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POSTHEARING MATTERS

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4.0 POSTHEARING MATTERS

4.1 Settlements and Stipulations

The Commission looks with favor upon settlements and is loath to second-guess the parties' (including Staff's) evaluation of their own interest. The Commission, like the Board, looks independently at such settlements to see whether they meet the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 205 (1997).

10 C.F.R. § 2.338 (formerly § 2.759) expressly provides, and the Commission stresses, that the fair and reasonable settlement of contested initial licensing proceedings is encouraged. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (July 28, 1998).

Apart from its policy of encouraging settlements, the Commission has an equally important policy of supporting prompt decisionmaking. This promptness policy carries extra weight in license renewal proceedings. Further, until a Licensing Board has addressed the threshold issues of standing and admissibility of contentions, the proceeding is too inchoate to call for aggressive Board encouragement of settlement. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 568-70 (2005).

10 C.F.R. § 2.338 provides that parties may submit a proposed settlement to the Board (paragraph (a)), authorizes the Board to impose additional requirements as part of a settlement (paragraph (e)), mandates certain form requirements for a settlement agreement (paragraph (g)), and mandates certain content requirements for a settlement agreement (paragraph (h)). Assuming these form and content requirements are met, 10 C.F.R. § 2.338(i) provides the standards for approval of a settlement. Reading paragraphs (e) and (i) together, the Board concluded that it had several options when reviewing a settlement, including: (1) approval of the settlement as is, (2) imposition of additional requirements on the settlement, or (3) rejection of the settlement and issuance of an order requiring adjudication. However, given the Commission's case law, the Board did not prefer the last option. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 836 (2006).

The Presiding Officer may attempt to facilitate negotiations between parties when they are seeking to resolve some or all of the pending issues. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, NY), LBP-98-20, 48 NRC 137, 138 (1998).

Parties may seek appointment of a settlement judge in accordance with the Commission's guidance in Rockwell Int'l Corp., CLI-90-05, 31 NRC 337 (1990). The Commission encourages the appointment of settlement judges. Since settlement judges are not involved in a decisionmaking role and not bound by the ex parte rule, they may avail themselves of a wider array of settlement techniques without compromising the rights of any of the parties. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 202 (2002).

When a party requests to withdraw a petition pursuant to a settlement, it is appropriate for a Licensing Board to review the settlement to determine whether it is in the public interest. 10 C.F.R. § 2.338(i) (formerly § 2.759). See also Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13 (1998). When the Licensing Board has held extensive hearings and has analyzed the record, it may not need to see the settlement agreement in order to conclude that the withdrawal of the petitioner is in the public interest. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-96-16, 44 NRC 59, 63-65 (1996).

In a proceeding stemming from the denial of a reactor operator license, a Licensing Board considered it appropriate, although no actual notice of hearing was issued, to formally state its approval of a settlement agreement between the parties. While acknowledging the possibility that Board approval may not have been required under 10 C.F.R. § 2.338(i), the Board noted that it had granted the hearing request and that the express terms and conditions of the settlement agreement had contemplated Board approval. David H. Hawes (Reactor Operator License for Vogtle Electric Generating Plant), LBP-06-2, 63 NRC 80, 81 n.1 (2006).

Commission case law holds that the opponents of a settlement may not simply object to a settlement in order to block it, but must show some substantial basis for disapproving the settlement or the existence of some material issue that requires resolution. The burden is on the opponent of a settlement to come forward and show that the public interest requires the rejection of the settlement and the adjudication of the issues. This is aptly expressed in 10 C.F.R. 2.338(i), which allows the presiding officer to order the adjudication of the issues if such adjudication is required in the public interest. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 836-37 (2006).

A Licensing Board may refuse to dismiss a proceeding “with prejudice” even though all the participants jointly request that action, unless it is persuaded by legal and factual arguments in support of that request. General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-29, 36 NRC 225 (1992). A settlement agreement must be submitted to the Licensing Board for a determination as to whether it is “fair and reasonable” in accordance with 10 C.F.R. 2.338 (formerly 2.759). A petition may be dismissed with prejudice provided that a Board reviews the settlement agreement and finds, consistent with 10 C.F.R. 2.338 (formerly 2.759), that it is a “fair and reasonable settlement.” General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-30, 36 NRC 227 (1992).

Pursuant to 10 C.F.R. § 2.203, in contested enforcement proceedings, settlements are subject to the approval of a presiding officer, or if none has been assigned, the Chief Administrative Law Judge, according due weight to the position of Staff. The settlement need not be immediately approved. If it is in the “public interest,” an adjudication of the issues may be ordered. 10 C.F.R. § 2.203; Sequoyah Fuels Corp. and General Atomics, LBP-96-18, 42 NRC 150, 154 (1995); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma), LBP-97-19, 46 NRC 237, 238 (1997); Conam Inspection, Inc. (Itasca, IL), LBP 98-31, 48 NRC 369 (1998).

The Commission is willing to presume that its Staff acted in the agency's best interest in agreeing to the settlement. Only if the settlement's opponents show some "substantial" public-interest reason to overcome that presumption will the Commission undo the settlement. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 208 (1997).

In the Orem case, although the Commission expressed reservations about aspects of the settlement agreement, the Commission permitted the agreement to take effect since it did not find the agreement to be, on balance, against the public interest. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993) (approving settlement after review of supplementary information). Cf. Safety Light Corp. (Bloomsburg Site Decontamination, Decommissioning, License Renewal Denials, and Transfer of Assets), LBP-94-41, 40 NRC 340, 341 (1994) (approving settlement after hearing on joint settlement motion).

When the parties agree to settle an enforcement proceeding, the Licensing Board loses jurisdiction over the settlement agreement once the Board's approval under 10 C.F.R. § 2.203 becomes final agency action. Thereafter, supervisory authority over such an agreement rests with the Commission. Eastern Testing & Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), CLI-80-12, 11 NRC 514, 417 (1980).

The NRC is not required under the Atomic Energy Act of 1954, as amended (AEA) to adhere without compromise to the remedial plan of an enforcement order. Such a restriction would effectively preclude settlement because, by prohibiting any meaningful compromise as to remedy, it would eliminate the element of exchange which is the groundwork for settlements. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 219-220 (1997).

In examining a settlement of an enforcement proceeding, the Commission divides its public-interest inquiry into four parts: (1) whether, in view of the agency's original order and risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 202-224 (1997). Although these factors were adopted by the Commission in an enforcement context, the Commission derived these factors from an array of federal court settlement approval decisions that dealt with settlements ranging from public school desegregation class actions to antitrust enforcement suits. Given the diversity of these cases and the fact that the Board found these factors to be useful in determining whether there is some substantial public interest reason to reject a settlement in a licensing proceeding, the Board adopted the Sequoyah Fuels factors for the purpose of deciding the public interest issue in a licensing proceeding. Vermont Yankee, LBP-06-18, 63 NRC at 836-37.

The silence of 10 C.F.R. § 2.338(i) as to the process for determining whether a proposed settlement is in the "public interest" indicates that the Commission intended to leave it to the discretion of the Board to determine how to make this determination. Here, the Board considered the nature of the contentions, the identity of the proposed settlers, and the

degree of media and public concern in the case, in determining whether to invite public or party comment on the proposed settlement. Id. at 838.

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). Id. at 843-44.

In reviewing risks and benefits, the Commission considers (1) the likelihood (or uncertainty) of success at trial; (2) the range of possible recovery and the related risk of uncollectibility of a larger trial judgment; and (3) the complexity, length, and expense of continued litigation. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 209 (1997).

Settlement decisions made by the Staff, presumably based on an analysis of litigation risk and optimum use of scarce resources, are commonplace in litigation and have previously received Commission approval, consistent with the Commission's longstanding policy of encouraging settlements. Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 7 (2006) (citing, e.g., Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207-11 (1997)).

The essence of settlements is compromise, and the Commission will not judge them on the basis of whether the Staff (or any party) achieves in a settlement everything it could possibly attain from a fully and successfully litigated proceeding. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 210-211 (1997).

Pursuant to 10 C.F.R. § 2.203, any negotiated settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the presiding officer. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996), aff'd, CLI-97-13, 46 NRC 195 (1997).

The issue is not whether the matter before the Board presents the best settlement that could have been obtained. The Board's obligation instead is merely to determine whether the agreement is within the reaches of the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 257 (1996), aff'd, CLI-97-13, 46 NRC 195 (1997); Special Testing Laboratories, Inc., LBP-99-2, 49 NRC 38, 38 (1999). If the agreement is not in the public interest, the Board may require an adjudication of any issues that require resolution prior to termination of the proceeding. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996), aff'd, CLI-97-13, 46 NRC 195 (1997).

10 C.F.R. § 2.203 sets forth the Board's function in reviewing settlements in enforcement cases. It provides that (1) settlements are subject to the Board's approval; (2) the Board, in considering whether to approve a settlement, should "accord[] due weight to the

position of the staff"; and (3) the Board may "order such adjudication of the issues as [it] may deem to be required in the public interest to dispose of the proceeding." Sequoyah Fuels Corporation and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 205 (1997).

Third parties (including applicants) have no absolute right to veto settlements that the agreeing parties find to their advantage. Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 6 (2006).

Administrative agencies and their adjudicators routinely approve stipulations and settlements to which fewer than all the parties in a case subscribe; the Commission has done so in the enforcement context. Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 7 (2006) (citing Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 222-23 (1997)). Commission regulations contemplate this possibility, requiring only "the consenting parties" to file the settlement with the Board. Such settlements do not offend the rights of an excluded party, particularly where the party has had notice and opportunity to comment on the approved stipulation. Pa'ina, CLI-06-18, 64 NRC at 7 (citing 10 C.F.R. § 2.338(g)).

4.2 Proposed Findings

Each party to a proceeding may file proposed findings of fact and conclusions of law with the Licensing Board. Although 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, 499 F.2d 1069 (D.C. Cir. 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Power Station, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), the Appeal Board thereafter indicated that a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977).

10 C.F.R. § 2.712 (formerly § 2.754) permits the Licensing Board to vary its regularly provided procedures by altering the ordinary regulatory schedule for findings of fact. The NRC Staff is permitted to consider the position of other parties before finalizing its position. Consumers Power Co. (Big Rock Point Plant), LBP-82-51A, 16 NRC 180, 181 (1982).

10 C.F.R. § 2.712(c) (formerly § 2.754(c)) requires that a party's proposed findings of fact and conclusions of law be confined to the material issues of fact and law presented on the record. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). However, unless a Board has previously required the filing of all arguments, a party is not precluded from presenting new arguments in its proposed findings of fact. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-81, 18 NRC 1410, 1420-1421 (1983), reconsid. denied sub nom. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517 (1984).

Even though a party presents no expert testimony, it may advance proposed findings that include technical analyses, opinions, and conclusions, as long as the facts on which they are based are matters of record. The Licensing Board must do more than act as an "umpire blandly calling balls and strikes for adversaries appearing before it." The Board includes experts who can evaluate the factual material in the record and reach their own judgment as to its significance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-35, 40 NRC 180, 192 (1994); Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-97-7, 45 NRC 265, 271 n.7 (1997).

Requiring the submission to a Licensing Board of proposed findings of fact or a comparable document is not a mere formality: it gives that Board the benefit of a party's arguments and permits it to resolve them in the first instance, possibly in the party's favor, obviating later appeal. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 906-907 (1982).

Where an intervenor chooses to file proposed findings, the Board is entitled to take that filing as setting forth all of the issues that were contested. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 371 (1983).

A pro se licensee in a civil penalty proceeding will not be held to strict compliance with the format requirements for proposed findings if it can make a convincing showing that it cannot comply with all the technical pleading requirements of 10 C.F.R. § 2.712(c) (formerly § 2.754(c)). Unlike intervenors who voluntarily participate in licensing proceedings, a pro se licensee, who has requested a hearing, must participate in a civil penalty proceeding in order to protect its property interests. A Licensing Board will use its best efforts to understand and rule on the merits of the claims presented. Tulsa Gamma Ray, Inc., LBP-91-40, 34 NRC 297, 303-304 (1991).

When statements in applicant's proposed findings, which are based on applicant statements by witnesses under oath before the presiding officer or as part of its application, indicate a willingness to comply with all or a portion of specific, nationally recognized consensus standards, little purpose would be served in repeating the terms of these commitments as license conditions (or as presiding officer directives). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 410 (2000), citing Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 423-24 (1980).

4.2.1 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings of fact and conclusions of law only with respect to issues which that party placed in controversy or sought to place in controversy in the proceeding. 10 C.F.R. § 2.712(c) (formerly § 2.754(c)); Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,182 (Aug. 11, 1989).

If an intervenor files additional filings that are not authorized by the Board, they will not be considered in the Board's decision. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 346 (1998).

4.2.2 Failure to File Proposed Findings

Consistent with 10 C.F.R. § 2.712 (formerly § 2.754(b)), contentions for which findings have not been submitted may be treated as having been abandoned. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1568 (1982).

The Appeal Board did not feel bound to review exceptions made by a party who had failed to file proposed findings on the issues with respect to which the exceptions were taken. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 964 (1974).

A Licensing Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

A party that fails to submit proposed findings as requested by a Licensing Board, relying instead on the submission of others, assumes the risk that such reliance might be misplaced; it must be prepared to live with the consequence that its further appeal rights will be waived. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 907 (1982).

The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise. The presiding officer is empowered to take a party's failure to file proposed findings, when directed to do so, as a default. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983).

Even when a Licensing Board order requesting the submission of proposed findings has been disregarded, the Commission's Rules of Practice do not mandate a sanction. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 23 (1983), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 332-33 (1973).

The failure to file proposed findings is subject to sanctions only in those instances where a Licensing Board has directed such findings to be filed. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 23 (1983).

Absent a Board order requiring the submission of proposed findings, an intervenor that does not make such a filing is free to pursue on appeal all issues it litigated below. The setting of a schedule for filing proposed findings falls short of an explicit direction to file findings and thus does not form the basis for finding a party in default. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 371 (1983), citing former 10 C.F.R. § 2.754 (now § 2.712); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983).

4.3 Initial Decisions

After the hearing has been concluded and proposed findings have been filed by the parties, the Licensing Board will issue its initial decision. This decision can conceivably constitute the ultimate agency decision on the matter addressed in the hearing provided that it is not modified by subsequent Commission review. Between 1979 and 2007, the Licensing Board's decision authorizing issuance of a full-power operating license (i.e., for other than fuel loading and 5% power operations) was considered automatically stayed until the Commission completed a sua sponte review to determine whether to stay the decision. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-647, 14 NRC 27, 29 (1981); Licenses, Certifications and Appeals for New Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,415 (Aug. 28, 2007).

Prior to 1979, an initial decision authorizing issuance of a construction permit (or operating license) was effective when issued, unless stayed. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978). At that time, decisions were presumptively valid and, unless or until they were stayed or overturned by appropriate authority, were entitled to full recognition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-423, 6 NRC 115, 117 (1977)).

Under 10 C.F.R. § 2.713 (formerly § 2.760(a)), an initial decision will constitute the final decision of the Commission forty (40) days from its issuance unless a petition for review is filed in accordance with 10 C.F.R. § 2.341 (formerly § 2.786), or the Commission directs otherwise. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

In a Federal Register notice dated August 28, 2007 (72 Fed. Reg. 49,352), the Commission published a final rule amending 10 C.F.R. § 2.340. The amendments to § 2.410 make presiding officers' initial decisions in production and utilization facility proceedings immediately effective. See 72 Fed. Reg. 44,415-16.

Previously, with respect to authorization of issuance of construction permits, 10 C.F.R. § 2.340(f) (formerly § 2.764(e)) provides for Commission review, within sixty (60) days of any Licensing Board decision that would otherwise authorize licensing action, of any stay motions timely filed. If none were filed, the Commission would within the same period of time conduct a sua sponte review and decide whether a stay was warranted under the procedures set out in 10 C.F.R. § 2.342 (formerly § 2.788).

10 C.F.R. 2.340(f) (formerly 2.764(e)) does not apply to manufacturing licenses. A manufacturing license can become effective before it becomes final. The Commission does not undertake an immediate effectiveness review of a Licensing Board decision authorizing its issuance. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), CLI-82-37, 16 NRC 1691 (1982). A Licensing Board decision on a manufacturing license becomes effective before it becomes final because the issuance of a manufacturing license does not conclude the construction permit process; such a license does not present health and safety issues requiring immediate review. Cf. Immediate Effectiveness Rule, 46 Fed. Reg. 47,764, 47,765 (Sep. 30, 1981).

A Licensing Board's initial decision must be in writing. Although a Board's initial decision may refer to the transcript of its oral bench rulings, such practice should be avoided in complicated NRC licensing hearings because it is counterproductive to meaningful appellate review. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 727 n.61 (1985).

The findings and initial decision of the Licensing Board must be supported by reliable, probative, and substantial evidence on the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187 (1975). The initial decision must contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 14 n.18 (1975). Of course, a Licensing Board's decision cannot be based on factual material that has not been introduced and admitted into evidence. Otherwise, the parties would be deprived of the opportunity to impeach the evidence through cross-examination or to rebut it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

Licensing Boards have a general duty to insure that initial decisions contain a sufficient exposition of any ruling on a contested issue of law or fact to enable the parties and a reviewing tribunal to readily apprehend the foundation of the ruling. This is not a mere procedural nicety but it is a necessity. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 10-11 (1976); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 n.2 (1973).

Clarity of the basis for the initial decision is important. In circumstances where a Licensing Board bases its ruling on an important issue on considerations other than those pressed upon it by the litigants themselves, there is especially good reason why the foundation for that ruling should be articulated in reasonable detail. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 414 (1976). When resort is made to technical language which a layman could not be expected to readily understand, there is an obligation on the part of the opinion writer to make clear the precise significance of what is being said in terms of what is being decided. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), ALAB-336, 4 NRC 3 (1976).

The requirement that a Licensing Board clearly delineate the basis for its initial decision was emphasized by the Appeal Board in Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977). Therein, the Appeal Board stressed that the Licensing Board must sufficiently inform a party of the disposition of its contentions and must, at a minimum, explain why it rejected reasonable and apparently reliable evidence contrary to the Board's findings.

Thus, a prior Licensing Board ruling in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), LBP-77-7, 5 NRC 452 (1977), to the effect that a Board need not justify its findings by discounting proffered testimony as unreliable appears to be in error insofar as it is contrary to the Appeal Board's guidance in Seabrook. Although normally the Appeal Board was disinclined to examine the record to determine whether there is support for conclusions which the Licensing Board failed to justify, it evaluated evidence in one case because (1) the Licensing Board's decision preceded the Appeal Board's

decision in Seabrook which clearly established this policy, and (2) it did not take much time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 368 (1978).

In certain circumstances, time may not permit a Licensing Board to prepare and issue its detailed opinion. In this situation, one approach is for the Licensing Board to reach its conclusion and make a ruling based on the evidentiary record and to issue a subsequent detailed decision as time permits. The Appeal Board tacitly approved this approach in Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-460, 7 NRC 204 (1978). This approach has been followed by the Commission in the Generic Environmental Statement on Use of Mixed Oxide Fuel (GESMO) proceeding. See Mixed Oxide Fuel, CLI-78-10, 7 NRC 711 (1978).

It is the right and duty of a Licensing Board to include in its decision all determinations of matters on an appraisal of the record before it. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 30 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Partial initial decisions on certain contentions favorable to an applicant can authorize issuance of certain permits and licenses, such as a low-power testing license (or, in a construction permit proceeding, a limited work authorization), notwithstanding the pendency of other contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1137 (1983).

4.3.1 Reconsideration of Initial Decision

See also Digest Section 4.5 infra.

Petitions for reconsideration of a final decision must be filed within ten (10) days after the date of the decision. 10 C.F.R. § 2.345(a)(1) [former § 2.771(a)] petitions for reconsideration of Commission decisions are subject to the requirements of § 2.341(d) [former § 2.786(e)].

The Commission revised the Rules of Practice in 2004 with respect to motions for reconsideration by adopting a “compelling circumstances” standard for motions for reconsideration. 10 C.F.R. §§ 2.323(e) and 2.345(b) [former §§ 2.730 and 2.771]. This standard, which is a higher standard than prior case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration and the claim could not have been raised earlier. In the Commission’s view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

A Licensing Board has inherent power to entertain and grant a motion to reconsider an initial decision. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 646 (1974).

A presiding officer in a materials licensing proceeding retains jurisdiction to rule on a timely motion for reconsideration of his or her final initial decision even if one of the

parties subsequently files an appeal. Curators of the University of Missouri (Trump-S Project), LBP-91-34, 34 NRC 159, 160-61 (1991), aff'd, CLI-95-1, 41 NRC 71, 93 (1995).

An authorized, timely-filed petition for reconsideration before the trial tribunal may work to toll the time period for filing an appeal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-659, 14 NRC 983, 985 (1981).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

Petitioners may be granted permission by the Commission to file a consolidated request for reconsideration if they have not had full opportunity to address the precise theory on which the Commission's first decision rests. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 51 (2000).

A properly supported motion for reconsideration should not include previously presented arguments that have been rejected. Instead the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. Reconsideration may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000).

4.4 Reopening Hearings

Hearings may be reopened, in appropriate situations, either upon motion of any party or sua sponte. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Sua sponte reopening is required when a Board becomes aware, from any source, of a significant unresolved safety issue or of possible major changes in facts material to the resolution of major environmental issues. Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 352 (1978). For reopening the record, the new evidence to be presented need not always be so significant that it would alter the Board's findings or conclusions when the taking of new evidence can be accomplished with little or no burden upon the parties. To exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), LBP-78-2, 7 NRC 83, 85 (1978). An Appeal Board indicated that it might be sympathetic to a motion to reopen a hearing if

documents appended to an appellate brief constituted newly discovered evidence and tended to show that significant testimony in the record was false. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2& 3); Perry Nuclear Power Plant, Units 1 & 2), ALAB-430, 6 NRC 457 (1977).

Until the full-power license for a nuclear reactor has actually been issued, the possibility of a reopened hearing is not entirely foreclosed; a person may request a hearing concerning that reactor, even though the original time period specified in the Federal Register notice for filing intervention petitions has expired, if the requester can satisfy the late intervention and reopening criteria. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993).

Until a license has actually been issued, the Commission (as opposed to the Licensing Board) retains jurisdiction to reopen a closed case. Dominion Nuclear Connecticut, 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); Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-1, 35 NRC 1 (1992)). Until that time, "there remains in existence an operating license 'proceeding'" that can be "reopened," and the Commission still has authority to add conditions to a license or to supplement an environmental impact statement if intervenors (or the NRC Staff itself) uncover significant, previously unconsidered, and newly arising safety or environmental impacts. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006) (quoting Comanche Peak, CLI-92-1, 35 NRC at 6 n.5). If a motion to reopen a closed proceeding is filed after a license has been issued, the motion should be considered as a petition for enforcement action under 10 C.F.R. § 2.206. Millstone, CLI-06-4, 63 NRC at 36 n.4 (citing Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 67 (1992)).

In license amendment proceedings, the issuance of the amendment does not terminate the proceeding. Adjudicatory proceedings on license amendments continue until they are over, even if the amendment is issued in the interim. Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 121-22 (2009) (finding that issuance of amendment did not preclude consideration of motion to reopen filed before issuance of the amendment).

Motions to reopen a record are governed by 10 C.F.R. § 2.326 (formerly § 2.734), which requires that a motion to reopen a closed record be timely, that it address a significant safety or environmental issue, and that it demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-35, 40 NRC 180 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-9, 59 NRC 120, 124 (2004). A motion to reopen a closed record is designed to consider additional evidence of a factual or technical nature and is not the appropriate method for advising a Board of a non-evidentiary matter such as a state court decision. A Board may take official notice of such non-evidentiary matters. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 521 (1988).

New regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226, 233 (1981).

A motion to reopen the record based on the recent criminal indictment of a tribal leader does not meet the standard enumerated in § 2.326 where neither the individual indicted nor the tribe would own or operate the facility in question and the intervenor fails to suggest how the alleged theft of tribal money or filing false tax returns, even if true, would have any bearing on facility operations. PFS, CLI-04-9, 59 NRC at 124.

Where a record is reopened for further development of the evidence, all parties are entitled to an opportunity to test the new evidence and participate fully in the resolution of the issues involved. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). Permissible inquiry through cross-examination at a reopened hearing necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 94 (1977).

A Licensing Board lacks the power to reopen a proceeding once final agency action has been taken, and it may not effectively "reopen" a proceeding by independently initiating a new adjudicatory proceeding. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977).

The Licensing Board also 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 (2000), n.3, citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755 (1983); cf. Curators of the University of Missouri (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. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984).

Where finality has attached to some, but not all, issues, new matters may be considered when there is a reasonable nexus between those matters and the issues remaining before the Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-930, 31 NRC 343, 346-47 (1990). The focus is on whether and what issues are still being reviewed. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1589 n.4 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 708 (1979).

A Board has no jurisdiction to consider a motion to reopen the record in a proceeding where it has issued its final decision and a party has already filed a petition for

Commission review of the decision. The motion to reopen the record should be referred to the Commission for consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-823, 22 NRC 773, 775 (1985). However, when a subsequent motion is filed, and the Secretary, pursuant to her power under 10 C.F.R. § 2.346, refers the motion to the Board, jurisdiction returns to the Board to address the motion and the proceeding remains alive until the Board acts upon the motion, even if the Commission concurrently rules upon the appeal or petition for review before it. Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 120 (2009). The referral, however, does not operate to reopen the record. Id.

Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal, and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

Under former practice, the Appeal Board dismissed for want of jurisdiction a motion to reopen hearings in a proceeding in which the Appeal Board had issued a final decision, followed by the Commission's election not to review that decision. The Commission's decision represented the agency's final action, thus ending the Appeal Board's authority over the case. The Appeal Board referred the matter to the Director of Nuclear Reactor Regulation because, under the circumstances, he had the discretionary authority to grant the relief sought subject to Commission review. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-530, 9 NRC 261, 262 (1979). See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-1330 (1983).

The fact that certain issues remain to be litigated does not absolve an intervenor from having to meet the standards for reopening the completed hearing on all other radiological health and safety issues in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. Although the Commission has held that only a party to a proceeding could move to reopen a closed record, the Commission has subsequently indicated that a non-party seeking late intervention after the record has closed must address both the standard for late intervention and the standard for reopening a closed record. Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009). Stringent criteria must be met in order for the record to be reopened. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-9, 39 NRC 122, 123 (1994). See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 25 (2006) ("Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence"). Pursuant to 10 C.F.R. § 2.326(a) (formerly § 2.734), a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
(2) The motion must address a significant safety issue.
(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
(4) The motion must be accompanied by one or more affidavits which set forth factual and/or technical bases for the movant's claim. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.

Evidence contained in affidavits must meet the admissibility standards set forth in § 2.326(b) (formerly § 2.734(c)). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-9, 39 NRC 122, 123-24 (1994).

In addition, the motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claims. 10 C.F.R. § 2.326(b) (formerly § 2.734(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-38, 30 NRC 725, 734 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484 (1991). In addition, the movant is also free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversight of the facility. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 363 (1981).

However, a document prepared by another party, such as the Staff, cannot serve as a substitute for the affidavit requirement in 10 C.F.R. § 2.326(b). The only authority that stands for the proposition that another party's document could substitute for the affidavit requirement, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973), predates codification of the reopening standard in 1986. In that case, because the Staff document raised significant safety issues on its face, the Appeal Board indicated that the affidavit requirement could be bypassed. AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672-73 & n.55 (2008).

Under well-settled precedent, the proponent of a motion to reopen the record has a heavy burden to bear. See e.g., Amergen Energy Company LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 675 (2008).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 C.F.R. § 2.309 (formerly § 2.714(a)), and the criteria established for reopening the record. See e.g.,

Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.309(f) (formerly 2.714(b)) for admissible contentions. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (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). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 C.F.R. 2.337(a) (formerly 2.743(c)) which defines admissible evidence as "relevant, material, and reliable." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366-67 (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); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1367 n.18 (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); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-87-21, 25 NRC 958, 962 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-915, 29 NRC 427, 431-32 (1989). A "mere showing" of a possible violation of regulatory safety standards is not enough. Amergen Energy Company LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 670 (2008). Clearly, a dissenting judicial opinion cannot substitute for the movant's required affidavit and thus cannot be considered "additional evidence." Id. at 673.

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. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

The Commission will not consider a last-second reopening of an adjudication and a restart of Licensing Board proceedings based on a pleading that is defective on its face. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 38 (2006).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366-67 (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).

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the final decision but was received by the Board after the decision, the Board denied the motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect under former § 2.712(e)(3) (now 10 C.F.R. § 2.305(e)(3)) concerning service by mail, but did not reach the jurisdictional question since the motion was properly denied on the merits. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972) did not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant. The

motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing former § 2.734(a)(1)(now 10 C.F.R. § 2.326(a)(1)). See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 140 (2002).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-927, 31 NRC 137, 140 (1990).

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-90-12, 31 NRC 427, 445-46 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A person seeking late intervention in a proceeding in which the record has been closed must also address the reopening standards, but not necessarily in the same petition. However, it is in the petitioner's best interest to address both the late intervention and reopening standards together. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162 (1993).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (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). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became

available. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201-02 (1985).

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1369 (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).

A motion to reopen the record in order to admit a new contention must be filed promptly after the relevant information needed to frame the contention becomes available. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-6, 31 NRC 483, 487 (1990).

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The Vermont Yankee tests for reopening the evidentiary record are only partially applicable where reopening the record is the Board's sua sponte action. The Board has broader responsibilities than do adversary parties, and the timeliness test of Vermont Yankee does not apply to the Board with the same force as it does to parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-579, 11 NRC 223, 225-226 (1980).

4.4.1.2 Contents of Motion to Reopen Hearing

Pursuant to 10 C.F.R. § 2.326(b), a motion to reopen must be accompanied by affidavits of qualified experts presenting the factual and/or technical basis supporting the claim that there is a significant safety issue, together with evidence that meets the Commission's admissibility standards in 10 C.F.R. § 2.337.

A document prepared by another party does not satisfy the requirement of an affidavit demonstrating a significant safety issue unless the document on its face demonstrates a significant safety issue. A dissenting judicial opinion cannot

substitute for the affidavit the moving party must submit, with its motion to reopen, and thus cannot be considered "additional evidence" supporting the motion to reopen. AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672-73 & n.55 (2008) (discussing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power station), ALAB-124, 6 AEC 358, 364 (1973)). A Board must decide the motion to reopen on the pleadings before it and has no authority to engage in discovery or perform supplementary technical analysis to supplement the pleadings before it. Id. at 675).

Affidavits submitted in support of a motion to reopen must demonstrate that a materially different result is likely, i.e., the evidence supporting the motion to reopen would likely have materially altered the outcome of the proceeding. Affidavits containing bare assertions or speculation and lacking technical details or analysis are insufficient to demonstrate that a materially different result is likely. AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 22 aff'd CLI-08-28, 68 NRC 658 (2008).

4.4.2 Grounds for Reopening Hearing

The standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention. New information is not enough to reopen a closed record at the last minute, unless it is significant and plausible enough to require reasonable minds to inquire further and is likely to trigger a different result. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct cross-examination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), CLI-79-10, 10 NRC 675, 677 (1979).

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant," unresolved safety question is involved. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), reconsid. den., ALAB-141, 6 AEC 576; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). See also Digest Section 3.13.3.

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Pacific Gas & Electric 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). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973). Because the NRC hearing rules specify that reopening the record requires a showing that the new information will likely trigger a different result, the Licensing Board properly considered both the party's new

information and the opposing party's contrary evidence (citing 10 C.F.R. § 2.734(a)(3) (now § 2.326(a)(3)). PFS, CLI-05-12, 61 NRC at 350.

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 364-365 (1981).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9 (1978); LBP-85-19, 21 NRC 1707, 1720 (1985).

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of quality assurance/quality control personnel is insufficient, by itself, to support a motion to reopen. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-598, 11 NRC 876, 887 (1980).

Intervenor's argument that a possible violation of safety standards could occur does not demonstrate a significant safety issue. Binding case law provides that a party seeking to reopen the record does not show the existence of a significant safety issue merely by demonstrating that a plant component performs a safety function and thus is safety significant. AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 670, 672 (2008) (referring to Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-6, 31 NRC 483, 487 (1990)).

Intervenors failed to raise a significant safety issue when they did not present sufficient evidence to show that an applicant's program and continuing compliance with an NRC Staff-prescribed enhanced surveillance program would not provide the requisite assurance of plant safety. The intervenors' request for harsher measures than the NRC Staff had considered necessary, without presenting any new information that the Staff had failed to consider, is insufficient to raise a significant safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-6, 31 NRC 483, 487-88 (1990).

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-42, 22 NRC 795, 799 (1985), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986); see also AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672 (2008) (noting "evidentiary shortcomings" of newspaper articles as evidence of a significant safety issue).

Generalized complaints that an alleged ex parte communication to a Board compromised and tainted the Board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

In the context of a motion to reopen a closed proceeding, the Commission found that a difference of opinion between an intervenor and the Staff over a scientific question – such as where the Staff accepted a licensee's explanation of emission levels – does not constitute "fraud, deceit, and cover-up" by the Staff. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 36-37 (2006).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985);

Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1330 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sep. 13, 1984). Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); this standard also applies to an applicant's design quality assurance program. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (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).

The untimely listing of "historical examples" of alleged construction quality assurance deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1369-70 (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).

Long-range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule

applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant relitigation. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), CLI-79-5, 9 NRC 607, 609-10 (1979).

Speculation about the future effects of budget cuts or employment freezes does not present a significant safety issue which must be addressed. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-10, 32 NRC 218, 223 (1990).

4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

4.4.4 Discovery to Obtain Information to Support Reopening of Hearing Is Not Permitted

The burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." E.g., AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 (2008).

4.5 Motions to Reconsider

See also Digest Section 4.3.1 supra.

Motions for reconsideration must be filed within ten (10) days of the date of issuance of the challenged order or action for which reconsideration is requested. 10 C.F.R. §§ 2.323(e) and 2.345(a)(1) [former §§ 2.730 and 2.771(a)].

The Commission revised the Rules of Practice in 2004 with respect to motions for reconsideration by adopting a "compelling circumstances" standard for motions for reconsideration. See 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004); 10 C.F.R. §§ 2.323(e) and 2.345(b) [former §§ 2.730 and 2.771]. This standard, which is a higher standard than prior case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 3), ALAB-281, 2 NRC 6 (1975).

A reconsideration request that is grossly out of time without good cause shown may be rejected. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 311 (2000).

The Commission undertakes motions for reconsideration when a party demonstrates a compelling circumstance. Examples of such a compelling circumstance include the existence of a clear and material error in decision which could not have reasonably been anticipated that renders the decision invalid. This standard is applied strictly; motions for reconsideration are not granted lightly. Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006).

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-6, 15 NRC 281, 283 (1982).

When a petition for review is filed with the Commission at the same time as a motion for reconsideration is filed with the Board, the Commission will delay considering the petition for review until after the Board has ruled. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3 (2001), citing International Uranium Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appeal an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

A motion to reconsider a prior decision will be denied where the motion is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis and where the proponent does not request that the result reached in the prior decision be changed. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

"A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, or (2) previously presented arguments that have been rejected. Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision." Private Fuel Storage, L.L.C. (Independent Spent Fuel

Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001) (citation omitted), citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998).

Reconsideration motions afford an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a controlling decision of law that was overlooked. New arguments are improper. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2, 55 NRC 5, 7 (2002); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), citing Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

When an intervenor attempts, through a reconsideration motion, to broaden the scope of an issue the Board has already decided, the Board does not abuse its discretion by refusing to restart its hearing to reassess the issue in its broader form. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 414 (2005).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. Ralph L. Tetrick (Denial of Reactor Operator's License), LBP-97-6, 45 NRC 130, 131 (1997), citing Texas Utilities Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

Petitioners may be granted permission by the Commission to file a consolidated request for reconsideration if they have not had full opportunity to address the precise theory on which the Commission's first decision rests. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 51 (2000).

A motion to reconsider may not be used merely to re-argue matters already considered. Motions to reconsider must establish an error in the earlier decision and be based on the elaboration or refinement of arguments made initially, the identification of an overlooked controlling decision or a factual clarification. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 153 (2004). However, if the basis for subsequent Commission modification of a Board ruling is not that there was a mistake of law or fact, but that the facts have changed, a party should not be characterized (or penalized) as having waived its argument by not filing a motion for reconsideration; that is not the type of situation where the Commission "reconsiders" its decision. Id. at 154.

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or on appeal cannot be raised on a motion for

reconsideration. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Although some decisions hold that motions for reconsideration are generally disfavored when premised on new arguments or evidence rather than errors in the existing record, there also are cases that permit reconsideration based on new facts not available at the time of the decision in question and relevant to the particular issue under consideration which clarify information previously relied on and are potentially sufficient to change the result previously reached. See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69 (1998); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-21, 38 NRC 143 (1993); see also Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981). Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-01-17, 53 NRC 398, 403-04 (2001).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998); see also Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1977). Private Fuel Storage, L.L.C., LBP-99-39, 50 NRC 232, 237 (1999).

Additionally, an argument raised for the first time in a motion to reconsider does not serve as a basis for reconsideration of admission of a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 292 (1998).

Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and new arguments are not relevant in such a motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984). In accordance to 10 C.F.R. § 2.326 (formerly § 2.734), motions for reconsideration will be denied for failure to show that the Presiding Officer has made a material error of law or fact. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-7, 23 NRC 233, 235 (1986), Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986).

A motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law that would have a controlling effect and that has been overlooked or that there has been a misapprehension of the facts. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-94-31, 40 NRC 137, 140 and n.1 (1993). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision and the federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

A Board cannot reconsider a matter after it loses jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-579, 11 NRC 223, 225-226 (1980).

4.6 Procedure on Remand

4.6.1 Jurisdiction of the Licensing Board on Remand

The question as to whether a Licensing Board, on remand, assumes its original plenary authority or, instead, is limited to consideration of only those issues specified in the remand order was, for some time, unresolved. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-389, 5 NRC 727 (1977). Of course, jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of review of the decision. Issues to be considered by the Board on remand would be shaped by that order. If the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of scope to embrace other discrete matters. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 708 (1979).

However, a Licensing Board was found to be "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission and the petition for intervention dealt with matters outside that scope. This establishes that a Licensing Board has limited jurisdiction in a remanded proceeding and may consider only what has been remanded to it. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), ALAB-526, 9 NRC 122, 124 n.3 (1979). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-857, 25 NRC 7, 11, 12 (1987) (the Licensing Board properly rejected an intervenor's proposed license conditions which exceeded the scope of the narrow remanded issue of school bus driver availability).

Although an adjudicatory board to which matters have been remanded would normally have the authority to enter any order appropriate to the outcome of the remand, the Commission may, of course, reserve certain powers to itself, such as, for example, reinstatement of a construction permit suspended pending the remand. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 961 (1978).

Where the Commission remands an issue to a Licensing Board, it is implicit that the Board is delegated the authority to prescribe warranted remedial action within the

bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

4.6.2 Jurisdiction of the Board on Remand

Jurisdiction over previously determined issues is not necessarily preserved by the pendency of other issues in a proceeding. Metropolitan Edison Co. (Three Mile Island, Unit 1), ALAB-766, 19 NRC 981, 983 (1984), citing Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-513, 8 NRC 694, 695-96 (1978).

4.6.3 Stays Pending Remand to Licensing Board

10 C.F.R. § 2.342 (formerly § 2.788) does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.342 (formerly Section 2.788), the Commission held that the standards for issuance of a stay pending remand are less stringent than those of the Virginia Petroleum Jobbers test, relied on by federal courts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 521 (1977).

4.6.4 Participation of Parties in Remand Proceedings

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. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).