedings or resolution of all pending matters. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 229-31 (1990).

3.1.2.3 Scope of Authority in Uncontested Proceedings ("Mandatory Hearings")

A balance must be struck between the leeway enjoyed by the Board to perform its "truly independent" review, and burdens on the NRC Staff. A "mandatory hearing" Board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance. "It serves no purpose for the Staff to produce volumes of documents and information supporting facts and conclusions that are of small importance and are beyond dispute. It likewise serves no purpose for the Staff to produce copies of every document used in its review when the Board cannot possibly read through every one, let alone scrutinize them." Exelon Generation Co., LLC; Sys. Energy Res., Inc. (Early Site Permit for Clinton ESP Site; Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 64 NRC 15, 21-22 (2006); USEC, Inc. (Am. Centrifuge Plant), LBP-07-6, 65 NRC 429, 436-37 (2007) (stating and applying legal standards governing uncontested proceedings). Boards in mandatory hearings should be able to look to the Staff for assistance in understanding the basis for each major finding in the safety evaluation report (SER) and environmental impact statement (EIS) and in identifying appropriate areas of inquiry. Clinton & Grand Gulf ESP, CLI-06-20, 64 NRC at 21. See also Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 35-36 (2007).

A mandatory hearing Board request that the Staff produce a comprehensive, freshly prepared, narrative report covering the entire SER and final environmental impact statement (FEIS) would require an unnecessary duplication of effort. Instead, mandatory hearing Boards should review the Staff documents (together with additional materials requested), and then tailor requests for additional information to those areas for which the Boards need additional information in order to understand the Staff's review documents. Clinton & Grand Gulf ESP, CLI-06-20, 64 NRC at 23 (emphasis in original). However, mandatory hearing Boards, if they choose, may

require the Staff to provide indexes as a device to simplify the Board's review of the Staff's documents. Id.

It is reasonable for a mandatory hearing Board, in order to help focus its review, to request certain information concerning the Staff's use of regulatory guidance – in particular, if a regulatory guide was used and not referred to in the SER and EIS, or if a potentially applicable guide was not used. Clinton & Grand Gulf ESP, CLI-06-20, 64 NRC at 23.

Mandatory hearing Boards may probe the Staff for additional testimony or record material when necessary to ascertain whether the Staff had reasonable bases for the Staff's final determinations. However, an uncontested, mandatory hearing need not, and should not, commence with a requirement that the Staff identify, explain, and resolve its preliminary differences of opinion (i.e., by producing the Staff's predecisional documents). Exceptional circumstances should not be presumed. Clinton & Grand Gulf ESP, CLI-06-20, 64 NRC at 25. Because the Board's role in an uncontested proceeding is somewhat analogous to the function of an appellate court, applying the "substantial evidence" test, the Board need not demand all possible views and facts be put into the record or presume preliminary views to raise matters of controversy about the bases for the final Staff determinations. Rather, the "boards should decide simply whether the safety and environmental record is 'sufficient.'" Id. See also Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site) LBP-07-09, 65 NRC 539, 558 (2007) (Board review is not to be a rubber stamp, but instead Boards must carefully probe NRC Staff findings by asking appropriate questions and by requiring supplemental information).

The Advisory Committee on Reactor Safeguards (ACRS) is an independent federal advisory committee that is not under the Staff's control. While a mandatory hearing Board may ask the Staff to produce relevant ACRS documents that it has reviewed, the Board should not ask the Staff to obtain additional ACRS documents that it has not reviewed, as it is not clear that they are germane given that the Board's review is intended to ensure that the Staff's conclusions have "reasonable support in logic and fact." Clinton & Grand Gulf ESP, CLI-06-20, 64 NRC at 25-26.

3.1.2.4 Scope of Authority in License Amendment Proceedings

A Licensing Board's power in a license amendment proceeding is limited by the scope of the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988) (a Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application). The Board may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the Commission's Notice of Hearing on the licensing action. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 &2), ALAB-739, 18 NRC 335, 339 (1983), citing Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) and Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976).

Thus, in considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some

ownership interest in advance of Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 C.F.R. Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978).

The failure of a licensee to fulfill responsibilities associated with a license amendment issued by the Staff gives rise to an enforcement issue that does not come within the purview of a license amendment adjudication. Rather, in such circumstances, the available remedy is to file a petition with the appropriate division director, calling attention to the asserted failure of the licensee to meet its license obligations and requesting appropriate remedial action. 10 C.F.R. § 2.206; U.S. Army (Jefferson Proving Ground Site), LBP-07-7, 65 NRC 507 (2007). A claim that a license amendment applicant's current license should be revoked due to violations of that license is an enforcement matter that is outside the scope of the license amendment proceeding. Safety Light Corp. (Bloomsburg, Pennsylvania Site), LBP-04-25, 60 NRC 516, 529-30 (2004).

3.1.2.5 Scope of Authority to Rule on Petitions and Motions

Merely by having been constituted, a Licensing Board has authority to entertain petitions. See 10 C.F.R. § 2.309(a) (formerly § 2.714(a)). To grant a petition, however, the Licensing Board must have been given the requisite authority specifically, either under Commission regulations or through one of the five notices or orders issued in relation to the proceeding in question.

A 10 C.F.R. Part 70 materials license is an "order" which, under 10 C.F.R. § 2.318(b) (formerly § 2.717(b)), may be "modified" by a Licensing Board delegated authority to consider a 10 C.F.R. Part 50 operating license. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

A Licensing Board has jurisdiction to review an order of the Director of Nuclear Reactor Regulation which relates to a matter which could be admitted as a late-filed contention in a pending proceeding. The order does not have to be related to a currently admitted contention in the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 150-52 (1988), citing 10 C.F.R. §2.318(b) (formerly § 2.717(b)).

Licensing Boards lack authority to consider a motion for an Order to Show Cause pursuant to 10 C.F.R. §§ 2.202 and 2.206. Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980), rev'd on other grounds, ALAB-605, 12 NRC 153 (1980).

Licensing Boards also lack authority to consider claims for damages. North Coast, LBP-80-15, 11 NRC at 767.

In NRC proceedings in which a hearing is not mandatory but depends on the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon intervention petitions. If a petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wis. Elec.

Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978); Commonwealth Edison Co. (Byron Station, Units 1 & 2), LBP-81-30-A, 14 NRC 364, 366 (1981). Thus, an "intervention" Licensing Board established solely for the purpose of passing on petitions to intervene does not have the additional authority to proceed beyond that assignment or to entertain filings going to the merits of matters in controversy between the petitioners and the applicant. Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977); Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-18, 33 NRC 394, 395-96 (1991). An "intervention" board cannot, for example, rule on motions for summary disposition. Stanislaus, ALAB-400, 5 NRC at 1177-78.

A Licensing Board may entertain a request for declaratory relief. Kan. Gas & Elec. Co. (Wolf Creek Nuclear Generating Station), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977). This power stems from the fact that the Commission itself may grant declaratory relief under the APA, 5 U.S.C. § 554(e), and delegate that power to presiding officers. 5 U.S.C. § 556(c)(9); Wolf Creek, CLI-77-1, 5 NRC 1. In this vein, Licensing Boards have the authority to issue declaratory orders to terminate a controversy or remove uncertainty. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). A Licensing Board has utilized the following test to determine whether a genuine controversy exists sufficient to support the issuance of a declaratory order: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. Advanced Med. Sys. (One Factory Row, Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314-16 (1989), citing SEC v. Sloan, 436 U.S. 103, 109 (1978) (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam)).

A Licensing Board established for an operating license proceeding has authority to consider materials license questions where matters regarding a materials license bear on issues in the operating license application. Zimmer, LBP-79-24, 10 NRC at 228.

If a Licensing Board determines that a participation agreement prohibiting the flow of electricity in interstate commerce is inconsistent with the antitrust laws, the Board may impose license conditions despite a federal court injunction prohibiting participant from violating the agreement. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 577 (1979).

The power to grant an exemption from the regulations has not been delegated to Licensing Boards. Such Boards, therefore, lack the authority to grant exemptions. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

A Licensing Board has authority to condition termination on the licensee's payment of fees and costs to the intervenors, but the prospect of a second proceeding, standing alone, is not a legally cognizable harm that would warrant payment of fees and costs. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999).

Where the Staff has acted to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order or to enter into an agreement to take such actions to settle a proceeding, its actions are subject to review by the presiding officer. Oncology Servs. Corp., LBP-94-2, 39 NRC 11, 11 fn.12 (1994).

A presiding officer has jurisdiction to consider a timely motion for reconsideration filed after the issuance of an initial decision but before the timely filing of appeals. Curators of the Univ. of Mo., CLI-95-1, 41 NRC 71, 93-95 (1995). But, unless a Licensing Board takes action on a motion seeking reconsideration or clarification of a decision disposing of all matters before it, the Board does not retain jurisdiction normally lost, and the motion is effectively denied. Nuclear Fuel Servs. Inc. (Western New York Nuclear Service Center), LBP-83-15, 17 NRC 476, 477 (1983).

A reconstituted Licensing Board is legally competent to rule on all matters within its jurisdiction, including a party's objections to any orders issued by the original Licensing Board prior to the reconstitution of the Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-86-38A, 24 NRC 819, 821 (1986).

A Licensing Board does not have the jurisdiction to refer NRC examination cheaters for criminal prosecution, nor does it have authority over formulation of generic Staff procedures for administering NRC examinations. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 302, 372 (1982).

The ASLB may not place itself in the position of deciding whether the NRC Staff should be permitted to refer information obtained through discovery to NRC investigatory staff offices. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 225 (1995).

3.1.2.6 Scope of Authority to Reopen the Record

If a Licensing Board believes that circumstances warrant reopening the record for receipt of additional evidence, it has discretion to take that course of action. Where a Board was faced with an insufficient record for summary disposition, and knew of a document which had not been introduced into evidence and would support summary disposition, it was not improper to request submission of the document in support of a motion for summary disposition. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 752 (1977).

A Licensing Board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of an appeal or the expiration of the period during which the Commission can exercise its right to review the record. See 10 C.F.R. §§ 2.318(a), 2.713(a), 2.319(m) and 2.341 (formerly §§ 2.717(a), 2.760(a), 2.718(j), and 2.786); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982); Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-12, 17 NRC 466, 467 (1983); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-83-25, 17 NRC 681, 683 (1983); Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing Three Mile Island, ALAB-699, 16 NRC at 1324. Until an appeal from an initial decision has been filed, jurisdiction to rule on a motion to reopen lies with

the Licensing Board. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755, 757 (1983); Zimmer, LBP-83-58, 18 NRC at 646. Where no appeal from an initial decision has been filed within the time allowed and the period for sua sponte review has not expired, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Limerick, LBP-83-25, 17 NRC at 757.

The Licensing Board lacks the jurisdiction to consider a motion to reopen the record after a petition to review a final order has been filed. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 n.3 (2000), citing Limerick, ALAB-726, 17 NRC 755; cf. Curators of the Univ. of Mo. (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995).

An adjudicatory Board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the Board has another discrete issue pending before it. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-513, 8 NRC 694, 695 (1978).

Until a license has actually been issued, the Commission (as opposed to the Licensing Board) retains jurisdiction to reopen a closed case. Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35-36 (2006), citing Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1 (1993) and Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-1, 35 NRC 1 (1992).

3.1.2.7 Scope of Authority to Rule on Contentions

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 C.F.R. Part 2, Subpart C includes the authority to permit an applicant for license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, see 10 C.F.R. § 2.309 (formerly § 2.714), and the right to file late contentions under certain conditions, see 10 C.F.R. § 2.309(a) (formerly § 2.714(a)). Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-07 (1984).

Where a Licensing Board has retained jurisdiction following issuance of initial decision to conduct further proceedings, it has jurisdiction to consider the admissibility of new contentions which are not related to any matter previously litigated. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-12, 17 NRC 466, 467 (1983).

Pursuant to § 2.309(a)-(f) (formerly § 2.714(a)), a Licensing Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting specificity requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Failure to meet the standards for admitting late-filed contentions does not, under NRC rules, leave the Board free to impose an array of sanctions of varying severity. On the contrary, under 10 C.F.R. § 2.309(c) (formerly § 2.714(a)(1)), the rules specify that impermissibly late-filed contentions "will not be entertained." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001).

Jurisdiction to rule on the admission of contentions, which were filed prior to final agency action and which have never been litigated, rests with the Licensing Board. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983).

An intervenor's failure to particularize certain contentions or even, arguendo, to pursue settlement negotiations, when taken by itself, does not warrant the out-of-hand dismissal of intervenors' proposed contentions. There is a sharp contrast between an intervenor's refusal to provide information requested by another party on discovery, even after a Licensing Board order compelling its disclosure, and the asserted failure of intervenors to take advantage of additional opportunity to narrow and particularize their contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 990 (1982).

3.1.2.8 Authority of Licensing Board to Raise Sua Sponte Issues

A Licensing Board has the power to raise sua sponte any significant environmental or safety issue in operating license hearings, although this power should be used sparingly in operating license cases. 10 C.F.R. § 2.340(a) (formerly § 2.760a); Consol. Edison Co. of N.Y. (Indian Point Nuclear Nuclear Generating Units 1, 2& 3), ALAB-319, 3 NRC 188, 190 (1976); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board's independent responsibilities under NEPA may require it to raise environmental issues not raised by a party. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

The Board has the prerogative, under the regulations, to consider raising serious issues sua sponte and the responsibility of reviewing materials filed before it to determine whether the parties have brought such an issue before. This is particularly necessary when an issue is excluded from the proceeding because it has not been properly raised rather than because it has been rejected on its merits. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

Pursuant to 10 C.F.R. § 2.340(a) (formerly § 2.760a) and a Commission memorandum, a Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that would prompt reasonable minds to inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-81-36, 14 NRC 691, 697 (1981), citing Memorandum from the Secretary of the Commission to the Chairman of the Licensing Board Panel (June 30, 1981) (concerning sua sponte issues).

Having found that adjudication of contentions was not "required in the public interest" during its review of a proposed settlement agreement, the Board concluded that settlement of those same contentions did not raise serious safety, environmental, or common defense and security concerns warranting sua sponte review under 10 C.F.R. § 2.340(a). Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 843-44 (2006).

The regulations limiting the Board's authority to raise sua sponte issues restrict its right to consider safety, environmental or defense matters not raised by parties but do not restrict its responsibility to oversee the fairness and efficiency of proceedings and to raise important procedural questions on its own motion. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-24A, 15 NRC 661, 664 (1982).

Because Boards may raise important safety and environmental issues sua sponte, they should review even untimely contentions to determine that they do not raise important issues that should be considered sua sponte. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-32 (1982).

A Licensing Board's inherent power to shape the course of a proceeding should not be confused with its limited authority under 10 C.F.R. § 2.340(a) (formerly § 2.760a) to shape the issues of the proceeding. The latter is not a substitute for or a means to accomplish the former. Sua sponte authority is not a case management tool. Accordingly, the apparent need to expedite a procedure or monitor the Staff's progress in identifying or evaluating potential safety or environmental issues are not factors that authorize a Board to exercise its sua sponte authority. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-36, 14 NRC 1111, 1113 (1981).

The incompleteness of Staff review of an issue is not in itself sufficient to satisfy the standard for sua sponte review. South Texas, LBP-85-8, 21 NRC at 519, citing Comanche Peak, CLI-81-36, 14 NRC at 1114. However, a Board may take into account the pendency and likely efficacy of NRC Staff non-adjudicatory review in determining whether or not to invoke its sua sponte review authority. South Texas, LBP-85-8, 21 NRC at 519-23, citing Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982), reconsid. denied, CLI-83-4, 17 NRC 75 (1983), and Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-75, 18 NRC 1254 (1983).

A Board decision to review a proposal concerning the withholding of a portion of the record from the public is an appropriate exercise of Board authority and is not subject to the sua sponte limitation on Board authority. Point Beach, LBP-82-5A, 15 NRC 216; Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-12, 15 NRC 354 (1982). Because exercise of this authority does not give rise to a sua sponte issue, notification of the Commission is not required.

The Board's authority to consider substantive issues is limited by the sua sponte rule, but the same limitation does not apply to its consideration of procedural matters, such as confidentiality issues arising under 10 C.F.R. § 2.390 (formerly § 2.790). While it would not always be appropriate for the Board to take up proprietary matters on its own, where the Board finds the Staff's review

unsatisfactory, sua sponte review of those matters may be necessary. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-6, 15 NRC 281, 288 (1982).

A Board may raise a procedural question, such as whether a portion of its record should be treated as proprietary or released to the public, regardless of whether the full scope of the question has been raised by a party. Point Beach, LBP-82-6, 15 NRC at 288.

Information that will help the Board decide whether to raise a sua sponte issue should be made available to the Board. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-9, 15 NRC 339, 340 (1982).

Board inquiries related to admitted contentions do not create sua sponte matters requiring notification of the Commission. That the Board gives advance notification to a party that related questions may be asked does not convert those questions into sua sponte issues requiring notification of the Commission. Nor is notification required when a Board has already completed action on a procedural matter and no further obligation has been imposed on a party. The sua sponte rule is intended to preclude major, substantive inquiries not related to subject matter already before the Board, not minor procedural matters. Point Beach, LBP-82-12, 15 NRC at 356.

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 C.F.R. § 2.340(a) (formerly § 2.760a). This discretionary authority necessarily places on the Board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), rev. denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980). An adjudicatory Board's decision to exercise its sua sponte authority must be based on evidence contained in the record. A Board may not engage in discovery in an attempt to obtain information upon which to establish the existence of a serious safety or environmental issue. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986).

A Licensing Board may, under 10 C.F.R. § 2.340(a) (formerly § 2.760a), raise and decide, sua sponte, a serious safety, environmental, or common defense and security matter, should it determine such a serious issue exists. The limitations imposed by regulation on a Board's review of a matter not in contest (and therefore not subject to the more intense scrutiny afforded by the adversarial process) do not override a Board's authority to invoke 10 C.F.R. § 2.340(a) (formerly § 2.760a). The Commission may, however, on a case-by-case basis relieve the Board of any obligation to pursue uncontested issues. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1112 & n.58 (1983), citing Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 248 n.7 (1978).

A Licensing Board has ruled that exercise of its sua sponte authority to examine certain serious issues is not dependent on either (1) the presence of any party to raise or pursue those issues in the proceeding, or (2) the particular stage of the

proceeding. Thus, the Licensing Board determined that it could properly retain jurisdiction over an intervenor's admissible contentions even though the intervenor had been dismissed from the proceeding prior to the issuance of a Notice of Hearing. Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-32, 32 NRC 181, 185-86 (1990), overruled, CLI-91-13, 34 NRC 185, 188-89 (1991). The Commission made clear that a Licensing Board does not have the authority to raise a sua sponte issue in an operating license or operating license amendment proceeding where all parties in the proceeding have withdrawn or been dismissed. If the Board believes that serious safety issues remain to be addressed, it should refer those issues to the NRC Staff for review. Turkey Point, CLI-91-13, 34 NRC at 188-89.

The NRC's regulations do not contain provisions conferring jurisdiction on Licensing Boards to impose fines sua sponte. The powers granted to a Licensing Board by 10 C.F.R. § 2.319 (formerly § 2.718) to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order, do not include the power to impose a civil penalty. 10 C.F.R. § 2.205(a) confers the authority to institute a civil penalty proceeding only upon the NRC's Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director of the Office of Inspection and Enforcement. A Licensing Board becomes involved in a civil penalty proceeding only if the person charged with a violation requests a hearing. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1238 (1982); see 10 C.F.R. § 2.205(f).

It is appropriate for the Board to address issues concerning the confidentiality of a portion of its record, regardless of whether the issue was raised by a party. Such an action is within the Board's general authority to respond to a "proposal" that a document be treated as proprietary and is not a prohibited sua sponte action of the Board. Point Beach, LBP-82-5A, 15 NRC at 220; Point Beach, LBP-82-6, 15 NRC 281; Point Beach, LBP-82-12, 15 NRC 354.

3.1.2.9 Expedited Proceedings; Timing of Rulings

Commission policies seek to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001), citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390-91 (2001). This is in keeping with the Administrative Procedure Act's directive that agencies should complete hearings and reach a final decision "within a reasonable time." Private Fuel Storage, CLI-01-26, 54 NRC at 381, citing 5 U.S.C. § 558(c).

The Commission may authorize the Board to use appropriate procedural devices to expedite a decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279, 284 (2003) (declining review of LBP-03-04, 57 NRC 69 (2003)).

Licensing Boards have broad discretion regarding the appropriate time for ruling on petitions and motions filed with them. Absent clear prejudice to the petitioner from a Licensing Board's deferral of a decision on a pending motion, an Appeal Board is constrained from taking any action since the standard of review of a Licensing Board's deferral of action is whether such deferral is a clear abuse of discretion. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A Licensing Board has authority under 10 C.F.R. § 2.307(a) (formerly § 2.711(a)) to extend or lessen the times provided in the Rules for taking any action. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980). However, the Commission discourages extensions of deadlines, absent extreme circumstances, for fear that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case. Hydro Res., Inc., CLI-99-1, 49 NRC 1, 1 (1999).

As a general matter, when expedition is necessary, the Commission's Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening, even drastically in some circumstances, the various time limits for the party's filings and limiting the time for, and type of, discovery. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing 10 C.F.R. § 2.307 (formerly § 2.711); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 251 (1986).

Procedures for expediting a proceeding, however, should not depart substantially from those set forth in the Rules of Practice, and steps to expedite a case are appropriate only upon a party's good-cause showing that expedition is essential. Point Beach, ALAB-696, 16 NRC at 1263, citing 10 C.F.R. § 2.307 (formerly § 2.711).

Under extraordinary circumstances, it is appropriate for the Licensing Board to address questions to an applicant, even before formal action has been completed, concerning admission of an intervenor into a license amendment proceeding. These questions need not be considered sua sponte issues requiring notification of the Commission. The Board may also authorize a variety of special filings in order to expedite a proceeding and may even grant petitioners the right to utilize discovery even before they are admitted as parties. However, special sensitivity must be shown to an intervenor's procedural rights when the cause for haste in a proceeding was a voluntary decision by the applicant concerning both the timing and content of its request for a license amendment. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-39, 14 NRC 819, 821, 824 (1981); Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-55, 14 NRC 1017 (1981).

Under exceptional circumstances, Board questions may precede discovery by the parties. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-44, 14 NRC 850, 851 (1981).

When time pressures cause special difficulties for intervenors, discovery against intervenors may be restricted in order to prevent interference with their preparation for a hearing. A presiding officer has discretionary power to authorize specially

tailored proceedings in the interest of expedition. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-46, 14 NRC 862, 863 (1981).

When quick action is required on a license amendment, it is appropriate to interpret a petitioner's safety concerns broadly and to admit a single broad contention that will permit wide-ranging discovery within the limited time without the need to decide repeated motions for late filing of new contentions. But the contentions must still relate to the license amendment which is requested. A petitioner may not challenge the safety of activities already permitted under the license. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-45, 14 NRC 853, 860 (1981).

Though the Board may admit a single broad contention in the interest of expedition, its liberal policy towards admissions may be rescinded when the time pressure justifying it is relieved. However, issues already raised under the liberal policy are not retroactively affected by its rescission. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-19A, 15 NRC 623, 625 (1982).

In Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2); Power Auth. of N.Y. (Indian Point Nuclear Generating Unit 3), LBP-82-12A, 15 NRC 515 (1982), the intervening petitioner filed a motion requesting permission to observe the emergency planning exercise scheduled to be held two days later for the Indian Point facility. The Licensing Board ruled that, although 10 C.F.R. § 2.707 (formerly § 2.741) directs that a party first seek discovery of this sort from another party and that only after a thirty (30)-day opportunity to respond can the party apply to the Board for relief, in this case, strict adherence to the rule would not be required. Where, as here, the exigencies of the case do not permit a thirty (30)-day response period, procedural delicacy will not be allowed to frustrate the purpose of the hearing – especially where no party is seriously disadvantaged by expediting the action. Indian Point, LBP-82-12A, 15 NRC at 518. Furthermore, where the issue of adequacy of emergency planning was clearly an issue to be fully investigated and the observations of the potential intervenors the next day would be useful to the Board in its deliberations, the Board would deny the licensee's requests for stay and certification to the Commission, since to grant these motions would render the issue moot. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2); Power Auth. of N.Y. (Indian Point Nuclear Generating Unit 3), LBP-82-12B, 15 NRC 523, 525 (1982).

3.1.2.10 Licensing Board's Relationship with the NRC Staff

A Licensing Board may not delegate its obligation to decide issues in controversy to the Staff. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984), citing Perry, ALAB-298, 2 NRC at 737.

The rule against delegation applies even to issues a Licensing Board raises on its own motion in an operating license proceeding. Byron, LBP-84-2, 19 NRC at 211, citing Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The rule against delegation applies, in particular, to quality assurance issues. Byron, LBP-84-2, 19 NRC at 212, citing Vermont

Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). However, where there is nothing remaining to be adjudicated on a quality assurance issue, the adequacy of a 100 percent reinspection of a contractor's work may be delegated to the Staff to consider posthearing. Byron, LBP-84-2, 19 NRC at 216-17.

On the other hand, with respect to emergency planning, the Licensing Board will accept predictive findings and posthearing verification by Staff of the formulation and implementation of aspects of emergency plans. Byron, LBP-84-2, 19 NRC at 212, 251-52, citing La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-49, 361-62 (1991).

With respect to emergency planning, it is "established NRC practice that, where appropriate, the Licensing Board may refer minor safety matters not pertinent to its basic findings to the NRC Staff for posthearing resolution, and may make predictive findings regarding emergency planning that are subject to posthearing verification." La. Energy Servs. (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 108 (1996), citing Mass. v. NRC, 924 F.2d 311, 331 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991). But only matters not material to the basic findings necessary for issuance of a license may be referred to the NRC Staff for posthearing resolution – e.g., minor procedural or verification questions. The "posthearing" approach should be employed sparingly and only in clear cases. La. Energy Servs., CLI-96-8, 44 NRC at 108 (internal quotations and citations omitted).

In a construction permit proceeding, the Licensing Board has a duty to assure that the NRC Staff's review was adequate even as to matters which are uncontested. Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 774 (1977). In this vein, a more recent case reiterating the rule that a Licensing Board may not delegate its obligation to decide significant issues to the NRC Staff is Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

A Licensing Board does not have the power under 10 C.F.R. § 2.319 (formerly § 2.718), or any other regulation, to direct the Staff in the performance of its independent responsibilities. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Rockwell Int'l Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990); U.S. Army (Jefferson Proving Ground), LBP-05-9, 61 NRC 218, 222 (2005), citing Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (in materials licensing proceedings conducted under informal procedural rules, a presiding officer's jurisdiction does not extend to superintending the Staff's discharge of its review functions). Thus, unless the Commission has made an extraordinary grant of power to the Board, the Board has no jurisdiction over the Staff's non-adjudicatory functions. Catawba, CLI-04-6, 59 NRC at 71.

Whether a Board may modify an order or action of the Staff depends on the relationship of the order to the subject matter of a pending proceeding. If closely related, a Staff order may not be issued, or is subject to a stay until resolution of the contested issue. If far removed from the subject matter of a pending proceeding, a Staff order should not be considered by the Board. Finally, there are matters which are properly the subject of independent Staff action, but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board is also appropriate. Nuclear Fuel Servs. Inc. (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1082 (1982), citing Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-30 (1979).

Issues relating to NRC Staff compliance with and implementation of a Licensing Board order, rather than the order itself, should be presented to the Licensing Board in the first instance, rather than to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162, 165 (1982).

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a Licensing Board interfere in the review activities of the Staff. Philadelphia Elec. Co. (Fulton Generating Station, Units 1 & 2), LBP-79-23, 10 NRC 220, 223-24 (1979). See also Jefferson Proving Ground, LBP-05-9, 61 NRC at 222, citing Catawba, CLI-04-6, 59 NRC at 74

The Staff produces, among other documents, the SER and the draft and final EISs (DEIS and FEIS). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing NEP, LBP-78-9, 7 NRC 271. See Offshore Power Sys. (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

In a materials license proceeding conducted under informal procedural rules, where the Staff delayed its technical review of a decommissioning-related proposal pending a licensee's submission of relevant information requested by the Staff, a presiding officer found that he was foreclosed from either calling upon the Staff to justify its approach or directing the licensee to furnish a full explanation regarding its default in furnishing to the Staff the information sought from it. Jefferson Proving Ground, LBP-05-9, 61 NRC at 222.

In a materials license proceeding conducted under informal procedural rules, where the presiding officer expressed concern about extended delay in a licensee's submission of a decommissioning plan, the presiding officer commented in dicta that he had not undertaken examination of the license to determine whether the licensee might be in violation of some license condition (related to decommissioning), because any inquiry along those lines would be in the first instance the responsibility of the Office of Enforcement. Jefferson Proving Ground, LBP-05-9, 61 NRC at 222 n.3.

The decision whether to approve a plan for construction during the period in which certain design engineering and construction management, and possibly construction responsibilities, are being transferred from one contractor to another, is initially within the province of the NRC Staff. But because of the safety significance of the work to be performed, and its clear bearing on whether, or on what terms, a project should be licensed, and on the resolution of certain existing contentions, consideration of the adequacy of, and controls to be exercised by, the applicants and NRC Staff over such work falls well within the jurisdiction of the Licensing Board. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-81-54, 14 NRC 918, 919-20 (1981).

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's functions should bring the matter to the Commission's attention or certify the matter to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 516-17 (1980). Cf. Jefferson Proving Ground, LBP-05-9, 61 NRC at 219, 223-24 (calling Commission's attention to status of a materials licensing proceeding where the presiding officer found the Staff's review was not moving forward). Ordinarily, Licensing Boards should not decide whether a given action significantly affects the environment without the record support provided by the Staff's environmental review. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330 (1981).

Where the Staff scheduled a closed meeting with a license amendment applicant to discuss the applicant's security submittal, the Board lacked jurisdiction to order the Staff to grant access to the meeting to a hearing petitioner's representatives. Catawba, CLI-04-6, 59 NRC at 74.

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. Offshore Power Sys., ALAB-489, 8 NRC at 207.

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 C.F.R. gives the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of its own, it should give the NRC Staff every opportunity to explain, correct and supplement its testimony. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981), rev. declined, CLI-82-10, 15 NRC 1377 (1982).

Applying the criteria of Summer, CLI-82-10, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a

health effects contention. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 & 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances, an adjudicatory Board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a full-term, full-power operating license has been issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory Board. Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

For a Licensing Board to accept unsupported NRC Staff statements would be to abrogate its ultimate responsibility and would be substituting the Staff's judgment for its own. On ultimate issues of fact, the Board must see the evidence from which to reach its own independent conclusions. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-114, 16 NRC 1909, 1916 (1982).

It is the Commission's policy that the NRC Staff has primary responsibility for technical fact-finding on uncontested matters. Licensing Boards should defer to the NRC Staff on such uncontested matters unless the Staff's review was incomplete or inadequately explained in the record. Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460, 492 (2006).

Should a Staff review demonstrate the need for corrective action, the decision on the adequacy of such a corrective action is one that the Licensing Board may not delegate. Case law suggests that even in cases where a Board resolves an issue in an applicant's favor, leaving the Staff to perform what is believed to be a confirmatory review, the Staff should inform the Board should it discover that corrective action is warranted. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 520 n.21 (1983).

A Licensing Board faced with a NEPA review by the Staff must independently determine whether the NEPA process has been complied with, what the final balance of competing factors is, and whether the license or permit should be issued. In doing so, however, the Board must not undertake its own independent research or duplicate Staff analysis that has already been done. The Board may only second-guess the Staff's underlying technical or factual findings where the Board determines that either (1) the Staff review was incomplete or (2) the record does not sufficiently explain the Staff's findings. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 45 (2005); USEC, Inc. (Am. Centrifuge Plant), LBP-07-6, 65 NRC 429, 438 (2007).

A Board's urging of settlement discussions and its suggestion of a possible route to settlement, even when the Board's jurisdiction over the matter is in question, is not

an impermissible Board direction to the Staff regarding how the Staff is to perform its non-adjudicatory regulatory functions. By urging settlement and suggesting a possible approach, the Board is merely making a nonbinding suggestion to the Staff; it is in no way "directing" the Staff to settle the case or to do so in a particular manner. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 116 n.14 (2006).

3.1.2.11 Licensing Board's Relationship with States and Other Agencies (Including the Council on Environmental Quality)

The requirements of state law are for state bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978), citing Cleveland Elec. Illuminating Co. (Perry Nuclear Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977). In Tyrone, the Wisconsin Public Service Commission decided that some of the applicants were "foreign corporations," and so could not construct the Tyrone facility. Although the Appeal Board would not question the state's ruling, it remanded the case to reconsider financial and technical qualifications in light of the changes in legal relationships of the co-applicants that resulted from the state determination. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 899 (1985), rev'd in part on other grounds, ALAB-847, 24 NRC 412 (1986).

In the absence of a controlling contrary judicial precedent, the Commission will defer to a State Attorney General's interpretation of state law concerning the designation of representatives of a state participating in an NRC proceeding as an interested state. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 148 (1987).

The Commission lacks the authority to disqualify a state official or an entire state agency based on an assertion that they have prejudged fundamental issues in a proceeding involving the transfer of jurisdiction to a state to regulate nuclear waste products. A party must pursue such due process claims under state law. State of Illinois (Section 274 Agreement), CLI-88-6, 28 NRC 75, 88 (1988).

A Licensing Board does not have jurisdiction in a construction permit proceeding under the Atomic Energy Act of 1954, as amended (AEA), to review the decision of the Rural Electrification Administration to guarantee a construction loan to a part-owner of the facility being reviewed. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 267-68 (1978).

It would be improper for a Licensing Board to entertain a collateral attack upon any action or inaction of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction. Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Thus, a Licensing Board refused to review whether the Federal Emergency Management Agency (FEMA) complied with its own agency regulations in performing its emergency planning responsibilities. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 499 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18-19 (1989).

Although the Commission will take cognizance of activities before other legal tribunals when the facts so warrant, it should not delay its licensing proceedings or withhold a license merely because some other legal tribunal might conceivably take future action which may later impact upon the operation of a nuclear facility. Palo Verde, LBP-82-117A, 16 NRC at 1991, citing Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978); Wis. Elec. Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928, 930 (1974); Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-171, 7 AEC 37, 39 (1974); Perry, ALAB-443, 6 NRC at 748; Shoreham, LBP-85-12, 21 NRC at 900; Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 & n.9 (1985).

The occurrence of concurrent proceedings before a state regulatory agency is not a sufficient ground for suspension of a reactor license transfer proceeding, when the state agency is reviewing a license transfer under a different statutory authority than the NRC (and its conclusion would therefore not be dispositive of issues before the NRC) and when an insufficient explanation of financial burden reduction on the parties has not been fully explained. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 344 (1999).

Under the AEA, NRC regulates most uses of source material, including depleted uranium, in the United States and U.S. territories. However, NRC does not regulate most of the activities conducted by the U.S. Department of Energy (DOE), including, for example, testing performed at DOE test sites, or battlefield and direct support activities thereof involving source material by the armed forces outside of U.S. territories. Therefore, NRC did not regulate the testing performed at DOE's Nevada Test Site, nor did it regulate the military use of depleted uranium munitions in Operation Desert Storm, Serbia, Okinawa, or Kosovo. NRC cannot grant the petition or take any other regulatory action with respect to military activities that it does not regulate. U.S. Dept. of Def. Users of Depleted Uranium, DD-01-1, 53 NRC 103, 104 (2001).

Where a statute is administered by several different agencies, courts do not defer to any one agency's particular interpretation. Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 78 (D.C. Cir. 1999).

As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the Council on Environmental Quality (CEQ). Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-880, 26 NRC 449, 461 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 228-29 (9th Cir. 1988).

While the Commission agrees that CEQ's regulations are entitled to substantial deference where applicable, the CEQ regulations apply only to federal actions to which NEPA applies. In adopting the CEQ regulations, the Commission stated that the NRC is not bound by those portions of the CEQ's NEPA regulations that have some substantive impact on the way in which the Commission performs its regulatory functions. 49 Fed. Reg. 9,352 (Mar. 12, 1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991).

At least one court has held that CEQ guidelines are not binding on the NRC if not expressly adopted. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725, 743 (3rd Cir. 1989).

3.1.2.12 Conduct of Hearing by Licensing Board

The Commission has issued a Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), which provides guidance to Licensing Boards on the timely completion of proceedings while ensuring a full and fair record. Specific areas addressed include: scheduling of proceedings; consolidation of intervenors; negotiations by parties; discovery; settlement conferences; timely rulings; summary disposition; devices to expedite party presentations, such as pre-filed testimony outlines; round-table expert witness testimony; filing of proposed findings of fact and conclusions of law; and scheduling to allow prompt issuance of an initial decision in cases where construction has been completed.

Consistency with the Commission's Statement of Policy on Conduct of Licensing Proceedings requires that in general delay be avoided, and specifically that a Board obtain Commission guidance when it becomes apparent that such guidance will be necessary. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 604 (1983).

A Licensing Board has considerable flexibility in regulating the course of a hearing and designating the order of procedure. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 727 (1985), citing 10 C.F.R. §§ 2.319(g), 2.324 (formerly §§ 2.718(e), 2.731). See Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245-46 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Although the Commission's Rules of Practice set forth a general schedule for the filing of proposed findings, a Licensing Board is authorized to alter that schedule or to dispense with it entirely. Limerick, ALAB-819, 22 NRC at 727, citing 10 C.F.R. § 2.712(a) (formerly § 2.754(a)).

The procedures set forth in the Rules of Practice are the only ones that should be used in any licensing proceeding, absent explicit Commission instructions in a particular case. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing 10 C.F.R. § 2.319 (formerly § 2.718).

A Board must use its powers to assure that the hearing is focused upon the matters in controversy and that the hearing process is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1152 (1984). A Board may limit cross-examination, redirect a party's presentation of its case, restrict the introduction of reports and other material into evidence, and require the submittal of all or part of the evidence in written form as long as the parties are not thereby prejudiced. Shoreham, ALAB-788, 20 NRC at 1151-54, 1178.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Pub. Serv. Co. of Ind.

(Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

Pursuant to 10 C.F.R. § 2.319 (formerly § 2.718), Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. In addition, they may defer depositions to allow both parties to have equal access to extensive evidence which might be adverse to the deponent. Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-8, 37 NRC 292, 299-301 (1993). However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-2, 15 NRC 48, 53 (1982).

While a Licensing Board should endeavor to conduct a licensing proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982), citing Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454; Limerick, ALAB-819, 22 NRC at 730; Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 558 (1986).

A Commission-ordered discretionary proceeding before a Licensing Board held to resolve issues designated by the Commission, although adjudicatory in form, was not an “on-the-record” proceeding within the meaning of the AEA. Therefore, in admitting and formulating contentions and sub-issues and determining order of presentation, the Board would not be bound by 10 C.F.R. Part 2. As to all other matters, 10 C.F.R. Part 2 would control. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2), Power Auth. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-81-1, 13 NRC 1, 5 n.4 (1981), clarified by CLI-81-23, 14 NRC 610, 611 (1981).

In order that a proper record is compiled on all matters in controversy, as well as sua sponte issues raised by it, a Board has the right and responsibility to take an active role in the examination of witnesses. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 893 (1981); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 498-99 (1985). Although a Board may exercise broad discretion in determining the extent of its direct participation in the hearing, the Board should avoid excessive involvement which could prejudice any of the parties. Perry, ALAB-802, 21 NRC at 499. This does not mean that a Licensing Board should remain mute during a hearing and ignore deficiencies in the testimony. A Board must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. Limerick, ALAB-819, 22 NRC at 741, citing S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station,

Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), rev. denied, CLI-82-10, 15 NRC 1377 (1982).

Pursuant to 10 C.F.R. § 2.319 (formerly § 2.718), the Licensing Board has the duty to conduct a fair and impartial hearing under the law, which includes the responsibility to impose upon all parties to a proceeding the obligation to disclose all potential conflicts of interest. Fundamental fairness clearly requires disclosure of potential conflicts so as to enable the Board to determine the materiality of such information. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-73, 16 NRC 974, 979 (1982). See also Vogtle, LBP-93-8, 37 NRC at 299-301.

A Board may refer a potential conflict of interest matter to the NRC General Counsel, who is responsible for interpreting the NRC's conflict of interest rules. Once the matter has been handled in accordance with NRC internal procedures, a Board will not review independently either the General Counsel's determination on the matter or the judgment on whether any punitive measures are required. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 583-84 (1985).

The Commission also outlined examples of sanctions a Licensing Board may impose on a participant in a proceeding who fails to meet its obligations. A Board can warn the offending party that its conduct will not be tolerated in the future; refuse to consider a filing by that party; deny the right to cross-examine or present evidence; dismiss one or more of its contentions; impose sanctions on its counsel; or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, a Board should consider the relative importance of the unmet obligation; the potential for harm to other parties or the orderly course of the proceedings; whether the occurrence is part of a pattern of behavior; the importance of any safety or environmental concerns raised by the party; and all of the circumstances. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982), citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454; Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191, 194-95 (1992).

Pursuant to 10 C.F.R. § 2.320 (formerly § 2.707), the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order, "to make such orders in regard to the failure as are just." The just result, where intervenors have not fully availed themselves of an opportunity to further particularize their contentions, is to simply rule on intervenors' contentions as they stand, dismissing those proposed contentions which lack adequate bases and specificity. Shoreham, LBP-82-73, 16 NRC at 990; Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-804, 21 NRC 587, 592 (1985).

3.1.2.12.1 Powers/Role of Presiding Officer

The presiding officer has the duty to conduct a fair and impartial hearing, to maintain order, and to take appropriate action to avoid delay. Specific powers of the presiding officer are set forth in 10 C.F.R. § 2.319 (formerly § 2.718). While the Licensing Board has broad discretion as to the manner in which a hearing is conducted, any actions pursuant to that discretion must be supported by a record

that indicates that such action was based on a consideration of discretionary factors. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978).

A presiding officer has the authority to rule in the first instance on questions regarding the existence and scope of jurisdiction. Fansteel Inc. (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96, 100 (2003).

In a complex proceeding, it is not unfair for the presiding officer to permit parties to rectify fatal deficiencies in their initial written presentations by posing additional written questions to the parties. Hydro Res., Inc., CLI-00-12, 52 NRC 1, 4 (2000).

§ 1204(b) allows the presiding officer to permit cross-examination upon motion of a party if the presiding officer finds that cross-examination is necessary for development of an adequate record.

The presiding officer may encourage the parties to reach a settlement. However, the presiding officer may not participate in any private and confidential settlement negotiations among the parties. Any settlement conference conducted by the presiding officer pursuant to 10 C.F.R. § 2.319(b) (formerly § 2.1209(c)) must be open to the public, absent compelling circumstances. Rockwell Int'l Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 720-21 (1989), aff'd, CLI-90-5, 31 NRC 337, 339-40 (1990).

The presiding officer in a Subpart L informal adjudicatory proceeding, who was concerned about an incomplete hearing file, ordered the Staff to include in the hearing file any NRC report (including inspection reports and findings of violation) and any correspondence between the NRC and the licensee during the previous 10 years which the intervenors could reasonably believe to be relevant to any of their admitted areas of concern. Curators of the Univ. of Mo., LBP-90-22, 31 NRC 592, 593 (1990); 10 C.F.R. § 2.1203 (formerly § 2.1231(b)). The presiding officer further directed the Staff to serve all such relevant documents on the parties, since there was no local public document room and the burden on the Staff to provide a copy of publicly available documents to the intervenors' attorney was minuscule. Curators of the Univ. of Mo., LBP-90-27, 32 NRC 40, 42-43 (1990).

Where the presiding officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed. Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 45, 46 (2001). Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), CLI-06-1, 63 NRC 1, 2 (2006).

Exercising his or her general authority to simplify and clarify the issues, a presiding officer can recast what a petitioner sets out as two contentions into one. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 22 (1996). See also La. Energy Servs., L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004).

A presiding officer lacks authority to adopt a "policy" that invalidates a Commission regulation. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 59 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006).

3.1.3 Quorum Requirements for Licensing Board Hearing

In Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974), the Appeal Board attempted to establish elaborate rules to be followed before a Licensing Board may sit with a quorum only, despite the fact that 10 C.F.R. § 2.321(c) (formerly § 2.721(d)) requires only a chairman and one technical member to be present. The Appeal Board's ruling in ALAB-222 was reviewed by the Commission in CLI-74-35, 8 AEC 374 (1974). There, the Commission held that hearings by quorum are permitted according to the terms of 10 C.F.R. § 2.321(c) (formerly § 2.721(d)) and that inflexible guidelines for invoking the quorum rule are inappropriate. At the same time, the Commission indicated that quorum hearings should be avoided wherever practicable and that the absence of a Licensing Board member must be explained on the record. Zion, ALAB-222, 8 AEC at 376.

3.1.4 Disqualification of a Licensing Board Member

3.1.4.1 Motion to Disqualify Adjudicatory Board Member

The rules governing motions for disqualification or recusal are generally the same for the administrative judiciary as for the judicial branch itself, and the Commission has followed that practice. Suffolk County & N.Y. Motion for Disqualification of Chief Admin. Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 NRC 385, 386 (1984), citing Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1366 (1982); Hydro Res., Inc. (2929 Coors Rd. Suite 101, Albuquerque, N.M. 87120), CLI-98-9, 47 NRC 326, 331 (1998).

The general requirements for motions to disqualify are discussed in Duquesne Light Co. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974). Based on that discussion and on cases dealing with related matters:

(1) All disqualification motions must be timely filed. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973). In particular, any question of bias of a Licensing Board member must be raised at the earliest possible time or it is waived. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 384-386 (1974); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-749, 18 NRC 1195, 1198 (1983); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsid. denied, ALAB-757, 18 NRC 1356 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 (1984). The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for

disqualification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1081-82 (1984); Seabrook, ALAB-757, 18 NRC at 1361.

(2) A disqualification motion must be accompanied by an affidavit establishing the basis for the charge, even if founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center), ALAB-225, 8 AEC 379 (1974); Shoreham, ALAB-777, 20 NRC at 23, n.1; Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), CLI-8515, 22 NRC 184, 185 n.3 (1985).

(3) A disqualification motion, as with all other motions, must be served on all parties or their attorneys. 10 C.F.R. §§ 2.302(b), 2.323(a) (formerly §§ 2.701(b), 2.730(a)).

Disqualification of a Licensing Board member, either on his own motion or on motion of a party, is addressed in 10 C.F.R. § 2.313 (formerly § 2.704). Strict compliance with § 2.313(b)(2) (formerly § 2.704(c)) is required. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981). A motion to disqualify a member of a Licensing Board is determined by the individual Board member rather than by the full Licensing Board. Pub. Serv. Elec. & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21 n.26 (1984); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-748, 18 NRC 1184, 1186 n.1 (1983), citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

Pursuant to 10 C.F.R. 2.313(b)(2), if an ASLB member denies a party's motion to recuse him or her, the motion is automatically referred to the Commission to "determine the sufficiency of the grounds alleged." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 1). Section 2.313 does not contemplate additional briefing by the parties following referral of a decision denying a recusal motion. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 2).

The Appeal Board has stressed that a party moving for disqualification of a Licensing Board member has a manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement of 10 C.F.R. § 2.313(b)(2) (formerly § 2.704(c)). Dairyland Power Coop. (La Crosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978). See also Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-672, 15 NRC 677, 680 (1982).

Nevertheless, as to the affidavit requirement, the Appeal Board has held that the movant's failure to file a supporting affidavit is not crucial where the motion to disqualify is founded on a fact to which the Licensing Board itself had called attention and is particularly narrow, thereby obviating the need to reduce the likelihood of an irresponsible attack on the Board member in question through use of an affidavit. Sheffield, ALAB-494, 8 NRC at 301 n.3.

An intervenor's status as a party to a proceeding does not of itself give it standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-556, 10 NRC 30, 32-33 (1979); Seabrook, ALAB-748, 18 NRC at 1187. However, a party requesting disqualification may attempt to establish, by reference to a Board member's overall conduct, that a pervasive climate of prejudice exists in which the party cannot obtain a fair hearing. A party may also attempt to demonstrate a pattern of bias by a Board member toward a class of participants of which it is a member. Seabrook, ALAB-748, 18 NRC at 1187-1188. See also Seabrook, ALAB-749, 18 NRC at 1199 n.12.

ASLB judges are under a continuing obligation to recuse themselves if grounds for their recusal arise. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 7).

3.1.4.2 Grounds for Disqualification of Adjudicatory Board Member

The aforementioned rules (Section 3.1.4.1) with respect to motions to disqualify apply, of course, where the motion is based on the assertion that a Board member is biased. Although a Board member or the entire Board will be disqualified if bias is shown, the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a particular party is not evidence of bias against that party. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 721, 726 n.60 (1985). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988). Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-556, 10 NRC 30, 34 (1979).

The disqualification of a Licensing Board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding. Dairyland Power Coop. (La Crosse Boiling Water Reactor), ALAB-614, 12 NRC 347, 348-49 (1980).

In the absence of bias, an Appeal Board member who participated as an adjudicator in a construction permit proceeding for a facility is not required to disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-11, 11 NRC 511 (1980).

An administrative trier of fact is subject to disqualification if:

(1) he has a direct, personal, substantial pecuniary interest in a result;
(2) he has a personal bias against a participant;
(3) he has served in a prosecutive or investigative role with regard to the same facts as are in issue;
(4) he has prejudged factual – as distinguished from legal or policy – issues; or
(5) he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Nuclear Eng'g Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984), citing Pub. Serv. Elec. & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 65 (1973).

The fact that a member of an adjudicatory tribunal may have a crystallized point of view on questions of law or policy is not a basis for his or her disqualification. Shoreham, ALAB-777, 20 NRC at 34, citing Midland, ALAB-101, 6 AEC at 66; Shoreham, LBP-88-29, 28 NRC at 641.

An ASLB judge's experience and background in a relevant technical field does not imply knowledge of the specific disputed facts in the case." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 6).

Although the disqualification standard for federal judges in 28 U.S.C. § 455 does not by its terms apply to administrative judges, the Commission and its adjudicatory boards have applied it in dispositioning motions for disqualification under 10 C.F.R. § 2.313. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 2); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982) (making clear that Licensing Board members are governed by the same disqualification standards that apply to federal judges).

U.S.C., Sections 144 and 455 require a federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. Public Serv. Elec. & Gas Co. et al. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984). Section 455(a) imposes an objective standard: whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. Id. at 21-22; Hydro Res., Inc. (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-98-9, 47 NRC 326, 331 (1998).

"Section 455(a) requires a showing that would cause an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal." Entergy Nuclear Generation Co. and

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 6) (quoting In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001)). Inquiry under 28 U.S.C. § 455 must be made from the perspective of a "reasonable person, knowing all the circumstances." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 6). The possibility "that an unreasonable person, focusing on only one aspect of the story, might perceive a risk of bias is irrelevant." Id.

Under 28 U.S.C. § 455(b)(2), a judge must disqualify himself in circumstances where, inter alia, he served in private practice as a lawyer in the "matter in controversy." In accord with 28 U.S.C. § 455(e), disqualification in such circumstances may not be waived. Hope Creek, ALAB-759, 19 NRC at 21.

In applying the disqualification standards under 28 U.S.C. § 455(b)(2), the Appeal Board concluded that, in the instance of an adjudicator versed in a scientific discipline rather than in the law, disqualification is required if he previously provided technical services to one of the parties in connection with the "matter in controversy." Hope Creek, ALAB-759, 19 NRC at 23. To determine whether the construction permit proceeding and the operating license proceeding for the same facility should be deemed the same "matter" for 28 U.S.C. § 455(b)(2) purposes, the Appeal Board adopted the "wholly unrelated" test, and found the two to be sufficiently related that the Licensing Board judge should have recused himself. Id. at 24-25.

An administrative trier of fact is subject to disqualification for the appearance of bias or prejudgment of the factual issues as well as for actual bias or prejudgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-672, 15 NRC 677, 680 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); Three Mile Island, CLI-85-5, 21 NRC at 568; Hydro Res., Inc., CLI-98-9, 47 NRC at 326; Hydro Res., Inc. (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), LBP-98-11, 47 NRC 302, 330-31 (1998).

Disqualifying bias or prejudice of a trial judge must generally stem from an extrajudicial source, even under the objective standard for recusal, which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Preliminary assessments, made on the record, during the course of an adjudicatory proceeding, based solely upon application of the decisionmaker's judgment to material properly before him in the proceeding, do not compel disqualification as a matter of law. South Texas, CLI-82-9, 15 NRC at 1364-1365, citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169, 170 (1973); Int'l Bus. Machs. Corp., 618 F.2d 923, 929 (2d Cir. 1980); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-748, 18 NRC 1184, 1187 (1983). See also Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-749, 18 NRC 1195, 1197 (1983); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsid. denied, ALAB-757, 18 NRC 1356 (1983); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 721 (1985).

The fact that a Board member's actions are erroneous, superfluous, or inappropriate does not, without more, demonstrate an extrajudicial bias. Matters are extrajudicial when they do not relate to a Board member's official duties in a case. Rulings, conduct, or remarks of a Board member in response to matters which arise in administrative proceedings are not extrajudicial. Seabrook, ALAB-749, 18 NRC at 1200. See also Seabrook, ALAB-748, 18 NRC at 1188; Shoreham, LBP-88-29, 28 NRC at 640-41, aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A judge will not be disqualified on the basis of occasional use of strong language toward a party or in expressing views on matters arising from the proceeding, or actions which may be controversial or may provoke strong reactions by parties in the proceeding. Three Mile Island, CLI-85-5, 21 NRC at 569; Limerick, ALAB-819, 22 NRC at 721; Shoreham, LBP-88-29, 28 NRC at 641. See also, Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 71 NRC __ (July 8, 2010) (slip op. at 58-59).

A letter from a Board judge expressing his opinions to a judge presiding over a related criminal case did not reflect extrajudicial bias, since the contents of the letter were based solely on the record developed during the NRC proceeding. The factor to consider is the source of the information, not the forum in which it is communicated. Three Mile Island, CLI-85-5, 21 NRC at 569-70. Such a letter does not violate Canon 3A(6) of the Code of Judicial Conduct, which prohibits a judge from commenting publicly about a pending or impending proceeding in any court. Canon 3A(6) applies to general public comment, not the transmittal of specific information by a judge to another court. Id. at 571. Such a letter also does not violate Canon 2B of the Code of Judicial Conduct, which prohibits a judge from lending the prestige of his office to advance the private interests of others, and from voluntarily testifying as a character witness. Canon 2B seeks to prevent a judge's testimony from having an undue influence in a trial. Id. at 570.

Membership in a national professional organization does not perforce disqualify a person from adjudicating a matter to which a local chapter of the organization is a party. Sheffield, ALAB-494, 8 NRC at 302.

3.1.4.3 Improperly Influencing an Adjudicatory Board Decision

Where a Licensing Board has been subjected to an attempt to improperly influence the content or timing of its decision, the Board is duty-bound to call attention to that fact promptly on its own initiative. On the other hand, a Licensing Board which has not been subjected to attempts at improper influence need not investigate allegations that such attempts were contemplated or promised. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 102 (1977).

3.1.5 Resignation of a Licensing Board Member

The Administrative Procedure Act requirement that the official who presides at the reception of evidence must make the recommendation or initial decision (5 U.S.C. § 554(d)) includes an exception for the circumstance in which that official becomes "unavailable to the agency." When a Licensing Board member resigns from the Commission, he becomes "unavailable." 10 C.F.R. § 2.313(c) (formerly § 2.704(d)); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 101

(1977). Resignation of a Board member during a proceeding is not, of itself, grounds for declaring a mistrial and starting the proceedings anew. Seabrook, ALAB-422, 6 NRC at 101. Seabrook was affirmed generally and on the point cited herein in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

"Unavailability" of a Licensing Board member is dealt with generally in 10 C.F.R. § 2.313(c) (formerly § 2.704(d)).

3.2 Export Licensing Hearings

3.2.1 Scope of Export Licensing Hearings

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the AEA, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission, in making its export licensing determinations, will consider non-proliferation and safeguards concerns, but not foreign health and safety matters. Westinghouse Elec. Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-61 (1980); Gen. Elec. Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

The focus of Section 134 of the AEA is on discouraging the continued use of high-enriched uranium as reactor fuel, not its per se prohibition. Transnuclear, Inc. (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333 (1998).

3.2.2 Standing to Intervene in Export License Hearings

The Commission has applied judicial standing tests to its export licensing proceedings. Transnuclear, Inc., (Export of Enriched Uranium), CLI-99-15, 49 NRC 366, 367 (1999).

An organization's institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient to confer standing as a matter of right under Section 189.a. of the AEA. Transnuclear, CLI-99-15, 49 NRC at 367. See U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 (2004).

3.2.3 Hearing Requests

A discretionary hearing is not warranted where such a hearing would impose unnecessary burdens on participants and would not provide the Commission with additional information needed to make its statutory determinations under the AEA. Transnuclear, Inc., (Export of Enriched Uranium), CLI-99-15, 49 NRC 366, 368 (1999).

3.3 Hearing Scheduling Matters

3.3.1 Scheduling of Hearings

As a general rule, scheduling is a matter of Licensing Board discretion which will not be interfered with absent a "truly exceptional situation." Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975).

An ASLB has general authority to regulate the course of a licensing proceeding and may schedule hearings on specific issues pending related developments on other issues. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977). In deciding whether early hearings should be held on specific issues, the Board should consider:

(1) the likelihood that early findings would retain their validity;
(2) the advantage to the public interest and to the litigants in having early, though possibly inconclusive, resolution of certain issues;
(3) the extent to which early hearings on certain issues might occasion prejudice to one or more litigants, particularly in the event that such issues were later reopened because of supervening developments.

Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975); accord Allied-Gen. Nuclear Servs. (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975).

The Board may proceed to early hearings on the merits of safety issues – that is, before the NRC Staff has issued a final safety evaluation – but they "may not commence" hearings on environmental issues before the NRC Staff has issued a final EIS. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 394 (2007); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 214 (2001). But see La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-03, 59 NRC 10, 17 (2004) (where all parties have acquiesced in proceeding to hearings based on a draft EIS, and pending legislation would have required a decision on new enrichment facility applications within two (2) years of receipt of the application, the Commission can expedite proceedings by holding hearings on the merit of environmental issues before a final EIS has been issued).

It is the Board's duty to set and adhere to reasonable schedules for the various steps in the hearing process, with the expectation that the parties will comply with the scheduling orders set forth in the proceeding and that the Board will take appropriate action against parties who fail to comply. Wash. Pub. Power Supply Sys. (Washington Nuclear Project No. 1), LBP-00-18, 52 NRC 9, 13 (2000), citing Statements of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21-22 (1998).

The ASLB interpreted agency jurisprudence as reflecting a general reluctance to base the dismissal of contentions on pleading defects or procedural defects, including defects of timing. At the same time, the ASLB judged that the Commission expects its presiding officers to set schedules, expects that parties will adhere to those schedules, and expects that presiding officers will enforce compliance with those schedules. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000), citing Sequoia Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996); Statement of Policy, CLI-98-12, 48 NRC at 21.

A Licensing Board may not schedule a hearing for a time when it is known that a technical member will be unavailable for more than one half of one day unless there is

no reasonable alternative to such scheduling. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 238 (1974).

Generally speaking, Licensing Boards determine scheduling matters on the basis of representations of counsel about projected completion dates, availability of necessary information, and adequate opportunities for a fair and thorough hearing. The Board would take a harder look at an applicant's projected completion date if it could only be met by a greatly accelerated schedule, with minimal opportunities for discovery and the exercise of other procedural rights. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-83-8A, 17 NRC 282, 286-87 (1983).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Sys. (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 C.F.R. 2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet-to-be-filed operating license application. Shearon Harris, ALAB-577, 11 NRC at 27-28. Section 2.104(a) of the Commission's Rules of Practice contemplates determination of a need for a hearing in the public interest on an operating license only after application for such a license is made. Id.; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

A Licensing Board's denial of a request for a schedule change will be overturned only on a finding that the Board abused its discretion by setting a schedule that deprives a party of its right to procedural due process. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983), citing Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982), quoting Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188 (1978); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 95 (1986).

The bifurcation of proceedings to address environmental and safety issues (with resolution of environmental matters potentially occurring months later, after public meetings) is a normal accouterment of any hearing process involving NEPA, and license applicants at the NRC assume the risk of imposition of these additional burdens. Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 5 (2006).

3.3.1.1 Public Interest Requirements re Hearing Schedule

In matters of scheduling, the paramount consideration is the public interest. The public interest is usually served by as rapid a decision as is possible, consistent with everyone's opportunity to be heard. Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

To fulfill its obligation under the Administrative Procedure Act to decide cases within a reasonable time, the Commission established expedited procedures for the conduct of the 1988 Shoreham emergency planning exercise proceeding in order to minimize the delays resulting from the Commission's usual procedures, while still preserving the rights of the parties. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-70 (1988), citing Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

Findings under 10 C.F.R. § 2.104(a) on a need for a public hearing on an application for an operating license in the public interest cannot be made until after such application is filed. Such finding must be based on the application and all information then available. While the Commission can determine that a hearing on an operating license is needed in the public interest, a Licensing Board could not. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

3.3.1.2 Convenience of Litigants re Hearing Schedule

Although the convenience of litigants is entitled to recognition, it cannot be dispositive on questions of scheduling. Allied Gen. Nuclear Servs. (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

A licensee's indecision should not dictate the scope and timing of the hearing process. It is sensible to decide the most time-sensitive issues first, but it is unacceptable to simply decline to reach other questions about an already-issued license. Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 39 (2001).

Nevertheless, a Board's action in keeping to its schedule, despite intervenors' assertions that they were unable to prepare for cross-examination or to attend the hearing because of a need to prepare briefs in a related matter in the U.S. Court of Appeals for the Seventh Circuit, was held to be an error requiring reopening of the hearing. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.3.1.3 Adjourned Hearings

(RESERVED)

3.3.2 Postponement of Hearings

3.3.2.1 Factors Considered in Hearing Postponement

Where there is no immediate need for the license sought, a Board's decision as to whether to go forward with hearings or postpone them should be guided by three factors:

(1) the likelihood that findings would retain their validity;
(2) the advantage to the public and to litigants in having early, though possibly inconclusive, resolution;
(3) the possible prejudice arising from an early hearing.

Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

"The Commission's longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication." Private Fuel Storage, L.L.C. (Independent Spent Fuel Installation), CLI-01-26, 54 NRC 376, 381 (2001). See Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 389 (2001).

The fact that a party has failed to retain counsel in a timely manner is not grounds for seeking a delay in the commencement of hearings. Offshore Power Sys. (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 816 (1975).

A Licensing Board has considered the following factors in evaluating an NRC Staff motion to stay the commencement of a show cause proceeding involving the Staff's issuance of an immediately effective license suspension order: (1) the length of the requested stay; (2) the reasons for requesting the stay; (3) whether the licensee has persistently asserted its rights to a prompt hearing and to other procedural means to resolve the matter; and (4) the resulting prejudice to the licensee's interests if the stay is granted. Finlay Testing Laboratories, Inc., LBP-88-1A, 27 NRC 19, 23-26 (1988), citing Barker v. Wingo, 407 U.S. 514 (1972).

When Staff action may obviate the need for a Commission decision or the parties before the Commission may resolve their dispute in another forum, the Commission may hold a hearing request in abeyance. CBS Corp. (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 235 (2007).

The Commission is reluctant to suspend pending adjudications in order to await outcome of other proceedings. McGuire, CLI-01-27, 54 NRC at 390. For example, the Commission did not hold adjudications in abeyance pending the results of an ongoing reexamination of its rules in the aftermath of the Three Mile Island Nuclear Station accident. Id. at 390. See Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979). However, situations may arise where efficiencies might be gained from suspending an adjudication due to the presence of overlapping issues in multiple NRC proceedings. Atlas Corp. (Moab, Utah Site), LBP-00-4, 51 NRC 53 (2000).

The mere possibility that proceedings will be mooted by another agency's decision is not a sufficient reason to postpone reviewing the application. Private Fuel Storage, CLI-01-26, 54 NRC at 383. "However, the Commission will postpone adjudicatory matters in the unusual cases where moving forward would clearly amount to a waste of resources." Id. at 383. "The Commission disfavors suspending proceedings where the relief is not narrowly tailored to the goal of promoting adjudicatory efficiency." Id. "It has not been [the Commission's] general policy to place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval. Instead, absent extraordinary reasons for delay, the NRC acts as promptly as practicable on all applications it receives." Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-04-14, 59 NRC 250, 254 (2004).

A motion to suspend the proceeding pending resolution in state court of a state agency's determination concerning site suitability is appropriate in a situation where a particular course of action by an applicant is being challenged under state law. Whether the particular course of action is a violation of state law is a question for state authorities to determine, not a question for which a Licensing Board is an appropriate arbiter. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-26, 44 NRC 406, 409 (1996).

The conclusion of a licensing proceeding need not await the outcome of a final rulemaking petition "as every license the Commission issues is subject to the possibility of additional requirements." Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003) (emphasis in original).

3.3.2.2 Effect of Plant Deferral on Hearing Postponement

The deferral of a plant which has been noticed for hearing does not necessarily mean that hearings should be postponed. At the same time, a Licensing Board does have authority to adjust discovery and hearing schedules in response to such deferral. Wis. Elec. Power Co. (Koshkonong Nuclear Power Plant, Units 1 & 2), CLI-75-2, 1 NRC 39 (1975). The adjudicatory early site review procedures set forth in 10 C.F.R. Part 2 provide a means by which separate, early hearings may be held on site suitability matters despite the fact that the proposed plant and related construction permit proceedings have been deferred.

3.3.2.3 Sudden Absence of ASLB Member at Hearing

When there is a sudden absence of a technical member, consideration of a hearing postponement must be made, and if time permits, the parties' views must be solicited before a postponement decision is rendered. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974).

In Commonwealth Edison Co. (Zion Station, Units 1 & 2), CLI-74-35, 8 AEC 374 (1974), the Commission reviewed ALAB-222. While the Commission was not in full agreement with the Appeal Board's setting of inflexible guidelines for invoking the quorum rule, it agreed in principle with the Appeal Board's view that all three Board members must participate to the maximum extent possible in evidentiary hearings. As such, it appears that the above guidance from ALAB-222 remains in effect.

3.3.2.4 Time Extensions for Case Preparation Before Hearing

In view of the disparity between the Staff and applicant, on the one hand, and the intervenors, on the other, with regard to the time available for review and case preparation, the Appeal Panel has been solicitous of intervenors' desires for additional time for case preparation. See, e.g., Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986, 992-93 (1974). At the same time, a party's failure to have as yet retained counsel does not provide grounds for seeking a delay in proceedings. Offshore Power Sys. (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Moreover, a party must make a timely request for additional time to prepare its case; otherwise, it may waive its right to complain. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978). More recently, too, both the Commission and the Appeal Board have made it clear that the fact that a party may possess fewer resources than others to devote to a proceeding does not relieve that party of its hearing obligations. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982).

In St. Lucie, the Appeal Board granted the Staff's request for an extension of a deadline for filing written testimony, but called the matter to the attention of the Commission, which has supervisory authority over the Staff. In granting the extension, made as a result of the Staff's inability to meet the earlier deadline due to the assignment of the Staff to Three Mile Island-related matters, the Board rejected the intervenor's suggestion that it hold a hearing to determine the reasons for, and reasonableness of, the extension request. Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-553, 10 NRC 12 (1979).

Where time extensions have been granted, the original time period is not material to a determination as to whether due process has been observed. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980).

In considering motions for extensions of time, the Commission's construction of "good cause" to require a showing of "unavoidable and extreme circumstances" constitutes a reasonable means of avoiding undue delay in a license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Commission's policy statements and the Administrative Procedure Act. Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998).

3.3.3 Scheduling Disagreements Among Parties

Parties must lodge promptly any objections they may have to the scheduling of the prehearing phase of a proceeding. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-377, 5 NRC 430 (1977).

3.3.4 Appeals of Hearing Date Rulings

As a general rule, scheduling is a matter of Licensing Board discretion. Scheduling decisions will not be reviewed absent a "truly exceptional situation" which warrants interlocutory consideration. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975). Since the responsibility for conduct of the hearing rests with the presiding officer pursuant to 5 U.S.C. § 556(c) and 10 C.F.R. § 2.319 (formerly § 2.718), a Licensing Board's scheduling decision will not be examined except where there is a claim that such decision constituted an abuse of discretion and amounted to a denial of procedural due process. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188 (1978); Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 379 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 74 & n.68, 83 (1985).

With regard to claims of insufficient time to prepare for a hearing, even if a party is correct in its assertion that the Staff received an initial time advantage in preparing testimony as a result of scheduling, it must make a reasonable effort to have the procedural error corrected (by requesting additional time to respond) and not wait to use the error as grounds for appeal if the party disagrees with the decision on the merits. A party is entitled to a fair hearing, not a perfect one. Marble Hill, ALAB-459, 7 NRC at 188-89.

Although, absent special circumstances, Licensing Board scheduling determinations were not reviewed absent a claim of deprivation of due process, the former Appeal Board would, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

3.3.5 Location of Hearing

(RESERVED)

3.3.5.1 Public Interest Requirements re Hearing Location

(RESERVED)

3.3.5.2 Convenience of Litigants Affecting Hearing Location

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-31 (1979).

3.3.6 Consolidation of Hearings and of Parties

Consolidation of parties is covered generally by 10 C.F.R. § 2.316 (formerly § 2.715a), and consolidation of hearings is covered generally by 10 C.F.R. § 2.317 (formerly § 2.716).

A Board, on its own initiative, may consolidate parties who share substantially the same interest and who raise substantially the same questions, except when such action would prejudice one of the intervenors. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 501 (1986), citing 10 C.F.R. § 2.316 (formerly § 2.715a) and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also La. Energy Servs., L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 71 (2004) (stating that presiding officers possess authority under 10 C.F.R. § 2.319 to eliminate duplicative or cumulative evidence and arguments by consolidating parties or designating lead parties to represent interests held in common by multiple groups).

Consolidation is primarily discretionary with the Boards involved. Taking into account the familiarity of the Licensing Boards with the issues most likely to bear on a consolidation motion, the Commission will interpose its judgment in consolidation cases only in the most unusual circumstances. Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-26, 4 NRC 608 (1976). See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 89 (1992).

Under 10 C.F.R. § 2.317 (formerly § 2.716), consolidation is permitted if found to be conducive to the proper dispatch of the Board's business and to the ends of justice. Dairyland Power Coop. (La Crosse Boiling Water Reactor, Operating License and Show Cause), LBP-81-31, 14 NRC 375, 377 (1981). See Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-13A, 35 NRC 205, 205-06 (1992) (a 10 C.F.R. Part 2, Subpart G proceeding and a 10 C.F.R. Part 2, Subpart L proceeding were consolidated as a Subpart G proceeding), explained, LBP-92-16A, 36 NRC 18, 19-22 (1992).

A Board need not consolidate related hearings where parties are not identical and scheduling differences are extensive. That some factual or legal questions may overlap the proceedings is fortuitous, not legally controlling. Molycorp, Inc. (Washington, Pennsylvania, Temporary Waste Storage & Site Decommissioning Plan), LBP-00-10, 51 NRC 163, 172 (2000).

Nothing forces the Commission or the parties to continue down the "somewhat tortured path" created by addressing a multisite license in a single proceeding, especially if the applicant only intends to use one site. Hydro Res., Inc., CLI-00-8, 51 NRC 227, 242-43 (2000).

Pursuant to § 2.319, the Board may hold a challenge to a license amendment in abeyance when the amendment is the first of three that, once all are submitted and approved, represent a new licensee activity. Nuclear Fuel Servs., Inc., LBP-03-1, 57 NRC 9, 12-15 (2003).

The Commission may, in its own discretion, order the consolidation of two or more export licensing proceedings, and may utilize 10 C.F.R. § 2.317 (formerly § 2.716) as

guidance for deciding whether or not to take such action. Edlow Int'l Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328-29 (1977). Note, however, that persons who are not parties to either of two adjudicatory proceedings have no standing to have those proceedings consolidated under § 2.317 (formerly Section 2.716). Id. at 1328. Where proceedings on two separate applications are consolidated, the Commission may explicitly reserve the right to act upon the applications at different times. Edlow Int'l Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-78-4, 7 NRC 311, 312 (1978). See Braunkohle Transp., USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 894 (1987).

3.3.7 In Camera Hearings

Procedures for in camera hearings are discussed in Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227 (1980).

Where a party to a hearing objects to the disclosure of information and makes out a prima facie case that the material is proprietary in nature, it is proper for an adjudicatory board to issue a protective order and conduct an in camera session. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-196, 7 AEC 457, 469 (1974).

No reason exists for an in camera hearing on security grounds where there is no showing of some incremental gain in security from keeping the information secret. Duke Power Co. (Amendment to Materials License SNM-1773, Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), CLI-80-3, 11 NRC 185, 186 (1980).

Because the party that seeks disclosure of allegedly proprietary information has the right to conduct cross-examination in camera, no prejudice results from an adjudicatory Board's use of this procedure. Three Mile Island, ALAB-807, 21 NRC at 1215.

Following the issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered; if an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-55, 14 NRC 1017, 1025 (1981).

3.4 Issues for Hearing

A Licensing Board does not have the power to explore matters beyond those which are embraced by the Notice of Hearing for the particular proceeding. This is a holding of general applicability. Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426

(1980); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1269, 1286 (1983).

The judgment of a Licensing Board with regard to what is or is not in controversy in a proceeding being conducted by it is entitled to great respect. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

A genuine scientific disagreement on a central decisional issue is the type of matter that should ordinarily be raised for adversarial exploration and eventual resolution in the adjudicatory context. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 105 (1983). See Va. Elec. & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 (1976), aff'd sub nom. Va. Elec. & Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 912-13 (1982), rev. denied, CLI-83-2, 17 NRC 69 (1983).

Subpart C calls for "specificity" in pleadings. Power Auth. of N.Y. (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 300 n.23 (2000), citing Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to the petitioners when framing their issues, the Commission has deemed it appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.

The scope of a license renewal proceeding will not include issues litigated at the initial licensing proceeding absent a material change in circumstance affecting the original determination of the issue or some differentiation of other sites from the one already litigated. Hydro Res., Inc. (Crownpoint, N.M.), LBP-03-27, 58 NRC 408, 416 (2003).

An NRC licensing proceeding is not an open forum for discussing the country's need for energy and spent fuel storage. NRC's regulations provide procedures for qualified applicants to obtain licenses for safely operated nuclear facilities. If an applicant believes he is qualified to operate a nuclear storage or reprocessing facility, he must comply with those prescribed licensing procedures. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-7, 59 NRC 111, 112 (2004).

Findings under 10 C.F.R. § 2.104(a) on a need for a public hearing on issues involved in an application for an operating license cannot be made until after such application is filed. Such finding must be based on the application and information then available. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Commission may entirely eliminate certain issues from operating license consideration on the ground that they are suited for examination only at the earlier construction permit stage. Short of that, the Commission has considerable discretion to provide by rule that only issues that were or could have been raised by a party to the construction permit proceeding will not be entertained at the operating license stage except upon such a showing as "changed circumstances" or "newly discovered evidence." Commission practice, however, has been to determine the litigability of issues at the operating license stage with reference to conventional res judicata and collateral estoppel

principles. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 354 (1983), citing Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC 688, 696-97 (1982).

The Commission has accepted the question of whether the applicants' financial assurance arrangement is lawful under C.F.R. § 50.75 as genuine disputes of law and fact admissible at a hearing. James A. FitzPatrick, CLI-00-22, 52 NRC at 302. Other issues which have been recognized as appropriate in a hearing on a license transfer are whether NRC approval of the transfers will deprive the Commission of authority to require the applicant to conduct remediation under decommissioning, and whether, under those circumstances, the applicant would no longer have access to the decommissioning trust for remediation it would need to complete. Id. at 307.

The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency plans are fundamentally flawed. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 31-33 (1993). Emergency planning implementing procedures – the how-to and what-to-do details of the plan – should not become the focus of the adjudicatory process. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 406-07 (2000), citing La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); Curators of the Univ. of Mo., CLI-95-1, 41 NRC 71, 140-42 (1995). New licensees must meet all the requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. For the issue to be admissible at a license transfer hearing, the petitioner must allege with supporting facts that the new licensee is likely to violate the NRC's emergency planning rules. James A. FitzPatrick, CLI-00-22, 52 NRC at 317.

The fundamental question in reviewing an intervenor's challenge to an ISFSI applicant's financing plan is whether it departs from governing regulations, the Commission's controlling order on financial qualifications (CLI-00-13), and sound financial sense. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 139 (2004).

The issue of management capability to operate a facility is better determined at the time of the operating license application, rather than years in advance on the basis of preliminary plans. Shearon Harris, ALAB-577, 11 NRC at 31.

The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated. Lack of either technical competence or character qualifications on the part of a licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application. In making determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. However, not every licensing action throws open an opportunity to engage in an inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute. The issue of character is a proper matter for inquiry in a license transfer proceeding. Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25 (1993). See also Piping Specialists, Inc. (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24,

36 NRC 156, 163, n.5 (1992); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 189 (1999).

Since the Appendix I (of 10 C.F.R. Part 50) rule itself does not specify health effects, and there is no evidence that the purpose of the Appendix I rulemaking was to determine generally health effects from Appendix I releases, it follows that health effects of Appendix I releases must be litigable in individual licensing proceedings. Pub. Serv. Co. of Okla. (Black Fox Station, Units 1 & 2), CLI-80-31, 12 NRC 264, 276 (1980). See also Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Units 2 & 3), LBP-82-105, 16 NRC 1629, 1641 (1982), citing Black Fox, CLI-80-31, 12 NRC at 264.

Upon certification, the Commission held that in view of the fact that the Three Mile Island Nuclear Station accident resulted in generation of hydrogen gas in excess of hydrogen generation design basis assumptions of 10 C.F.R. § 50.44, hydrogen gas control could be properly litigated under Part 100. Under Part 100, hydrogen control measures beyond those required by 10 C.F.R. § 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guidelines values. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980). See Ill. Power Co. (Clinton Power Station, Unit 1), LBP-82-103, 16 NRC 1603, 1609 (1982), citing Three Mile Island, CLI-80-16, 11 NRC at 675.

Whether non-NRC permits are required is the responsibility of bodies that issue such permits, not the NRC. Thus, the issue of whether or not a party has obtained other appropriate permits is not admissible in a Licensing Board hearing. Hydro Res., Inc. (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-98-16, 48 NRC 119, 120 (1998).

It is not a profitable use of adjudicatory time to litigate the probabilistic risk assessment (PRA) methodology used on the chance that different methodology would identify a new problem or substantially modify existing safety concerns. If it is known that a problem exists which would be illustrated by a change in PRA methodology, that problem can be litigated directly; there is no need to modify the PRA to consider it. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC 67, 73 (1983).

Under 10 C.F.R. § 50.33(f)(2), the sufficiency vel non of the transferee's supplemental funding does not constitute grounds for a hearing; and the parent company guarantee is supplemental information and not material to the financial qualifications determination. James A. FitzPatrick, CLI-00-22, 52 NRC at 299-300, citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000).

A petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. James A. FitzPatrick, CLI-00-22, 52 NRC at 300, citing Oyster Creek, CLI-00-6, 51 NRC at 207-08.

The Commission does not require "absolute certainty" in financial forecasts. James A. FitzPatrick, CLI-00-22, 52 NRC at 300, citing N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999). Challenges by interveners to financial qualifications "ultimately will prevail only if [they] can demonstrate

relevant certainties significantly greater than those that usually cloud business outlooks." James A. FitzPatrick, CLI-00-22, 52 NRC at 300, quoting Seabrook, CLI-99-6, 49 NRC at 222. See also Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, 68 NRC 431, 448-49 (2008) (finding that petitioner had failed to present enough support for its contention concerning the applicant's financial qualifications to justify an evidentiary hearing).

A plant's proximity to various cities, towns, entertainment centers, and military facilities is not relevant to the question whether to approve the license transfer to that plant. James A. FitzPatrick, CLI-00-22, 52 NRC at 317.

The Commission denied a petitioner's request to arrange for an independent analysis of plants' conditions based on historical problems in NRC's Region I, since such an inquiry would go considerably beyond the scope of the license transfer proceeding. James A. FitzPatrick, CLI-00-22, 52 NRC at 318, citing Vermont Yankee, CLI-00-20, 52 NRC at 171; Oyster Creek, CLI-00-6, 51 NRC at 210; Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

Issues resolved in an ESP proceeding are "resolved" for the purposes of a COLA combined license application proceeding, although failure to meet ESP permit conditions or address combined license action items are still litigable and in that sense are not "resolved" because they will receive future attention. Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 209 (2007). "[O]nce an ESP is issued, the public, and in most cases, the NRC, are barred (absent a finding of necessity) from applying more stringent or contemporary regulatory siting requirements on matters that were resolved in the ESP proceeding." Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-07-09, 65 NRC 539, 561 (2007).

The Commission no longer conducts antitrust reviews in license transfer proceedings. James A. FitzPatrick, CLI-00-22, 52 NRC at 318, citing Vermont Yankee, CLI-00-20, 52 NRC at 174; Oyster Creek, CLI-00-6, 51 NRC at 210; Tex. Gas & Elec. Corp. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 56 Fed. Reg. 44,649 (July 19, 2000).

3.4.1 Intervenor's Contentions – Admissibility at Hearing

Contentions are like federal court complaints; before any decision that a contention should not be entertained, the proponent of the contention must be given some chance to be heard in response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979).

A contention concerning the health effects of radon emissions will be admitted only if the documented opinion of one or more qualified authorities is provided to the Licensing Board that the incremental [health effects of] fuel cycle-related radon emissions will be greater than those determined in the Appeal Board proceeding. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1454 (1982), citing Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-654, 14 NRC 632, 635 (1981).

Where the only NEPA matters in controversy are legal contentions that there has been a failure to comply with NEPA and 10 C.F.R. Part 51, the Board may rule on the contentions without further evidentiary hearings, making use of the existing evidentiary record and additional material of which it can take official notice. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 NRC 1724, 1728 (1981).

When considering admission of new intervenor contentions based on new regulatory requirements, the Licensing Board must find a "nexus" between the new requirements and the particular facility involved in the proceeding, and that the contentions raise significant issues. The new contentions need not be solely related to contentions previously admitted, but may address themselves to the new requirements imposed. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226, 233-34 (1981).

New environmental contentions based on the NRC Staff's draft environmental impact statement (DEIS) are permitted if data or conclusions in the DEIS differ significantly from the applicant's environmental report. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 n.6 (2000), citing La. Energy Servs., L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

Petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. Power Auth. of N.Y. (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207-08 (2000).

As a general rule, Licensing Boards should not accept in individual license proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission. As a corollary, certain issues included in an adjudicatory proceeding may be rendered inappropriate for resolution in that proceeding because the Commission has taken generic action during the pendency of the adjudication. There may nonetheless be situations in which matters subject to generic consideration may also be evaluated on a case-by-case basis where such evaluation is contemplated by, or at least consistent with, the approach adopted in the rulemaking proceeding. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889-90 (1983), aff'd, CLI-84-11, 20 NRC 1 (1984).

Intervenor maintains that the Board erred in refusing to consider its argument that the licensee must seek a construction permit to use the piping and equipment that were abandoned in the early 1980s. The Board ruled that the construction permit claim was not a part of intervenor's admitted contention and cannot be admitted unless it fulfills the late-filing standards set out in 10 C.F.R. § 2.309(c) (formerly § 2.714(a)). See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 281 (2000). Because intervenor made no effort to address the late-filing standards, the Board precluded further consideration of the issue. See Id. at 281-82. The Staff agrees with the Board. Intervenor was inexcusably late in attempting to introduce its construction permit claim. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391-92 (2001).

3.4.2 Issues Not Raised by Parties (Also See Section 3.1.2.7)

A Licensing Board may, on its own motion, explore issues which the parties themselves have not placed in controversy. 10 C.F.R. § 2.340(a) (formerly § 2.760a); Consol. Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). This power, however, is not a license to conduct fishing expeditions and, in operating license proceedings, should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious safety or environmental issue remains. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7 (1974); Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-24, 14 NRC 614, 615 (1981); Carolina Power & Light Co. (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985).

When a Licensing Board in an operating license proceeding considers issues which might be deemed to be raised sua sponte by the Board, it should transmit copies of the order raising such issues to the Commission and General Counsel in accordance with the Secretary's memo of June 30, 1981. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-81-54, 14 NRC 918, 922-23 (1981).

The Licensing Board may be alerted to such serious issues not raised by the parties through the statements of those making limited appearances. See Iowa Elec. Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

Pursuant to authority granted under 10 C.F.R. § 2.340(a) (formerly § 2.760a), the presiding officer in an operating license proceeding may examine matters not put into controversy by the parties only where he or she determines that a serious safety, environmental or common defense and security matter exists. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-24, 14 NRC 614, 615 (1981); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

The Commission has directed that when a Licensing Board raises an issue sua sponte in an operating license proceeding, it must issue a separate order making the requisite findings, briefly state its reasons for raising the issue, and forward a copy of the order to the Office of the General Counsel and the Commission. Comanche Peak, CLI-81-24, 14 NRC at 614; Vermont Yankee, ALAB-869, 26 NRC at 25. A Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that reasonable minds could inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-81-36, 14 NRC 691, 697 (1981).

In an operating license proceeding where a hearing is convened as a result of intervention, the Licensing Board will resolve all issues raised by the parties and any issues which it raises sua sponte. Indian Point, ALAB-319, 3 NRC at 190. The decision as to all other matters which need to be considered prior to issuance of the operating license is the responsibility of the NRC Staff alone. Indian Point, ALAB-319, 3 NRC at 190; Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1),

LBP-84-26, 20 NRC 53, 58 (1984). Once the Licensing Board has resolved all contested issues and any sua sponte issues, the NRC Staff then has the authority to decide if any other matters need to be considered prior to the issuance of an operating license. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-81-23, 14 NRC 159 (1981). The mere acceptance of a contention does not justify a Board's assuming that a serious safety, environmental, or common defense and security matter exists or otherwise relieve it of the obligation under 10 C.F.R. § 2.340(a) (formerly § 2.760a) to affirmatively determine that such a situation exists. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-36, 14 NRC 1111, 1114 (1981).

In a construction permit proceeding, the Licensing Board has a duty to ensure that the NRC Staff's review was adequate, even as to matters which are uncontested. Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 774 (1977).

The fact that the Staff may be estopped from asserting a position does not affect a Board's independent responsibility to consider the issue involved. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975).

An adjudicatory board's examination of unresolved generic safety issues, not put into controversy by the parties, is necessarily limited to whether the Staff's approach is plausible, and whether the explanations given for support of continued safe operation of the facility are sufficient on their face. Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-620, 12 NRC 574, 577 (1980).

Arguments not raised by intervenors in their written presentations, but raised in the affidavits of intervenor expert witnesses, were not considered by the presiding officer and were deemed to have been waived. Hydro Res., Inc. (P.O. Box 777, Crownpoint, N.M. 87313), LBP-05-17, 62 NRC 77, 98-99 n.14 (2005).

3.4.3 Issues Not Addressed by a Party

The parties must be given an opportunity, at oral hearing or by written pleadings, to produce relevant evidence concerning abuses of Commission regulations and adjudicatory process, but if a party fails to formally tender such evidence, the Licensing Board should not engage in its own independent and selective search of the record. Philadelphia Elec. Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 978 (1981).

While an applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore. The burden of going forward on any issues that make it to the hearing process is on the intervenor which is pursuing that issue. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326 (2005), aff'd, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403 (2005).

Although it is incumbent upon a party to act to protect its rights, there is no bar to a Licensing Board taking every precaution to be sure that, after a ruling is made, there is not even a possibility that its full import may be misunderstood. Therefore, although

the Board was only required to rule on the scope of the hearing, it could also have gone on to define more precisely and expressly the outlines of, and limits upon, the issues. Private Fuel Storage, LBP-05-12, 61 NRC at 329.

3.4.4 Separate Hearings on Special Issues

Pursuant to a Licensing Board's general power to regulate the course of a hearing under 10 C.F.R. § 2.319 (formerly § 2.718), a Board has the authority to consider, either on its own or at a party's request, a particular issue separately from and prior to other issues that must be decided in a proceeding. Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 544 (1975). Indeed, multiple contentions can be grouped and litigated in separate segments of the evidentiary hearing so as to enable the Licensing Board to issue separate partial initial decisions, each of which decides a major segment of the case. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983).

In a special proceeding, where the Commission has specified the issues for hearing, a Licensing Board is obliged to resolve all such issues even in the absence of active participation by intervenors. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

A request for a low-power license does not give rise to an entire proceeding separate and apart from a pending full-power operating license proceeding. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361 (1981).

The Appeal Board's holding in Douglas Point – that any early findings made by a Licensing Board, in circumstances where the applicant had disclosed an intent to postpone construction for several years, would be open to reconsideration "only if supervening developments or newly available evidence so warrant" – does not support a later Licensing Board's action in imposing a similar limitation on the right to raise issues which were not encompassed by the early findings. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-87 (1979), reconsid. denied, ALAB-539, 9 NRC 422 (1979).

The Chief Judge of the Licensing Board Panel is empowered to establish multiple Boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple Boards than by a single Board; and (3) multiple Boards can conduct the proceedings in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 311 (1998); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998).

3.4.5 Construction Permit Extension Proceedings

Section 185 of the AEA, 42 U.S.C. § 2235, provides that a construction permit will not expire and no rights under the permit will be forfeited unless two circumstances are present: (1) the facility is not completed, and (2) the latest date for completion has

passed. If construction is complete, no further extension of the completion date is required. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 201 (1993). Commission regulations provide that the substantial completion of a facility's construction satisfies the AEA's requirements regarding completion of the facility. See 10 C.F.R. §§ 50.56, 50.57(a)(1) (1993); Comanche Peak, CLI-93-10, 37 NRC at 201 n.35.

The filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the licensee may lawfully continue construction activities pending a final determination of its application. Comanche Peak, CLI-93-10, 37 NRC at 201, 202.

An applicant who fails to file a timely request for an extension of its construction permit and allows the permit to expire does not automatically forfeit the permit. The Commission has held that a construction permit does not lapse until the Commission has taken affirmative action to complete the forfeiture. The Commission will consider and may grant an untimely application for an extension of the construction permit, without requiring the initiation of a new construction permit proceeding. However, the applicant must still establish good cause for an extension of its permit. In addition, the applicant is not entitled to continue its construction activities after the expiration date of its permit and prior to any extension of its permit. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 120 & n.4-5 (1986).

A licensee's substantial completion of construction, lawfully undertaken during the pendency of petitioner's challenge to a construction extension request, renders moot any controversy over further extension of the completion date in the construction permit. Comanche Peak, CLI-93-10, 37 NRC at 200.

Unless an applicant is responsible for delays in completion of construction and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such a proceeding and is proven true, the AEA and implementing regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 553 (1983).

3.4.5.1 Scope of Construction Permit Extension Proceedings

The focus of any construction permit extension proceeding is to be whether "good cause" exists for the requested extension. Determination of the scope of an extension proceeding should be based on "common sense" and the "totality of the circumstances"; more specifically, whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and, prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay

occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1227, 1229-30 (1982), citing Ind. & Mich. Elec. Co. (Donald C. Cook Nuclear Plant, Units 1 & 2), ALAB-129, 6 AEC 414 (1973); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558 (1980). See Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984).

The NRC's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension; the same limitation to apply to any interested person seeking to challenge the request for an extension. The most "common sense" approach to the interpretation of Section 185 of the AEA and 10 C.F.R. § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show a "good cause" justification for the delay. WPPSS, CLI-82-29, 16 NRC at 1228-29; Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 550-51 (1983); Pub. Serv. Co. of N.H. (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121 (1986).

The only question litigable in a construction permit extension proceeding – whether the licensee has demonstrated "good cause" for the extension – is no longer of legal interest after the licensee has lawfully completed construction under the permit and requires no further extension of the completion date. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 204 (1993).

Proceedings on construction permit extensions are limited in scope to challenges to the licensee's asserted "good cause" for the extension, and are not an avenue to challenge a pending operating license. Comanche Peak, CLI-93-10, 37 NRC at 205.

The scope of review for construction period recapture proceedings may be broader than that for license renewal, inasmuch as the Commission issued a new rule (10 C.F.R. Part 54) for license renewal specifically spelling out and limiting the scope of such proceedings. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 13-14 (1993).

A permit holder may establish good cause for delays by showing a need to correct deficiencies which resulted from a previous corporate policy to speed construction by intentionally violating NRC requirements. The permit holder must also show that the previous policy has since been discarded and repudiated. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 403 (1986).

An intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 1), LBP-84-9, 19 NRC 497, 504 (1984), aff'd, ALAB-771, 19 NRC 1183, 1190 (1984).

The Licensing Board should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives. It is not the Board's mission to superintend utility management when it makes business judgments for which it is ultimately responsible. WPPSS, ALAB-771, 19 NRC at 1190-91, citing Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-475, 7 NRC 752, 757-58 (1978).

3.4.5.2 Contentions in Construction Permit Extension Proceedings

The test for determining whether a contention is within the scope of a construction permit extension proceeding is a two-pronged one. First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatory." If both prongs are met, the delay is without "good cause." Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1231 (1982); Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 (1983); Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 1), LBP-84-9, 19 NRC 497, 502 (1984), aff'd, ALAB-771, 19 NRC 1183, 1189 (1984). "Dilatory conduct" in this context means the intentional delay of construction without a valid purpose. WPPSS, ALAB-722, 17 NRC at 552; WPPSS, LBP-84-9, 19 NRC at 502, aff'd, ALAB-771, 19 NRC at 1190.

Intervenors in a construction permit extension proceeding may only litigate those issues that (1) arise from the reasons assigned to the requested extension, and (2) cannot abide the operating license proceeding. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), LBP-80-31, 12 NRC 699, 701 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1301 (1982).

Contentions having no discernible relationship to the construction permit extension are inadmissible in a permit extension proceeding; a show cause proceeding under 10 C.F.R. § 2.206 is the exclusive remedy. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), LBP-81-6, 13 NRC 253, 254 (1981), citing Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558 (1980); Shoreham, LBP-82-41, 15 NRC at 1302; Pub. Serv. Co. of N.H. (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 979 (1984).

An intervenor's concerns about substantive safety issues are inadmissible in a construction permit extension proceeding. Such concerns are more appropriately raised in an operating license proceeding or in a 10 C.F.R. § 2.206 petition for NRC Staff enforcement action against the applicant. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121 & n.6, 123 (1986).

A consideration of the health, safety or environmental effects of delaying construction cannot be heard at the construction permit extension proceeding but must await the operating license stage. WPPSS, LBP-84-9, 19 NRC at 506-07, aff'd, ALAB-771, 19 NRC at 1189.

There is no basis in the AEA or in the regulations for challenging the period of time in the requested extension on the grounds that the period requested is too short. WPPSS, LBP-84-9, 19 NRC at 506, aff'd, ALAB-771, 19 NRC at 1191.

In a construction period recapture proceeding, implementation of maintenance and surveillance programs may be challenged, even though the paper programs are not being modified. Irrespective of how comprehensive a program may appear on paper, it will be essentially without value unless it is timely, continuously, and properly implemented. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 19 (1993), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-106, 6 AEC 182, 184 (1973).

Numerous, repetitious cited violations or other incidents may form the basis for a contention questioning the adequacy of a maintenance or surveillance program, even though none of the individual violations or other incidents rises to the level of a serious safety issue. When sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may be in order. Diablo Canyon, LBP-93-1, 37 NRC at 19.

3.4.6 Motion to Strike

A motion to strike is the appropriate mechanism for seeking the removal of information from a pleading or other submission that is "irrelevant," or in the context of summary dispositions, portions of a filing or affidavit that contain technical arguments based on questionable competence. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003).

3.4.7 Result of Withdrawal of a Party

When a party withdraws from a proceeding, the issues sponsored solely by it are normally dismissed from the proceeding. Power Auth. of N.Y. (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), LBP-01-5, 53 NRC 136, 137 (2001).

A co-sponsored issue need not be dismissed as a result of the withdrawal of one of the sponsoring parties. Id. at 137.

A participant is free to withdraw a request for a licensing action without presiding officer approval. Such an action generally moots the proceeding. Fansteel Inc. (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96, 102 (2003).

3.5 Summary Disposition

3.5.1 Applicability of Federal Rules Governing Summary Judgment

The NRC's standard for summary disposition in 10 C.F.R. § 2.710 is based upon the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 11-12). Decisions arising under the Federal Rules may serve as guidelines to Licensing Boards in applying 10 C.F.R. § 2.710 (formerly § 2.749). Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 754 (1977); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878-79 (1974). Subsequent decisions of Licensing Boards have analogized

10 C.F.R. § 2.710 (formerly § 2.749) to Rule 56 to the extent that the Rule applied in the cases in question. See, e.g., Pub. Serv. Co. of Okla. (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787 n.51 (1978); Gulf States Util. Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Seabrook, LBP-74-36, 7 AEC at 878; Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 121 (2006), citing Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). See also Section 5.8.5. Further, because the Commission's summary disposition rules borrow extensively from Rule 56 of the Federal Rules of Civil Procedure, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for the Commission's rules. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167 (1995), citing Perry, ALAB-443, 6 NRC at 753-54; Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 79 (2005). Thus, pursuant to Rule 56(c), and, by analogy the Commission's summary disposition rule, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Safety Light Corp., LBP-95-9, 41 NRC at 449 n.167, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

3.5.2 Standard for Granting/Denying a Motion for Summary Disposition

Summary disposition may be granted where the relevant documents demonstrate 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. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 11-12); Advanced Med. Sys., Inc., CLI-93-22, 38 NRC 98, 102-03 (1993), reconsid. denied, CLI-93-24, 38 NRC 187 (1993).

Under the concept of summary disposition (or summary judgment), the motion is granted only where the movant is entitled to judgment as a matter of law, where it is quite clear what the truth is and where there is no genuine issue of material fact that remains for trial. Tenn. Valley Auth. (Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-73-29, 6 AEC 682, 688 (1973); Private Fuel Storage, L.L.C., LBP-99-23, 49 NRC 485, 491 (1999); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001).

The regulations do not require merely the showing of a "material issue of fact" or an "issue of fact." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 12). The regulations require a genuine issue of material fact. To be genuine, the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983). Absent any probative evidence supporting the claim, mere assertions of a dispute as to material facts does not invalidate the licensing Board's grant of summary disposition. Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 309-10 (1994), aff'd, Advanced Med. Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002); Safety Light Corp. (Bloomsburg Site

Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary disposition is a useful tool for resolving contentions that, after discovery is completed, are shown by undisputed facts to have nothing to commend them, but it is not a tool for trying to convince a Licensing Board to decide genuine issues of material fact that warrant resolution at a hearing. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001); Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 121 (2006).

A contention will not be summarily dismissed where the Licensing Board determines that there still exist controverted issues of material fact. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 640-41 (1981). Admission as a party to a Commission proceeding based on one acceptable contention does not preclude summary disposition nor guarantee a party a hearing on its contentions. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 n.15 (1982), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Section 2.710 (formerly Section 2.749), like Rule 56, is a procedural device to be used as part of a screening mechanism for eliminating unnecessary consideration of assertions which do not involve factual controversy. Use of summary disposition to resolve tenuous issues raised in petitions to intervene has been encouraged by the Commission and the Appeal Board. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 (1981); Miss. Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973); Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-81-8, 13 NRC 335, 337 (1981). If the issue is demonstrably insubstantial, it should be decided pursuant to summary disposition procedures to avoid unnecessary and possibly time-consuming hearings. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981).

Once an applicant has submitted a motion that makes a proper showing for summary disposition, the litmus test of whether or not to grant the summary disposition motion is whether the intervenor has presented a genuine issue as to any material fact that is relevant to its allegation that could lead to some form of relief. Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2) LBP-94-37, 40 NRC 288 (1994). A fact is material if it will affect the outcome of a proceeding under the governing law. Entergy Nuclear Generating Co. (Pilgrim Nuclear Power Station), LBP-07-12, 66 NRC 113, 125 (2007).

The Commission has encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing Prairie Island, CLI-73-12, 6 AEC at 242, aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Allens Creek, ALAB-590, 11 NRC at 550-51; Grand Gulf, ALAB-130, 6 AEC at 424-25.

A Licensing Board will deny intervenors' motion for summary disposition where the intervenors have not raised any litigable issues because of their failure to submit admissible contentions. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-38, 30 NRC 725, 741 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484, 490 n.19 (1991).

If there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should have been permitted or required to proceed further, the motion must be denied. Gen. Elec. Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). As the Board rules on such a motion, all statements of material facts required to be served by the moving party must be deemed to be admitted, unless controverted by the statement required to be served by the opposing party. 10 C.F.R. § 2.710 (formerly § 2.749).

Motions for summary disposition under Section 2.710 (formerly Section 2.749) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient. The asserted facts must be material and of a substantial nature, not fanciful or merely suspicious. Where neither an answer opposing the motion nor a statement of material fact has been filed by an intervenor, and where Staff and applicants have filed affidavits to show that no genuine issue exists, the motion for summary judgment will not be defeated. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-82-17, 15 NRC 593, 595-96 (1982). Even though the summary disposition opponent is entitled to all reasonable inferences, it must, in the face of well-pled undisputed material facts, provide something more than suspicious or bald assertions as the basis for a material factual dispute. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-40, 54 NRC 526, 536 (2001).

The Commission's summary disposition rule (10 C.F.R. § 2.710 (formerly § 2.749)) gives a party a right to an evidentiary hearing only where there is a genuine issue of material fact. Cameo Diagnostic Ctr., Inc., LBP-94-34, 40 NRC 169 (1994). An important effect of this principle is that applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 301 (1982).

On its face, 10 C.F.R. § 2.710 (formerly § 2.749) provides a remedy only with regard to matters which have not already been the subject of an evidentiary hearing in the proceedings at bar, but which are susceptible of final resolution on the papers submitted by the parties in advance of any such hearing. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-554, 10 NRC 15, 19 (1979).

While summary judgment is generally not appropriate, pursuant to Rule 56 of the Federal Rules, where credibility of witness determinations are necessary, witness testimony that lacks an adequate basis will not suffice to preclude summary judgment. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 81 (2005).

For proceedings conducted pursuant to the "informal" hearing procedures of 10 C.F.R. Part 2, Subpart L, summary disposition motions are to be resolved in accord with the standards for dispositive motions for "formal" hearings, as set forth in Part 2, Subpart G. See 10 C.F.R. § 2.1205(c). In that regard, 10 C.F.R. § 2.710(d)(2) provides that summary disposition may be entered with respect to any matter (or all matters) in a proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), 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." Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 62-63 (2008).

Challenges in Freedom of Information Act cases routinely are resolved on the basis of summary judgment pleadings. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-08-7, 67 NRC 361, 371 (2008).

3.5.3 Burden of Proof with Regard to Summary Disposition Motions

The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact and evidence must be viewed in the light most favorable to the party opposing summary judgment; e.g., Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Private Fuel Storage, L.L.C., LBP-99-31, 50 NRC 147, 152 (1999); Private Fuel Storage, L.L.C., LBP-99-42, 50 NRC 295, 301 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 112 (2000); Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 121 (2006); Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-08-7, 67 NRC 361, 371 (2008).

To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact. Poller v. Columbia Broad. Sys. Inc., 368 U.S. 464 (1962); Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 627 (1954); La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981). See also Vermont Yankee, LBP-06-5, 63 NRC at 121 ("Summary disposition may be granted only if the truth is clear") (citing Poller, 368 U.S. at 467).

Summary disposition is not appropriate when the movant fails to carry its burden setting forth all material facts pertaining to its summary disposition motion. Gulf States Util. Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 466 (1995). Thus, if a movant fails to make the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982). See Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 & 2), LBP-84-7, 19 NRC 432, 435 (1984), reconsid. denied on other grounds, LBP-84-15, 19 NRC 837, 838 (1984). The fact that the party opposing summary disposition failed to submit evidence controverting the disposition does not mean that the motion must be granted. Even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. An intervenor that does respond to a motion for summary disposition but that fails to file the required "separate statement" should be no worse off than one who fails to respond at all. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-3, 17 NRC 59, 62 (1983). Nonetheless, where a proponent of a contention fails to respond to a motion

for summary disposition, it does so at its own risk; for, if a contention is to remain litigable, there must at least be presented to the Board a sufficient factual basis "to require reasonable minds to inquire further." La Crosse, LBP-82-58, 16 NRC at 519-20, citing Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 340 (1980); La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-93-12, 38 NRC 5 (1993).

The moving party fails to meet its burden when the filings demonstrate the existence of a genuine material fact, when the evidence introduced does not show that the nonmoving party's position is a sham, when the matters presented fail to foreclose the possibility of a factual dispute, or when there is an issue as to the credibility of the moving party's evidentiary material. Vermont Yankee, LBP-06-5, 63 NRC at 122. In PFS, the petitioner asserted numerous statements of fact, none of which were deemed to show any genuine dispute of law or fact existed. These included a statement as to the identity of certain state officials, statements about the actions and policies of the Utah Legislation and the Governor, statements about the petitioner's proposed independent spent fuel storage installation (ISFSI) (which was not the subject of the licensing proceeding), and the petitioner's claims for monetary damages arising from actions taken by the State of Utah. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 125-26 (2000).

Where the movant has satisfied his initial burden and has supported his motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983). The opposing party need not show that he would prevail on the issues, but only that there are genuine issues to be tried. Am. Mfgs. Mut. Ins. Co. v. Am. Broad.–Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1967); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-86-12, 23 NRC 414, 418 (1986). Where a party opposing the motion is unable to file affidavits in opposition in the time available, he may file an affidavit showing good reasons for his inability to make a timely response, in which case the Board may refuse to grant summary disposition, grant a continuance to permit proper affidavits to be prepared, or take other appropriate action. 10 C.F.R. § 2.710(c) (formerly § 2.729(c)); Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 103 & n.6 (1993).

The party opposing summary disposition must append to its response a statement of material facts about which there exists a genuine issue to be heard. If the responding party does not adequately controvert material facts set forth in the motion, the party faces the possibility that those facts may be deemed admitted. See 10 C.F.R. § 2.710(a) (formerly § 2.749(a)); Private Fuel Storage, L.L.C., LBP-99-23, 49 NRC 485, 491 (1999). Given the respondent's burden to counter the movant's assertions and statement of material facts, the Board may consider the respondent's failure to directly contradict these proffered assertions if the Board believes it is well within the respondent's power to do so, when judging the reliability of the movant's assertions. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30-31 (2002). If the evidence before the Board does not establish the absence of a genuine issue of material fact, then the motion must be

denied even if there is no opposing evidence. See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977).

A summary disposition opponent is entitled to the favorable inferences that may be drawn from any evidence submitted. See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994), aff'd, CLI-94-11, 40 NRC 55 (1994); Vermont Yankee, LBP-06-5, 63 NRC at 121-22, citing Advanced Med. Sys., Inc., CLI-93-22, 38 NRC at 102. The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. See Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of Am., Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878-79 (1974); Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-81-8, 13 NRC 335, 337 (1981); La Crosse, LBP-82-58, 16 NRC at 519, citing Poller, 368 U.S. at 473; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-85-29, 22 NRC 300, 310 (1985); Braidwood, LBP-86-12, 23 NRC at 417; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-91-24, 33 NRC 446, 450 (1991), aff'd, CLI-92-8, 35 NRC 145 (1992).

The party opposing summary disposition must make a sufficient showing of each element of the case on which it has the burden of proof. Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-02-10, 55 NRC 236, 239 (2002), citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The quality of the evidence submitted at the summary disposition stage "is expected to be of a higher level than that at the contention filing stage." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 36) (quoting Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11. 1989).

A party opposing the motion may not rely on a simple denial of material facts stated by the movant but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are insufficient. 10 C.F.R. § 2.710(b) (formerly § 2.749(b)); Advanced Med. Sys., Inc., CLI-93-22, 38 NRC at 102; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 195 (2002); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002). The opposing party is not relieved from the responsibility, in the face of well-pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for any purported material factual disputes. See Seabrook, LBP-91-24, 33 NRC at 451; Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), aff'd, Advanced Med. Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 92-93 (1996); Private Fuel Storage, L.L.C., LBP-99-35, 50 NRC 180, 194 (1999). For example, prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative

that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Med. Sys., CLI-93-22, 38 NRC at 108.

All material facts set forth in the motion and not adequately controverted by the response are deemed to be admitted. 10 C.F.R. § 2.710(a) (formerly § 2.749(a)); Perry, LBP-83-3, 17 NRC at 61; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Med. Sys. (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991), aff'd, CLI-93-22, 38 NRC 98 (1993); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 79 (2005). The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or the fact will be deemed admitted. Advanced Med. Sys., CLI-93-22, 38 NRC at 102-03.

If intervenors present evidence or argument that directly and logically challenges the basis for summary disposition, creating a genuine issue of fact for resolution by the Board, then summary disposition cannot be granted. On the other hand, if intervenors' facts are fully and satisfactorily explained by other parties, without any direct conflict of evidence, then intervenors will have failed to show the presence of a genuine issue of material fact. However, after concluding the process of reviewing facts contained in the intervenor's response, the Board must also examine the motion to see whether the movant's unopposed findings of fact establish the basis for summary disposition. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-114, 16 NRC 1909, 1913 (1982).

The fact that the NRC Staff may agree with the factual or technical positions of a party's motion for summary disposition, either informally or in a formal document such as an SER, does not "resolve" the dispute or mean that there is no genuine issue of material fact in dispute. Vermont Yankee, LBP-06-5, 63 NRC at 124.

A party which seeks to conduct discovery to respond to a summary disposition motion must file an affidavit which identifies the specific information it seeks to obtain and shows how that information is essential to its opposition to the summary disposition motion. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-92-8, 35 NRC 145, 152 (1992).

3.5.4 Contents of Motions for/Responses to Summary Disposition

The general requirements as to contents of motions for summary disposition and responses thereto are set out in 10 C.F.R. § 2.710 (formerly § 2.749).

Under the NRC Rules of Practice, a motion for summary disposition must contain a "separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982), citing 10 C.F.R. § 2.710(a) (formerly § 2.749(a)). Where such facts are properly presented and are not controverted, they are deemed to be admitted. La Crosse, LBP-82-58, 16 NRC at 520; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1),

LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Med. Sys. (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991); Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2) LBP-94-37, 40 NRC 288, 293-94 (1994), citing Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 239-40 (1993). See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-85-29, 22 NRC 300, 305 (1985). The failure of a party to file in its motion for summary disposition a separate statement of the "material facts as to which the moving party contends there is no genuine issue to be heard," as required by 10 C.F.R. § 2.710(a) (formerly § 2.749(a)), while asserting in its reply that its statement of undisputed facts actually appears in its brief, is arguably a procedural defect that warrants denial of summary disposition. Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-02-10, 55 NRC 236, 240 (2002).

In opposing summary disposition by seeking to establish the existence of a genuine dispute regarding a material factual issue, a party must present sufficiently probative evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence that is "merely colorable" or is "not significantly probative" will not preclude summary judgment); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86 n.9 (1996). Further, a party's bald assertion, even when supported by an expert, will not establish a genuine material factual dispute. See United States v. Various Slot Machs. on Guam, 658 F.2d 697, 700 (9th Cir. 1981) (in the context of summary judgment motion, an expert must back up his opinion with specific facts). See also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 807 (9th Cir. 1988) (expert's study based on "unsupported assumptions and unsound extrapolation" cannot be used to support summary judgment motion); Yankee, LBP-96-18, 44 NRC at 103. Specifically, it would frequently be insufficient for an opponent to rely on quotations from or citations to the published work of researchers who have reached conclusions at variance with the movant's affiants. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 & 2), LBP-84-7, 19 NRC 432, 436 (1984), reconsid. denied on other grounds, LBP-84-15, 19 NRC 837, 838 (1984). Where a licensee opposing summary disposition in an enforcement proceeding did not contest the occurrence of the essential facts contained in signed statements or reports of interviews of former licensee employees, general objections to the Staff's reliance on such documents or bald assertions that the employees were "disgruntled" workers was insufficient to show a concrete, material issue of fact that would defeat summary disposition. Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1984), aff'd, Advanced Med. Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

A submission that is insufficient to show an absence of an issue of fact cannot premise a grant of summary judgment. Mere allegations and denials will not suffice; there must be a showing of genuine issues of fact. 10 C.F.R. § 2.710(b) (formerly § 2.749(b)); Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981); Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 229, 231 (1985); Commonwealth Edison Co. (Braidwood

Nuclear Power Station, Units 1 & 2), LBP-86-12, 23 NRC 414, 417 (1986); Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-88-23, 28 NRC 178, 182 (1988). See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-88-31, 28 NRC 652, 662-65 (1988). An opponent's allegation of missing information, without a showing of its materiality, is insufficient to defeat a motion for summary disposition. Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 687-88 (1989), vacated and rev'd, ALAB-944, 33 NRC 81, 140-48 (1991).

In responding to a statement filed in support of a motion for summary disposition, a party who opposes the motion may only address new facts and arguments presented in the statement. The party may not raise additional arguments beyond the scope of the statement. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-86-30, 24 NRC 437, 439 n.1 (1986).

With regard to affidavits in support of a motion for a summary disposition, a document submitted with a verified letter in which the attestation states that the person is "duly authorized to execute and file this information on behalf of the applicants" is not sufficient to make the document admissible into evidence pursuant to § 2.710(b) (formerly § 2.749(b)). An affidavit must be submitted by a person to show he is competent to testify to all matters discussed in the document. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 755 (1977). See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 500-01 (1991). Although 10 C.F.R. § 2.710(b) (formerly § 2.749(b)) does not expressly require that the affidavit be based on a witness's personal knowledge of the material facts, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Braidwood, LBP-86-12, 23 NRC at 418-419.

Answers to interrogatories can be used to counter evidentiary material proffered in support of a motion for summary disposition, but only if they are made on the basis of personal knowledge, over facts that would be admissible as evidence, and are made by a respondent competent to testify to those facts. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-83-32A, 17 NRC 1170, 1175 (1983).

The hearsay nature of an investigator's interview report with a witness does not bar its consideration in deciding whether to grant summary disposition, particularly in the absence of any evidence suggesting the report's inherent unreliability or any material objection to the statement of facts recounted in the interview report. Advanced Med. Sys., CLI-94-6, 39 NRC at 306-07.

The NRC Staff's subsequent decision to rescind an enforcement order does not constitute an admission that disputed facts remained regarding the sufficiency of the order when issued. Advanced Med. Sys., CLI-94-6, 39 NRC at 306.

In an action challenging a civil penalty for violations of both the Commission's regulations and the facility's license condition, the Board held that prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory

violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 107-08 (1993).

In Gulf States, the Board concluded that the question of whether bankruptcy courts will adequately fund nuclear facilities to ensure safety constitutes a disputed factual question for which summary disposition is inappropriate. Gulf States Util. Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 471 (1995).

For purposes of summary disposition, health effects contentions have been differentiated from other contentions. An opponent of summary disposition in the health effects area must have some new (post-1975) and substantial evidence that casts doubt on the Committee on the Biological Effects of Ionizing Radiation estimates. Furthermore, he must be prepared to present that evidence through qualified witnesses at the hearing. Shearon Harris, LBP-84-7, 19 NRC at 437, citing Pub. Serv. Co. of Okla. (Black Fox Station, Units 1 & 2), CLI-80-31, 12 NRC 264, 277 (1980).

One possible answer to a motion for summary disposition is the assertion that discovery is needed to respond fully to the motion. See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-92-8, 35 NRC 145, 152 (1992). Such a request generally should be made in a pleading supported by an affidavit. See id.; Gen. Pub. Util. Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 166 n.20 (1996). The functional equivalent of such a filing may be the statements of counsel during a prehearing conference outlining the discovery needed to support the party's case. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8 (1996).

A party that conducted discovery following the filing of the dispositive motion generally cannot interpose claims based on a lack of information as to the valid basis for a genuine material factual dispute. Yankee, LBP-96-18, 44 NRC at 101-02.

3.5.5 Time for Filing Motions for Summary Disposition

Summary disposition motions must be filed no later than twenty (20) days after the close of discovery. 10 C.F.R. § 2.710(a) (formerly § 2.749(a)).

A Licensing Board convened solely to rule on petitions to intervene lacks the jurisdiction to consider filings going to the merits of the controversy. Consequently, such a Board cannot entertain motions for summary disposition. Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). The filing of such motions must, therefore, await the appointment of a hearing board.

In Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 336 (1982), the Board permitted late filing of affidavits in support of a motion for summary disposition where: (1) blizzard conditions and misunderstandings as to late filing requirements existed; (2) no serious delay in the proceedings resulted; and (3) the testimony and affidavits submitted were particularly helpful and directly relevant to the safety of the spent fuel pool amendment being sought.

10 C.F.R. § 2.710(d)(1) (formerly § 2.749) permits a Board to deny summarily motions for summary disposition which occur shortly before a hearing where the motion would require the diversion of the parties' or the Board's resources from preparation for the hearing. Regents of the Univ. of Cal. (UCLA Research Reactor), LBP-82-93, 16 NRC 1391, 1393 (1982).

A presiding officer typically will not consider a motion for summary disposition at the same time he is making a determination about the admissibility of a contention. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 38 (1996).

3.5.6 Time for Filing Responses to Summary Disposition Motions

Responses to motions for summary disposition must be filed within twenty (20) days after service of the motion. 10 C.F.R. § 2.710(a) (formerly § 2.749(a)).

A party who seeks an extension of the time period for the filing of its response to a motion for summary disposition should not merely assert the existence of potential witnesses who might be persuaded to testify on its behalf. A party should provide some assurances that the potential witnesses will appear and will testify on pertinent matters. Ga. Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-872, 26 NRC 127, 143 (1987). See also Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-85-32, 22 NRC 434, 436 (1985) (the Licensing Board extended the time period for the applicants' response to an intervenor's motion for summary disposition where the applicants, pursuant to a management plan to resolve design and quality assurance issues, were gathering information to establish the adequacy and safety of the plant).

A movant for summary disposition is generally prohibited from filing a reply to another party's answer to the motion. 10 C.F.R. § 2.710(a) (formerly § 2.749(a)). However, pursuant to its general authority under 10 C.F.R. § 2.319(g) (formerly § 2.718(e)), a Licensing Board may lift the prohibition if the movant can establish a compelling reason or need to file a reply. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 204 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987). See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 499-500 (1991). Cf. Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 123 n.10 (2006) (pursuant to 10 C.F.R. § 2.323(c), although there is no right of reply to an answer to a motion for summary disposition, if such an answer included a plainly and factually incorrect allegation, the moving party could request an opportunity to respond and to correct the record).

3.5.7 Role/Power of Licensing Board in Ruling on Summary Disposition Motions

With the consent of the parties, the Board may adopt a somewhat more lenient standard for granting summary disposition than is provided under 10 C.F.R. § 2.710 (formerly § 2.749). For example, the Board may grant summary disposition whenever it decides that it can arrive at a reasonable decision without benefit of a hearing. That test would permit the Board to grant summary disposition under some circumstances in which it would otherwise be required to find that there is a genuine issue of fact

requiring trial. Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-25, 19 NRC 1589, 1591 (1984).

The proponent of the motion must still meet its burden of proof to establish the absence of a genuine issue of material fact. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977); Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 633 (1986). The Board's function, based on the filing and supporting material, is simply to determine whether genuine issues exist between the parties. It has no role to decide or resolve such issues at this stage of the proceeding. The parties opposing such motions may not rest on mere allegations or denials, and facts not controverted are deemed to be admitted. Since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination & Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994).

When conflicting expert opinions are involved, summary disposition is rarely appropriate. Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006), citing, e.g., Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005). Differences among experts may occur at different factual levels: either about disputed baseline observations, or about the ultimate facts or inferences to be drawn even where baseline facts may be uncontested. Vermont Yankee, LBP-06-5, 63 NRC at 122, citing Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001). Factual disputes of this nature are to be resolved at an evidentiary hearing, where the Board has the opportunity to examine witnesses, probe the documents, and weigh the evidence. Vermont Yankee, LBP-06-5, 63 NRC at 122. However, this rule would not apply if an expert asserts a factual and technical position that is so patently incorrect or absurd (e.g., that the world is flat) that a presiding officer must reject that position as constituting a genuine dispute. Id. at 125 n.13.

When a trial court considers a motion for summary disposition involving conflicting expert testimony, the court must focus on each opinion's "principles and methodology" to ensure it is sufficiently grounded in factual basis, but it is not the court's role to determine which experts are more correct. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001), citing Kannankeril v. Terminix Int'l, 128 F.3d 802, 807 (3d Cir. 1997); Norfolk Southern Corp. v. Oberly, 632 F.Supp. 1225, 1243 (D. Del. 1986), aff'd on other grounds, 822 F.2d 388 (3d Cir. 1987); Vermont Yankee, LBP-06-5, 63 NRC at 122. The above holdings apply to the Licensing Boards, even though the Boards have the dual function of ruling on summary disposition motions and then becoming the trier of fact. This dual role does not allow Licensing Boards to combine both functions in one step. Private Fuel Storage, LBP-01-39, 54 NRC at 510.
The Board may not dictate to any party the manner in which it presents its case. The Board may not substitute its judgment for the parties on the merits of their cases in order to summarily dismiss their motions; rather, it must deal with the motions on the

merits before reaching a conclusion. Regents of the Univ. of Cal. (UCLA Research Reactor), LBP-82-93, 16 NRC 1391, 1394, 1395 (1982).

A presiding officer need consider only those purported factual disputes that are "material" to the resolution of the issues raised in a summary disposition motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (factual disputes that are "irrelevant or unnecessary" will not preclude summary judgment); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 99 (1996).

In an interesting approach seeking to avoid relitigation of matters considered in a prior proceeding concerning the same reactor, a Licensing Board invited motions for summary disposition which rely on the record of the prior proceeding. In response, the intervenor was expected to indicate why the prior record was inadequate and why further proceedings might be necessary. The Licensing Board planned to take official notice of the record in the prior proceeding and render a decision as to whether further evidentiary hearings were necessary. Gen. Elec. Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 408 (1985).

Where the existing record is insufficient to allow summary disposition, it is not improper for a Licensing Board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition motion. Perry, ALAB-443, 6 NRC at 752.

When summary disposition is requested before discovery is completed, the Board may deny the request either upon a showing of the existence of a genuine issue of material fact or upon a showing that there is good reason for the Board to defer judgment until after specific discovery requests are made and answered. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-55, 14 NRC 1017, 1021 (1981).

A summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same allegation. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-32 (1982).

In dicta, a Board commented that it is an abuse of the adjudicatory process to use a motion for summary disposition as a subterfuge for the filing of interrogatories, requests for admission, or other discovery (which are generally not permitted in Subpart L proceedings); as a mechanism for exhausting an impecunious litigant; or for any other extraneous purpose. Vermont Yankee, LBP-06-5, 63 NRC at 128 n.15.

3.5.7.1 Operating License Hearings

A Board may grant summary disposition as to all or any part of the matters involved in an operating license proceeding. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 634 (1986), citing 10 C.F.R. § 2.710(a) (formerly § 2.749(a)).

In an operating license proceeding, where significant health and safety or environmental issues are involved, a Licensing Board should grant a motion for summary disposition only if it is convinced from the material filed that the public health and safety or the environment will be satisfactorily protected.

10 C.F.R. § 2.340 (formerly § 2.760a); Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981), citing Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741 (1977); South Texas, LBP-86-15, 23 NRC at 633.

In an operating license proceeding, summary disposition on safety issues should not be considered or granted until after the Staff's SER and the ACRS letter have been issued. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 NRC 680, 681 (1977).

3.5.7.2 Construction Permit Hearings

While, as a general rule, summary disposition can be granted in nearly any proceeding as to nearly any matter for which there is no genuine issue of material fact, there is an exception under the NRC Rules of Practice. In construction permit hearings, summary disposition may not be used to determine the ultimate issue as to whether the construction permit will be granted. 10 C.F.R. § 2.710(d) (formerly § 2.749(d)). See Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980), rev'd on other grounds, ALAB-605, 12 NRC 153 (1980).

The limitation on summary disposition in a construction permit proceeding does not apply in a construction permit amendment proceeding. Summary disposition may be granted in a construction permit amendment proceeding where there is no genuine issue as to any material fact that warrants a hearing and the moving party is entitled to a decision in its favor as a matter of law. Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 & n.14 (1984).

3.5.7.3 Amendments to Existing Licenses

Summary disposition may be used in license amendment proceedings where a hearing is held with respect to the amendment. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). See, e.g., Pub. Serv. Elec. & Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 566-67 (1979); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-85-29, 22 NRC 300, 310 (1985).

3.5.8 Summary Disposition: Mootness

Where a contention challenges an omission by an applicant, and the applicant has since remedied this omission through responses to a Staff request for additional information (RAI), summary disposition of the contention on mootness grounds is appropriate. Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 182 (2005).

When summary disposition is being sought based on a contention's mootness in light of revised information submitted by an applicant in response to an NRC Staff RAI, a summary disposition motion is not premature because the information was not incorporated into a license application amendment until after the disposition motion was filed. Regardless of the situation prior to the submission of the application

amendment, given that there is no material dispute that the application currently contains RAI information, nothing precludes the entry of summary disposition. Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 493 (1999).

When summary disposition is being sought based on a contention's mootness in light of revised information submitted by the applicant, a challenge to the validity of the revised information does not support the notion there is a controversy, factual or otherwise, regarding the existing contention so that summary disposition is inappropriate; instead, this is an argument in favor of a new contention. Private Fuel Storage, LBP-99-23, at 493.

3.5.9 Contents of Summary Disposition Order

In granting summary judgment, the Licensing Board should set forth the legal and factual bases for its action. Where it has not, the record will be examined to see if there are any genuine issues. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

An evidentiary hearing would be necessary only if a genuine issue of material fact were in dispute. Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 119-20 (1993).

3.5.10 Appeals from Rulings on Summary Disposition

As is the case under Rule 56 of the Federal Rules, a denial of a motion for summary disposition is interlocutory and, therefore, not appealable. La. Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93 (1974); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-85-29, 22 NRC 300, 331 (1985). This applies as well to denials of partial summary disposition. Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-641, 13 NRC 550, 551 (1981), citing Waterford, ALAB–220, 8 AEC at 94.

An order granting summary disposition of an intervenor's sole contention is not interlocutory, since the consequence is intervenor's dismissal from the proceeding. As such, it is immediately appealable. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981). However, an order summarily dismissing some, but not all, of an intervenor's contentions and which does not have the effect of dismissing the intervenor from the proceeding is interlocutory in nature and an appeal must await the issuance of an initial decision. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-736, 18 NRC 165 (1983); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1198 n.3 (1985); Turkey Point, LBP-85-29, 22 NRC at 331.

Where a Licensing Board has not set forth the legal and factual basis for its action on a summary judgment motion, the Appeal Board will examine the record to see if there are any genuine issues. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

Reluctance to certify a Licensing Board's summary disposition decision to the Commission, claiming that it is a ruling as a matter of law, is outweighed by both the fact that there are often factual elements and also the Commission's 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." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 136 (2000), quoting Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998).

3.6 Other Dispositive Motions/Failure to State a Claim

The Commission's Rules of Practice make no provision for motions for orders of dismissal for failing to state a legal claim. However, the Federal Rules of Civil Procedure do in Rule 12(b)(6), and Licensing Boards occasionally look to federal cases interpreting that rule for guidance. In the consideration of such dismissal motions, which are not generally viewed favorably by the courts, all factual allegations of the complaint are to be considered true and to be read in a light most favorable to the nonmoving party. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination & Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994).

3.7 Attendance at and Participation in Hearings

An intervenor may not step in and out of participation in a particular issue at will. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975). According to one Licensing Board, an intervenor who raises an issue and then refuses to actively participate in the hearing may lose his right to appeal the Licensing Board's decision. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156 (1976). See Ga. Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-851, 24 NRC 529, 530 (1986), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 907 (1982), rev. declined, CLI-83-2, 17 NRC 69 (1983). A party's total failure to assume a significant participational role in a proceeding (e.g., his failure to appear at hearings and to file proposed findings), at least in combination with other factors militating against his being retained as a party, will, upon motion of another party, result in his dismissal from the proceeding. Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558, 560 (1976).

If an intervenor "walks out" of a hearing, it is nevertheless proper for the Licensing Board to proceed in his absence. 10 C.F.R. § 2.320(b) (formerly § 2.707(b)); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 251 (1975). The best practice in such a situation is for the Board to make thorough inquiry as to the issues raised by the absent intervenor despite his absence. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 849 (1974).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request presented before the date of the conference. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

The appropriate sanction for willful refusal to attend a prehearing conference is dismissal of the petition for intervention. In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the Staff at the

prehearing conference. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed, although the Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

A participant in an NRC proceeding should anticipate having to manipulate its resources, however limited, to meet its obligations. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983), citing Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-666, 15 NRC 277, 279 (1982); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530 (1979); Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 559 (1986).

3.8 Burden and Means of Proof

A licensee generally bears the ultimate burden of proof. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing 10 C.F.R. § 2.325 (formerly § 2.732). This is also true for a Part 2, Subpart K proceeding. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 254-55 (2000). But intervenors must give some basis for further inquiry. Three Mile Island, ALAB-697, 16 NRC at 1271.

The ultimate burden of proof in a licensing proceeding on the question of whether a permit or license should be issued is upon the applicant. But where one of the other parties to the proceeding contends that, for a specific reason, the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once the party has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant, which as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985). See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101, 103 (1976); Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 15-16 (1990).

Government entities have the same burdens in proving their cases in NRC licensing proceedings as private entities. Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 (1997).

Where the Licensing Board directed an intervenor to proceed with its case first because of the intervenor's failure to comply with certain discovery requests and Board orders, the alteration in the order of presentation did not shift the burden of proof. That burden has been and remains on the licensee. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

Under Commission practice, the applicant for a construction permit or operating license always has the ultimate burden of proof. 10 C.F.R. § 2.325 (formerly § 2.732). The degree to which he must persuade the Board (burden of persuasion) should depend upon the gravity of the matters in controversy. Va. Elec. & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17, n.18 (1975).

An applicant has the burden of proof to demonstrate that the offsite emergency plan complies with Commission rules and guidance. The burden must be carried whether or not the applicant is primarily responsible for carrying out a particular aspect of the plan. Consumers Power Co. (Big Rock Point Plant), LBP-82-77, 16 NRC 1096, 1099 (1982), citing 10 C.F.R. § 2.325 (formerly § 2.732).

An applicant has the burden of proving, prior to the issuance of a full-power license, that there is reasonable assurance that adequate protective measures can and will be taken in an emergency. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 518 (1986), citing 10 C.F.R. § 50.47(a)(1). However, an applicant is not required to prove and reprove essentially unchallenged factual elements of its case. An intervenor may not merely assert a need for more current information without having raised any questions concerning the accuracy of the applicant's submitted facts. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-857, 25 NRC 7, 13 (1987).

The applicant must demonstrate that it satisfies the "reasonable assurance standard" by a preponderance of the evidence. "Reasonable assurance" "is not susceptible to formalistic quantification or mechanistic application. Rather, whether the reasonable assurance standard is met is based upon sound technical judgment applied on a case-by-case basis." Compliance with the Commission's regulations is a touchstone for reasonable assurance. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 340 (2007), aff'd, CLI-09-07, 69 NRC 235, 263 (2009) (rejecting an argument that reasonable assurance should be quantified with 95% confidence).

There is some authority to the effect that in show cause proceedings for modification of a construction permit, the burden of going forward is on the Staff or intervenor who is seeking the modification since such party is the "proponent of an order." Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-74-54, 8 AEC 112 (1974).

With respect to motions, the moving party has the burden of proving that the motion should be granted and he must present information tending to show that allegations in support of his motion are true. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977).

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. East. Testing & Inspection, Inc., LBP-96-9, 43 NRC 211, 215-16 (1996), citing 55 Fed. Reg. 27,645, 27,646 (1990); St Joseph Radiology Assocs., Inc., LBP-92-34, 36 NRC 317, 321-22 (1992); Aharon Ben-Haim, Ph.D. (Upper Montclair, New Jersey), LBP-97-15, 46 NRC 60, 61 (1997). See Section 5.7.5.

The general rule that the applicant carries the burden of proof does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978).

The applicant carries the burden of proof on safety issues. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11, 17 (1975).

An applicant who challenges the Staff's denial of his application for an operator's license has the burden of proving that the Staff incorrectly graded or administered the operator examination. If the applicant establishes a prima facie case that the Staff acted incorrectly, then the burden of going forward with evidence shifts to the Staff. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987).

Applicants for a certificate of registration for a sealed source using cesium-137 chloride in caked powder form for proposed use in an irradiator held to be governed by 10 C.F.R. Part 36 must meet its burden of proof by a preponderance of the evidence. See Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 720 (1985); Hydro Res., Inc., LBP-99-30, 50 NRC 77, 100 (1999); Graystar, Inc., LBP-01-7, 53 NRC 168, 180 (2001).

3.8.1 Duties of Applicant/Licensee

A licensee of a nuclear power plant has a great responsibility to the public, one that is increased by the Commission's heavy dependence on the licensee for accurate and timely information about the facility and its operation. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985).

The NRC is dependent upon all of its licensees for accurate and timely information. The licensee must have a detailed knowledge of the quality of installed plant equipment. Petition for Emergency & Remedial Action, CLI-80-21, 11 NRC 707, 712 (1980); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 910 (1982), citing Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978); Tenn. Valley Auth. (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387 (1982).

In general, if a party has doubts about whether to disclose information, it should do so, as the ultimate decision with regard to materiality is for the decisionmaker, not the parties. Midland, ALAB-691, 16 NRC at 914.

The ultimate burden of persuasion rests with applicant and with NRC Staff to extent Staff supports the applicant's position. Parties saddled with this burden typically proceed first and then have the right to rebut the case presented by their adversaries. Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 529 (1979). Because the licensee, rather than the Staff, bears the burden of proof in a licensing proceeding, the adequacy of the Staff's safety review is, in the final analysis, not determinative of whether the application should be approved. Consequently, it would be pointless for the presiding officer to rule upon the adequacy of the Staff's review. Curators of Univ. of Mo., CLI-95-1, 41 NRC 71, 121 (1995).

3.8.2 Intervenor's Contentions – Burden and Means of Proof

It has long been held that an intervenor has the burden of going forward, either by direct evidence or by cross-examination, as to issues raised by his contentions. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1008, reconsid. denied, ALAB-166, 6 AEC 1148 (1973), remanded on other grounds, CLI-74-2, 7 AEC 2, aff'd, ALAB-175, 7 AEC 62 (1974); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-83-20A, 17 NRC 586, 589 (1983).

Where an intervenor raises a particular contention challenging a licensee's ability to operate a nuclear power plant in a safe manner, the intervenor necessarily assumes the burden of going forward with the evidence to support that contention. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor must come forward with sufficient evidence to require reasonable minds to inquire further, and it has an obligation to reveal pursuant to a discovery request what the evidence is. That requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination. Seabrook, LBP-83-20A, 17 NRC at 589.

This requirement has, on occasion, been questioned by the courts in those situations in which the information is in the hands of the Staff or applicant. See, e.g., York Comm. for a Safe Env't v. NRC, 527 F.2d 812, 815 n.12 (D.C. Cir. 1975).

The scope of the "burden of going forward" rule has also been questioned by the courts. In Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir, 1976), the Court of Appeals indicated that an intervenor, in commenting on a draft EIS, need only bring sufficient attention to an issue "to stimulate the Commission's consideration of it" in order to trigger a requirement that the NRC consider whether the issue should receive detailed treatment in an EIS. The court stated that this test does not support the imposition of the burden of an affirmative evidentiary showing. Id. at n.13. Aeschliman was reversed in this regard by the U.S. Supreme Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Therein, the Court held that it is

"incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Id. at 553. The Court found that the NRC's use of "a threshold test," requiring intervenors to make a "showing sufficient to require reasonable minds to inquire further," was well within the agency's discretion. Id. at 554. See Pa. Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 957 (1982), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978).

While the outlines of an intervenor's burdens with respect to its contentions may not be fully defined, it is clear that the Commission's rules do not preclude an intervenor from building its case defensively, on the basis of cross-examination. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 389 (1974); Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-05 (1973).

The "threshold test," restored by the Supreme Court in Vermont Yankee,, 435 U.S. at 553, goes only to the matter of the showing necessary to initiate an inquiry into a specific alternative which an intervenor (or prospective intervenor) thinks should be explored, and not to the placement of the burden of proof once such an inquiry actually has been undertaken in an adjudicatory context. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978).

In Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-10, 15 NRC 341, 344 (1982), the Board required intervenors to file a motion concerning litigable issues, by which the burden of going forward on summary disposition (but not the burden of proof) was placed on the intervenors. However, applicant and Staff would have to respond and intervenors reply. Thereafter, the standard for summary disposition would be the same as required under the rules. This special procedure was appropriate because time pressures had caused the Board to apply a lax standard for admission of contentions, depriving applicants of full notice of the contentions in the proceeding, and because applicants had already shown substantial grounds for summary disposition of all contentions in the course of a hearing that had already been completed. The motion for litigable issues was intended to parallel the motion for summary disposition in all but one respect – that intervenor was required to file first and to come forward with evidence indicating the existence of genuine issues of fact before applicant had to file a summary disposition motion. Applicant retained the burden of proof demonstrating the absence of genuine issues of fact, just as it would if it had originated the summary disposition process by its own motion. Wis. Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-88, 16 NRC 1335, 1339 (1982).

3.8.3 Specific Issues – Means of Proof

3.8.3.1 Exclusion Area Controls

The applicant must demonstrate constant total control of the entire exclusion area except for roads and waterways. As to those, only a showing of post-accident control is necessary. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 393-95 (1975). Note also that in certain situations there may be very narrow stretches of land (e.g., a narrow strand

of beach below the mean high tide line), the lack of total control of which might readily be viewed as de minimis. Where such a de minimis situation exists, strict application of the constant total control requirements may be inappropriate. Id. at 394-95.

3.8.3.2 Need for Facility

NEPA implicitly requires that a proposed facility exhibit some benefit to justify its construction or licensing. In the case of a nuclear power plant, the plant arguably has no benefit unless it is needed. Thus, a showing of need for the facility is apparently required to justify the licensing thereof. This need can be demonstrated either by a showing that there is a need for additional generating capacity to produce needed power or by a showing that the nuclear plant is needed as a substitute for plants that burn fossil fuels that are in short supply. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-54 (1975). See Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978). A plant may also be justified on the basis that it is needed to replace scarce natural gas as an ultimate energy resource, "i.e., to satisfy residential and business energy requirements now being directly met by natural gas." Wolf Creek, ALAB-462, 7 NRC at 327. In evaluating a utility's load forecast, "the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made." Id. at 328. Because of the uncertainty involved in predicting future demand and the serious consequences of not having generating capacity available when needed, an isolated forecast which is appreciably lower than all others in the record may be accepted only if the Board finds that the isolated forecast "rests on firm ground." Id. at 332.

Prior to rule changes precluding the consideration of need for power in operating license adjudications, it was held that a change in the need for power at the operating license stage must be sufficiently extensive to offset the environmental and economic costs of construction before it may be raised as a viable contention. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-35, 14 NRC 682, 684 (1981). Under the current rules, need for power now may be litigated in operating license proceedings only if it is shown, pursuant to 10 C.F.R. § 2.335 (formerly § 2.758), that special circumstances warrant waiver of the rules prohibiting litigation of need for power. Ga. Power Co. (Vogtle Nuclear Plant, Units 1 & 2), LBP-84-35, 20 NRC 887, 889-90 (1984), citing 10 C.F.R. 51.53(c); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 84 (1985).

The substitution theory, whereby the need for a nuclear power facility is based on the need to substitute nuclear-generated power for that produced using fossil fuels, has been upheld as providing an adequate basis on which to establish need for the facility. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 97-98 (1st Cir. 1978).

Considerable weight should be accorded the electrical demand forecast of a state utilities commission that is responsible by law for providing current analyses of probable electrical demand growth and which has conducted public hearings on the subject. A party may have the opportunity to challenge the analysis of such commission. Nevertheless, where the evidence does not show that such analysis is

seriously defective or rests on a fatally flawed foundation, no abdication of NRC responsibilities under NEPA results from according conclusive effect to such a forecast. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-490, 8 NRC 234, 240-41 (1978).

It is reasonable, in projecting market supply and demand, to rely upon the public statements of market participants, particularly those whose interests do not appear to coincide with the applicant. La. Energy Servs., L.P. (National Enrichment Facility), LBP-05-13, 61 NRC 385, 439 (2005). The willingness of potential customers to purchase an applicant's product is the best evidence of the applicant's ability to enter the market. Id. at 443-44 (regarding an applicant which had entered into contracts constituting a majority of the applicant's expected production capacity during the first 10 years of production).

The U.S. Supreme Court has noted that there is little doubt that under the AEA, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). But this Commission's responsibilities regarding need for power have their primary roots in NEPA rather than the AEA. NEPA does not foreclose the placement of heavy reliance on the judgment of local regulatory bodies charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligations to meet customer demands. Rochester Gas & Elec. Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 388-89 (1978).

3.8.3.3 Burden and Means of Proof in Interim Licensing Suspension Cases

Several cases have set forth the requirements as to burden of proof and burden of going forward in interim licensing suspension cases. These rulings were promulgated in the context of the Commission's General Statement of Policy on the Uranium Fuel Cycle, 41 Fed. Reg. 34,707 (Aug. 16, 1976), but presumably would be applicable in similar contexts that may arise in the future.

In a motion by intervenors for suspension of a construction permit in such a situation, the applicant for the construction permit has the burden of proof. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976); Union Elec. Co. (Callaway Plant, Units 1 & 2), ALAB-346, 4 NRC 214 (1976). An applicant faced with such a motion stands in jeopardy of having the motion summarily granted where he does not make an evidentiary showing or even address the relevant factors bearing on the propriety of suspension in his response to the motion. Callaway, ALAB-346, 4 NRC at 215. The applicant also has the burden of going forward with evidence. Union Elec. Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). This burden of going forward is not triggered by a motion to suspend a construction permit which fails to state any reason which might support the grant of the motion. Id. On the other hand, the Board's duty to entertain the motion and the applicant's duty to go forward is triggered where the motion contains supporting reasons "sufficient to require reasonable minds to inquire further." Id.

3.8.3.4 Availability of Uranium Supply

In considering the extent of uranium resources, a Board should not restrict itself to established resources which have already been discovered and evaluated in terms of economic feasibility but should consider, in addition, "probable" uranium resources which will likely be available over the next 40 years. The Board should also consider the total number of reactors "currently in operation, under construction, and on order" rather than the number reasonably expected to be operational in the time period under consideration since future reactors will not be licensed unless there is sufficient fuel for them as well as previously licensed reactors. Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 323-25 (1978). See Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-317, 3 NRC 175 (1976).

In order to establish the availability of a uranium supply, a construction permit applicant need not demonstrate that it has a long-term contract for fuel. Union Elec. Co. (Callaway Plant, Units 1 & 2), ALAB-347, 4 NRC 216, 222 (1976).

3.8.3.5 Environmental Costs

(RESERVED)

3.8.3.5.1 Cost of Withdrawing Farmland from Production

The environmental cost of withdrawing farmland is "deemed to be the costs of the generation (if necessary) of an equal amount of production on other land." Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 335 (1978). The Appeal Board specifically rejected the analytical approach in which the lost productivity is compared to available national cropland resources as "an 'empty ritual' with a predetermined result" since this approach will always lead to the conclusion that withdrawal will have an insignificant impact. Id. See also Section 6.16.6.1.1.

3.8.3.6 Alternate Sites Under NEPA

To establish that no suggested alternative site is "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site and individual alternatives. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

3.8.3.7 Management Capability

Under the Atomic Energy Act, the Commission is authorized to consider a licensee's character or integrity in deciding whether to continue or revoke its operating license. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). A licensee's ethics and technical proficiency are both legitimate areas of inquiry insofar as consideration of the licensee's overall management competence is

at issue. Three Mile Island, ALAB-772, 19 NRC at 1227; Piping Specialists, Inc. (Kansas City, Missouri), LBP-92-25, 36 NRC 156, 153 (1992).

Candor is an especially important element of management character because of the Commission's heavy dependence on an applicant or licensee to provide accurate and timely information about its facility. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985), citing Three Mile Island, ALAB-772, 19 NRC at 1208; Piping Specialists, LBP-92-25, 36 NRC at 156.

Another measure of the overall competence and character of an applicant or licensee is the extent to which the company management is willing to implement its quality assurance program. Waterford, ALAB-812, 22 NRC at 15 n.5, citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-106, 6 AEC 182, 184 (1973). A Board may properly consider a company's efforts to remedy any construction and related quality assurance deficiencies. Ignoring such remedial efforts would discourage companies from promptly undertaking such corrective measures. Waterford, ALAB-812, 22 NRC at 15, 53 n.64, citing Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 371-74 (1985).

Areas of inquiry to determine if a utility is capable of operating a facility are outlined in Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-5, 11 NRC 408 (1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-84-13, 19 NRC 659 (1984).

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

The generally applicable standard for licensee character and integrity is whether there is reasonable assurance that the licensee has the character to operate the facility in a manner consistent with the public health and safety and NRC requirements. To decide that issue, the Commission may consider evidence of licensee behavior having a rational connection to safe operation of the facility and some reasonable relationship to licensee's candor, truthfulness, and willingness to abide by regulatory requirements and accept responsibility to protect public health and safety. In this regard, the Commission can rest its decision on evidence that past inadequacies have been corrected and that current licensee management has the requisite character. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

Like "negligence," the standard of "reasonable management conduct" requires considerable judgment by the trier of fact. As there is no precedent directly on point regarding lack of reasonable management conduct by a nonexpert manager, it is appropriate, therefore, for the Licensing Board to be very careful not to apply a

standard that is too demanding and that benefits too much from hindsight. Piping Specialists, Inc. (Kansas City, Missouri), LBP-92-25, 36 NRC 156, 166, n.13 (1992).

3.9 Burden of Persuasion (Degree of Proof)

For an applicant to prevail on each factual issue, its position must be supported by a preponderance of the evidence. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-763, 19 NRC 571, 577 (1984), rev. declined, CLI-84-14, 20 NRC 285 (1984); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 720 (1985). See Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 360 (1978), reconsid. denied, ALAB-467, 7 NRC 459 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 405 n.19 (1976).

The burden of persuasion (degree to which a party must convince the Board) should be influenced by the "gravity" of the matter in controversy. Va. Elec. & Power Co. (North Anna Power Station, Units 1, 2, 3, & 4), ALAB-256, 1 NRC 10, 17 n.18 (1975).

A Licensing Board has utilized the clear and convincing evidence standard with regard to findings concerning the falsification and manipulation of test results by a licensee's personnel because such findings could result in serious injuries to the reputations of the individuals involved. The Board also believed that a more stringent evidentiary standard was justified where the events in question allegedly occurred seven or eight years before the hearing and the memories of the witnesses had faded. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 691 (1987). Compare Piping Specialists, Inc. and Forrest L. Roudebush, LBP-92-25, 36 NRC 156, 186 (1992).

3.9.1 Environmental Effects Under NEPA

It is not necessary that environmental effects be demonstrated with certainty. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1191-92 (1975).

It is appropriate to focus only on whether a partial interim action will increase the environmental effects over those analyzed for the full proposed action where there is no reasonable basis to foresee that the full action will not be permitted in the future. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 629 n.76 (1983).

3.10 Stipulations

10 C.F.R. § 2.330 (formerly § 2.753) permits stipulation as to facts in a licensing proceeding. Such stipulations are generally encouraged. See, e.g., Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-74-2, 7 AEC 2, 3 n.1 (1974). However, in the NEPA context, Licensing Boards retain an independent obligation to assure that NEPA is complied with and its policies protected despite stipulations to that effect. Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-75-14, 2 NRC 835, 838 (1975).

3.11 Official Notice of Facts

Under 10 C.F.R. § 2.337(f) (formerly § 2.743(i)), official notice may be taken of any fact of which U.S. Courts may take judicial notice. In addition, Licensing Boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. Pursuant to 10 C.F.R. § 2.337(f) (formerly § 2.743(i)), the Commission may take official notice of publicly available documents filed in the docket of a FERC proceeding. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996). In any event, parties must have the opportunity to controvert facts which have been officially noticed.

Pursuant to this regulation, Licensing and Appeal Boards have taken official notice of such matters as:

(1) a statement in a letter from the AEC's General Manager that future releases of radioactivity from a particular reactor would not exceed the lowest limit established for all reactors at the same site. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-74-25, 7 AEC 711, 733 (1974);

(2) Commission records, letters from applicants and materials on file in the Public Document Room to establish the facts with regard to the Ginna fuel problem as that problem related to an appeal in another case. Consol. Edison Co. of N.Y. (Indian Point, Unit 2), ALAB-75, 5 AEC 309, 310 (1972);

(3) portions of a hearing record in another Commission proceeding involving the same parties and a similar facility design. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-5, 7 AEC 82, 92 (1974);

(4) a statement, set forth in a pleading filed by a party in another Commission proceeding, of AEC responses to interrogatories propounded in a court case to which the agency was a party. Catawba, LBP-74-5, 7 AEC at 96;

(5) Staff reports and WASH documents. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-22, 7 AEC 659, 667 (1974);

(6) ACRS letters on file in the Public Document Room. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 332 (1973);

(7) the existence of an applicant's Federal Water Pollution Control Act Section 401 certificate. Wash. Pub. Power Supply Sys. (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973).

In most of these cases, the basis for taking official notice was that the document or material noticed was within the knowledge of the Commission as an expert body or was a part of the public records of the Commission. See, e.g., cases cited in items 1, 2, 3, 5 and 6, supra.

In the same vein, it would appear that nothing would preclude a Licensing Board from taking official notice of reports and documents filed with the agency by regulated parties,

provided that parties to the proceeding are given adequate opportunity to controvert the matter as to which official notice is taken. See, e.g., Mkt. St. Ry Co. v. R.R. Comm'n of Cal., 324 U.S. 548, 562 (1945) (agency's decision based in part on officially noticed monthly operating reports filed with agency by party); Wis. v. FPC, 201 F.2d 183, 186 (1952), cert. denied, 345 U.S. 934 (1953) (regulatory agency can and should take official notice of reports filed with it by regulated company).

The Commission may take official notice of a matter which is beyond reasonable controversy and which is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991), citing Gov't of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991).

10 C.F.R. § 2.337(f) (formerly § 2.743(i)) requires that the parties be informed of the precise facts as to which official notice will be taken and be given the opportunity to controvert those facts. Moreover, it is clear that official notice applies to facts, not opinions or conclusions. Consequently, it is improper to take official notice of opinions and conclusions. Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), LBP-74-26, 7 AEC 758, 760 (1974). While official notice is appropriate as to background facts or facts relating only indirectly to the issues, it is inappropriate as to facts directly and specifically at issue in a proceeding. K. Davis, Administrative Law Treatise, § 15.08.

Official notice of information in another proceeding is permissible where the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information. Armed Forces Radiobiology Research Inst. (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 n.3 (1982), citing United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-30 (1945); 10 C.F.R. § 2.337(f) (formerly § 2.743(i)).

The use of officially noticeable material is unobjectionable in proper circumstances. 10 C.F.R. § 2.337(f) (formerly § 2.743(i)). Interested parties, however, must have an effective chance to respond to crucial facts. Union Elec. Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 350 (1983), citing Carson Prods. Co. v. Califano, 594 F.2d 453, 459 (5th Cir. 1979).

A Licensing Board will decline to take official notice of a matter which is initially presented in a party's proposed findings of fact and conclusions of law since this would deny opposing parties the opportunity under 10 C.F.R. § 2.337(a) (formerly § 2.734(c)) to confront the facts noticed. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 565-66 (1988).

Absent good cause, a Licensing Board will not take official notice of documents which are introduced for the first time as attachments to a party's proposed findings of fact. In order to be properly admitted as evidence, such documents should be offered as exhibits before the close of the record so that the other parties have an opportunity to raise objections to the documents. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 687-88 (1987).

The Commission's reference to various documents in the background section of an order and Notice of Hearing does not indicate that the Commission has taken official notice of

such documents. A party who wishes to rely upon such documents as evidence in the hearing should offer the documents as exhibits before the close of the record. Three Mile Island Inquiry, LBP-87-15, 25 NRC at 688-89.

A Licensing Board will not take official notice of state law. Thus, if a party wishes to base proposed findings on a state's regulations, such regulations must be offered and accepted as an exhibit. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 525, 549 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

3.12 Evidence

10 C.F.R. §§ 2.337 and 2.711 (formerly § 2.743) generally delineate the types and forms of evidence which will be accepted and, in some cases, must be submitted in NRC licensing proceedings.

Generally, testimony is to be pre-filed in writing before the hearing. Pre-filed testimony must be served on the other parties at least fifteen (15) days in advance of the hearing at which it will be presented, though the presiding officer may permit introduction of testimony not so served either with the consent of all parties present or after they have had a reasonable chance to examine it. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-367, 5 NRC 92 (1977). However, where the proffering party gives an exhibit to the other parties the night before the hearing and then alters it over objection at the hearing the following day, it is error to admit such evidence because the objecting parties had no reasonable opportunity to examine it. Id.

Parties in civil penalty proceedings are exempt from the general requirement for filing pre-filed written direct testimony. Tulsa Gamma Ray, Inc., LBP-91-25, 33 NRC 535, 536 (1991), citing 10 C.F.R. § 2.711(d) (formerly § 2.743(b)(3)). Prepared testimony, while generally used in licensing proceedings, is not required in certain enforcement proceedings. 10 § C.F.R. 2.711(d) (formerly 2.743(b)(3)); Conam Inspection, Inc. (Itasca, Illinois), LBP-98-2, 47 NRC 3, 5 (1998). However, a Licensing Board may require the filing of pre-filed written direct testimony in an enforcement proceeding pursuant to its authority to order depositions to be taken and to regulate the course of the hearing and the conduct of the participants. Piping Specialists, Inc. LBP-92-7, 35 NRC 163, 165 (1992).

Technical analyses offered in evidence must be sponsored by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 367 (1983), citing Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 477 (1982). See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 754-56 (1977); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 494 n.22 (1986); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-891, 27 NRC 341, 350-51 (1988). See also Section 3.13.4, Expert Witnesses.

3.12.1 Rules of Evidence

While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 n.32 (1983). See generally Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982).

3.12.1.1 Admissibility of Evidence

Evidence is admissible if it is relevant, material, reliable and not repetitious. 10 C.F.R. §§ 2.337(a), 2.711(e) (formerly § 2.743(c)). Under this standard, the application for a permit or license is admissible upon authentication. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974).

The requirement of authentication or identification as a condition precedent to the admissibility of evidence in NRC licensing proceedings is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 (1983), citing Fed. R. Evid. 901(a).

A determination on materiality will precede the admission of an exhibit into evidence, but this is not an ironclad requirement in administrative proceedings in which no jury is involved. The determinations of materiality could be safely left to a later date without prejudicing the interests of any new party. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

The final safety analysis report (FSAR) is conditionally admissible as substantive evidence, but once portions of the FSAR are put into controversy, applicants must present one or more competent witnesses to defend them. San Onofre, ALAB-717, 17 NRC at 366.

Prepared testimony may be struck where the witness lacks personal knowledge of the matters in the testimony and lacks expertise to interpret facts contained therein. Ga. Inst. of Tech. (Georgia Tech Research Reactor Atlanta, Georgia), LBP-96-10, 43 NRC 231, 232-33 (1996).

The opinions of an expert witness which are based on scientific principles, acquired through training or experience, and data derived from analyses or by perception are admissible as evidence. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 720 & n.52 (1985). See Fed. R. Evid. 702; McGuire, supra, 15 NRC at 475.

In order for expert testimony to be admissible, it need only (1) assist the trier of fact, and (2) be rendered by a properly qualified witness. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983). See Fed. R. Evid. 702; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1602 (1985).

A Licensing Board may refuse to accept an expert witness's pre-filed written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 C.F.R. § 2.319 (formerly § 2.718); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-659 (1971).

The fact that a witness is employed by a party, or paid by a party, goes only to the persuasiveness or weight that should be accorded the expert's testimony, not to its admissibility. Waterford, supra, 17 NRC at 1091; Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-85-39, 22 NRC 755, 756 (1985).

3.12.1.1.1 Admissibility of Hearsay Evidence

Hearsay evidence is generally admissible in administrative proceedings. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 366 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411-12 (1976); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 501 n.67 (1985); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 279 (1987).

There is still a requirement, however, that the hearsay evidence be reliable. For example, a statement by an unknown expert to a nonexpert witness which such witness proffers as substantive evidence is unreliable and, therefore, inadmissible. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977). In addition to being reliable, hearsay evidence must be relevant, material and not unduly repetitious, to be admissible under 10 C.F.R. § 2.337(a) (formerly § 2.743(c)). Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 477 (1982).

Although the testimony of an expert witness which is based on work or analyses performed by other people is essentially hearsay, such expert testimony is admissible in administrative proceedings if its reliability can be determined through questioning of the expert witness. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 718 (1985).

In considering a motion for summary disposition, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-86-12, 23 NRC 414, 418-19 (1986).

The fact that the NRC Staff's charges in support of an enforcement order may be "hearsay" allegations does not provide sufficient reason to dismiss those claims ab initio. See Oncology Servs. Corp., LBP-93-20, 38 NRC 130, 135 n.2 (1993) (hearsay evidence is generally admissible in administrative hearing if it is reliable,

relevant, and material). Rather, so long as those allegations are in dispute, the validity and sufficiency of any "hearsay" information upon which they are based generally is a matter to be tested in the context of an evidentiary hearing in which the Staff must provide adequate probative evidence to carry its burden of proof. Ind. Reg'l Cancer Ctr., LBP-94-21, 40 NRC 22, 31 (1994).

3.12.1.2 Hypothetical Questions

Hypothetical questions may be propounded to a witness. Such questions are proper and become a part of the record, however, only to the extent that they include facts which are supported by the evidence or which the evidence tends to prove. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 828-29 (1976).

3.12.1.3 Reliance on Scientific Treatises, Newspapers, Periodicals

An expert may rely on scientific treatises and articles despite the fact that they are, by their very nature, hearsay. Ill. Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976). The Appeal Board in Clinton left open the question as to whether an expert could similarly rely on newspapers and other periodicals.

An expert witness may testify about analyses performed by other experts. If an expert witness were required to derive all his background data from experiments which he personally conducted, such expert would rarely be qualified to give any opinion on any subject whatsoever. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 718 (1985), citing Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972).

3.12.1.4 Off-the-Record Comments

Obviously, nothing can be treated as evidence which has not been introduced and admitted as such. In this vein, off-the-record ex parte communications carry no weight in adjudicatory proceedings and cannot be treated as evidence. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 191 (1978).

3.12.1.5 Presumptions and Inferences

With respect to Safeguards Information, the Commission has declined to permit any presumption that a party who has demonstrated standing in a proceeding cannot be trusted with sensitive information. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-40, 18 NRC 93, 100 (1983).

In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability of emergency planning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 702 (1983), citing 10 C.F.R. § 50.47(a)(2).
When a party has relevant evidence within his control which he fails to produce, it may be inferred that such evidence is unfavorable to him. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

Although the testimony of a public official working for a government agency may be entitled to a rebuttable presumption that public officials are presumed to have performed their official duties in a proper manner, this presumption does not apply where the official is not operating in a traditional governmental capacity but rather as an official of a regulated entity operated by a government unit. Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 (1997).

In the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations whenever the opportunity arises. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 405 (2000).

3.12.1.6 Government Documents

NRC adjudicatory boards may follow Rule 902 of the Federal Rules of Evidence, waiving the need for extrinsic evidence of authenticity as a precondition to admitting into evidence official government documents. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-520, 9 NRC 48, 49 (1979).

3.12.2 Status of ACRS Letters

Section 182(b) of the AEA and 10 C.F.R. § 2.337(g) (formerly § 2.743(g)) of the Commission's Rules of Practice require that the ACRS letter be proffered and received into evidence. However, because the ACRS is not subject to cross-examination, the ACRS letter cannot be admitted for the truth of its contents, nor may it provide the basis for any findings where the proceeding in which it is offered is a contested one. Ark. Power & Light Co. (Arkansas Nuclear-1, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

The contents of an ACRS report are not admissible in evidence for the truth of any matter stated therein as to controverted issues, but only for the limited purpose of establishing compliance with statutory requirements. A Licensing Board may rely upon the conclusion of the ACRS on issues that are not controverted by any party. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 367 & n.36 (1983). See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 340 (1973).

However, the contents of an ACRS report cannot, of itself, serve as an underpinning for findings on health and safety aspects of licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 518 (1983), citing Arkansas Nuclear-1, ALAB-94, 6 AEC at 32. The ACRS is an independent federal advisory committee that is not under the Staff's control. In the context of an uncontested ("mandatory") hearing, a Board may ask the Staff to produce relevant ACRS documents that it has reviewed, but it should not ask the Staff to obtain additional ACRS documents that it has not reviewed, as it is not clear that they are germane given that the Board's review is intended to ensure that the Staff's conclusions have "reasonable support in logic and fact." Exelon Generation Co., LLC; Sys. Energy Res., Inc. (Early Site Permit for Clinton ESP Site; Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 64 NRC 15, 25-26 (2006).

3.12.3 Presentation of Evidence by Intervenors

An intervenor may not adduce affirmative evidence on an issue that he has not raised himself unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17 (1974). Nevertheless, an intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), aff'g ALAB-244, 8 AEC 857, 867-88 (1974).

An intervenor which has failed to present allegedly relevant information during direct examination of a witness in a Licensing Board proceeding may not assert that the information nevertheless should be considered on appeal since it could have been elicited during cross-examination. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 387 n.49 (1990).

3.12.4 Evidentiary Objections

Objections to particular evidence or the manner of presentation thereof must be made in a timely fashion. Failure to object to evidence bars the subsequent taking of exceptions to its admission. Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 554 n.56 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). To preserve a claim of error on an evidentiary ruling, a party must interpose its objection and the basis therefore clearly and affirmatively. If a party appears to acquiesce in an adverse ruling and does not insist clearly on the right to introduce evidence, the Appeal Board will not find that the evidence was improperly excluded. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 362 n.90 (1978).

Failure to raise objections at hearing constitutes wavier of the objection on appeal. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 26) (citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411 & n.46 (1976)).

3.12.5 Statutory Construction; Weight

"Absent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Supreme Court has gone even further, indicating that, when the words of a statute are unambiguous, no further judicial inquiry into legislative history of the language is permissible. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1); Cleveland Elec. Illuminating Co. & Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 301 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

If an NRC regulation is legislative in character, the rules of interpretation applicable to statutes will be equally germane to determining that regulation's meaning. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 143, rev'd on other grounds, CLI-96-13, 44 NRC 315 (1996).

Where a regulation leaves a term undefined, the Board, in attempting to define it, will look first to the plain meaning of the term, then to the structure of the regulation, and finally, if appropriate, to the regulatory history. U.S. Dept. of Energy (High-Level Waste Repository), LBP-05-27, 62 NRC 478, 506 (2005).

When regulatory language is ambiguous, it is appropriate to resort to the regulatory history of the provision. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 259 (2000).

Where the meaning of a regulation is clear and obvious, the regulatory language is conclusive, and the Board may not disregard the letter of the regulation. The Board must enforce the regulation as written. Perry, LBP-95-17, 42 NRC at 145.

The Licensing Board may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written. To discern regulatory meaning, the Board is not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one. Perry, LBP-95-17, 42 NRC at 145.

The Board will not look to a regulation's Statements of Consideration for help in defining terms where the Board can interpret the regulation satisfactorily simply by utilizing the plain meaning of those terms, and where the statement of consideration language cited is not actually aimed at clarifying the disputed terms. High-Level Waste Repository, LBP-05-27, 62 NRC at 511-12.

The "best source of legislative history" is the congressional reports on a particular bill. See Ala. Power Co., 692 F.2d. at 1368. Perry & Davis-Besse, LBP-92-32, 36 NRC at 302.

Statement of witnesses during a congressional hearing that are neither made by a member of Congress nor referenced in the relevant committee report are normally to be accorded little, if any, weight. See Kelly v. Robinson, 479 U.S. 36, 50 n.13 (1986); Perry & Davis-Besse, LBP-92-32, 36 NRC at 302.

A legislative body will be afforded a large measure of deference in its choice of which aspects of a particular evil it wishes to eliminate. See, e.g., Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981); Perry & Davis-Besse, LBP-92-32, 36 NRC at 307.

3.12.5.1 Due Process

An equal protection challenge to an economic classification is reviewed under the rational basis standard, which requires that any classifications established in the challenged statute must rationally further a legitimate government objective. See,

e.g., Nordlinger v. Hahn, 505 U.S. 1, 10 (1992); Ohio Edison Co., Cleveland Elec. Illuminating Co. & Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 306 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.12.5.2 Bias or Prejudgment, Disqualification

In reviewing an agency decision allegedly subject to bias, including improper legislative influence, the independent assessment of an adjudicatory decisionmaker regarding the merits of the parties' legal (as opposed to factual) positions will attenuate any earlier impropriety. See Gulf Oil Corp. v. FPC, 563 F.2d 588, 611-12 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); Ohio Edison Co., Cleveland Elec. Illuminating Co. & Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 308 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.13 Witnesses at Hearing

Because of the complex nature of the subject matter in NRC hearings, witness panels are often utilized. It is recognized in such a procedure that no one member of the panel will possess the variety of skills and experience necessary to permit him to endorse and explain the entire testimony. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 569 (1977).

The testimony and opinion of a witness who claims no personal knowledge of, or expertise in, a particular aspect of the subject matter of his testimony will not be accorded the weight given testimony on that question from an expert witness reporting results of careful and deliberate measurements. Pub. Serv. Elec. & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-78-15, 7 NRC 642, 647 n.8 (1978).

While a Licensing Board has held that prepared testimony should be the work and words of the witness, not his counsel, Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-81-63, 14 NRC 1768, 1799 (1981), the Appeal Board has made it clear that what is important is not who originated the words that comprise the prepared testimony but rather whether the witness can truthfully attest that the testimony is complete and accurate to the best of his or her knowledge. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 918 (1982).

Where technical issues are being discussed, Licensing Boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand simultaneously so they may respond immediately on an opposing witness' answer to a question. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). The admission of surrebuttal testimony is a matter within the discretion of a Licensing Board, particularly when the party sponsoring the testimony reasonably should have anticipated the attack upon its evidence. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 397 n.101 (1990), citing Cellular Mobile Sys. v. FCC, 782 F.2d 182, 201-02 (D.C. Cir. 1985).

Where the credibility of evidence turns on the demeanor of a witness, an appellate board will give the judgment of the trial Board, which saw and heard the testimony, particularly great deference. Metro. Edison Co. (Three Mile Island Nuclear Station,

Unit 1), ALAB-772, 19 NRC 1193, 1218 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). However, demeanor is of little weight where other testimony, documentary evidence, and common sense suggest a contrary result. Three Mile Island, ALAB-772, 19 NRC at 1218.

3.13.1 Compelling Appearance of Witness

10 C.F.R. § 2.702 (formerly § 2.720) provides that, pursuant to proper application by a party, a Licensing Board may compel the attendance and testimony of a witness by the issuance of a subpoena. A Licensing Board has no independent obligation to compel the appearance of a witness. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

An NRC subpoena is enforceable if: (1) it is for a proper purpose authorized by Congress; (2) the information is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance. United States v. Powell, 379 U.S. 48, 57-58 (1964); Constr. Prods. Research Inc. v. United States, 73 F.3d 464, 469-71 (2d Cir.), cert. denied, 519 U.S. 927 (1996); St. Mary's Med. Ctr., CLI-97-14, 46 NRC 287, 291 (1997). The NRC may begin an investigation "merely on suspicion that the law is being violated, or even just because it wants assurances that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). The NRC's subpoena power is essentially analogous to the broad subpoena powers accorded to a grand jury. Powell, 379 U.S. at 57; Morton Salt Co., 338 U.S. at 642-43; Okla. Press Co. v. Walling, 327 U.S. 186, 209 (1946); St. Mary's Med. Ctr., CLI-97-14, 46 NRC 287, 291 (1997).

The Rules of Practice preclude a Licensing Board from declining to issue a subpoena on any basis other than that the testimony sought lacks "general relevance." In ruling on a request for a subpoena, the Board is specifically prohibited from attempting "to determine the admissibility of evidence." 10 C.F.R. § 2.702(a) (formerly § 2.720(a)); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 93 (1977).

3.13.1.1 NRC Staff as Witnesses

The provisions of 10 C.F.R. § 2.702(a)-(g) (formerly § 2.720(a)-(g)) for compelling attendance and testimony do not apply to NRC Commissioners or Staff. 10 C.F.R. § 2.702(h) (formerly § 2.720(h)). Nevertheless, once a Staff witness has appeared, he may be recalled and compelled to testify further, despite the provisions of 10 C.F.R. § 2.702(h) (formerly § 2.720(h)), if it is established that there is a need for the additional testimony on the subject matter. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974).

The Rules of Practice do not permit particular Staff witnesses to be subpoenaed. But a Licensing Board, pursuant to 10 C.F.R. § 2.709 (formerly § 2.720(h)(2)), may upon a showing of exceptional circumstances, require the attendance and testimony of NRC personnel. Where an NRC employee has taken positions at odds with those espoused by witnesses to be presented by the Staff, on matters at issue in a proceeding, exceptional circumstances exist. The Board determined that differing views of such matters are facts differing from those likely to be presented by the Staff witnesses and, on that basis, required the attendance and testimony of named

NRC personnel. Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-96-8, 43 NRC 178, 180-81 (1996).

3.13.1.2 ACRS Members as Witnesses

Members of the ACRS are not subject to examination in an adjudicatory proceeding with regard to the contents of an ACRS report. Gulf States Util. Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 766 n.10 (1977).

The Appeal Board, at intervenors' request, directed that certain consultants to the ACRS appear as witnesses in the proceeding before the Board. Such an appearance was proper under the circumstances of the case, since the ACRS consultants had testified via subpoena at the Licensing Board level at intervenors' request. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-604, 12 NRC 149, 150-51 (1980).

3.13.2 Sequestration of Witnesses

In Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565 (1977), the Appeal Board considered a Staff request for discretionary review of a Licensing Board ruling which excluded prospective Staff witnesses from the hearing room while other witnesses testified. The Appeal Board noted that while sequestration orders must be granted as a matter of right in federal district court cases, NRC adjudicatory proceedings are clearly different in that direct testimony is generally pre-filed in writing. As such, all potential witnesses know in advance the basic positions to be taken by other witnesses. In this situation, the value of sequestration is reduced. Moreover, the highly technical and complex nature of NRC proceedings often demands that counsel have the aid of expert assistance during cross-examination of other parties' witnesses.

In view of these considerations, the Appeal Board held that sequestration is only proper where there is some countervailing purpose which it could serve. The Board found no such purpose in this case, but in fact, found that sequestration here threatened to impede full development of the record. As such, the Licensing Board's order was overturned. The Appeal Board also noted that there may be grounds to distinguish between Staff witnesses and other witnesses with respect to sequestration, with the Staff being less subject to sequestration than other witnesses, depending on the circumstances. Id.

3.13.3 Board Witnesses

Where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion, which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-08 (1977).

In the interest of a complete record, the Staff may be ordered to submit written testimony from a "knowledgeable witness" on a particular issue in a proceeding.

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-607, 12 NRC 165, 167 (1980).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. 10 C.F.R. Part 2 gives the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory Board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981). See Metro. 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). Thus, while Licensing Boards have the authority to call witnesses of their own, the exercise of this discretion must be reasonable and, like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Applying the criteria of Summer, supra, ALAB-663, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health effects contention. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 & 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. denied on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

3.13.4 Expert Witnesses

Although the Federal Rules of Evidence are not directly applicable to Commission proceedings, NRC presiding officers often look to the rules for guidance, including Federal Rule 702, which allows a witness to be qualified as an expert "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982), quoting Fed. R. Evid. 702; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his expertise. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1405 (1977); Shearon Harris, LBP-01-9, 53 NRC at 250.

A witness is qualified as an expert by knowledge, skill, experience, training, or education. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing Fed. R. Evid. 702. See William B. McGuire, ALAB-669, 15 NRC at 475; see also Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-78-36, 8 NRC 567, 570 (1978) (the qualifications of the expert should be established by showing either academic training or relevant experience or some combination of the two); Shearon Harris, LBP-01-9,

53 NRC at 250 (same). As to academic training, such training that bears no particular relationship to the matters for which an individual is proposed as an expert witness is insufficient, standing alone, to qualify the individual as an expert witness on such matters. Diablo Canyon, LBP-78-36, 8 NRC at 571. In addition, the fact that a proposed expert witness was accepted as an expert on the subject matter by another Licensing Board in a separate proceeding does not necessarily mean that a subsequent Board will accept the witness as an expert. Id. at 572.

The value of testimony by a witness at NRC proceedings is not undermined merely by the fact that the witness is a hired consultant of a licensee. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1211 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

Disqualifying bias cannot automatically be attributed to equipment vendor witnesses, "even if those vendors receive substantial benefits as a result of a decision in their favor." Furthermore, allegations of bias require substantial evidentiary support. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 341 (2003), aff'd, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11 (2003).

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability – for whatever reason – to provide the foundation for them to the decisionmaker and litigants. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-555, 10 NRC 23, 26 (1979). See Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 171-72 (1989), stay denied on other grounds, ALAB-914, 29 NRC 357 (1989), aff'd on other grounds, ALAB-926, 31 NRC 1 (1990). An assertion of "engineering judgment," without any explanation or reasons for the judgment, is insufficient to support the conclusions of an expert engineering witness. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-81, 18 NRC 1410, 1420 (1983), modified on reconsid. sub nom., Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 518, 532 (1984).

A Board should give no weight to the testimony of an asserted expert witness who can supply no scientific basis for his statements (other than his belief) and who disparages his own testimony. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 735 (1985).

A witness testifying to the results of an analysis need not have at hand every piece of datum utilized in performing that analysis. In this area, a rule of reason must be applied. It is not unreasonable, however, to insist that, where the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated. North Anna, ALAB-555, 10 NRC at 27.

A Licensing Board may refuse to accept an expert witness's pre-filed written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. La. Power & Light Co. (Waterford

Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 C.F.R. § 2.319 (formerly § 2.718); see also Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

Merely because expert witnesses for all parties reach similar conclusions on an issue does not mean that the Licensing Board must reach the same conclusion. The significance of various facts is for the Board to determine from the record, and cannot be delegated to the expert witnesses of various parties, even if they all agree. The Board must satisfy itself that the conclusions reached have a solid foundation. Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 270 (1997).

For expert qualification in the security context, technical competence ideally requires practical experience, but this is not indispensable in all cases. Too great an insistence on "specific" knowledge in selected aspects of the subject should not be used to disqualify an expert witness who possesses a strong general background and specialized knowledge in the relevant field. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 30-31 (2004).

Licensing Boards must assure themselves that a purported security expert has authentic credentials or experience in security. In the security arena, Boards ought not tolerate "fishing expeditions" by untutored laypersons. Catawba, CLI-04-21, 60 NRC at 31.

Where NRC Staff made five separate need-to-know determinations granting a person access to safeguards documents in his asserted capacity as the intervenor's expert, it was too late to challenge the expert's security qualifications and deny access to safeguards documents. Catawba, CLI-04-21, 60 NRC at 29.

An expert's testimony that challenges a summary disposition motion will not preclude summary disposition where the testimony is based upon "subjective belief or unsupported speculation" rather than the "methods and procedures of science," and where it is not based upon sufficient facts or data to be the product of applying reliable principles and methods to the facts. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 98-99 (2005).

3.13.4.1 Fees for Expert Witnesses

10 C.F.R. § 2.706 (formerly § 2.740a(h)) incorporates the provisions of Federal Rules of Civil Procedure Rule 26(b)(4)(C) pertaining to expert witness fees. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-14, 58 NRC 104, 107 (2003).

Commission regulations provide for expert witness fees in connection with depositions (10 C.F.R. § 2.706(a)(8)) (formerly § 2.740(h)) and for subpoenaed witnesses (10 C.F.R. § 2.702(d)) (formerly § 2.720(d)). Although these regulations specify that the fees will be those "paid to witnesses in the district courts of the United States," there had been some uncertainty as to whether the fees referred to were the statutory fees of 28 U.S.C. § 1821 or the expert witness fees of Rule 26 of the Federal Rules of Civil Procedure. In Pub. Serv. Co. of Okla. (Black Fox Station, Units 1 & 2), LBP-77-18, 5 NRC 671 (1977), the Licensing Board ruled that the fees

referred to in the regulations were the statutory fees. The Board suggested that payment of expert witness fees is especially appropriate when the witness was secured because of his experience and when the witness' expert opinions would be explored during the deposition or testimony. The Board relied on 10 C.F.R. § 2.702(f) (formerly § 2.720(f)), which permits conditioning denial of a motion to quash subpoenas on compliance with certain terms and conditions which could include payment of witness fees, and on 10 C.F.R. § 2.705(c) (formerly § 2.740(c)), which provides for orders requiring compliance with terms and conditions, including payment of witness fees, prior to deposition.

3.14 Cross-Examination

Cross-examination must be limited to the scope of the contentions admitted for litigation and can appropriately be limited to the scope of direct examination. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC 688, 698, aff'd, CLI-82-11, 15 NRC 1383 (1982); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1, 2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867, 869 (1974); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 378 (1985).

In exercising its discretion to limit what appears to be improper cross-examination, a Licensing Board may insist on some offer of proof or other advance indication of what the cross-examiner hopes to elicit from the witness. La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978); San Onofre, CLI-82-11, 15 NRC at 697; Prairie Island, ALAB-244, 8 AEC at 869.

The authority of a Board to demand cross-examination plans is encompassed by the Board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. 10 C.F.R. §§ 2.319(g), 2.333(c) (formerly §§ 2.718(e), 2.757(c)). Such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981); South Texas, ALAB-799, 21 NRC at 377. 10 C.F.R. § 2.711 (formerly § 2.743) clearly gives the presiding officer the discretion to require the submittal of a cross-examination plan from any party seeking to conduct cross-examination. The plan must contain a brief description of the issues on which cross-examination will be conducted, the objectives to be achieved by cross-examination, and the proposed line of questions designed to achieve those objectives. 10 C.F.R. §§ 2.711(a), (b), and (c) (formerly §§ 2.743(a), (b)(2)); 54 Fed. Reg. 33,168, 33,181 (Aug. 11, 1989). Civil penalty proceedings and proceedings for the modification, suspension, or revocation of a license are exempt from these requirements. 10 C.F.R. § 2.711(d) (formerly § 2.743(b)(3)).

Although the Rules of Practice generally require parties to submit cross-examination plans to the Licensing Board, they do not require parties to provide other parties with advance notice of exhibits they plan to use in cross-examinations. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-35, 40 NRC 180 (1994).

Even if cross-examination is wrongly denied, such denial does not constitute prejudicial error per se. The complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding. Waterford, ALAB-732, 17 NRC at 1096; San Onofre, ALAB-673, 15 NRC at 697 n.14; San Onofre, CLI-82-11, 15 NRC at 1384; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984); South Texas, ALAB-799, 21 NRC at 376-77; Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 76 (1985); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 495 (1986).

3.14.1 Cross-Examination by Intervenors

The ability to conduct cross-examination in an adjudication is not such a fundamental right that its denial constitutes prejudicial error per se. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

An intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding, as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), aff'g ALAB-244, 8 AEC 857 (1974). In the case of a reopened proceeding, permissible inquiry through cross-examination necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977).

It is error to preclude cross-examination on the ground that intervenors have the burden of proving the validity of their contentions through their own witnesses since it is clear that intervenors may build their case "defensively" through cross-examination. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-20, 21 NRC 1732, 1745 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

Calculations underlying a mathematical estimate which is in controversy are clearly relevant since they may reveal errors in the computation of that estimate. Hartsville, ALAB-463, 7 NRC at 355-56. A Licensing Board might be justified in denying a motion to require production of such calculations to aid cross-examination on the estimate as a matter of discretion in regulating the course of the hearing. See, e.g., Ill. Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 32-36 (1976). However, an Appeal Board will not affirm a decision to cut off cross-examination on the basis that it was within the proper limits of a Licensing Board's discretion when the record does not indicate that the Licensing Board considered this discretionary basis. Hartsville, ALAB-463, 7 NRC at 356.

An intervenor's cross-examination may not be used to expand the number or scope of contested issues. Prairie Island, ALAB-244, 8 AEC at 867. To assure that cross-examination does not expand the boundaries of issues, a Licensing Board may:

(1) require in advance that an intervenor indicate what it will attempt to establish on cross-examination;
(2) limit cross-examination if the Board determines that it will be of no value for development of a full record on the issues;
(3) halt cross-examination which makes no contribution to development of a record on the issues; and
(4) consolidate intervenors for purposes of cross-examination on the same point where it is appropriate to do so in accordance with the provisions of 10 C.F.R. § 2.316 (formerly § 2.715a).

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

While an intervenor has a right to cross-examine on any issue in which he has a discernible interest, the Licensing Board has a duty to monitor and restrict such cross-examination to avoid repetition. Prairie Island, CLI-75-1, 1 NRC at 1. The Board is explicitly authorized to take the necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination, and the Board may properly limit cross-examination which is merely repetitive. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Prairie Island, ALAB-244, 8 AEC at 868. As a general proposition, no party has a right to unfettered or unlimited cross-examination and cross-examination may not be carried to unreasonable lengths. The test is whether the information sought is necessary for a full and true disclosure of the facts. Prairie Island, ALAB-244, 8 AEC at 869 n.16; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1674-75 (1982), citing Section 181 of the AEA and Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). This limitation applies equally to cross-examination on issues raised sua sponte by the Licensing Board in an operating license proceeding. Prairie Island, ALAB-244, 8 AEC at 869.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

Unnecessary cross-examination may be limited by a Licensing Board, in its discretion, to expedite the orderly presentation of each party's case. Cross-examination plans (submitted to the Board alone) are encouraged, as are trial briefs and pre-filed testimony outlines. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

Licensing Boards are authorized to establish reasonable time limits for the examination of witnesses, including cross-examination, under 10 C.F.R. §§ 2.319(d) and 2.333(f) (formerly §§ 2.718(c) and 2.757(c)), the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) and relevant judicial decisions. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-24, 19 NRC 1418, 1428 (1984); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 501 (1986). See MCI Communications Corp. v. AT&T, 85 F.R.D. 28 (N.D. Ill. 1979), aff'd, 708 F.2d 1081, 1170-73 (7th Cir. 1983).

A Licensing Board has the authority to direct that parties to an operating license proceeding conduct their initial cross-examination by means of prehearing examinations in the nature of depositions. Pursuant to 10 C.F.R. § 2.319 (formerly § 2.718), a Board has the power to regulate the course of the hearing and the conduct of the participants, as well as to take any other action consistent with the Administrative Procedure Act. See also 10 C.F.R. § 2.333 (formerly § 2.757). In expediting the hearing process using the case management method contained in Part 2, a Board should ensure that the hearings are fair, and produce a record which leads to high-quality decisions and adequately protects the public health and safety and the environment. Shoreham, LBP-82-107, 16 NRC at 1677, citing Statement of Policy, CLI-81-8, 13 NRC at 453.

In considering whether to impose controls on cross-examination, questions (as raised by the applicant) concerning the adequacy of the Appeal Board or Commission Staff to review a lengthy record (either on appeal or sua sponte) should not be taken into account. To the extent that cross-examination may contribute to a meaningful record, it should not be limited to accommodate asserted staffing deficiencies within NRC. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-83-28, 17 NRC 987, 992 (1983).

3.14.2 Cross-Examination by Experts

The Rules of Practice permit a party to have its cross-examination of others performed by individuals with technical expertise in the subject matter of the cross-examination provided that the proposed interrogator is shown to meet the requirements set forth in 10 C.F.R. § 2.703(a) (formerly § 2.633(a)). An expert interrogator need not meet the same standard of expertise as an expert witness. The standard for interrogators under 10 C.F.R. § 2.703(a) (formerly § 2.733(a)) is that the individual "is qualified by scientific training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination." Regents of the Univ. of Cal. (UCLA Research Reactor), LBP-81-29, 14 NRC 353, 354-55 (1981).

3.14.3 Inability to Cross-Examine as Grounds to Reopen

Where a Licensing Board holds to its hearing schedule despite a claim by an intervenor that he is unable to prepare for the cross-examination of witnesses because of scheduling problems, the proceeding will be reopened to allow the intervenor to cross-examine witnesses. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.15 Record of Hearing

It is not necessary for legal materials, including the Standard Review Plan, regulatory guides, documents constituting Staff guidance, and industry code sections applicable to a facility, to be in the evidentiary record. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-55, 18 NRC 415, 418 (1983).

The term "close of the hearing" in 10 C.F.R. § 2.1209 refers to closure of the evidentiary record. The administrative record (and the hearing process), however, remain open. The Board's initial decision, any petition for review thereof, and the Commission's ultimate

decision on review are all docketed and included in the administrative record following closure of the Board's evidentiary record. Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-08-9, 67 NRC 353, 355 (2008).

3.15.1 Supplementing Hearing Record by Affidavits

Gaps in the record may not be filled by affidavit where the issue is technical and complex. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-284, 2 NRC 197, 205-06 (1975).

There is no significance to the content of affidavits which do not disclose the identity of individuals making statements in the affidavit. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-525, 9 NRC 111, 114 (1979).

3.15.2 Reopening Hearing Record

If a Licensing Board believes that circumstances warrant reopening the record for receipt of additional evidence, it has discretion to take that course of action. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741 (1977). It may do so, for example, in order to receive additional documents in support of motion for summary disposition where the existing record is insufficient. Id. at 752. For a discussion of reopening, see Section 4.4.

Although the standard for reopening the record in an NRC proceeding has been variously stated, the traditional standard requires that (1) the motion be timely, (2) significant new evidence of a safety question exist, and (3) the new evidence might materially affect the outcome. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 800 n.66 (1983), rev. denied, CLI-83-32, 18 NRC 1309 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-41, 18 NRC 104, 108 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 476 (1983); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-8, 21 NRC 1111, 1113 (1985); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 17 (1986); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 140-41 (2004) (finding that the Board had correctly applied the "materially alter the outcome of the hearing" standard for reopening a hearing record).

The traditional standard for reopening applies in determining whether a record should be reopened on the basis of new information. The standard does not apply where the issue is whether the record should be reopened because of an inadequate record. Three Mile Island, CLI-85-2, 21 NRC at 285 n.3.

Reopening a record is an extraordinary action. To prevail, the petitioners must demonstrate that their motions are timely, that the issues they seek to litigate are significant, and that the information they seek to add to the record would change the results. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-34A, 15 NRC 914, 915 (1982); Union Elec. Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1207 (1983); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power

Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). See also Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1216 (1985). Put another way, reopening the record is within the Licensing Board's discretion and need not be done absent a showing that the outcome of the proceeding might be affected and that reopening the record would involve issues of major significance. Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-46, 15 NRC 1531, 1535 (1982), citing Pub. Serv. Co. of Okla. (Black Fox Station), 10 NRC 775, 804 (1978); Pub. Serv. Co. of N.H. (Seabrook Station), 6 NRC 33, 64, n.35 (1977); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973).

The factors to be applied in reopening the record are not necessarily additive. Even if timely, the motion may be denied if it does not raise an issue of major significance. However, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1143 (1983), citing Vermont Yankee, ALAB-138, 6 AEC at 523.

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Byron, LBP-83-41, 18 NRC at 109.

A motion to reopen the evidentiary record because of previously undiscovered conclusions of an NRC Staff inspection group must establish the existence of differing technical bases for the conclusions. The conclusions alone would be insufficient evidence to justify reopening of the record. Three Mile Island, LBP-82-34A, 15 NRC at 916.

After the record is closed in an operating license proceeding, where parties proffering new contentions do not meet legal standards for further hearings, the fact that the contentions raise serious issues is insufficient justification to reopen the record to consider them as Board issues when the contentions are being dealt with in the course of ongoing NRC investigation and Staff monitoring. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110 (1982), reversing Cincinnati Gas & Elec. Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210 (1982); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-7, 23 NRC 233, 236 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

The Board must be persuaded that a serious safety matter is at stake before it is appropriate for it to require supplementation of the record. Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-55, 18 NRC 415, 418 (1983). See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-879, 26 NRC 410, 412 n.5, 413 (1987).

In proceedings where the evidentiary record has been closed, the record should not be reopened on Three Mile Island-related issues relating to either low or full power absent a showing, by the moving party, of significant new evidence not included in the record that materially affects the decision. Bare allegations or simple submission of new contentions is not sufficient; only significant new evidence requires reopening. Diablo Canyon, ALAB-728, 17 NRC at 803.

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-84-3, 19 NRC 282, 286 (1984).

3.15.3 Material Not Contained in Hearing Record

Adjudicatory decisions must be supported by evidence properly in the record. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 499 n.33 (1986). The Licensing Board may not base a decision on factual material which has not been introduced into evidence. However, if extra-record material raises an issue of possible importance to matters such as public health, the material may be examined on review. If this examination creates a serious doubt about the decision reached by the Licensing Board, the record may be reopened for the taking of supplementary evidence. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-52 (1978). See also Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-937, 32 NRC 135, 150-52 (1990).

Whether or not proffered affidavits would leave the Licensing Board's result unchanged, simple equity precludes reopening the record in aid of intervenors' apparent desire to attack the decision below on fresh grounds. Where the presentation of new matter to supplement the record is untimely, its possible significance to the outcome of the proceeding is of no moment, at least where the issue to which it relates is devoid of grave public health and safety or environmental implications. Puerto Rico Elec. Power Auth. (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34, 38-39 (1981), citing Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Hartsville, ALAB-463, 7 NRC at 351.

3.16 Interlocutory Review via Directed Certification

[See Section 5.12.4]

3.17 Licensing Board Findings (See Also "Standards for Reversing Licensing Boards on Findings of Fact and other Matters" in Section 5.6)

The findings of a Licensing Board must be supported by reliable, probative and substantial evidence in the record. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184 (1975). It is well settled that the possibility that inconsistent or even contrary views could be drawn if the views of an opposing party's experts were accepted does not prevent the Licensing Board's findings from being

supported by substantial evidence. Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 866 (1975).

A Licensing Board is free to decide a case on a theory different from that on which it was tried but when it does so, it has a concomitant obligation to bring this fact to the attention of the parties before it and to afford them a fair opportunity to present argument, and where appropriate, evidence. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 55-56 (1978); Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975). Note that as to a Licensing Board's findings, the appellate tribunal has authority to make factual findings on the basis of record evidence which are different from those reached by a Licensing Board and can issue supplementary findings of its own. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). The appellate decision can be based on grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument or evidence. Id. In any event, decisions may not be based on factual material which has not been introduced into evidence. Otherwise, other parties would be deprived of the opportunity to impeach the evidence through cross-examination or to refute it with other evidence. Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

A Licensing Board decision which is pending on appeal will be vacated when, subsequent to the issuance of the decision, circumstances have changed so as to significantly alter the evidentiary basis of the decision. Where a party seeks to change its position or materially alter its earlier presentation to the Licensing Board, the hearing record no longer represents the actual situation in the case. Other parties should be given an appropriate opportunity to comment upon or to rebut any new information which is material to the resolution of issues. Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 115-17 (1991).

The Board's initial decision should contain record citations to support the findings. Va. Elec. & Power Co. (North Anna Power Station, Units 1, 2, 3, & 4), ALAB-256, 1 NRC 10, 14 n.8 (1975). Despite the fact that a number of older cases have held that a Licensing Board is not required to rule specifically on each finding proposed by the parties, see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 449 F.2d 1069 (D.C. Cir 1974); Wis. Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 321 (1972), a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Seabrook, ALAB-422, 6 NRC at 33. While the Seabrook Appeal Board found that the deficiencies in the initial decision were not so serious as to require reversal, especially in view of the fact that the Appeal Board itself would make findings of fact where necessary, the Appeal Board made it clear that a Licensing Board's blatant failure to follow the Appeal Board's direction in this regard is ground for reversal of the Licensing Board's decision.

Notwithstanding its authority to do so, the Appeal Board was normally reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright vacating of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Seabrook, ALAB-422, 6 NRC at 42. See Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 530-31 (1988). Note, however, that in at least one case the Appeal Board did search the record where (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook that clearly established this policy and (2) it did not take an extended period of time for the Appeal Board to conduct its own evaluation. Hartsville, ALAB-463, 7 NRC at 368.

The admonition that Licensing Boards must clearly set forth the basis for their decisions applies to a Board's determination with respect to alternatives under NEPA. Thus, although a Licensing Board may utilize its expertise in selecting between alternatives, some explanation is necessary. Otherwise, the requirement of the Administrative Procedure Act that conclusions be founded upon substantial evidence and based on reasoned findings "become[s] lost in the haze of so-called expertise." Seabrook, ALAB-422, 6 NRC at 66.

When evidence is presented to the Licensing Board in response to appellate instruction that a matter is to be investigated, the Licensing Board is obligated to make findings and issue a ruling on the matter. Hartsville, ALAB-463, 7 NRC at 368.

In Pub. Serv. Co. of N.H. (Seabrook Station, Units & 2), ALAB-471, 7 NRC 477, 492 (1978), the Appeal Board reiterated that the bases for decisions must be set forth in detail, noting that, in carrying out its NEPA responsibilities, an agency "must go beyond mere assertions and indicate its basis for them so that the end product is" an informed and adequately explained judgment.

Licensing Boards have an obligation "to articulate in reasonable detail the basis for [their] determination." A substantial failure of the Licensing Board in this regard can result in the matter being remanded for reconsideration and a full explication of the reasons underlying whatever result that Board might reach upon such reconsideration. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-504, 8 NRC 406, 410-12 (1978).

The fact that a Licensing Board poses questions requiring that evidence be produced at the hearing in response to those questions does not create an inviolate duty on the part of the Board to make findings specifically addressing the subject matter of the questions. Portland Gen. Elec. Co. (Trojan Nuclear Plant), LBP-78-32, 8 NRC 413, 416 (1978).

A Licensing Board decision which rests significant findings on expert opinion not susceptible of being tested on examination of the witness is a fit candidate for reversal. Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-555, 10 NRC 23, 26 (1979).

Licensing Boards passing on construction permit applications must be satisfied that requirements for an operating license, including those involving management capability, can be met by the applicant at the time such license is sought. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Where evidence may have been introduced by intervenors in an operating license proceeding, but the construction permit Licensing Board made no explicit findings with regard to those matters, and at the construction permit stage the proceeding was not contested, the operating license Licensing Board will decline to treat the construction

permit Licensing Board's general findings as an implicit resolution of matters raised by intervenors. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 79 n.6 (1979).

In order to avoid unnecessary and costly delays in starting the operation of a plant, a Board may conduct and complete operating license hearings prior to the completion of construction of the plant. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-811, 21 NRC 1622, 1627 (1985), rev. denied, CLI-85-14, 22 NRC 177, 178 (1985). Thus, a Board must make some predictive findings and, "in effect, approve applicant's present plans for future regulatory compliance." Diablo Canyon, ALAB-811, 21 NRC at 1627, citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-653, 16 NRC 55, 79 (1981).

Where a Licensing Board is able to make the basic findings prerequisite to the issuances of an operating license based on the existing record, there is no mandate (under the AEA nor the Commission's regulations) that the Board may not resolve any contested issue if any form of confirmatory analysis was ongoing as of the close of the record on that issue. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 519 (1983), citing Consol. Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974) and Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978); Diablo Canyon, ALAB-811, 21 NRC at 1628.

Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

3.17.1 Independent Calculations by Licensing Board

A Board is free to draw conclusions by applying known engineering principles to and making mathematical calculations from facts in the record, whether or not any witness purported to attempt this exercise. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437 (1974), rev'd on other grounds, CLI-74-40, 8 AEC 809 (1974). However, the Board must adequately explain the basis for its conclusions. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

3.18 Res Judicata and Collateral Estoppel

Although the judicially developed doctrine of res judicata is not fully applicable in administrative proceedings, the considerations of fairness to parties and conservation of resources embodied in this doctrine are relevant. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 27 (1978), citing Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

Thus, as a general rule, it appears that res judicata principles may be applied, where appropriate, in NRC adjudicatory proceedings. Consistent with those principles, res judicata does not apply when the foundation for a proposed action arises after the prior ruling advanced as the basis for res judicata or when the party seeking to employ the doctrine had the benefit, when he obtained the prior ruling, of a more favorable standard

as to burden of proof than is now available to him. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

The common law rules regarding res judicata do not apply, in a strict sense, to administrative agencies. Res judicata need not be applied by an administrative agency where there are overriding public policy interests which favor relitigation. U.S. Dept. of Energy, Project Mgmt. Corp., Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing Int'l Harvester Co. v. Occupational Safety & Health Review Comm'n, 628 F.2d 982, 986 (7th Cir. 1980); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002).

The res judicata or other preclusive effect of a previously decided issue is appropriately decided at the time the issue is raised anew. La. Energy Servs., L.P (Claiborne Enrichment Ctr.), CLI-98-5, 47 NRC 113, 114 (1998).

When an agency decision involves substantial policy issues, an agency's need for flexibility outweighs the need for repose provided by the principle of res judicata. Clinch River, supra, 16 NRC at 420, citing Maxwell v. NLRB, 414 F.2d 477, 479 (6th Cir. 1969); FTC v. Texaco, 555 F.2d 867, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), reh'g denied, 434 U.S. 883 (1977).

A change in external circumstances is not required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to which an old policy applied. Clinch River, CLI-82-23, 16 NRC at 420 (1982), citing Maxwell, 414 F.2d at 479.

An agency must be free to consider changes that occur in the way it perceives the facts, even though the objective circumstances remain unchanged. Clinch River, CLI-82-23, 16 NRC at 420, citing Maxwell, 414 F.2d at 479; Texaco, 555 F.2d at 874.

Principles of collateral estoppel, like those of res judicata, may be applied in administrative adjudicatory proceedings. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-378, 5 NRC 557 (1977); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 181 (2002).

Collateral estoppel precludes relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. Davis-Besse, ALAB-378, 5 NRC at 561; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 212 (1974). As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues." Safety Light, LBP-95-9, 41 NRC at 442, citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

The application of collateral estoppel does not hinge on the correctness of the decision or interlocutory ruling of the first tribunal. Moore's Federal Practice ¶¶0.405[1] and [4.1] at 629, 634-37 (2d ed. 1974); Davis-Besse, ALAB-378, 5 NRC at 563; Safety Light, LBP-95-9, 41 NRC at 446; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage

Installation), CLI-05-1, 61 NRC 160, 165 n.19 (2005). It is enough that the tribunal had jurisdiction to render the decision, that the prior judgment was rendered on the merits, that the cause of action was the same, and that the party against whom the doctrine is asserted was a party to the earlier litigation or in privity with such a party. Davis-Besse, ALAB-378, 5 NRC at 563; see also Private Fuel Storage, CLI-05-1, 61 NRC at 165 ("Ordinarily, under principles of collateral estoppel, losing parties are not free to relitigate already-decided questions in subsequent cases involving the same parties."). Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties. Philadelphia Elec. Co. (Peach Bottom Station, Units 2 & 3), Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 2), Pub. Serv. Elec. & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-640, 13 NRC 487, 543 (1981).

In virtually every case in which the doctrine of collateral estoppel was asserted to prevent litigation of a contention, it was held that privity must exist between the intervenor advancing the contention and the intervenor which litigated it in the prior proceeding. Gen. Elec. Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 404 (1985). But see Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175, 199-200 (1981). Conversely, that parties to the former action were not joined to the second action does not prevent application of the principle. Dreyfus v. First Nat'l Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir. 1970), cert. denied, 400 U.S. 832 (1970); Hummel v. Equitable Assurance Soc'y, 151 F.2d 994, 996 (7th Cir. 1945); Davis-Besse, ALAB-378, 5 NRC at 557.

Where circumstances have changed (as to context or law, burden of proof or material facts) from when the issues were formerly litigated or where public interest calls for relitigation of issues, neither collateral estoppel nor res judicata applies. Farley, ALAB-182, 7 AEC at 203; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 NRC 680 (1977); Gen. Pub. Util. Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 286 (1986); Shearon Harris, ALAB-837, 23 NRC at 537; Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-3, 29 NRC 51, 56-57 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989); Safety Light, LBP-95-9, 41 NRC at 445. See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-89-28, 30 NRC 271, 275 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 126-27 (1992); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Elec. Illuminating Co.; Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 285 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 154 (2004).

Furthermore, under neither principle does a judicial decision become binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. 2 Davis, Administrative Law Treatise, 18.12 at 627-28. Cf. United States v. Radio Corp. of America, 358 U.S. 334, 347-52 (1959). Where application of collateral estoppel would not affect the Commission's ability to control its internal proceedings, however, a prior court decision may be binding on the NRC. Davis-Besse, ALAB-378, 5 NRC at 561-62.

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One

exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-75 (1979). Whatever other public policy factors may outweigh the application of the doctrine of collateral estoppel, the correctness of the earlier determination of an issue is not among them. Simply stated, issue preclusion does not depend on the correctness of a prior decision. Safety Light, LBP-95-9, 41 NRC at 446.

There is no basis under the AEA or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages; principles of res judicata and collateral estoppel then come into play. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-10, 9 NRC 439, 464 (1979); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-82-76, 16 NRC 1029, 1044 (1982), citing Farley, CLI-74-12, 7 AEC 203.

An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Seabrook, LBP-82-76, 16 NRC at 1081, citing Farley, CLI-74-12, 7 AEC 203; Shearon Harris, ALAB-837, 23 NRC at 536. A contention already litigated between the same parties at the construction permit stage may not be re-litigated in an operating license proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-107A, 16 NRC 1791, 1808 (1982), citing Farley, ALAB-182, 7 AEC 210; Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-3, 15 NRC 61, 78-82 (1982); Shearon Harris, ALAB-837, 23 NRC at 536.

A party which has litigated a particular issue during an NRC proceeding is not collaterally estopped from litigating in a subsequent proceeding an issue which, although similar, is different in degree from the earlier litigated issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 849 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 22 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

A party countering a motion for summary judgment based on res judicata need only recite the facts found in the other proceedings, and need not independently support those "facts." Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14, 15 n.3 (1980).

When certain issues have been adequately explored and resolved in an early phase of a proceeding, an intervenor may not re-litigate similar issues in a subsequent phase of the proceeding unless there are different circumstances which may have a material bearing on the resolution of the issues in the subsequent proceeding. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 402-03 (1990). "To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree such as might place before the court an issue different in some respect from the one decided in the initial case." Safety Light, LBP-95-9, 41 NRC at 446, citing 1B Moore's Federal Practice ¶0.448 at III.-642 (2d ed. 1995). Similarly, "a change or development in the controlling legal principles" or a "change [in] the legal atmosphere" may make issue preclusion inapplicable. Safety Light, LBP-95-9, 41 NRC at 446; citing Comm'r v. Sunnen, 333 U.S. 591, 599-600 (1948).

Collateral estoppel requires the presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. South Texas, LBP-79-27, 10 NRC at 566; Tex. Util. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-34, 18 NRC 36, 38 (1983), citing Fla. Power & Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); Shearon Harris, ALAB-837, 23 NRC at 536-37. See also Safety Light, LBP-95-9, 41 NRC at 445. In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Shearon Harris, ALAB-837, 23 NRC at 536; Tex. Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993).

The doctrine of collateral estoppel traditionally applies only when the parties in the case were also parties (or their privies) in the previous case. A limited extension of that doctrine permits "offensive" collateral estoppel, i.e., the claim by a person not a party to previous litigation that an issue had already been fully litigated against the defendant and that the defendant should be held to the previous decision because he has already had his day in court. Parklane Hosiery Co. v. Leo M. Shore, 439 U.S. 322 (1979). See also Safety Light, LBP-95-9, 41 NRC at 442. At least one Licensing Board has held that, in operating license proceedings, estoppel may also be applied defensively, to preclude an intervenor who was not a party from raising issues litigated in the construction permit proceeding. Perry, LBP-81-24, 14 NRC at 199-201. This would not appear to be wholly consistent with the Appeal Board's ruling in Peach Bottom, Three Mile Island & Perry, ALAB-640, 13 NRC at 543.

The Licensing Board which conducted the San Onofre operating license hearing relied upon similar reasoning. The Board held that, although "identity of the parties" and "full prior adjudication of the issues" are textbook elements of the doctrines of res judicata and collateral estoppel, they are not prerequisites to foreclosure of issues at the operating stage which were or could have been litigated at the construction permit stage. San Onofre, LBP-82-3, 15 NRC at 82. When an issue was known at the construction permit stage and was the subject of intensive scrutiny, anyone who could have (even if no one had) litigated the issue at that time cannot later seek to do so at the operating license hearing without a showing of changed circumstances or newly discovered evidence. Id. at 78-82. The Appeal Board subsequently found that the Licensing Board had erred. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC at 694-96; Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 353-54 (1983). The doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as having their day in court. There is no public policy reason why the agency's administrative proceedings warrant a looser standard. San Onofre, ALAB-673, 15 NRC at 696. The Appeal Board also disagreed with the Licensing Board's statement that organizations or persons who share a general point of view will adequately represent one another in NRC proceedings. Id. at 695-96.

The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another is whether legal accountability between the two groups or virtual representation of one group by the other is shown. Comanche Peak, LBP-83-34, 18 NRC at 38 n.3, citing San Onofre, ALAB-673, 15 NRC at 695-96 (dictum).

A Licensing Board will not apply collateral estoppel to an issue which was considered during an uncontested construction permit hearing. When there are no adverse parties in the construction permit hearing, there can be neither privity of parties nor "actual prior litigation" of the issue sufficient to support reliance on collateral estoppel. Braidwood, LBP-85-11, 21 NRC at 622-24, citing San Onofre, ALAB-673, 15 NRC at 694-96. See also Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 506 (1989) (collateral estoppel does not apply to an issue which was reviewed by the NRC Staff, but which was not previously the subject of a contested proceeding).

An intervenor in an operating license proceeding, who was not a party in the construction permit proceeding, is not collaterally estopped from raising and re-litigating issues which were fully investigated in the construction permit proceeding. However, the intervenor has the burden of providing even greater specificity than normally required for its contentions. The intervenor must specify how circumstances have changed since the construction permit proceeding or how the Licensing Board erred in the construction permit proceeding. Shearon Harris, ALAB-837, 23 NRC at 539-40. Cf. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally San Onofre, ALAB-717, 17 NRC at 354 n.5.

Where the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in litigation of similar issues under a different statute. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-29-27, 10 NRC 563, 571 (1979).

The Commission will give effect to factual findings of federal courts and sister agencies when those findings are part of a final judgment, even when the party seeking estoppel effect was not a party to the initial litigation. Although the application of collateral estoppel would be denied if a party could have easily joined in the prior litigation, the Commission will apply collateral estoppel even though it is alleged that a party could have joined in, if the prior litigation was a complex antitrust case. Furthermore, FERC determinations about the applicability of antitrust laws are sufficiently similar to Commission determinations to be entitled to collateral estoppel effect. Even a shift in the burden of persuasion does not exclude the application of collateral estoppel when it is apparent that the FERC opinion did not arrive at its antitrust conclusions because of the burden of persuasion. On the other hand, the decision of a federal district court on a summary judgment motion is not a final judgment entitled to collateral estoppel effect, particularly when the court did not fully explain the grounds for its opinion and when its decision was issued after the hearing board had already begun studying the record and had formed factual conclusions which were not adequately addressed in the district court's opinion. St. Lucie, LBP-81-58, 14 NRC at 1173-80, 1189-90. The repose doctrines of res judicata, collateral estoppel, laches and the law of the case are applicable in NRC adjudicatory proceedings generally and all may be applied in antitrust proceedings because "litigation has the same conclusive power in antitrust as elsewhere." Perry & Davis-Besse, LBP-92-32, 36 NRC at 285.

Legal determinations made on appeal in a case are controlling precedent, becoming the "law of the case." A prior decision should be followed unless (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial. Hydro Res., Inc., CLI-06-11, 63 NRC 483, 488-89 (2006).

The repose doctrine of law of the case acts to bar relitigation of the same issue in subsequent stages of the same proceeding. Perry & Davis-Besse, LBP-92-32, 36 NRC at 283, citing Ariz. v. Cal., 460 U.S. 605, 618 (1983). Pursuant to the law of the case doctrine – which is a rule of repose designed to promote judicial economy and jurisprudential integrity – the decision of an appellate tribunal should ordinarily be followed in all subsequent phases of that case, provided that the particular question in issue was "actually decided or decided by necessary implication." Hydro Res., Inc., LBP-06-1, 63 NRC 41, 58 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (quoting Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-60 & n.5 (1992)). However, where the relevant appellate tribunal did not grant the petition to review the prior decision at issue, and the particular interpretation or issue was not even brought to that tribunal's attention as a basis for review, the law of the case doctrine is not apposite. Hydro Res., Inc., LBP-06-1, 63 NRC at 58-59.

That the law of the case doctrine does not apply in a particular circumstance does not mean that the prior decision is wholly without precedential value, only that it is limited to its power to persuade. Hydro Res., Inc., LBP-06-1, 63 NRC at 59.

The repose doctrines of res judicata and collateral estoppel are somewhat related. As described by the Supreme Court, under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privities based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane, 439 U.S. at 326 n.5. Both doctrines thus bar relitigation by the same parties of the same substantive issues. Res judicata also bars litigation of an issue that could have been litigated in the prior cause of action. Perry & Davis-Besse, LBP-92-32, 36 NRC at 284-85.

To establish the defense of laches, which is an equitable doctrine that bars the late filing of a claim if a party would be prejudiced because of its actions during the interim were taken in reliance on the right challenged by the claimant, "the evidence must show both that the delay was unreasonable and that it prejudiced the defendant." Van Bourg v. Nitze, 388 F. 2d 557, 565 (D.C. Cir. 1967), quoting Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966); Perry & Davis-Besse, LBP-92-32, 36 NRC at 286. It is well established that the absence of subject matter jurisdiction may be raised at any time in a proceeding without regard to timeliness considerations. Id. at 387.

Summary disposition may be denied on the basis of res judicata and collateral estoppel. South Texas, ALAB-575, 11 NRC 14, aff'g LBP-79-27, 10 NRC 563 (1979).

3.19 Termination of Proceedings

3.19.1 Procedures for Termination

10 C.F.R. § 2.203 authorizes a Board to terminate a proceeding, at any time after the issuance of a Notice of Hearing, on the basis of a settlement agreement, according due weight to the position of the Staff. Robert L. Dickherber & Commonwealth Edison Co. (Quad Cities Nuclear Power Station), LBP-90-28, 32 NRC 85, 86-87 (1990); St. Mary Med. Ctr.-Hobart & St. Mary Med. Ctr.-Gary, LBP-90-46, 32 NRC 463, 465 (1990); Kelli J. Hinds (Order Prohibiting Involvement In Licensed Activities), LBP-94-32, 40 NRC 147 (1994); Ind. Reg'l Cancer Ctr., LBP-94-36, 40 NRC 283, 284 (1994); Safety Light Corp. (Bloomsburg Site Decontamination, Decommissioning, License Renewal Denials, and Transfer of Assets), LBP-94-41, 40 NRC 340 (1994). The rationale for providing due weight to the position of the Staff may be grounded on the merited understanding that, in the end, the Staff is responsible for maintaining protection for the health and safety of the public and, in the absence of evidence substantiating challenges to the exercise of that responsibility, the Staff's position should be upheld. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996). A Licensing Board will review a proposed settlement agreement to determine if approval of the agreement might prejudice the outcome of a related NRC proceeding. N.Y. Power Auth. (James A. FitzPatrick Nuclear Power Plant); David M. Manning (Senior Reactor Operator), LBP-92-1, 35 NRC 11, 17-18 (1992).

Termination of adjudicatory proceedings on a construction permit application should be accomplished by a motion filed by the applicant's counsel with those tribunals having present jurisdiction over the proceeding. A letter by a lay official to the Commission when the Licensing Board has jurisdiction over the matter is not enough. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 & 3), ALAB-622, 12 NRC 667, 668-9 (1980).

An operating license proceeding may not be terminated solely on the basis of a stipulation whereby all the parties have agreed to terminate the proceeding. The parties must formally file a motion to terminate with the Licensing Board. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-89-14, 29 NRC 487, 488-89 (1989).

Where an amendment to an operating license has been noticed, and a petition for intervention has been filed, but the application for amendment is withdrawn prior to the Licensing Board ruling on the intervention petition and issuing a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2), the Commission, not the Licensing Board, has jurisdiction over the withdrawal of the application. See 10 C.F.R. § 2.107(a); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-93-16, 38 NRC23 (1993), aff'd, CLI-93-20, 38 NRC 83 (1993). However, it is the presiding Board or officer that has jurisdiction to terminate proceedings under such circumstances. Vermont Yankee, CLI-93-20, 38 NRC at 85.

If a Licensing Board has not yet issued a Notice of Hearing in a proceeding pursuant to 10 C.F.R. § 2.105(e)(2), the authority to approve a withdrawal of the application resides in the Commission rather than the Board. GPU Nuclear Corp. (Oyster Creek Nuclear Generating Station), CLI-99-29, 50 NRC 331, 332 (1999). See 10 C.F.R. § 2.107(a);

Vermont Yankee, CLI-93-20, 38 NRC at 82. Cf. 10 C.F.R. § 2.318(a) (formerly § 2.717(a)).

Termination of a proceeding with prejudice is not warranted where there has been no demonstration that there has been substantial prejudice to an opposing party or to the public interest. That an opposing party may "linger in uncertainty" about a future application does not constitute such a demonstration. In addition, termination with prejudice would be inappropriate in the absence of any information that would justify precluding the site from such future use. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-97-17, 46 NRC 227, 231-32 (1997).

Under 10 C.F.R. § 2.107(a), when a Notice of Hearing has not been issued, the ASLB has the authority to grant a motion to terminate a proceeding without seeking the views of various parties or petitioners for intervention. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-97-13, 46 NRC 11, 12 (1997). However, the Licensing Board lacks jurisdiction to terminate a matter pending before the Commission itself. In addition, where rulings on intervenors' standing were those of the Commission, the Licensing Board lacks jurisdiction to accord a "with prejudice" termination with respect to such standing rulings. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999).

3.19.2 Post-Termination Authority of Commission

10 C.F.R. § 2.107(a) expressly empowers Licensing Boards to impose conditions upon the withdrawal of a permit or license application after the issuance of a Notice of Hearing. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 & 3), ALAB-622, 12 NRC 667, 669 n.2 (1980).

Pursuant to its general supervisory authority and responsibility over safety matters, the Commission may direct the NRC Staff to evaluate safety matters of potential concern which remain after the termination of a proceeding. Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-92-3, 35 NRC 63, 67-68 (1992).

3.19.3 Dismissal

A proceeding is dismissed where there is continuous failure to provide information requested by the Board and information important to show petitioner's continued participation in the proceeding. Daniel J. McCool (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-11, 41 NRC 475, 476-77 (1995).

Where a contention's only allegation is that a required analysis was omitted, and the applicant subsequently conducts this analysis, the contention must be dismissed as moot. Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Plant), LBP-05-24, 62 NRC 429, 431-32 (2005).

3.20 Uncontested Proceedings (Mandatory Hearings)

Contested and uncontested designations with regard to mandatory hearings apply issue-by-issue, rather than case-by-case. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 34 (2005).

While there are differences between how a Board should adjudicate a contested hearing and how it should adjudicate an uncontested hearing, the fact that the relevant regulations (10 C.F.R. § 2.104(b)(1)-(2)) instruct Boards to "consider" questions in contested cases but to "determine" questions in uncontested cases was not meant to create any of these differences. "Consider" and "determine" are synonymous in this context. Both terms mean that the Board is to decide the questions involved. North Anna ESP, CLI-05-17, 62 NRC at 38.

When adjudicating an uncontested issue in a mandatory hearing, the Board's job is not to attempt to redo the Staff's work, but rather to conduct a sufficiency review, i.e., to ensure that the Staff performed an adequate review and made findings with reasonable support in logic and fact. De novo Board reviews of uncontested issues are prohibited. Even still, the Board's review should be a "truly independent" review, and the Board retains the authority to ask clarifying questions of witnesses, to order supplementation of the record, to reject the Staff's proposed action, to deny a permit outright, or to set conditions on permit approval. North Anna ESP, CLI-05-17, 62 NRC at 39-42; USEC, Inc. (American Centrifuge Plant), LBP-07-6, 65 NRC 429 (2007) (initial decision in uncontested proceeding on application for uranium enrichment facility); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site) LBP-07-09, 65 NRC 539, 555 (2007) (Board's role in uncontested proceeding is to conduct sufficiency review).

Intervenors in mandatory hearings may not participate on uncontested issues, because the scope of intervenor participation is limited to the scope of admitted contentions. North Anna ESP, CLI-05-17, 62 NRC at 49.

Early site permits are "partial construction permits" and are therefore subject to the mandatory hearing requirements of Section 189.a. of the AEA, as well as all procedural requirements in 10 C.F.R. Part 2 that are applicable to construction permits. Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 35 (2007).

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