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## 5.0 APPEALS

From 1969 to 1991 the Commission used a three-tiered adjudicatory process. As is the case now, controversies were resolved initially by an Atomic Safety and Licensing Board or presiding officer acting as a trial level tribunal. However, Licensing Board initial decisions (final decisions on the merits) and decisions wholly granting or denying intervention were subject to non-discretionary appellate review by the Atomic Safety and Licensing Appeal Board. Appeal Board decisions were subject to review by the Commission as a matter of discretion.

The Appeal Board was abolished in 1991, thereby creating a two-tiered adjudicatory system under which the Commission itself conducts all appellate review. Most Commission review of rulings by Licensing Boards and Presiding Officers, including initial decisions, is now discretionary. See 10 C.F.R. § 2.341 (a)–(f) (formerly § 2.786 (a)–(f)). A party must petition for review and the Commission, as a matter of discretion, determines if review is warranted. Appeals of orders wholly denying or granting intervention remain non-discretionary. See 10 C.F.R. § 2.311 (formerly § 2.714a).

The standards for granting interlocutory review have remained essentially the same. Appeal Board and Commission case law had permitted interlocutory review in extraordinary circumstances. These case law standards were codified in 1991 when the Appeal Board was abolished and the two-tiered process was developed. See 10 C.F.R. § 2.341(f) (formerly § 2.786(g)).

Although the Appeal Board was abolished in 1991, Appeal Board precedent, to the extent it is consistent with more recent case law and rule changes, may still be authoritative.

### 5.1 Commission Review

As a general matter, the Commission conducts review in response to a petition for review filed pursuant to 10 C.F.R. 2.341 (formerly 2.786), in response to an appeal filed pursuant to Section 2.311 (formerly 2.714a), or on its own motion (sua sponte).

The Commission has full discretion whether to undertake appellate review of its Licensing Boards' merits decisions. NRC rules say that the Commission may grant review of initial Board decisions (or partial initial decisions) based on "any consideration" it "deems to be in the public interest." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 132 (2004) (quoting former 10 C.F.R. § 2.786(b)(4) [now 10 C.F.R. § 2.341(b)]); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-08-7, 67 NRC 187 (2008).

#### 5.1.1 **Commission Review Pursuant to 2.341(b) (formerly 2.786(b))**

In determining whether to grant, as a matter of discretion, a petition for review of a Licensing Board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.341(b) (formerly § 2.786(b)(4)). The considerations set out in Section 2.341(b) (formerly § 2.786(b)(4)) are: (i) a clearly erroneous finding of material fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law; (iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest.

Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 184 (1993); Piping Specialists, Inc., et al., (Kansas City, MO), CLI-92-16, 36 NRC 351 (1992); Aharon Ben-Haim, Ph.D., CLI-99-14, 49 NRC 361, 363 (1999). See also Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279, 282-283 (2003), declining review of LBP-03-04, 57 NRC 69 (2003); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 422 (2003); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 35-36 (2004); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 410 (2005); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 132 (2004).

The Commission may dismiss its grant of review even though the parties have briefed the issues. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, & 3), CLI-82-26, 16 NRC 880, 881 (1982), citing Jones v. State Board of Education, 397 U.S. 31 (1970). 10 C.F.R. § 2.341 (formerly § 2.786) describes when the Commission “may” grant a petition for review but does not mandate any circumstances under which the Commission must take review. Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997).

The Commission agreed to take review of a Board’s merits ruling where it stated that the ruling arguably reflected a mistake of fact or law that may have derived from ambiguities in a prior Commission opinion. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 137 (2004).

Unsuccessful petitioners may appeal the denial of their intervention petitions, but they must make some argument that the appeal is justified. An appeal that does not point to an error of law or abuse of discretion by the Board but simply restates the contention with additional support will not meet the requirements for a valid appeal. Shieldalloy Metallurgical Corp., (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

### **5.1.2 Sua Sponte Review**

Sua sponte review, although rarely exercised, is taken in extraordinary circumstances. See, e.g., Ohio Edison Co., et al. (Perry & Davis-Besse), CLI-91-15, 34 NRC 269 (1991). The Commission has occasionally taken review of an issue sua sponte where the issue is not otherwise before the Commission on appeal or where the standard for interlocutory review is not met. Sua sponte review allows the Commission to address unappealed issues or orders, to: (1) establish case-specific timetables or procedures, (2) suspend a proceeding, (3) vacate an unreviewed Board order after withdrawal of the challenged application, (4) disqualify a presiding officer, (5) address an issue of broad implication, and/or (6) provide guidance to a Licensing Board. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5 & n.11-19 (2007) (citing cases in which the

Commission took sua sponte review for one of the six stated reasons and taking sua sponte review in the instant proceeding for the latter two reasons).

Because the Commission is responsible for all actions and policies of the NRC, the Commission has the inherent authority to act upon or review sua sponte any matter before an NRC tribunal. To impose on the Commission, to the degree imposed on the judiciary, requirements of ripeness and exhaustion would be inappropriate since the Commission, as part of a regulatory agency, has a special responsibility to avoid unnecessary delay or excessive inquiry. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 516 (1977); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 228-29 (1990). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-05-14, 61 NRC 359, 362 (2005) (undertaking sua sponte review of an issue that the Commission conceded may well have been moot).

In determining whether to take review of a Licensing Board order approving a settlement agreement, the Commission may ask the Staff to provide an explanation for its agreement in the settlement if such reasons are not readily apparent from the settlement agreement or the record of the proceeding. Randall C. Orem, D.O. (Byproduct Material License No. 34-26201-01), CLI-92-15, 36 NRC 251 (1992).

If sua sponte review uncovers problems in a Licensing Board's decision or a record that may require corrective action adverse to a party's interest, the consistent practice is to give the party ample opportunity to address the matter as appropriate. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n.8 (1982) (citing Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309-313 (1980)).

The Commission may exercise its inherent supervisory authority over adjudications sua sponte to address issues that are "significant, have potentially broad impact, and may well recur in the likely license renewal proceedings for other plants." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC \_\_\_ (Sep. 30, 2010) (slip op. at 8-9) (internal quotations omitted).

### **5.1.3 Effect of Commission's Denial of Petition for Review**

When a discrete issue has been decided by the Board and the Commission declines to review that decision, agency action is final with respect to that issue and Board jurisdiction is terminated. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 841 (1984), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984); 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 (1978).

The Commission's refusal to entertain a discretionary interlocutory review does not indicate its view on the merits. Nor does it preclude a Board from reconsidering the matter as to which Commission review was sought where that matter is still pending

before the Board. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978). The Commission's denial of review of a particular decision simply indicates that the appealing party "identified no 'clearly erroneous' factual finding or important legal error requiring Commission correction." Hydro Res., Inc., LBP-06-1, 63 NRC 41, 59 n.15 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (citing Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000) (quoting 10 C.F.R. § 2.786(b)(4), now § 2.341(b)(4))).

Commission silence on issues raised on appeal "should be interpreted as neither approval nor disapproval of any individual unreviewed ruling." U.S. Dep't of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 583 (2009).

When the time within which the Commission might have elected to review a Board decision expires, any residual jurisdiction retained by the Board expires. 10 C.F.R. § 2.318(a) (formerly § 2.717(a)); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978).

#### **5.1.4 Commission Review Pursuant to 2.311 (formerly 2.714a)**

NRC regulations contain a special provision (10 C.F.R. § 2.311 (formerly § 2.714a)) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene. Under 10 C.F.R. § 2.311(b) (formerly § 2.714a(b)), a petitioner may appeal such an order but only if the effect thereof is to deny the petition in its entirety – i.e., to refuse petitioner entry into the case. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11 (2007); Power Authority of the State of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974). Appellate review of a ruling rejecting some but not all of a petitioner's contentions is available only at the end of the case. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11 (2007); Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978). Similarly, where a proceeding is divided into two segments for convenience purposes and a petitioner is barred from participation in one segment but not the other, that is not such a denial of participation as will allow an interlocutory appeal under 10 C.F.R. § 2.311 (formerly § 2.714a). Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

An order admitting and denying various contentions is not immediately appealable under 10 C.F.R. § 2.311 (formerly § 2.714a) where it neither wholly denies nor grants a petition for leave to intervene/request for a hearing. Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 468 (2004). For a license applicant to take an appeal under Section § 2.311(c) (formerly § 2.714a(c)), the applicant must contend that, after considering all pending contentions, the Board erroneously granted a hearing to the petitioner. Therefore, a license applicant's appeal of a Board order granting a hearing request is premature when filed prior to the Board



ruling on all pending contentions. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203, 207-8 (2004).

An appeal under 10 C.F.R. § 2.311(c) of a Licensing Board decision granting a petition to intervene and/or request for hearing can only be granted if the request and/or petition should have been wholly denied. Answering this question requires a determination of whether the petitioner has standing and has submitted at least one admissible contention. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 371 (2005).

A state participating as an “interested State” under 10 C.F.R. § 2.315 (formerly § 2.715(c)) may appeal an order barring such participation, but it may not seek review of an order which permits the state to participate but excludes an issue which it seeks to raise. Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607, 610 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested state may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested state may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested state from participating in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-838, 23 NRC 585, 589-90 (1986).

Only the petitioner may appeal from an order denying it leave to intervene. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). The appellant must file a notice of appeal and supporting brief within 10 days after service of the Licensing Board’s order. 10 C.F.R. § 2.311(a) (formerly § 2.714a); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991). Other parties may file briefs in support of or in opposition to the appeal within ten (10) days of service of the appeal. The applicant, the NRC Staff or any other party may appeal an order granting a petition to intervene or request for a hearing in whole or in part, but only on the grounds that the petition or request should have been denied in whole. 10 C.F.R. § 2.311(a) (formerly § 2.714(c)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-896, 28 NRC 27, 30 (1988).

A Licensing Board’s failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board’s delay under 10 C.F.R. § 2.311 (formerly § 2.714a). Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977).

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

Once the time prescribed in Section 2.311 (formerly 2.714a) for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

#### **5.1.5 Effect of Affirmance as Precedent**

Affirmance of the Licensing Board's decision cannot be read as necessarily signifying approval of everything said by the Licensing Board. The inference cannot be drawn that there is agreement with all the reasoning by which the Licensing Board justified its decision or with the Licensing Board's discussion of matters which do not have a direct bearing on the outcome. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 208 n.4 (1974); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2-3 (1985).

Stare decisis effect is not given to Licensing Board conclusions on legal issues not reviewed on appeal. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), ALAB-713, 17 NRC 83, 85 (1983), citing Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978); General Electric Co. (Vallecitos Nuclear Center – General Electric Test Reactor, Operating License No. TR-1), ALAB-720, 17 NRC 397, 402 n.7 (1983); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-826, 22 NRC 893, 894 n.6 (1985). See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988); Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998); Aharon Ben-Haim, Ph.D., CLI-99-14, 49 NRC 361, 363 (1999).

Unreviewed Board rulings do not constitute binding precedent. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-14, 58 NRC 104, 110 (2003).

#### **5.1.6 Precedential Effect of Unpublished Opinions**

Unless published in the official NRC reports, decisions and orders of Appeal Boards are usually not to be given precedential effect in other proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 745 (1980).

#### **5.1.7 Precedential Weight Accorded Previous Appeal Board Decisions**

The Commission abolished the Atomic Safety and Licensing Appeal Board Panel in 1991, but its decisions still carry precedential weight. Entergy Nuclear Operations, Inc. and Entergy Nuclear Fitzpatrick, LLC (James L. FitzPatrick Nuclear Power Plant) et al., CLI-08-19, 68 NRC 251, 260 n.23 (2008); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).

### **5.2 Who Can Appeal**

The right to appeal or petition for review is confined to participants in the proceeding before the Licensing Board. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-433, 6 NRC 469 (1977); Consolidated Edison Co. (Indian Point Nuclear Generating

Unit 2), ALAB-369, 5 NRC 129 (1977); Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 88 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-294, 2 NRC 663, 664 (1975); Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-251, 8 AEC 993, 994 (1974); Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-237, 8 AEC 654 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 252 (1986). Thus, with the single exception of a state which is participating under the “interested State” provisions of 10 C.F.R. § 2.315(c) (formerly § 2.715(c)), a non-party to a proceeding may not petition for review or appeal from a Licensing Board’s decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Because movant’s motion for stay involved a challenge to the transfer to regulatory authority to a state, an action outside of the Commission’s adjudicatory process, Section 2.342 does not apply. However, the Commission, in its discretion, may entertain requests for stays of final agency action in anticipation of judicial review in other proceedings. Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC \_\_ (Jan. 7, 2010) (slip op. at 6-7).

Although an interested state is not a party to a proceeding in the traditional sense, the “participational opportunity” afforded to an interested state under 10 C.F.R. § 2.315(c) (formerly § 2.715(c)) includes the ability for an interested state to seek review of an initial decision. USERDA (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-317, 3 NRC 175, 177-180 (1976).

The selection of parties to a Commission review proceeding is clearly a matter of Commission discretion (10 C.F.R. § 2.341(c) (formerly § 2.786(d))). A major factor in the Commission decision is whether a party has actively sought or opposed Commission review. This factor helps reveal which parties are interested in Commission review and whether their participation would aid that review. Therefore, a party desiring to be heard in a Commission review proceeding should participate in the process by which the Commission determines whether to conduct a review. An interested state which seeks Commission review is subject to all the requirements which must be observed by other parties. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977).

In this vein, a person who makes a limited appearance before a Licensing Board is not a party and, therefore, may not appeal from the Board’s decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

As to petitions for review by specific parties, the following should be noted:

- (1) A party satisfied with the result reached on an issue is normally precluded from appealing with respect to that issue, but is free to challenge the reasoning used to reach the result in defending that result if another party appeals. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975). The prevailing party is free to urge any ground in defending the result, including grounds rejected by the Licensing Board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). See also

Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-793, 20 NRC 1591, 1597 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 789 (1979); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 908 n.8 (1982), citing Black Fox, supra, ALAB-573, 10 NRC at 789.

- (2) A third party entering a special appearance to defend against discovery may appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87-88 (1976).
- (3) As to orders denying a petition to intervene, only the petitioner who has been excluded from the proceeding by the order may appeal. In such an appeal, other parties may file briefs in support of or opposition to the appeal. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976).
- (4) A party to a Licensing Board proceeding has no standing to press the grievances of other parties to the proceeding not represented by him. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981), citing Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-556, 10 NRC 30 (1979); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-24, 24 NRC 132, 135 & n.3 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 203 n.3 (1986).

One seeking to appeal an issue must have participated and taken all timely steps to correct the error. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

Although a party generally may appeal only on a showing of discernible injury, the Staff may appeal on questions of precedential importance. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

### **5.2.1 Participating by Filing an Amicus Curiae Brief**

10 C.F.R. § 2.315 (formerly § 2.715) allows a non-party to file a brief amicus curiae with regard to matters taken up by the Commission under § 2.341 or sua sponte. The non-party must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion. 10 C.F.R. § 2.315(d) (formerly § 2.715(d)).

Our rules contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for

review. See 10 C.F.R. § 2.315(d) (formerly § 2.715(d)). Louisiana Energy (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997).

The opportunity of a non-party to participate as amicus curiae has been extended to Licensing Board proceedings. A U.S. Senator lacked authorization under his state's laws to represent his state in NRC proceedings. However, in the belief that the Senator could contribute to the resolution of issues before the Licensing Board, an Appeal Board authorized the Senator to file amicus curiae briefs or to present oral arguments on any legal or factual issue raised by the parties to the proceeding or the evidentiary record. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 150 (1987).

Requests for amicus curiae participation do not often arise in the context of Licensing Board hearings because factual questions generally predominate and an amicus customarily does not present witnesses or cross-examine other parties' witnesses. This happenstance, however, "does not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda amicus curiae (or to present oral argument) on issues of law or fact that still remain for Licensing Board consideration." Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 150 (1987). Thus, in the context of a proceeding in which a legal issue predominates, permitting a petitioner that lacks standing to file an amicus pleading addressing that issue is entirely appropriate. General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 161 n.13 (1996).

A state that does not seek party status or to participate as an "interested state" in the proceedings below is not permitted to file a petition for Commission review of a Licensing Board ruling. If the Commission takes review, the Commission may permit a person who is not a party, including a state, to file a brief amicus curiae. 10 C.F.R. § 2.315(d) (formerly § 2.715(d)). Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-96-3, 43 NRC 16, 17 (1996).

Third parties may file amicus briefs with respect to any appeal, even though such third parties could not prosecute the appeal themselves. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-369, 5 NRC 129 (1977); Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-304, 3 NRC 1, 7 (1976). If a matter is taken up by the Commission pursuant to 10 C.F.R. § 2.341(b) (formerly § 2.786(b)), a person who is not a party may, in the discretion of the Commission, be permitted to file a brief amicus curiae. 10 C.F.R. § 2.315(d) (formerly § 2.715(c)). A person desiring to file an amicus brief must file a motion for leave to do so in accordance with the procedures in Section 2.715(c). Sequoyah Fuels Corporation and General Atomics (Gore, OK, site), CLI-96-3, 43 NRC 16, 17 (1996).

Petitioner is free to monitor the proceedings and file a posthearing amicus curiae brief at the same time the parties to the proceeding file their posthearing submissions under 10 C.F.R. § 2.1322(c). North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999).

Rules for amicus briefs in 10 C.F.R. § 2.315(d) apply only to petitions for review filed under 10 C.F.R. § 2.341 or to matters taken up by the Commission sua sponte; the 10 C.F.R. § 2.315(d) rules do not apply to appeals filed under 10 C.F.R. § 2.1015. U.S. Department of Energy (High-Level Waste Repository), CLI-08-22, 68 NRC 355,

359 (2008). Where 10 C.F.R. § 2.315(d) does apply, amicus briefs must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise. Id.

## 5.2.2 Aggrieved Parties Can Appeal

Petitions for review should be filed only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes appellate jurisdiction to change the result. A petition for review is unnecessary and inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, & 3), ALAB-478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, 1177, aff'd, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 393 n.21 (1978); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 914 (1981); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-790, 20 NRC 1450, 1453 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 252 (1986).

An appeal from a ruling or a decision is normally allowed if the appellant can establish that, in the final analysis, some discernible injury to it has been sustained as a consequence of the ruling. Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978). As a general rule, a party may seek appellate redress only on those parts of a decision or ruling which he can show will result in some discernible injury to himself. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). An intervenor may appeal only those issues which it placed in controversy or sought to place in controversy in the proceeding.

In normal circumstances, an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees but which has no operative effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 980 (1978). For a case in which the Appeal Board held that a party may not file exceptions to a decision if it is not aggrieved by the result, see Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 393 (1978).

The fact that a Board made an erroneous ruling is not sufficient to warrant appellate relief. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 756 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 (1986) (appeals should focus on significant matters, not every colorable claim of error); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 143 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A party seeking appellate relief must demonstrate actual prejudice – that the Board's ruling had a substantial effect on the outcome of the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 278, 280 (1987) (intervenors failed to show any specific harm resulting from erroneous Licensing Board rulings).

### **5.2.3 Parties' Opportunity to Be Heard on Appeal**

Requests for emergency relief which require adjudicators to act without giving the parties who will be adversely affected a chance to be heard ought to be reserved for palpably meritorious cases and filed only for the most serious reasons. Emergency relief without affording the adverse parties at least some opportunity to be heard in opposition will be granted only in the most extraordinary circumstances. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 780 n.27 (1977).

## **5.3 How to Petition for Review**

The general rules for petitions for review of a decision of a Board or presiding officer are set out in 10 C.F.R. § 2.341(b) (formerly § 2.786(b)). The general rules for an appeal from a Licensing Board decision wholly granting or denying intervention, are set out in 10 C.F.R. 2.311 (formerly 2.714a).

Under 10 C.F.R. § 2.341(b)(4) (formerly § 2.786(b)(4)(1)), the Commission will grant a petition for review if the petition raises a “substantial question” whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding.

The NRC page limits on petitions for review and briefs are intended to encourage parties to make their strongest arguments clearly and concisely, and to hold all parties to the same number of pages of argument. The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern a party's particular concerns or the grounds for its claims. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001). The intervenor bears responsibility for any misunderstanding of its claims. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001).

The Commission's rule providing for review of decisions of a presiding officer states that a “petition for review...must be no longer than twenty five (25) pages.” See 10 C.F.R. § 2.341(b)(2) (enlarging 10-page limit formerly in § 2.786(b)(2)). Where a petitioner resorts to the use of voluminous footnotes, references to multipage sections of

earlier filings, and supplementation with affidavits that include additional substantive arguments, the Commission views this as an attempt to circumvent the intent of the page-limit rule. See Production and Maintenance Employees Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1406 (7th Cir. 1992); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-8, 29 NRC 399, 406 n.1 (1989). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001).

Page limits “are intended to encourage parties to make their strongest arguments clearly and concisely, and to hold all parties to the same number of pages of argument.” Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001). The Commission expects parties to abide by its current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001).

#### **5.4 Time for Seeking Review**

As a general rule, only “final” actions are appealable. The test for “finality” for appeal purposes is essentially a practical one. For the most part, a Licensing Board’s action is final when it either disposes of a major segment of a case or terminates a party’s right to participate. Rulings that do neither are interlocutory. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894 (1982), citing Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1256 (1982); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-77, 18 NRC 1365, 1394-1395 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-894, 27 NRC 632, 636-37 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-933, 31 NRC 491, 496-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-943, 33 NRC 11, 12-13 (1991).

Where a major segment of a case has been remanded to a Licensing Board, there is no final Licensing Board action for appellate purposes until the Licensing Board makes a final determination of all the remanded matters associated with that major segment. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-943, 33 NRC 11, 13 (1991). One may not appeal from an order delaying a ruling, when appeal will lie from the ruling itself. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

Administrative orders generally are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988).

A Licensing Board’s partial initial decision in an operating license proceeding, which resolves a number of safety contentions, but does not authorize the issuance of an operating license or resolve all pending safety issues, is nevertheless appealable since it disposes of a major segment of the case. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 298 n.21 (1985), citing Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981). See also Entergy Nuclear Vermont



Yankee, LLC and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 71 NRC \_\_\_ (July 8, 2010) (slip op. at 10).

The requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 C.F.R. § 2.311 (formerly § 2.714a), and appeals from initial decisions. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894 (1982).

Licensing Board rulings denying waiver requests pursuant to 10 C.F.R. § 2.335 (formerly § 2.758), which are interlocutory, are not considered final. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

In determining whether an agency has issued a final order so as to permit judicial review, courts look to whether the agency's position is definitive and if the agency action is affecting plaintiff's day-to-day activities. General Atomics v. U.S. Nuclear Regulatory Com'n, 75 F.3d 536, 540 (9th Cir. 1996).

Judicial review of an administrative agency's jurisdiction should rarely be exercised before final decision from agency; sound judicial policy dictates that there be exhaustion of administrative remedies. The exhaustion of administrative remedies doctrine requires that the administrative agency be accorded opportunity to determine initially whether it has jurisdiction. General Atomics v. U.S. Nuclear Regulatory Com'n, 75 F.3d 536, 541 (9th Cir. 1996).

In general, an immediately effective Licensing Board initial decision is a "final order," even though subject to appeal within the agency, unless its effectiveness has been administratively stayed pending the outcome of further Commission review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976). In other areas, an order granting discovery against a third party is "final" and appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). Similarly, a Licensing Board order on the issue of whether offsite activity can be engaged in prior to issuance of a limited work authorization (LWA) or a construction permit is appealable. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976). When a Licensing Board grants a Part 70 license to transport and store fuel assemblies during the course of an operating license hearing, the decision is not interlocutory and is immediately appealable. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976). Partial initial decisions which do not yet authorize construction activities nevertheless may be significant and, therefore, are subject to appellate review. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975). Similarly, a Licensing Board's decision authorizing issuance of an LWA and rejecting the applicant's claim that it is entitled to issuance of a construction permit is final for the purposes of appellate review. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

A protracted withholding of action on a request for relief may be treated as tantamount to a denial of the request and final action. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442 (1977). At least in those instances where the delay involves a Licensing Board's failure to act on a petition to intervene, such a "denial" of the

petition is appealable. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977).

An appeal is taken by the filing of a petition for review within fifteen (15) days after service of the initial decision. 10 C.F.R. § 2.341(b)(1). Licensing Boards may not vary or extend the appeal periods provided in the regulations. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (1976); Consolidated Edison Co. (Indian Point Nuclear Generating Unit 3), ALAB-281, 2 NRC 6 (1975). While a motion for a time extension may be filed, mere agreement among the parties is not sufficient to show good cause for an extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

The rules for taking an appeal also apply to appeals from partial initial decisions. Once a partial initial decision is rendered, review must be filed immediately in accordance with the regulations or the review is waived. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

In the interest of efficiency, all rulings that deal with the subject matter of the hearing from which a partial initial decision ensues should be reviewed by the Commission at the same time. Therefore, the time to ask the Commission's review of any claim that could have affected the outcome of a partial initial decision, including bases that were not admitted or that were dismissed prior to the hearing, is immediately after the partial initial decision is issued. The parties should assert any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate "contention" or a "basis" for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

Efficiency does not require the Commission to review orders dismissing contentions or bases (or other preliminary order) unrelated to the subject matter of the hearing on which the Licensing Board issues its partial decision. Absent special circumstances, review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or until the Board completes its proceedings, depending on the nature of the preliminary ruling. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 354 (2000).

Although the time limits established by the Rules of Practice with regard to review of Licensing Board decisions and orders are not jurisdictional, policy is to construe them strictly. Hence untimely appeals are not accepted absent a demonstration of extraordinary and unanticipated circumstances. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162, 165 n.3 (1982), citing Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-894, 27 NRC 632, 635 (1988). Failure to file an appeal in a timely manner amounts to a waiver of the appeal. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974). The same rule applies to appeals of partial initial decisions. A party must file its petition for review without waiting for the Licensing Board's disposition of the remainder of the proceeding. Mississippi Power &

Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974).

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).

The timeliness of a party's brief on appeal from a Licensing Board's denial of the party's motion to reopen the record is determined by the standards applied to appeals from final orders, and not 10 C.F.R. § 2.311 (formerly § 2.714a(b)), which is specifically applicable to appeals from Board orders "wholly denying a petition for leave to intervene and/or request for a hearing." Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 18 n.6 (1986).

It is accepted appellate practice for the appeal period to be tolled while the trial tribunal has before it an authorized and timely-filed petition for reconsideration of the decision or order in question. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-659, 14 NRC 983 (1981).

Pursuant to 10 C.F.R. § 2.311 (formerly § 2.714a), an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. South Texas Project Nuclear Operating Company (South Texas Project Units 3 & 4), CLI-09-18, 70 NRC 859, 861-62 (2009). A Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

Finality of a decision is usually determined by examining whether it disposes of at least a major segment of the case or terminates a party's right to participate. The general policy is to strictly enforce time limits for appeals following a final decision. However, where the lateness of filing was not due to a lack of diligence, but, rather, to a misapprehension about the finality of a Board decision, the appeal may be allowed as a matter of discretion. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-160 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-894, 27 NRC 632, 635-637 (1988).

A petitioner's request that the denial of his intervention petition be overturned, treated as an appeal under 10 C.F.R. § 2.311 (formerly § 2.714a), will be denied as untimely where it was filed almost three (3) months after the issuance of a Licensing Board's order, especially in the absence of a showing of good cause for the failure to file an appeal on time. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

#### **5.4.1 Variation in Time Limits on Appeals**

Only the Commission may vary the time for taking appeals; Licensing Boards have no power to do so. See Consolidated Edison Co. (Indian Point Nuclear Generating Unit 3), ALAB-281, 2 NRC 6 (1975).

Of course, mere agreement of the parties to extend the time for the filing of an appeal is not sufficient to show good cause for such a time extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

#### **5.5 Scope of Commission Review**

A petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the considerations listed in 10 C.F.R. § 2.341(b)(4)(i)-(v) (formerly § 2.786(b)(4)(i)-(v)). These considerations include a finding of material fact is erroneous, or in conflict with precedent; a substantial question of law or policy; or prejudicial procedural error.

When an issue is of obvious significance and is not fact-dependent, and when its present resolution could materially shorten the proceedings and guide the conduct of other pending proceedings, the Commission will generally dispose of the issue rather than remand it. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 517 (1977); Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006).

The Commission is not obligated to rule on every discrete point adjudicated below, so long as the Board was able to render a decision on other grounds that effectively dispose of the appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 466 n.25 (1982), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 15 (1981).

Acting as an appellate body, the Commission is free to affirm a Board decision on any ground finding support in the record, whether previously relied on or not. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (citing Hertz v. Luzenac America, Inc., 370 F.3d 1014, 1017 (10th Cir. 2004); Carney v. American Univ., 151 F.3d 1090, 1096 (D.C. Cir. 1998)). In CLI-05-1, the Commission rejected a timeliness challenge – that an argument made for the first time on appeal had not been the basis of the Board’s decision – when the argument had been made repeatedly in the course of the proceeding, including by the challenging party. PFS, CLI-05-1, 61 NRC at 165-66.

Where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 45-46 (2001).

On appeal evidence may be taken – particularly in regard to limited matters as to which the record was incomplete. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 (1978). However, since the Licensing Board is the initial fact-finder in NRC proceedings, authority to take evidence is

exercised only in exceptional circumstances. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-891, 27 NRC 341, 351 (1988).

A Staff appeal on questions of precedential importance may be entertained. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. See, e.g., Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 71 NRC \_\_\_ (July 8, 2010) (slip op. at 13). A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Opinions that, in the circumstances of the particular case, are essentially advisory in nature are reserved (if given at all) for issues of demonstrable recurring importance. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284-85 (1988).

There is some indication that a matter of recurring importance may be entertained on appeal in a particular case even though it may no longer be determinative in the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

On a petition for review, petitioner must adequately call the Commission's attention to claimed errors in the Board's approach. The Commission will not sift unaided through large swaths of earlier briefs in order to piece together and discern the petitioner's claims. Where the petitioner has submitted a complex set of pleadings that includes numerous detailed footnotes, attachments, and incorporations by reference, the Commission would not be able to discern what specific claims are being alleged. The Commission deems waived any arguments not raised before the Board or not clearly articulated in the petition for review. See Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 132 n.81(1995). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001); Hydro Resources, Inc., CLI-04-33, 60 NRC 581, 591-92 (2004). But cf. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 181-82 (2005), where for reasons of administrative efficiency, the Commission agreed to consider as part of an appeal an applicant's additional requests for redaction of allegedly privileged commercial information, even though the applicant would ordinarily have raised such supplemental requests initially with the Board. However, the Commission approved redaction of only one piece of information, where the rationale for approval was the same as for other information already redacted by the Board in its ruling; the Commission found no showing of good cause for the applicant's failure to seek Board protection for the other pieces of information in the request.

### **5.5.1 Issues Raised for the First Time on Appeal or in a Petition for Review**

Ordinarily an issue raised for the first time on appeal will not be entertained. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 348 (1978) (issues not raised in either proposed findings or

exceptions to the initial decision). Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 907 (1982); Public Service Electric and Gas Co. (Salem Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 20 (1986); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-872, 26 NRC 127, 133 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-924, 30 NRC 331, 358, 361 n.120 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 397 n.101 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000). Thus, as a general rule, an appeal may be taken only as to matters or issues raised at the hearing. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 (1978); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1021 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 343 (1973); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 221 (1997). A contention will not be entertained for the first time on appeal, absent a serious substantive issue, where a party has not pursued the contention before the Licensing Board through proposed findings of fact. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 143 (1982), citing Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). The disinclination to entertain an issue raised for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been, but were not, timely put before the Licensing Board. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

Once an appeal has been filed from a Licensing Board's decision resolving a particular issue, jurisdiction over that issue passes from the Licensing Board. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-859, 25 NRC 23, 27 (1987); See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 93 (1995). Once a partial initial decision has been appealed, supervening factual developments relating to major safety issues considered in the partial initial decision are properly before the appellate body, not the Licensing Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-383, 5 NRC 609 (1977); Shieldalloy Metallurgical Corp. (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 504 (2007).

An intervenor who seeks to raise a new issue on appeal must satisfy the criteria for reopening the record as well as the requirements concerning the admissibility of late-filed contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 248 n.29 (1986).

An intervenor must raise an issue before the Presiding Officer or the intervenor will be precluded from supplementing the record before the Commission. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 243 (2000); Hydro Resources, Inc., CLI-06-29, 64 NRC 417, 421 (2006).

For reasons of administrative efficiency, the Commission agreed in CLI-05-1 to consider as part of an appeal an applicant's additional requests for redaction of allegedly privileged commercial information, even though the applicant would ordinarily have raised such supplemental requests initially with the Board. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 181 (2005). However, the Commission approved redaction of only one piece of information, where the rationale for approval was the same as for other information already redacted by the Board in its ruling; the Commission found no showing of good cause for the applicant's failure to seek Board protection for the other pieces of information in the request. Id. at 182.

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken to an initial decision rests with the appellate body rather than the Licensing Board. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755, 757 n.3 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1713 n.5 (1985).

An appeal may only be based on matters and arguments raised below. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 20 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 496 n.28 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 235 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 281 (1987). Even though a party may have timely appealed a Licensing Board's ruling on an issue, the appeal may not be based on new arguments offered by the party on appeal and not previously raised before the Licensing Board. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82-83 (1985). Cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-27, 22 NRC 126, 131 n.2 (1985). See Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 812 (1986); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-880, 26 NRC 449, 457 (1987), remanded on other grounds sub nom. Sierra Club v. NRC, 862 F.2d 222, 229-30 (9th Cir. 1988). See also USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 44 (2004); Shieldalloy Metallurgical Corp. (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 504 (2007). A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 47-48 (1984). A party is not permitted to raise on appellate review Licensing Board practices to which it did not object at the hearing stage. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 378 (1985). "In Commission practice the Licensing Board, rather than the Commission itself, traditionally develops the factual record in the first instance." Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49, 51 (1997), citing Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-10, 42 NRC 1, 2 (1995); accord, Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-5, 45 NRC 355, 356 (1997).

### **5.5.2 Effect on Appeal of Failure to File Proposed Findings**

A party's failure to file proposed findings on an issue may be "taken into account" if the party later appeals that issue. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 864 (1974); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 333 (1973). Absent a Licensing Board order requiring the submission of proposed findings of fact and conclusions of law, an intervenor that does not make such a filing nevertheless is free to pursue on appeal all issues it litigated below. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 19, 20 (1983).

### **5.5.3 Matters Considered on Appeal of Ruling Allowing Late Intervention**

One exception to the rule prohibiting interlocutory appeals is that a party opposing intervention may appeal an order admitting the intervenor. 10 C.F.R. § 2.311 (formerly § 2.714a). See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 n.7 (1976). However, since Licensing Boards have broad discretion in allowing late intervention, an order allowing late intervention is limited to determining whether that discretion has been abused. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 107 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). The papers filed in the case and the uncontroverted facts set forth therein will be examined to determine if the Licensing Board abused its discretion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8 (1977).

### **5.5.4 Consolidation of Appeals on Generic Issues**

Where the issues are largely generic, consolidation will result in a more manageable number of litigants, and relevant considerations will likely be raised in the first group of consolidated cases. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-540, 9 NRC 428, 433 (1979), reconsid. denied, ALAB-546, 9 NRC 636 (1979). The Appeal Board consolidated and scheduled for hearing radon cases where intervenors were actively participating and held the remaining cases in abeyance.

## **5.6 Standards for Reversing Licensing Board on Findings of Fact and Other Matters**

Licensing Board rulings are affirmed where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board's decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000); Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (noting that the Commission affords its Licensing Boards substantial deference on threshold issues, such as standing and the admissibility of contentions).

Licensing Boards are the Commission's primary fact-finding tribunals. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975).



Pursuant to 2 C.F.R. § 2.341(b)(4) (formerly 2 C.F.R. § 2.786(b)(4)), the Commission will generally defer to the Board on its fact-findings absent a showing that the Board's findings were "clearly erroneous," meaning that, in light of the record viewed in its entirety, the findings were not even plausible. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005).

The normal deference that an appellate body owes to the trier of the fact when reviewing a decision on the merits is even more compelling at the preliminary state of review. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 133 (1982), citing Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-385, 5 NRC 621, 629 (1977).

In general, the Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically commands, the record compels a different result. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975); accord, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858 (1975); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181-82 (1989); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-932, 31 NRC 371, 397-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-947, 33 NRC 299, 365 n.278 (1991). The same standard applies even if the review is sua sponte. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981). In fact, where the record would fairly sustain a result deemed "preferable" by the agency to the one selected by the Licensing Board, the agency may substitute its judgment for that of the lower Board. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976). Nevertheless, a finding by a Licensing Board will not be overturned simply because a different result could have been reached. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Moreover, the "substantial evidence" rule does not apply to the NRC's internal review process and hence does not control evaluation of Licensing Board decisions. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

Where the Board's decision for the most part rests on its own carefully rendered factual findings, the Commission has repeatedly declined to second-guess plausible Board decisions. See, e.g., Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 45 (2001); Louisiana

Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998); Kenneth G. Pierce, CLI-95-6, 41 NRC 381, 382 (1995); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001); Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006); David Geisen, CLI-06-19, 64 NRC 9, 11 (2006), citing Andrew Siemaszko, CLI-06-12, 63 NRC 495, 501 & n.14 (2006). But see, Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-29, 60 NRC 417, 423 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004) (Ordinarily the Commission is disinclined to second-guess a Board's finding on a discovery dispute, as the Board is more familiar than the Commission with the nature of the contentions in a particular proceeding. However, the Commission reversed a Board discovery ruling where the Commission had particular knowledge of the history and scope of the requested guidance documents because it had participated in their formulation.)

The Commission tends not to upset the findings of a Presiding Officer on fact-specific technical issues, where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor. In particular, the Commission is reluctant to disturb the Presiding Officer's findings and conclusions where the Presiding Officer has weighed the submissions of experts. Occasionally, the Commission may choose to make its own findings of fact. But it does not generally exercise that authority where a Presiding Officer or Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact. Hydro Resources, Inc., CLI-06-29, 64 NRC 417, 422-23 (2006).

The Commission is generally not inclined to upset the Board's fact-driven findings and conclusions, particularly where it has weighed the affidavits or submissions of technical experts. AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 675 (2008) (refusing to review Board's weighing of evidence in decision on motion to reopen). Where the Board analyzed the parties' technical submissions carefully, and made intricate and well-supported findings in a 42-page opinion, the Commission saw no basis, on appeal, to redo the Board's work. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 388 (2001), aff'g LBP-00-12, 51 NRC 247, 269-280 (2000). See also Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005). Where a Presiding Officer reaches highly fact-specific findings following a review of technical information and consultation with technical experts, the Commission will ordinarily defer to these findings, absent an indication of a clearly erroneous finding. Hydro Resources, Inc., CLI-04-39, 60 NRC 657, 659 (2004).

The Commission standard of "clear error" for overturning Board factual findings is quite high, particularly with respect to intricate factual findings based on expert witness testimony and credibility determinations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26-27 (2003). See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 174 (2005). (The Commission traditionally defers to a Board's disclosure-related factual findings, and will reverse only if the findings are "clearly erroneous" (quoting 10 C.F.R. § 2.786(b)(4)(i) [now 10 C.F.R. § 2.341(b)(4)(i)]).)

The fact that a Board accorded greater weight to one party's evidence than to the others' is not a basis for overturning the Board's decision. David Geisen, CLI-10-23, 72 NRC \_\_\_ (Aug. 27, 2010) (slip op. at 12).

While the Commission has discretion to review all underlying factual issues de novo, it is disinclined to do so where the Board has weighed arguments presented by experts and rendered reasonable, record-based factual findings. The Commission generally steps in only to correct clearly erroneous findings – that is, findings not even plausible in light of the record reviewed in its entirety. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-06-15, 63 NRC 687, 697 (2006). See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

The Commission avoids engaging in de novo factual inquiries when reviewing Board decisions, particularly where the Board proceeding was especially complex and involved numerous experts and voluminous exhibits and where the Board has devoted weeks or months to the controversy. In general, the Commission will defer to the Board's factual findings unless there is strong reason to believe, in the case at hand, that the Board has overlooked or misunderstood important evidence. PFS, CLI-05-19, 62 NRC at 411. However, for conclusions of law, the Commission will review questions de novo and will reverse a Board's legal rulings if they depart from or are contrary to established law. Pa'ina Hawaii, LLC (Materials License Application), CLI-10-18, 71 NRC \_\_\_ (July 8, 2010) (slip op. at 20), quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

The Board could not be said to have given short shrift to intervenor's quality assurance concerns where the Board admitted the issue for hearing, allowed discovery, obtained written evidence, heard oral argument, and the Board ultimately devoted some 11 pages of its order to discussing the quality assurance issue on the merits. The Commission would not ordinarily second-guess Board fact-findings, particularly those reached with this degree of care. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391 (2001).

In a materials licensing proceeding concerning uranium mining, the Commission found that the intervenors' hearing rights were not violated where they had the opportunity to challenge the adequacy of the groundwater-related information submitted by the applicant and the Staff, as well as the methodology that would be used during the operational stages of mining to assure protection of groundwater quality. Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 6 (2006).

A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). Thus, a Licensing Board's failure to clearly set forth the basis for its decision is ground for reversal. Although the Licensing Board is the primary fact-finder, the Commission may make factual findings based on its own review of the record and decide the case accordingly. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

Licensing Board determinations on the timeliness of filing of motions are unlikely to be reversed on appeal as long as they are based on a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 159-160 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A Licensing Board's determination that an intervenor has properly raised and presented an issue for adjudication is entitled to substantial deference and will be overturned only when it lacks a

rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 & 5), ALAB-485, 7 NRC 986, 980 (1978).

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980). A Licensing Board finding that is based on testimony later withdrawn from the record will stand, if there is sufficient evidence elsewhere in the record to support the finding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 84 (1986).

Where a Licensing Board imposed an incorrect remedy, on appeal there may be a search for a proper one. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234-235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

If conditions on a license are invalid, the matter will be either remanded to the Board or the Commission may prescribe a remedy itself. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-577, 11 NRC 18, 31 (1980), reconsid., ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Appeal Board would not ordinarily conduct a de novo review of the record and make its own independent findings of fact since the Licensing Board is the basic fact-finder under Commission procedures. Wisconsin Electric Power Co. (Point Beach Nuclear Plant No. 2), ALAB-78, 5 AEC 319 (1972). In this regard, Appeal Boards were reluctant to make essentially basic environmental findings which did not receive Staff consideration in the final environmental impact statement or adequate attention at the Licensing Board hearing. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-260, 1 NRC 51, 55 (1975).

The Commission's review of a Board's settlement decision is de novo, although the Commission gives respectful attention to the Board's views. In its review, the Commission uses the "due weight to...staff" and "public-interest" standards set forth in 10 C.F.R. § 2.203 and New York Shipbuilding Co., 1 AEC 842 (1961). Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 206 (1997).

The Staff's position, while entitled to "due weight," is not itself dispositive of whether an enforcement settlement should be approved. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-97-13, 46 NRC 195, 207-09 (1997).

The Commission ordinarily defers to the Licensing Board standing determinations, and upheld the Presiding Officer's refusal to grant standing for petitioner's failure to specify its proximity-based standing claims. Atlas Corp. (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997).

A Licensing Board normally has considerable discretion in making evidentiary rulings, and the Commission's standard for review of these rulings is abuse of discretion. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004).

### 5.6.1 Standards for Reversal of Rulings on Intervention

The Commission's customary practice is to affirm Board rulings on contention admissibility absent an abuse of discretion or error of law. Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 729 (2006).

On specific matters, a Licensing Board's determination as to a petitioner's "personal interest" will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 193 (1973). In the absence of a clear misapplication of the facts or misunderstanding of the law, the Licensing Board's judgment at the pleading stage that a party has standing is entitled to substantial deference. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001).

A Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

A Licensing Board ruling on a discretionary intervention request will be reversed only if the Licensing Board abused its discretion. Andrew Siemaszko (CLI-06-16, 63 NRC 708, 715 (2006).

The Commission generally defers to the presiding officer's determinations regarding standing, absent an error of law or an abuse of discretion. U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC \_\_ (Aug. 12, 2010) (slip op. at 3); International Uranium Corporation (White Mesa Uranium Mill), CLI 98-6, 47 NRC 116, 118 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), CLI-98-20, 48 NRC 183 (1998); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1988).

The principle that Licensing Board determinations on the sufficiency of allegations of affected interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

Licensing Boards have broad discretion in balancing the eight factors which make up the criteria for nontimely filings listed in 10 C.F.R. § 2.309(c) (formerly § 2.714(a)(1)). However, a Licensing Board's decision may be overturned where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-918, 29 NRC 473, 481-82 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), dismissed as moot, ALAB-946, 33 NRC 245 (1991).

Where a Licensing Board holds that a contention is inadmissible for failing to meet more than one of the requirements specified in § 2.309(f)(1)(i)-(vi), a petitioner's failure to address each ground for the Board's ruling is sufficient justification for the Commission to reject the petitioner's appeal. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

## 5.7 Stays

The Rules of Practice do not provide for an automatic stay of an order upon the filing of an appeal. A specific request must be made. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-714, 17 NRC 86, 97 (1983). The provision for stays in 10 C.F.R. § 2.342 (formerly § 2.788) provides only for stays of decisions or actions in the proceeding under review. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

A stay of the effectiveness of a Licensing Board decision pending review of that decision may be sought by the party appealing the decision. 10 C.F.R. § 2.342 (formerly § 2.788) confers the right to seek stay relief only upon those who have filed (or intend to file) a timely petition for review of a decision or order sought to be stayed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979).

Such a stay is normally sought by written motion, although, in extraordinary circumstances, a stay *ex parte* may be granted. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420 (1974). The movant may submit affidavits in support of his motion; opposing parties may file opposing affidavits, and it is appropriate for the appellate tribunal to accept and consider such affidavits in ruling on the motion for a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-356, 4 NRC 525 (1976). The party seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977).

General assertions, in conclusionary terms, of alleged harmful effects are insufficient to demonstrate entitlement to a stay. United States Dep't of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721,

17 NRC 539, 544 (1983), citing Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 530 (1978).

In the past it has been held that, as a general rule, motions for stay of a Licensing Board action should be directed to the Licensing Board in the first instance. Under those earlier rulings, the Appeal Board made it clear that, while filing a motion for a stay with the Licensing Board is not a jurisdictional prerequisite to seeking a stay from the Appeal Board, Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976), the failure, without good cause, to first seek a stay from the Licensing Board is a factor which the Appeal Board would properly take into account in deciding whether it should itself grant the requested stay. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977); Public Service Co. of New Hampshire, ALAB-338, 4 NRC 10 (1976). See also Toledo Edison Co. (Davis-Besse Nuclear Power Plant), ALAB-25, 4 AEC 633, 634 (1971).

Under 10 C.F.R. § 2.342(f) (formerly § 2.788), a request for stay of a Licensing Board decision, pending the filing of a petition for Commission review, may be filed with either the Licensing Board or the Commission.

The Commission applies the factors in 10 C.F.R. § 2.342(e) to requests to stay issuance of a license or license amendment. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008); Entergy Nuclear Operations and Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station) CLI-06-8, 63 NRC 235, 237 (2006). These are the same factors considered by courts in granting emergency injunctive relief. CLI-08-13, 67 NRC at 399.

Where the Commission issues a stay wholly as a matter of its own discretion, it does not need to address the factors listed in 10 C.F.R. § 2.342 (formerly § 2.788). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 60 (1996).

In ruling on stay requests, the Commission has held that irreparable injury is the most crucial factor. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008) (stating that if the movant cannot show irreparable harm, it must make an “overwhelming showing” of likelihood of success on the merits, *i.e.*, that success on the merits is a “virtual certainty”). See also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981).

The effectiveness of conditions imposed in a construction permit may be stayed without staying the effectiveness of the permit itself. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

An appellate tribunal may entertain and grant a motion for a stay pending remand of a Licensing Board decision. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

The provisions of 10 C.F.R. § 2.342 (formerly § 2.788) apply only to requests for stays of decisions of the Licensing Board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a “Motion for Reconsideration” and/or a

Motion to Hold in Abeyance.” Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251 (1993). The date of service for purposes of computing the time for filing a stay motion under Section 2.342 (formerly Section 2.788) is the date on which the Docketing and Service Branch of the Office of the Secretary of the Commission serves the order or decision. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-414, 5 NRC 1425, 1427-1428 (1977).

The Commission may issue a temporary stay to preserve the status quo without waiting for the filing of an answer to a motion for stay. 10 C.F.R. § 2.342(f) (formerly § 2.788(f)). The issuance of a temporary stay is appropriate where petitioners raise serious questions, that, if petitioners are correct, could affect the balance of the stay factors set forth in 10 C.F.R. § 2.342(e) (formerly § 2.788(e)). Hydro Resources, Inc., LBP-98-3, 47 NRC 7 (1998); Hydro Resources, Inc., CLI-98-4, 47 NRC 111, 112 (1998).

Where a party files a stay motion with the Commission pursuant to 10 C.F.R. § 2.323 (formerly § 2.730) (which contains no standards by which to decide stay motions), the Commission will turn for guidance to the general stay standards in Section 2.342 (formerly Section 2.788). Sequoyah Fuels Corporation and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6 (1994). Thus, a full stay pending judicial review of a Commission decision may require the movant to meet the Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), criteria. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974).

If, absent a stay pending appeal, the status quo will be irreparably altered, grant of a stay may be justified to preserve the Commission’s ability to consider, if appropriate, the merits of a case. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-83-6, 17 NRC 333, 334 (1983).

### **5.7.1 Requirements for a Stay Pending Review**

The Commission may stay the effectiveness of an order if it has ruled on difficult legal questions and the equities of the case suggest that the status quo should be maintained during an anticipated judicial review of the order. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80 (1992), citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

#### **5.7.1.1 Stays of Initial Decisions**

Stays of an initial decision will be granted only upon a showing similar to that required for a preliminary injunction in the federal courts. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). The test to be applied for such a showing is that laid down in Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420, 421 (1974). See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-647, 14 NRC 27 (1981); South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear



Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1184-85 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-40, 18 NRC 93, 96-97 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1599 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1618 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.5 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-877, 26 NRC 287, 290 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 257 & n.59 (1990); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 267 (1990); Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103-104 (1990); Curators of the University of Missouri, LBP-90-35, 32 NRC 259, 265-66 (1990); Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55 (1993); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6 (1994).

### 5.7.1.2 Stays of Board Proceedings, Interlocutory Rulings and Staff Action

The Virginia Petroleum Jobbers rule applies not only to stays of initial decisions of Licensing Boards, but also to stays of Licensing Board proceedings in general, Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975), and stays pending judicial review, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). In addition, the concept of a stay pending consideration of a petition for directed certification has been recognized. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976). The rule applies to stays of LWAs, Public Service Co. of Indiana (Marble Hill Nuclear Generating

Station, Units 1 & 2), ALAB-437, 6 NRC 630 (1977), as well as to requests for emergency stays pending final disposition of a stay motion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). The rule also applies to stays of implementation and enforcement of radiation protection standards. Environmental Radiation Protection Standards for Nuclear Power Operations (40 C.F.R. 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 C.F.R. Parts 30, 40, 70, and 150), CLI-81-9, 13 NRC 460, 463 (1981). It also applies to postponements of the effectiveness of some license amendments issued by the NRC Staff. In the case of a request for postponement of an amendment, the Commission has stated that a bare claim of an absolute right to a prior hearing on the issuance of a license amendment does not constitute a substantial showing of irreparable injury as required by 10 C.F.R. § 2.342 (formerly § 2.788(e)). Nuclear Fuel Services, Inc. and New York State Energy Research & Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981). The rule has been applied to a stay of enforcement orders. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

However, the NRC Staff's issuance of an immediately effective license amendment based on a "no significant hazards consideration" finding is a final determination which is not subject to either a direct appeal or an indirect appeal to the Commission through the request for a stay. In special circumstances, the Commission may, on its own initiative, exercise its inherent discretionary supervisory authority over the Staff's actions in order to review the Staff's "no significant hazards consideration" determination. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); 10 C.F.R. § 50.58(b)(6).

Where petitioners do not relate their stay request to any action in the proceeding under review, the request for stay is beyond the scope of 10 C.F.R. § 2.342 (formerly § 2.788). Such a request is more properly a petition for immediate enforcement action under 10 C.F.R. § 2.206. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

Interlocutory appeals or petitions to the Commission are not devices for delaying or halting Licensing Board proceedings. The stringent four-part standard set forth in Section 2.342(e) (formerly Section 2.788(e)) makes it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding. Therefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission. Cf. 10 C.F.R. § 2.323(g) (formerly § 2.730(g)). Sequoyah Fuels Corporation and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6 (1994).

A party may file a motion for the Commission to stay the effectiveness of an interlocutory Licensing Board ruling, pursuant to 10 C.F.R. § 2.342 (formerly § 2.788), pending the filing of a petition for interlocutory review of that Board order. See Georgia Power Co., et al. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-94-5, 39 NRC 190, 193 (1994).

The provisions of 10 C.F.R. § 2.342 (formerly § 2.788) apply only to requests for stays of decisions of the Licensing Board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a “Motion for Reconsideration” and/or a “Motion to Hold in Abeyance.” Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251 (1993).

When ruling on stay motions in a license transfer proceeding, the Commission applies the four-pronged test set forth in 10 C.F.R. § 2.1327(d):

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000).

The application for a stay will be denied when intervenors do not make a strong showing that they are likely to prevail on the merits or that they will be irreparably harmed pending appeal of the Licensing Board’s decision. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

Note that 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 proceedings on remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1, 2, & 3), CLI-77-8, 5 NRC 503 (1977). The Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balance of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-89-15, 30 NRC 96, 100 (1989). Similarly, in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977), the Appeal Board ruled that the criteria for a stay pending remand differ from those required for a stay pending appeal. Thus, it appears that the criteria set forth in 10 C.F.R. § 2.342 (formerly § 2.788) may not apply to requests for stays pending remand. Where a litigant who has prevailed on a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. In such circumstances, the negative impact of the court’s decision places a heavy burden of proof on those opposing the stay. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978).

Where petitioners who have filed a request to stay issuance of a low-power license are not parties to the operating license proceeding, and where petitioners’ request does not address the eight factors for untimely filing found in

10 C.F.R. § 2.309(c)(1)(i)-(viii) (formerly § 2.714(a)(1)(i)-(v)), the request cannot properly be considered in that operating license proceeding. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 57-58 (1993).

The Commission will hold a stay proceeding in abeyance pending the consummation of a tentative bankruptcy settlement that could make unnecessary an earlier Staff order approving the transfer of operating licenses. As the law favors settlements, the Commission will take this action absent a harm to third parties or the public interest. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-10, 58 NRC 127, 129 (2003).

### **5.7.1.3 10 C.F.R. § 2.342 (formerly § 2.788) and Virginia Petroleum Jobbers Criteria**

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 130 (1982). See 10 C.F.R. § 2.342(e) (formerly § 2.788(e)). See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100 (1994) (the Commission will decline a grant of petitioner's request to halt decommissioning activities where petitioner failed to meet the four traditional criteria for injunctive relief); Hydro Resources, Inc., LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies longstanding agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

Under the Virginia Petroleum Jobbers test, codified in 10 C.F.R. 2.342(e) (formerly 2.788(e)), four factors are examined:

- (1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
- (2) has the movant shown that, without the requested relief, it will be irreparably injured;
- (3) would the issuance of a stay substantially harm other parties interested in the proceeding;
- (4) where does the public interest lie?

Section 2.342(b)(2) (formerly Section 2.788(b)(2)) specifies that an application for a stay must contain a concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of that section. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993). See also Fansteel, Inc. (Muskogee, Oklahoma Facility), LBP-99-47, 50 NRC 409 (1999).

A party's failure to address the four stay factors in 10 C.F.R. § 2.342(e) is reason enough to deny a stay request. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers is on the movant. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795 (1981).

Stays pending appellate review are governed by 10 C.F.R. § 2.342 (formerly § 2.788). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 262-263 (2002); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 392 (2001).

A decision to deny a petition for review terminates adjudicatory proceedings before the Commission and renders moot a motion for a stay pending appeal. Carolina Power & Light Co. (Shearon Harris Power Plant), CLI-01-11, 53 NRC 370, 392 (2001).

The Commission took no action on the intervenor's stay motion during its consideration of the intervenor's petition for review because it saw no possibility of irreparable injury where the record indicated that the injury asserted by the intervenor could not occur until nearly four months hence and even at that point the additional spent fuel stored at the site would be no more than 150 fuel elements in that calendar year. Moreover, the intervenor's claim of injury-offsite radiation exposure in the event of a spent fuel pool accident was speculative. These facts taken together result in a small likelihood of an accident occurring, and do not amount to the kind of "certain and great" harm necessary for a stay. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 392-93 (2001). See Cuomo v. NRC, 772 F.2d 972, 976 (D.C. Cir. 1985); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 747-48 & n.20 (1985).

Where the four factors set forth in 10 C.F.R. § 2.342(e) (formerly § 2.788(e)) are applicable, no one of these criteria is dispositive. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); Babcock and Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255 (1992). Rather, the strength or weakness of the movant's showing on a particular factor will determine how strong his showing on the other factors must be in order to justify the relief he seeks. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-81-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). Of the four stay factors, "the most crucial is whether irreparable injury will be incurred by the movant absent a stay." Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981). Accord, Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 7 (1994); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001). International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227 (2002), see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258 (1990). In any event, there should be more than a mere showing of the possibility of legal error by a Licensing Board to

warrant a stay. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95 (1975); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-158, 6 AEC 999 (1973). The establishment of grounds for appeal is not itself sufficient to justify a stay. Rather, there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-385, 5 NRC 621 (1977).

#### **5.7.1.3.1 Irreparable Injury**

Irreparable injury is the most important of the four factors considered for the grant of a stay. David Geisen, CLI-09-23, 70 NRC 935, 936 (2009), citing Entergy Nuclear Operations and Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station) CLI-06-8, 63 NRC 235, 237 (2006)). See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Dep't of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 & n.7 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 436 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258 (1990); Hydro Resources, Inc., LBP-98-5, 47 NRC 119 (1998); Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 321 n.5 (1998). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978). See also Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). It is the established rule that a party is not ordinarily granted a stay of an administration order without an appropriate showing of irreparable injury. Id. (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968)). Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1633-35 (1984)). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989); Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 324 (1998); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC 42, 48 (2002);

U.S. Dept. of Energy (High Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005).

Without a showing of irreparable injury, a petitioner for a stay must show that success on the merits is a “virtual certainty” to prevail. Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC \_\_\_ (Jan. 7, 2010) (slip op. at 16), quoting David Geisen, CLI-09-23, 70 NRC at 937.

A party is not ordinarily granted a stay absent an appropriate showing of irreparable injury. Where a decision as to which a stay is sought does not allow the issuance of any licensing authorization and does not affect the status quo ante, the movant will not be injured by the decision and there is, quite simply, nothing for the tribunal to stay. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978).

Where the Licensing Board’s decision is itself the cause of irreparable injury, a stay of proceedings pending review is appropriate. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 (2002).

The irreparable injury requirement is not satisfied by some cost merely feared as liable to occur at some indefinite time in the future. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-385, 5 NRC 621 (1977). Mere economic loss does not constitute irreparable injury. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 81 (1992), citing Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288, 291 (6th Cir. 1987). Nor are actual injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, sufficient to justify a stay if not irreparable. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-385, 5 NRC 621 (1977); see Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC 42, 49 (2002).

The mere possibility that a stay would save other parties from incurring significant litigation expenses is insufficient to offset the movant’s failure to demonstrate irreparable injury and a strong likelihood of success on the merits. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). Discovery in a license amendment case does not constitute irreparable injury. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-8, 37 NRC 292, 298 (1993). Litigation expense, even

substantial and unrecoverable cost, does not constitute irreparable injury. U.S. Dept. of Energy (High Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10 C.F.R. Parts 30, 40, 70, and 150), CLI-81-9, 13 NRC 460, 465 (1981), citing Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

An intervenor's claim that an applicant's commitment of resources to the operation of a facility pending an appeal will create a Commission bias in favor of continuing a license does not constitute irreparable injury. The Commission has clearly stated that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258-59 (1990), citing Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1985). Additionally, a party's claim that discovery expenses might deplete assets allotted for decommissioning activities does not constitute irreparable injury. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6 (1994). However, the Commission also noted that the commitment of resources and other economic factors are properly considered in the National Environmental Policy Act (NEPA) decisionmaking process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258 n.62 (1990). Thus, a party challenging the alternative site selection process may be able to show irreparable injury if a stay is not granted to halt the development of a proposed site during the pendency of its appeal. Any resources which might be expended in the development of the proposed site would have to be considered in any future cost-benefit analysis and, if substantial, could skew the cost-benefit analysis in favor of the proposed site over any alternative sites. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 268-269 (1990).

The fact that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 233 (2002). It must also be established that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-84-5, 19 NRC 953, 964 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 271 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 259-260 (1990).



The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-8, 29 NRC 399, 410 (1989). Similarly, irreversible changes produced by the irradiation of the reactor during low-power testing do not constitute irreparable injury. Seabrook, CLI-89-8, *supra*, 29 NRC at 411.

Mere exposure to the risk of full-power operation of a facility does not constitute irreparable injury when the risk is so low as to be remote and speculative. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 180 (1985).

The importance of a showing of irreparable injury absent a stay was stressed by the Appeal Board in Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 530 (1978), where the Appeal Board indicated that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure.

A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to obtain the grant of a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 260 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6 (1994).

#### **5.7.1.3.2 Possibility of Success on Merits**

The “level or degree of possibility of success” on the merits necessary to justify a stay will vary according to the tribunal’s assessment of the other factors that must be considered in determining if a stay is warranted. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); Hydro Resources, Inc., LBP-98-5, 47 NRC 119, 120 (1998). Where there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an overwhelming showing of likelihood of success on the merits is required to obtain a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-415, 5 NRC 1435, 1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-865, 25 NRC 430, 439 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 362-63 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 7 (1994).

To make a strong showing of likelihood of success on the merits, the movant must do more than list the possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795 (1981); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269-70 (1990). A party's expression of confidence or expectation of success on the merits of its appeal before the Commission or the Boards is too speculative and is also insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

While the Commission will grant a stay where the chance of reversal on appeal is "overwhelming" or "a virtual certainty," the Commission is reluctant to rush to judgment on the merits of an appeal, where there is no irreparable harm. U.S. Dept. of Energy (High Level Waste Repository), CLI-05-27, 62 NRC 715, 719 (2005).

Absent a demonstration of irreparable harm or likelihood of success on the merits, the Commission found it unnecessary to evaluate the two remaining factors as there was no basis upon which to grant a stay. Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC \_\_\_ (Jan. 7, 2010) (slip op. at 30).

#### **5.7.1.3.3 Harm to Other Parties and Where the Public Interest Lies**

If the movant for a stay fails to meet its burden on the first two 10 C.F.R. § 2.342(e) (formerly § 2.788(e)) factors, it is not necessary to give lengthy consideration to balancing the other two factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1635 (1984); Hydro Resources, Inc., LBP-98-5, 47 NRC 119, 120 (1998). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 363 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990); Sequoyah Fuels Corporation and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 8 (1994).

Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC proceedings, a Board may consider such interests in determining whether, under the third stay criterion, the granting of a stay would harm other parties. Thus, a Board may consider the potential economic harm to an applicant caused by a stay of the applicant's operating license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 180 (1985).

The imminence of the hearing is also a factor in a determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002).

In a decontamination enforcement proceeding where a licensee seeks a stay of an immediately effective order, the fourth factor – where the public interest lies – is the most important consideration. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 148 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

### **5.7.2 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 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. 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 Company (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).

### **5.7.3 Stays Pending Judicial Review**

Requests for stays pending judicial review have been entertained under the Virginia Petroleum Jobbers criteria (see Section 5.7.1, supra) to determine if a stay is appropriate. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974); Natural Resources Defense Council, CLI-76-2, 3 NRC 76 (1976).

Section 10(d) of the Administrative Procedure Act (5 U.S.C. § 705) pertains to an agency's right to stay its own action pending judicial review of that action. It confers no freedom on an agency to postpone taking some action when the impetus for the action comes from a court directive. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 783-84 (1977).

The Appeal Board suspended sua sponte its consideration of an issue in order to await the possibility of Supreme Court review of related issues, following the rendering of a decision by the First Circuit Court of Appeals, where certiorari had not yet been sought or ruled upon for such Supreme Court review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-548, 9 NRC 640, 642 (1979).

#### **5.7.4 Stays Pending Remand After Judicial Review**

Where a litigant who has prevailed upon a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 160.

#### **5.7.5 Immediate Effectiveness Review of Operating License Decisions**

In a Federal Register notice dated Aug. 28, 2007 (72 Fed. Reg. 49,352), the Commission published a final rule amending 10 C.F.R. § 2.340. The amendments to § 2.340 make Presiding Officers' initial decisions in production and utilization proceedings immediately effective. See 72 Fed. Reg. at 49,415-16. Previously, 10 C.F.R. § 2.340(f)(2) (formerly § 2.764(f)(2)), provided that upon receipt of a Licensing Board's decision authorizing the issuance of a full-power operating license, the Commission would determine, sua sponte, whether to stay the effectiveness of the decision. Criteria to be considered by the Commission included, but were not limited to: the gravity of the substantive issue; the likelihood that it has been resolved incorrectly below; and the degree to which correct resolution of the issue would be prejudiced by operation pending review. Until the Commission spoke, the Licensing Board's decision was considered to be automatically stayed. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-647, 14 NRC 27 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-85-13, 22 NRC 1, 2 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-85-15, 22 NRC 184, 185 n.2 (1985).

The Commission's immediate effectiveness review is usually based upon a full Licensing Board decision on all contested issues. However, the Commission conducted an immediate effectiveness review and authorized the issuance of a full-power license for Limerick Unit 2, even though, pursuant to a federal court remand, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider environmental issues. The Commission noted that: (1) all contested safety issues had been fully heard and resolved; and (2) the NEPA does not always require resolution of all contested environmental issues and completion of the entire NEPA review process prior to the issuance of a license. Philadelphia Electric Co. (Limerick Generating Station, Unit 2), CLI-89-17, 30 NRC 105, 110 (1989), citing 40 C.F.R. 1506.1.

An intervenor's speculative comments are insufficient grounds for a stay of a Licensing Board's authorization of a full-power operating license. The intervenor must challenge the Licensing Board's substantive conclusions concerning contested issues in the proceeding. Carolina Power & Light Co. and North Carolina Eastern Municipal Power

Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 (1987), aff'd sub nom. Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

Prior to moving for a stay of issuance of the operating license, a person or persons who are not parties to the license proceeding must petition for and be granted late intervention and reopening. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251 (1993).

Where construction of a plant is “substantially completed” any request to stay construction is moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251, 254 (1993).

The Commission’s denial of a stay, pursuant to its immediate effectiveness review, does not preclude a party from petitioning under 10 C.F.R. § 2.341 (formerly § 2.786) for appellate review of the Licensing Board’s conclusions. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 n.3 (1987) (citing 10 C.F.R. § 2.764, now § 2.340), aff'd sub nom. Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

Prior to amendments to 10 C.F.R. § 2.340 (formerly § 2.764) in August 2007 (72 Fed. Reg. 49,352, 49,415 (Aug. 28, 2007)), before a full-power license can be issued for a plant, the Commission had to complete its immediate effectiveness review of the pertinent Licensing Board decision pursuant to 10 C.F.R. § 2.340(f)(2) (formerly § 2.764(f)(2)). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 144 n.26 (1982).

### **5.7.6 Stay/Suspension of Ongoing Adjudicatory Proceedings**

Although the Commission’s regulations do not provide for a motion to suspend a proceeding, the Commission is occasionally asked to consider a request to suspend or hold ongoing proceedings in abeyance as an exercise of the Commission’s inherent supervisory power over proceedings. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 & n.105 (2008) (listing in a footnote three prior cases in which the Commission was asked to suspend an ongoing proceeding). Suspension of an ongoing proceeding is a drastic action and is not warranted in the absence of “immediate threats to public health and safety.” Id.

## **5.8 Review as to Specific Matters**

### **5.8.1 Scheduling Orders**

Since a scheduling decision is a matter of Licensing Board discretion, it will generally not be disturbed absent a “truly exceptional situation.” Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 95 (1986). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-344, 4 NRC 207, 209 (1976) (Appeal Board was reluctant to overturn or otherwise interfere with scheduling

orders of Licensing Boards absent due process problems); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-637, 13 NRC 367 (1981) (Appeal Board was loath to interfere with a Licensing Board's denial of a request to delay a proceeding where the Commission has ordered an expedited hearing; in such a case, there must be a "compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" to invoke discretionary review); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-858, 25 NRC 17, 21 (1987) (petitioner failed to substantiate its claim that a Licensing Board decision to conduct simultaneous hearings deprived it of the right to a fair hearing); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-860, 25 NRC 63, 68 (1987) (intervenors' concerns about infringement of procedural due process were premature); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 277 (1987) (intervenor failed to show specific harm resulting from the Licensing Board's severely abbreviated hearing schedule); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-4, 29 NRC 243, 244 (1989). But see, USEC, Inc. (American Centrifuge Plant), CLI-07-5, 65 NRC 109 (2007) (reversing Board decision rejecting applicant's request to accelerate the Board's proposed mandatory hearing schedule because the Board based its mandatory hearing schedule on milestones for contested proceedings and failed to even acknowledge the Commission's goal of issuing a final Commission decision on the application within thirty (30) months of the application's submission).

In determining the fairness of a Licensing Board's scheduling decisions, the totality of the relevant circumstances disclosed by the record will be considered. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-864, 25 NRC 417, 421 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-889, 27 NRC 265, 269 (1988).

Where a party alleges that a Licensing Board's expedited hearing schedule violated its right to procedural due process by unreasonably limiting its opportunity to conduct discovery, an Appeal Board will examine: the amount of time allotted for discovery; the number, scope, and complexity of the issues to be tried; whether there exists any practical reason or necessity for the expedited schedule; and whether the party has demonstrated actual prejudice resulting from the expedited hearing schedule. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-864, 25 NRC 417, 421, 425-27 (1987). Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-541, 9 NRC 436, 438 (1979).

## 5.8.2 Discovery Rulings

### 5.8.2.1 Rulings on Discovery Against Non-Parties

An order granting discovery against a non-party is final and appealable by that non-party as of right. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). An order denying such discovery is wholly interlocutory and immediate review by the party seeking discovery is excluded by 10 C.F.R. § 2.341(f) (formerly § 2.730(f)). Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 380-81 (1984).

### 5.8.2.2 Rulings Curtailing Discovery

In appropriate instances, an order curtailing discovery is appealable. To establish reversible error from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery is impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). Absent such circumstances, however, an order denying discovery, and discovery orders in general, are not immediately appealable since they are interlocutory. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469, 472 (1981); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

## 5.8.3 Refusal to Compel Joinder of Parties

A Licensing Board's refusal to compel joinder of certain persons as parties to a proceeding is interlocutory in nature and, pursuant to 10 C.F.R. § 2.341 (formerly § 2.730(f)), is not immediately appealable. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

### 5.8.3.1 Order Consolidating Parties

Just as an order denying consolidation is interlocutory, an order consolidating the participation of one party with others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

## 5.8.4 Order Denying Summary Disposition

An order denying a motion for summary disposition under 10 C.F.R. § 2.710 (formerly § 2.749) is not immediately appealable. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33 (2008) (denying petition for review of Board order granting summary disposition of one of two admitted contentions). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 C.F.R. § 2.311 (formerly § 2.714a) exception to the prohibition on interlocutory appeals and may not be appealed. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977). See also Section 3.5.

### **5.8.5 Procedural Irregularities**

Absent extraordinary circumstances, alleged procedural irregularities will not be reviewed unless an appeal has been taken by a party whose rights may have been substantially affected by such irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974). In general, the Commission is very hesitant to disturb procedural case management decisions made by the Board. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 629 (2004); Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 71 NRC \_\_\_ (July 8, 2010) (slip op. at 58). See also Section 3.1.4 (discussing Licensing Board prejudice, bias, and disqualification).

### **5.8.6 Matters of Recurring Importance**

There is some indication that a matter of recurring procedural importance may be appealed in a particular case even though it may no longer be determinative in that case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), interlocutory review will be refused. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

### **5.8.7 Advisory Decisions on Trial Rulings**

Advisory decisions on trial rulings which resulted in no discernible injury ordinarily will not be considered on appeal. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).

Where a Board ruling on an issue has no present practical significance, and very likely will have no future practical significance, the Commission will hold an appeal from the ruling on that issue in abeyance rather than engaging in the “academic exercise” of reviewing it right away. U.S. Dept. of Energy (High Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004); U.S. Department of Energy (High-Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008) (reaffirming the policy that the Commission disfavors issuing advisory opinions where there is no actual dispute, merely an anticipated dispute).

### **5.8.8 Order on Pre-LWA Activities**

A Licensing Board order on the issue of whether offsite activity can be undertaken prior to the issuance of an LWA or a construction permit is immediately appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976).

### **5.8.9 Partial Initial Decisions**

Partial initial decisions which do not yet authorize construction activities still may be significant and, therefore, immediately appealable. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 871 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).



For the purposes of appeal, partial initial decisions which decide a major segment of a case, or terminate a party's right to participate, are final Licensing Board actions on the issues decided. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-25, 17 NRC 681, 684 (1983). See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981). The Commission's regulations in 10 C.F.R. § 2.341(b)(1) allow for petitions for review of full or partial initial decisions. See Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 71 NRC \_\_ (July 8, 2010) (slip op. at 10). A partial initial decision is a decision rendered after an evidentiary hearing on one or more contentions, but that does not dispose of the entire matter. A grant of summary disposition on a particular contention is not a partial initial decision. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34 (2008).

In the interest of efficiency, all rulings that deal with the subject matter of the hearing from which a partial initial decision ensues should be reviewed by the Commission at the same time. Therefore, the time to ask the Commission's review of any claim that could have affected the outcome of a partial initial decision, including bases that were not admitted or that were dismissed prior to the hearing, is immediately after the partial initial decision is issued. The parties should assert any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate "contention" or a "basis" for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

#### **5.8.10 Other Licensing Actions**

When a Licensing Board, during the course of an operating license hearing, grants a Part 70 license to transport and store fuel assemblies, the decision is not interlocutory and is immediately appealable as of right. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976).

When a Licensing Board's ruling removes any possible adjudicatory impediments to the issuance of a Part 70 license, the ruling is immediately appealable. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 45 n.1 (1984), citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-854, 24 NRC 783, 787 (1986) (a Licensing Board's dismissal by summary disposition of an intervenor's contention dealing with fuel loading and precriticality testing may be challenged in connection with the intervenor's challenge of the order authorizing issuance of the license).

#### **5.8.11 Evidentiary Rulings**

While all evidentiary rulings are ultimately subject to appeal at the end of the proceeding, not all such rulings are worthy of appeal. Some procedural and evidentiary errors almost invariably occur in lengthy hearings where the presiding officer must rule quickly. Only serious errors affecting substantial rights and which might have improperly influenced the outcome of the hearing merit exception and

briefing on appeal. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

Evidentiary exclusions must affect a substantial right, and the substance of the evidence must be made known by way of an offer of proof or be otherwise apparent, before the exclusions can be considered errors. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC 688, 697-98 n.14 (1982).

For a discussion of the procedure necessary to preserve evidentiary rulings for appeal, see Section 3.12.4.

### **5.8.12 Authorization of Construction Permit**

A decision authorizing issuance of a construction permit may be suspended. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). Immediate revocation or suspension of a construction permit, upon review of the issuance thereof, is appropriate if there are deficiencies that:

- (a) pose a hazard during construction;
- (b) need to be corrected before further construction takes place;
- (c) are incorrectable; or
- (d) might result in significant environmental harm if construction is permitted to continue.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 401 (1975).

Whether a public utility commission's consent is required before construction contracts can be entered into and carried out is a question of state law. If the state authorities want to suspend construction pending the results of the public utility commission's review, it is their prerogative. But the construction permit will not be suspended on the "strength of nothing more than potentiality of action adverse to the facility being taken by another agency" (citation omitted). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977).

### **5.8.13 Certification of Gaseous Diffusion Plants**

To be eligible to petition for review of a Director's decision on the certification of a gaseous diffusion plant, an interested party must have either submitted written comments in response to a prior Federal Register notice or provided oral comments at an NRC meeting held on the application or compliance plan. 10 C.F.R. § 76.62(c). U.S. Enrichment Corp., CLI-96-12, 44 NRC 231, 233-34, 236 (1996).

Individuals who wish to petition for review of an initial Director's decision must explain how their "interest may be affected." 10 C.F.R. § 76.62(c). For guidance, petitioners may look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp., CLI-96-12, 44 NRC 231, 234-36 (1996).

## 5.9 Perfecting Appeals

Normally, review is not taken of specific rulings (e.g., rulings with respect to contentions) in the absence of a properly perfected appeal by the injured party. Washington Public Power Supply System (Nuclear Projects 1 & 4), ALAB-265, 1 NRC 374 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974).

While the Commission does not require the same precision in the filings of laymen that is demanded of lawyers, any party wishing to challenge some particular Licensing Board action must at least identify the order in question, indicate that he is seeking review of it, and give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978).

### 5.9.1 General Requirements for Petition for Review of an Initial Decision

The general requirements for petitions for review from an initial decision are set out in 10 C.F.R. § 2.341 (formerly § 2.786). Section 2.341(b) (formerly Section 2.786(b)) provides that such a petition is to be filed within fifteen (15) days after service of the initial decision.

## 5.10 Briefs on Appeal

### 5.10.1 Importance of Brief

The filing of a brief in support of a § 2.311 (formerly § 2.714a) appeal is mandatory. The Commission upon taking review, pursuant to § 2.341 (formerly § 2.786), may order the filing of appropriate briefs. See 10 C.F.R. § 2.341(c) (formerly § 2.786(d)).

Failure to file a brief has resulted in dismissal of the entire appeal, even when the appellant was acting pro se. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 485 n.2 (1986); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-91-5, 33 NRC 238, 240-41 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-92-3, 35 NRC 63, 66-67 (1992); see also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975). Commission appellate practice has long stressed the importance of a brief. A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993).

Intervenors have a responsibility to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). Even parties who participate in NRC licensing proceedings pro se have an obligation to familiarize themselves with proper briefing format and with the Commission's Rules of Practice. Salem, 14 NRC at 50 n.7. See

Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-92-3, 35 NRC 63, 66 (1992).

When an intervenor is represented by counsel, there should be no need, and there is no requirement, to piece together or to restructure vague references in the intervenor's brief in order to make intervenor's arguments for it. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 51 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3rd Cir. 1982). Therefore, those aspects of an appeal not addressed by the supporting brief may be disregarded. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Unit 1 & 2), ALAB-693, 16 NRC 952 (1982); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974).

#### **5.10.2 Time for Submittal of Brief**

10 C.F.R. § 2.311(a) (formerly § 2.714a(a)) requires the filing of a notice of appeal and a supporting brief within ten (10) days after service of a Licensing Board order wholly denying a petition for leave to intervene. See Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991).

If the Commission grants review pursuant to 10 C.F.R. § 2.341 (formerly § 2.786) and seeks additional briefs from the parties, it will issue an order setting the schedule for the filing of any further briefs. See 10 C.F.R. § 2.341(c) (formerly § 2.786(d)).

The Commission may consider an untimely appeal if the appellant can show good cause for failure to file on time. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265-66 (1991).

The time limits imposed for filing briefs refer to the date upon which the appeal was actually filed and not to when the appeal was originally due to be filed prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is not necessary for a party to bring to the adjudicator's attention the fact that its adversary has not met prescribed time limits. Nor as a general rule will any useful purpose be served by filing a motion seeking to have an appeal dismissed because the appellant's brief was a few days late; the mailing of a brief on a Sunday or Monday which was due for filing the prior Friday does not constitute substantial noncompliance which would warrant dismissal, absent unique circumstances. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably

submitted, irrespective of the extent of the lateness. Apparently, however, the written explanation for the tardiness may be waived if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125-26 (1977).

If service of appellant's brief is made by mail, and the responsive brief is to be filed within a certain period after service of the appellant's brief, add three days to the time period for filing unless the proceeding was noticed before October 15, 2007. 10 C.F.R. § 2.306 (formerly § 2.710); 72 Fed. Reg. 49,139 (Aug. 28, 2007) (final rule implementing the Commission's e-filing requirements).

#### **5.10.2.1 Time Extensions for Brief**

Motions to extend the time for briefing are not favored. In any event, such motions should be filed in such a manner as to reach the Commission at least one day before the period sought to be extended expires. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (1973); Boston Edison Co. (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308 (1972). An extension of briefing time which results in the rescheduling of an already calendared oral argument will not be granted absent extraordinary circumstances. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-144, 6 AEC 628 (1973).

If unable to meet the deadline for filing a brief in support of its appeal of a Licensing Board's decision, a party is duty-bound to seek an extension of time sufficiently in advance of the deadline to enable a seasonable response to the application. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-568, 10 NRC 554, 555 (1979).

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably submitted, irrespective of the extent of the lateness. Apparently, however, the written explanation for the tardiness may be waived if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125-26 (1977).

#### **5.10.2.2 Supplementary or Reply Briefs**

A supplementary brief will not be accepted unless requested or accompanied by a motion for leave to file which sets forth reasons for the out-of-time filing. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-115, 6 AEC 257 (1973).

Material tendered by a party without leave to do so, after an appeal has been submitted for decision, constitutes improper supplemental argument. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981). See also Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, n.74 (2008) (stating that a letter and affidavit to the

Chairman from the petitioner was an unauthorized attempt by the petition to bolster its argument and therefore was not part of the record).

10 C.F.R. § 2.311 (formerly § 2.714a) does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. See Nuclear Engineering Co. (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

A permitted reply to an answer should only reply to opposing briefs and not raise new matters. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 243 n.9 (1980). The Commission disapproves of parties presenting their main arguments in reply briefs rather than initial briefs because it deprives the other parties of an opportunity to directly respond to those arguments. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-05-14, 61 NRC 359, 361-62 n.7 (2005).

### **5.10.3 Contents of Brief**

Any brief which in form or content is not in substantial compliance with appropriate briefing format may be stricken either on motion of a party or on the Commission's own motion. For example, an appendix to a reply brief containing a lengthy legal argument will be stricken when the appendix is simply an attempt to exceed the page limitations. 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).

An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

The brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issue raised on appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397 (1976); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). A brief which does not contain such information is tantamount to an abandonment of the issue. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 805

(1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-793, 20 NRC 1591, 1619 (1984).

At a minimum, briefs must identify the particular error addressed and the precise portions of the record relied upon in support of the assertion of error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 338 n.4 (1983); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) and Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986). This is particularly true where the Licensing Board rendered its rulings from the bench and did not issue a detailed written opinion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 702-03 n.27 (1985).

A brief must clearly identify the errors of fact or law that are the subject of the appeal and specify the precise portion of the record relied on in support of the assertion of error. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-880, 26 NRC 449, 464 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 424 (1980).

Claims of error that are without substance or are inadequately briefed will not be considered on appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 481 (1982); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-872, 26 NRC 127, 132 (1987); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 499 (1991). Issues which are inadequately briefed are deemed to be waived. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990). Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings are properly dismissed for inadequate briefing. Houston

Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 378 (1985).

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

An appeal may be dismissed when an inadequate brief makes its arguments impossible to resolve. Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 956 (1982), citing Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 413 (1976). See Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 348 n.7 (1983), citing Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 71 (1985), Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 n.74 (1986). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 & 2), ALAB-872, 26 NRC 127, 131 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-947, 33 NRC 299, 322 (1991).

Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 956 (1982), citing Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10 (1990). See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). Nonetheless, litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 956 (1982), citing Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). See Georgia Power Co. (Vogtle Electric



Generating Plant, Units 1 & 2), CLI-92-3, 35 NRC 63, 66 (1992). All parties appearing in NRC proceedings, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of the facts. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 n.6 (1986).

A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, and (2) relate to matters raised in the party's proposed findings of fact and conclusions of law. Arguments raised for the first time on appeal, absent a serious, substantive issue, are not ordinarily entertained on appeal. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 906-907 (1982).

All factual assertions in the brief must be supported by references to specific portions of the record. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 211 (1986). All references to the record should appear in the appellate brief itself; it is inappropriate to incorporate into the brief by reference a document purporting to furnish the requisite citations. Kansas Gas & Electric Company (Wolf Creek Generating Plant, Unit 1), ALAB-424, 6 NRC 122, 127 (1977).

Licensing Boards and the Commission should not be expected to consider items never provided on the record. Therefore it is incumbent upon the parties to ensure that documents and other evidence referenced in their briefs be available in the case record. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC \_\_\_ (March 26, 2010) (slip op. at 25 n.97).

Documents appended to an appellate brief will be stricken where they constitute an unauthorized attempt to supplement the record. However, if the documents were newly discovered evidence and tended to show that significant testimony in the record was false, there may be a sufficient basis to grant a motion to reopen the hearing. 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 451 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 720 n.51 (1985), citing Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).

Personal attacks on opposing counsel are not to be made in appellate briefs, Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-838 (1974), and briefs which carry out personal attacks in an abrasive manner upon Licensing Board members will be stricken. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

Established page limitations may not be exceeded without leave and may not be circumvented by use of "appendices" to the brief. Toledo Edison Co. and Cleveland

Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977).

A request for enlargement of the page limitation on a showing of good cause should be filed at least seven (7) days before the date on which the brief is due. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 n.3 (1986).

#### **5.10.3.1 Opposing Briefs**

Briefs in opposition to the appeal should concentrate on the appellant's brief. See Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 52 n.39 (1976).

#### **5.10.3.2 Amicus Curiae Briefs**

Amicus curiae briefs are limited to the matters already at issue in the proceeding. "[A]n amicus curiae necessarily takes the proceeding as it finds it. An amicus curiae can neither inject new issues into a proceeding nor alter the content of the record developed by the parties." Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 150 (1987) (footnote omitted); Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997).

Our rules contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. Louisiana Energy Services (Claiborne Enrichment Center), CLI 97-7, 45 NRC 437, 438-39 (1997). See also Section 5.2.1 for discussion of procedures for and timing of amicus briefs.

### **5.11 Oral Argument**

The Commission, in its discretion, may allow oral argument upon the request of a party made in a notice of appeal or brief, or upon its own initiative. 10 C.F.R. § 2.343 (formerly § 2.763). The Commission will deny a request for oral argument where it determines that, based on the written record, it understands the positions of the participants and has sufficient information upon which to base its decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 68-69 (1992); Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Coop. (North Anna Power Station, Unit 3), LBP-08-23, 68 NRC 679, 683 (2008).

The Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 68-69 (1992); In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 23 n.1 (1989).

A late intervention petitioner may request oral argument on its petition. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69 n.4 (1992).

All parties are expected to be present or represented at oral argument unless specifically excused by the Board. Such attendance is one of the responsibilities of all parties when they participate in Commission adjudicatory proceedings. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-666, 15 NRC 277, 279 (1982).

#### **5.11.1 Failure to Appear for Oral Argument**

If for sufficient reason a party cannot attend an oral argument, it should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported. A bare declaration of inadequate financial resources is clearly deficient. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-666, 15 NRC 277, 279 (1982).

Failure to advise of an intent not to appear at oral argument already calendared is discourteous and unprofessional and may result in dismissal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-337, 4 NRC 7 (1976).

#### **5.11.2 Grounds for Postponement of Oral Argument**

Postponement of an already calendared oral argument for conflict reasons will be granted only upon a motion setting out:

- (1) the date the conflict developed;
- (2) the efforts made to resolve it;
- (3) the availability of alternate counsel;
- (4) public and private interest considerations;
- (5) the positions of the other parties;
- (6) the proposed alternate date.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-165, 6 AEC 1145 (1973).

A party's inadequate resources to attend oral argument, properly substantiated, may justify dispensing with oral argument. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-666, 15 NRC 277, 279 (1982).

#### **5.11.3 Oral Argument by Non-Parties**

Under 10 C.F.R. § 2.315(d) (formerly § 2.715(d)), a person who is not a party to a proceeding may be permitted to present oral argument to the Commission. A motion to participate in the oral argument must be filed and non-party participation is at the discretion of the Commission.

### **5.12 Interlocutory Review**

#### **5.12.1 Interlocutory Review Disfavored**

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question whether the petition should have been wholly denied (10 C.F.R. § 2.311 (formerly § 2.714a)), there is no right to appeal any interlocutory ruling by a Licensing Board. 10 C.F.R. § 2.323(f) (formerly

§ 2.730(f)); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 280 (1987). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-08-7, 67 NRC 187 (2008). As the Commission's procedural rules grant no right of appeal from interlocutory orders, an "appeal" from such an order will be treated as a petition for discretionary interlocutory review under 10 C.F.R. § 2.341(f). Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 4 (2006).

Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most extraordinary circumstances. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-09-6, 69 NRC 128, 133-37 (2009). See also Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 59 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307 (1998); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297 (2000).

New Hampshire (Seabrook Station, Units 1 & 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984); Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 4 n.10 (2006) (citing Seabrook, ALAB-731, 17 NRC at 1074).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are interlocutory and generally are not immediately appealable, though such rulings may be reviewed later by deferring appeals on them until the end of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). See also Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-637, 13 NRC 367 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-906, 28 NRC 615, 618 (1988) (a Licensing Board denied a motion to add new bases to a previously admitted contention). Similarly, interlocutory appeals from Licensing Board rulings made during the course of a proceeding, such as the denial of a motion to dismiss the proceeding, are forbidden. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 70 (2004).

The Commission avoids piecemeal interference in ongoing Licensing Board proceedings and typically denies petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002); Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-66 (2004); Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-34 (2008) (stating that rejection of a particular contention on summary disposition does not justify Commission review under 10 C.F.R. § 2.341(f)(2)). The Commission's regulations establish a high bar for interlocutory review. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 3 (2007).

Commission practice generally disfavors interlocutory review, but recognizes an exception in 10 C.F.R. § 2.341(f)(2) (formerly § 2.786(g)) where the disputed ruling threatens the aggrieved party with serious, immediate and irreparable harm where it will have a “pervasive or unusual” effect on the proceedings below. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224 (2002); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000); Sacramento Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

The question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot). David Geisen, CLI-06-19, 64 NRC 9, 11 (2006) (citing, e.g., Andrew Siemaszko, CLI-06-12, 63 NRC 495, 500 (2006); Oncology Servs. Corp., CLI-93-13, 37 NRC 419, 420-21 (1993)).

Although Commission practice generally disfavors interlocutory review, the Commission has the power to modify procedural rules on a case-by-case basis and, in the interest of efficiency, can modify rules about interlocutory appeal. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 360-361 (2003).

Absent a demonstration of irreparable harm or other compelling circumstances, the fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 15 (1983); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-94-15, 40 NRC 319 (1994); Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008). See 10 C.F.R. § 2.323(f) (formerly § 2.730(f)).

“The threat of future widespread harm to the general population of NRC Licensees is not a factor in interlocutory review, although it might encourage the Commission to review the final decision.” Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001). See 10 C.F.R. § 2.341 (formerly § 2.786).

The Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer’s decision and filing an appeal of the same ruling because that approach would require both trial and appellate tribunals to rule on the same issues at the same time. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24 (1997), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981). See also Hydro Resources, Inc., CLI-98-8, 47 NRC 314 (1998).

Lack of participation below will increase the movant’s already heavy burden of demonstrating that such review is necessary. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 175-76 (1983).

In a licensing proceeding, it is the order granting or denying a license that is ordinarily a final order. NRC orders that are given “immediate effect” constitute an exception to the general rule. City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998).

Incorrect interlocutory rulings may be reviewed, if necessary, on appeals from partial initial decisions or other final appealable orders. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), citing Private Fuel Storage, L.L.C., CLI-00-2, 51 NRC at 80.

While the Commission does not ordinarily review interlocutory orders denying extensions of time, it may do so in specific cases as an exercise of its general supervisory jurisdiction over agency adjudications. Hydro Resources, Inc., CLI-99-3, 49 NRC 25, 26 (1999). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004) (interlocutory challenge regarding expert witness qualifications in a security context); Exelon Generation Co., LLC, (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004).

Licensing Board rulings denying waiver requests pursuant to 10 C.F.R. § 2.335 (formerly § 2.758), which are interlocutory, are not considered final for the purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

### **5.12.2 Criteria for Interlocutory Review**

Although interlocutory review is disfavored and generally is not allowed as of right under NRC Rules of Practice, the criteria in § 2.341(f) (formerly §2.786(g)(1)&(2)) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc., CLI-98-22, 48 NRC 215, 216-17 (1998); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992), clarified Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993).

The Commission may also grant interlocutory review as an exercise of its inherent supervisory authority over ongoing adjudicatory proceedings. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 70 (2004).

Current practice under § 2.341(f) (formerly § 2.786(g)) is rooted in the practice developed by the former Appeal Board in recognizing certain exceptions to the proscription against interlocutory review. See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); Procedures for Direct Commission Review of Decisions of Presiding Officers, 56 Fed. Reg. 29,403 (June 27, 1991). For decisions of the Appeal Board on interlocutory review, see South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC1140 (1981); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980); United States Dep’t of Energy, Project

Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474, 475 (1982), citing Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 171 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-858, 25 NRC 17, 20-21 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Advanced Medical Systems, ALAB-929, 31 NRC 271, 278-79 (1990).

Discretionary interlocutory review will be granted if the Licensing Board's action either (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.341(f) (formerly § 2.786(1) & (2)). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 & 2) CLI-94-15, 40 NRC 319 (1994); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Hydro Resources, Inc., CLI-99-7, 49 NRC 230, 231 (1999); Hydro Resources, Inc., CLI-99-8, 49 NRC 311, 312 (1999); Hydro Resources, Inc., CLI-99-18, 49 NRC 411, 431 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001). For Appeal Board decisions on this point, see Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1110, 1113-14 (1982); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-762, 19 NRC 565, 568 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-839, 24 NRC 45, 49-50 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-870, 26 NRC 71, 73 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 261 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-916, 29 NRC 434, 437 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 360-62 (1990); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 70 (2004).

The Commission additionally has discretion under § 2.341(f)(1) to grant interlocutory review where the Board has either referred a ruling, or certified a question, which raises significant and novel legal or policy issues. Absent a referral or certification by the Board, however, the Commission will generally not consider taking interlocutory appeals under this standard, even if the Commission itself views the issue as significant or novel. Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-68 (2004).

Though the Commission's procedural rules at 10 C.F.R. 2.311(c) allow an applicant to file an interlocutory appeal of Board orders admitting contentions, the appeal must challenge the admissibility of all admitted contentions. Hydro Resources, Inc., CLI-06-14, 63 NRC 510, 508-509 (2006).

Where the applicant did not show that the intervenor's request for a hearing should have been denied in its entirety, remaining points of error would have to meet the Commission's standard for interlocutory review; that is, appellant must show that it will suffer serious immediate and irreparable harm or that the adverse ruling will have a pervasive and unusual effect on the hearing below. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18 (2001).

The Commission encourages Licensing Boards and presiding officers to refer rulings to the Commission which present novel questions which could benefit from early resolution. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1988)).

Satisfaction of one of the criteria in 10 C.F.R. § 2.341(b)(4) (formerly § 2.786(b)(4)) is not mandatory in order to obtain interlocutory review. When reviewing interlocutory matters on the merits, the Commission may consider the criteria set forth in 10 C.F.R. § 2.341(b)(4) (formerly § 2.786(b)(4)). However, it is the standards listed in 10 C.F.R. § 2.341(f) (formerly § 2.786(g)) that control the Commission's determination of whether to undertake such review. Oncology Services Corp., CLI-93-13, 37 NRC 419 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 320 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

Discovery rulings rarely meet the test for discretionary interlocutory review. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-870, 26 NRC 71, 74 (1987); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-318, 3 NRC 186 (1976). This is true even of orders rejecting objections to discovery on grounds of privilege. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-300, 2 NRC 752, 769 (1975). In this vein, the Appeal Board refused to review a discovery ruling referred to it by a Licensing Board where the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling, and where the ruling was not novel. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon



the public interest is indeed “unusual.” Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96 (1981).

Similarly, rulings on the admissibility of evidence rarely meet the standards for interlocutory review. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-504, 8 NRC 406, 410 (1978); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981). In fact, the Appeal Board was generally disinclined to direct certification on rulings involving “garden-variety” evidentiary matters. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767, 768 (1977), the Appeal Board reiterated that it would not allow consideration of interlocutory evidentiary rulings, stating that, “it is simply not our role to monitor these matters on a day-to-day basis; were we to do so, ‘we would have little time for anything else’” (citation omitted). While the Board may reasonably accommodate pro se petitioners, those petitioners must meet the basic requirements of contention admissibility. The Board may not fill in missing support but must deny unsupported contentions. PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 339 n.286 (2007). Interlocutory review is rarely appropriate where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. United States Dep’t of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 475 (1982), citing Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976).

The Commission has granted interlocutory review in situations where the question or order must be reviewed “now or not at all.” Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 321 (1998). The Commission does not ordinarily review Board orders denying extensions of time. However, the Commission may review such interlocutory orders pursuant to its general supervisory jurisdiction over agency adjudications. Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-19, 48 NRC 132, 134 (1998).

When considering whether to exercise “pendent” discretionary review over otherwise nonappealable issues, the Commission will favor review where the otherwise unappealable issues are “inextricably intertwined” with appealable issues, such that consideration of all issues is necessary to ensure meaningful review. Sequoyah Fuels Corp. (Gore, OK, site decommissioning), CLI-01-2, 53 NRC 2, 19 (2001). When the Commission considers whether to exercise “pendent” discretionary review over otherwise nonappealable issues, factors weighing against review include a lack of an adequate record; the possibility that the issue could be altered or mooted by further proceedings below; and whether complex issues considered under pendent review would predominate over relatively insignificant, but final and appealable, issues. Id. at 19-20; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-08-27, 68 NRC 655, 657 (2008).

Interlocutory review of a Licensing Board’s ruling denying summary disposition of a part of a contention, claimed to be an unwarranted expansion of the scope of issues

resulting in the necessity to try these issues and cause unnecessary expense and delay meets neither standard for interlocutory review. That case is no different than that involved any time a litigant must go to hearing. Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-641, 13 NRC 550 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).

Even though the criteria for discretionary interlocutory review have not been satisfied, the Commission may still accept a Licensing Board's referral of an interlocutory ruling where the ruling involves a question of law, has generic implications, and has not been addressed previously on appeal. Oncology Services Corporation, CLI-93-13, 37 NRC419 (1993); see Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 279 (1990). However, interlocutory review will not be granted unless the Licensing Board below had a reasonable opportunity to consider the question as to which review is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 618-619, rev'd in part sub nom. USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the presiding officer's inappropriate admission of an area of concern, nor the use of an inappropriate legal standard, meets the standard for interlocutory review in a Subpart L proceeding. Sequoyah Fuels Corp. (Gore, OK, site decommissioning), CLI-01-2, 53 NRC 2, 18-19 (2001), citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-641, 13 NRC 550 (1981).

When interlocutory review is granted of one Licensing Board order, it may also be conducted of a second Licensing Board order which is based on the first order. Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 362 (1990).

#### **5.12.2.1 Irreparable Harm**

To meet the criterion in § 2.341(f)(2)(i) (formerly § 2.786(g)), petitioners must demonstrate that the ruling if left in place will result in irreparable impact which, as a practical matter, cannot be alleviated by Commission review at the end of the proceeding. The following cases illustrate the extraordinary circumstances that must be present to warrant review pursuant to the first criterion:

Immediate review may be appropriate in exceptional circumstances, when the potential difficulty of later unscrambling and remedying the effects of an improper disclosure of privileged material would likely result in an irreparable impact. Georgia Power Co., et al. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-95-15, 42 NRC 181, 184 (1995) (Commission reviewed Board order to release notes claimed to be attorney-client work product); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-839, 24 NRC 45, 50, 51 (1986) (A Licensing Board's denial of an intervenor's motion to correct the official transcript of a prehearing conference was granted where there were doubts that the transcript could be corrected at the end of the hearing. Without a complete and accurate transcript, the intervenor would suffer serious and irreparable injury because its ability to challenge the Licensing Board's rulings through an appeal would be compromised).

For purposes of interlocutory review, irreparable harm does not qualify as immediate merely because it is likely to occur before completion of the hearing. Hydro Resources, Inc., CLI-98-8, 47 NRC 314 (1998).

While it may not always be dispositive, one factor favoring review is that the question or order for which review is sought is one which “must be reviewed now or not at all.” Georgia Power Co., et al. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-94-5, 39 NRC 190, 193 (1994) (interlocutory Commission review warranted where Board ordered immediate release of an NRC Investigatory Report); see Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993) (interlocutory Commission review warranted where Board imposed 120-day stay of a license-suspension proceeding); see also Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469, 473 (1981).

The question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot). David Geisen, CLI-06-19, 64 NRC 9, 11 (2006) (citing, e.g., Andrew Siemaszko, CLI-06-12, 63 NRC 495, 500 (2006); Oncology Servs. Corp., CLI-93-13, 37 NRC 419, 420-21 (1993)).

There is no irreparable harm arising from a party’s continued involvement in a proceeding until the Licensing Board can resolve factual questions pertinent to the Commission’s jurisdiction. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 62 (1994). Nor is there obvious irreparable harm from continuation of the proceeding. The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a Licensing Board scheduling order. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-9, 40 NRC 1, 6-7 (1994); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-858, 25 NRC 17, 21-22 (1987). A mere increase in the burden of litigation does not constitute serious and irreparable harm. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001). In the absence of a potential for truly exceptional delay or expense, the risk that a Licensing Board’s interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that Board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-768, 19 NRC 988, 992 (1984), citing Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-805, 21 NRC 596, 600 (1985); Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004).

Mere generalized representations by counsel or unsubstantiated assertions regarding “immediate and serious irreparable impact” are insufficient to meet the stringent threshold for interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 61 (1994); Clinton ESP, CLI-04-31, 60 NRC at 467.

A license applicant's request for Commission review of the Staff's settlement of NEPA claims with an intervenor failed to satisfy the criteria for interlocutory review, because settling NEPA claims and eliminating the need for the hearing on those issues did not constitute "immediate and serious irreparable" harm to the applicant, and settling some but not all contentions is a routine feature of NRC litigation and does not affect the proceeding in a "pervasive or unusual manner." Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 4 (2006).

#### **5.12.2.2 Pervasive and Unusual Effect on the Proceeding**

An interlocutory review is appropriate when the ruling "affects the basic structure of the proceeding by mandating duplicative or unnecessary litigating steps." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998).

Review of interlocutory rulings pursuant to the criterion in § 2.341(f)(2)(ii) (formerly § 2.786), i.e., the Board ruling affects the basic structure of the proceeding in a pervasive or unusual manner, is granted only in extraordinary circumstances. The following cases illustrate this point:

Although a definitive ruling by the Licensing Board that the Commission actually has jurisdiction might rise to the level of a pervasive or unusual effect upon the nature of the proceeding, a preliminary ruling that mere factual development is necessary does not rise to that level. The fact that an appealed ruling touches on a jurisdictional issue does not, in and of itself, mandate interlocutory review. Similarly, the mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding and thereby justify interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 63 (1994); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

A Licensing Board decision refusing to dismiss a party from a proceeding does not, without more, constitute a compelling circumstance justifying interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 59 (1994).

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant an interlocutory review. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262-63 (1988). See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159 (1992).

A Board order to the Staff to disclose Safeguards Information to a party would result in immediate harm if the party lacks sufficient basis to view the information, and so interlocutory review of the order is proper. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 71 (2004).

The fact that an interlocutory ruling may be wrong does not per se justify interlocutory appellate review, unless it can be demonstrated that the error

fundamentally alters the proceeding. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 378 n.11 (1983), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 14 n.4 (1983); Sequoyah Fuels Corp. and General Atomics (Gore, OK, site), CLI-94-11, 40 NRC 55, 61 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004).

“A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions.” Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001), citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); Hydro Resources, Inc., CLI-98-8, 47 NRC 314 (1998). A legal error, standing alone, does not alter the basic structure of an ongoing proceeding. Such errors can be raised on appeal after the final Licensing Board decision. Dr. James E. Bauer (Order Prohibiting Involvement in NRC Licensed Activities), CLI-95-3, 41 NRC 245, 246 (1995).

Similarly, a mere conflict between Licensing Boards on a particular question does not mean that interlocutory review as to that question will automatically be granted. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-485 (1975). Unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a “final” Licensing Board decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1112-13 (1982). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263 (1988).

Interlocutory review is not favored on the question as to whether a contention should have been admitted into the proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 94 (1994), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-706, 16 NRC 1754, 1756 (1982), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464 (1982). Ordinarily appeals of such interlocutory decisions by the Board must wait until the case ends. Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004). A Board's rejection of an interested state's sole contention is not appropriate for directed certification when the issues presented by the state are also raised by the contentions of

intervenors in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-838, 23 NRC 585, 592-593 (1986).

The admission by a Licensing Board of more late-filed than timely contentions does not, in and of itself, affect the basic structure of a licensing proceeding in a pervasive or unusual manner warranting interlocutory review. If the untimely filings have been admitted by the Board in accordance with 10 C.F.R. § 2.309 (formerly § 2.714), it cannot be said that the Board's rulings have affected the case in a pervasive or unusual manner. Rather, the Board will have acted in furtherance of the Commission's own rules. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-706, 16 NRC 1754, 1757 (1982). The basic structure of an ongoing proceeding is not changed by the simple admission of a contention which is based on a Licensing Board ruling that (1) is important or novel or (2) may conflict with case law, policy, or Commission regulations. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1112-13 (1982).

Despite the reluctance to grant review of Board orders admitting contentions, in exceptional circumstances, limited review has been undertaken. In Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241 (1986), the Commission reviewed and reversed a Board order admitting a late-filed contention; the Appeal Board had declined review of the same ruling, stating that the Board's admission of a contention did not meet the stringent standards for interlocutory review. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), ALAB-817, 22 NRC 470, 474 (1985). In Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982), the Appeal Board accepted referral of several rulings associated with the Licensing Board's conditional admission of several contentions. The Appeal Board limited its review to two questions which it determined to have "generic implications": (1) whether the Rules of Practice sanctioned the admission of contentions that fall short of meeting Section 2.309(f) (formerly Section 2.714(b)) specificity requirements; and (2) if not, how should a Licensing Board approach late-filed contentions that could not have been earlier submitted with the requisite specificity. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464-65 (1982).

Adverse evidentiary rulings may turn out to have little, if any, evidentiary effect on a Licensing Board's ultimate substantive decision. Therefore, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant interlocutory intercession. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

The Commission itself may exercise its discretion to review a Licensing Board's interlocutory order if the Commission wants to address a novel or important issue. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

An intervenor failed to satisfy the criteria for interlocutory review, because settling NEPA claims and eliminating the need for the hearing on those issues did not constitute "immediate and serious irreparable" harm to the applicant, and settling

some but not all contentions is a routine feature of NRC litigation and does not affect the proceeding in a “pervasive or unusual manner.” Pa’ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 4 (2006).

### 5.12.3 Responses Opposing Interlocutory Review

Opposition to a petition seeking interlocutory review should include some discussion of petitioner’s claim of a Licensing Board error. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 374 n.3 (1983), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Failure of a party to address the standards for interlocutory review in responding to a motion seeking such review may be construed as a waiver of any argument regarding the propriety of such review. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 n.7 (1984); see Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Even issues “raised by the Staff [that] go to the very heart of [the Commission’s] long-standing position that license renewal proceedings should be limited in scope” will not suffice to demonstrate a pervasive and unusual effect on the proceedings under 10 C.F.R. § 2.341(f)(2). Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI 10-27, 72 NRC \_\_\_ (Sep. 30, 2010) (slip op. at 8).

### 5.12.4 Certification of Questions for Interlocutory Review and Referred Rulings

Although generally precluding interlocutory appeals, 10 C.F.R. §§ 2.319(l) and 2.323(f) (formerly §§ 2.718(l) and 2.730(f)) allow the presiding officer to refer a ruling to the Commission. See Sequoyah Fuels Corp. and General Atomics (Gore, OK, site decontamination and decommissioning funding), CLI-94-12, 40 NRC 64 (1994); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203, 209 (2004). The Commission need not, however, accept the referral. See Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), ALAB-817, 22 NRC 470, 475 (1985). The Commission does assign considerable weight to the Board’s view of whether the ruling merits immediate review because Licensing Boards are granted a great deal of discretion in managing the proceedings of cases before them. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001).

Notwithstanding the general proscription against interlocutory review, the Commission has encouraged Boards and presiding officers to certify novel legal or policy questions early in the proceeding. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-05-14, 61 NRC 359, 364 n.18 (2005); see 10 C.F.R. §§ 2.323(f) and 2.319(l) (formerly §§ 2.730(f) and 2.718(i)). In commenting on the Commission’s earlier Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), the Appeal Board opined that the policy statement did not call for a marked relaxation of the standard that the discretionary review of interlocutory Licensing Board rulings authorized should be undertaken only in the most compelling circumstances; rather, the policy statement simply exhorts the Licensing Boards to put

before the appellate tribunal legal or policy questions that, in their judgment, are “significant” and require prompt appellate resolution. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 375 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

Generally, the Commission has accepted “novel issues that would benefit from early review” where the Board, rather than a party, has found such review necessary and helpful. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 375 (2001), citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000). See also Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004).

The Commission has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review. Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 320 n.3 (1998).

A Licensing Board’s decision to admit a contention which will require the Staff to perform further statutory required review does not result in unusual delay or expense which justifies referral of the Board’s decision for interlocutory review. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257-258 n.19 (1985), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464 (1982), rev’d in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

The fact that an evidentiary ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

Authority to certify questions to the Commission should be exercised sparingly. Absent a compelling reason, certification will be declined. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-421, 6 NRC 25, 27 (1977); Consolidated Edison Co. and Power Authority of the State of N.Y. (Indian Point Nuclear Generating Units 2 & 3), LBP-82-23, 15 NRC 647, 650 (1982).

Despite the general prohibition against interlocutory review, the regulations provide that a party may ask a Licensing Board to certify a question to the Commission without ruling on it. 10 C.F.R. § 2.319(l) (formerly § 2.718(l)). The regulations also allow a party to request that a Licensing Board refer a ruling on a motion to the Commission under 10 C.F.R. § 2.323(f) (this provision was added to former § 2.730(f)).

The Boards’ certification authority was not intended to be applied to a mixed question of law and fact in which the factual element was predominant. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 (1977).

It is the Commission’s customary practice to accept Board certifications or referrals. Similarly, the NRC’s rules of practice permit interlocutory Commission review of referred Board rulings if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the



proceeding. However, routine rulings on the admissibility of contentions are not usually occasions for the Commission to exercise its authority to step into ongoing Licensing Board proceedings and undertake interlocutory review. This is especially true when a Board hearing on related matters is about to take place. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539-40 (2005).

A party seeking certification under Section 2.319(l) (formerly Section 2.718(i)) must, at a minimum, establish that a referral under 10 C.F.R. § 2.323(f) (formerly § 2.730(f)) would have been proper – *i.e.*, that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1652-53 (1982). However, the added delay and expense occasioned by the admission of a contention – even if erroneous – does not alone distinguish the case so as to warrant interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1114 (1982). The fact that applicants will be unable to recoup the time and financial expense needed to litigate late-filed contentions is a factor that is present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory Appeal Board review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), *citing* Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1114 (1982).

The case law standards governing review of interlocutory orders have been codified in 10 C.F.R. § 2.341(f) (formerly § 2.786(g)) which provides that the Commission may conduct discretionary interlocutory review of a certified question, 10 C.F.R. § 2.319(l) (formerly § 2.718(l)), or a referred ruling, 10 C.F.R. 2.323(f) (formerly § 2.730(f)), if the petitioner shows that the certified question or referred ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). See Section 5.12.1, "Interlocutory Review Disfavored."

#### **5.12.4.1 Effect of Subsequent Developments on Motion to Certify**

Developments occurring subsequent to the filing of a request for interlocutory review may strip the question brought of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977). *See also* Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-93-18, 38 NRC 62 (1993).

When reviewing a motion for directed certification, an Appeal Board would not consider events which occurred subsequent to the issuance of the challenged Licensing Board ruling. A party which seeks to rely upon such events must first

seek appropriate relief from the Licensing Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-889, 27 NRC 265, 271 (1988).

#### **5.12.4.2 Effect of Directed Certification on Uncertified Issues**

The pendency of interlocutory review does not automatically result in a stay of hearings on independent questions not intimately connected with the issue certified. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-374, 5 NRC 417 (1977).

#### **5.12.4.3 Certification of Questions Relating to Restricted Data or National Security Information**

A Licensing Board may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising in an adjudicatory context. While the Commission may consider matters that arguably touch on the merits in resolving such questions, an actual merits decision comes only after development of the record. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-37, 60 NRC 646, 649-50 (2004).

### **5.13 Disqualification of a Commissioner**

Determinations on the disqualification of a Commissioner reside exclusively in that Commissioner and are not reviewable by the Commission. Consolidated Edison Co. and Power Authority of the State of N.Y. (Indian Point Nuclear Generating Units 2 & 3), CLI-81-1, 13 NRC 1 (1981), clarified, CLI-81-23, 14 NRC 610 (1981); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

When a party requests the disqualification of more than one Commissioner, each Commissioner must decide whether to recuse himself from the proceeding, but the Commissioners may issue a joint opinion in response to the motion for disqualification. Joseph J. Macktal, CLI-89-18, 30 NRC 167, 169-70 (1989), denying reconsid. of CLI-89-14, 30 NRC 85 (1989).

It is Commission practice that the Commissioners who are subject to a recusal motion will decide that motion themselves and may do so by issuing a joint decision. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 56-57 (1996).

A prohibited communication is not a concern if it does not reach the ultimate decisionmaker. Where a prohibited communication is not incorporated into advice to the Commission, never reaches the Commission, and has no impact on the Commission's decision, it provides no grounds for the recusal of Commissioners. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 57 (1996).

Commission guidance does not constitute factual prejudgment where the guidance is based on regulatory interpretations, policy judgments, and tentative observations about dose estimates that are derived from the public record. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 58 (1996).

Where there are no facts from which the Commission can reasonably conclude that a prohibited communication was made with any corrupt motive or was other than a simple mistake, and where a Report of the Office of the Inspector General confirms that an innocent mistake was made and that the Staff was not guilty of any actual wrongdoing, and where the mistake did not ultimately affect the proceeding, the Commission will not dismiss the Staff from the proceeding as a sanction for having made the prohibited communication. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 59 (1996).

In the absence of bias, an adjudicator who participated on appeal in a construction permit proceeding need not disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-11, 11 NRC 511, 512 (1980).

The expression of tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Co. (Sheffield, IL, Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

#### **5.14 Reconsideration by the Commission (Also see Section 4.5)**

The Commission's ability to reconsider is inherent in the ability to decide in the first instance. The Commission has sixty (60) days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

"Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-02-1, 55 NRC 1, 2 (2002). The Commission does not lightly revisit the Board's already-issued and well-considered decisions and does so only if the party seeking reconsideration brings decisive new information to the Commission's attention or demonstrates a fundamental Commission misunderstanding of a key point. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 622 (2004); 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.

Petitions for reconsideration of Commission decisions denying review will not be entertained. 10 C.F.R. § 2.341(d) (formerly § 2.786(e)). A petition for reconsideration after review may be filed. 10 C.F.R. § 2.341(d) (formerly § 2.786(e)). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 410 (2005).

A movant seeking reconsideration of a final decision must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced, generally on the basis of information not previously available. See Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418,

6 NRC 1, 2 (1977). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992). A reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-02-1, 55 NRC 1, 2 (2002); Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1, 3-4 (1988); and State of Alaska Dept. of Transportation and Public Facilities, CLI-04-38, 60 NRC 652, 655-56 (2004).

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).

The Commission has granted reconsideration to clarify the meaning or intent of certain language in its earlier decision. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 390-91 (1995); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-37, 60 NRC 646 (2004); and Alaska Dept. of Transp., CLI-04-38, 60 NRC at 653.

Reconsideration is at the discretion of the Commission. Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 234 n.6 (1995); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980)).

NRC rules contemplate petitions for reconsideration of a Commission decision on the merits, not petitions for reconsideration of a Commission decision to decline review of an issue. See 10 C.F.R. § 2.341(d) (formerly § 2.786(e)). Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

10 C.F.R. § 2.345 (formerly § 2.771) provides that a party may file a petition for reconsideration of a final decision within ten (10) days after the date of that decision. See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005).

A motion to reconsider a prior decision will be denied where the arguments presented are not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977); Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

Motions to reconsider an order must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to a case. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-735, 18 NRC 19, 25-26 (1983).

A showing of factual discrepancies contained in dicta in a Commission decision is not sufficient to support a motion for reconsideration when those discrepancies do not undercut the core rulings of the decision. Alaska Dept. of Transp., CLI-04-38, 60 NRC at 654-55.

A majority vote of the Commission is necessary for reconsideration of a prior Commission decision. U.S. Dep't of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-8, 15 NRC 1095, 1096 (1982).

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).

Although the Commission must set aside wrongly issued licenses when the post-licensing hearing uncovers fatal defects, the Commission need not set aside licenses when it uncovers defects which are promptly curable. Hydro Resources, Inc., CLI-00-15, 52 NRC 65 (2000).

The Commission will grant a motion for reconsideration when the Commission's alleged error is clear, petitioner's arguments are new, and petitioners could not have previously made the arguments. Consumers Energy Company (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 522 (2007).

#### **5.15 Jurisdiction of the NRC to Consider Matters While Judicial Review Is Pending**

The NRC has jurisdiction to deal with supervening developments in a case which is pending before a court, at least where those developments do not bear directly on any question that will be considered by the court. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

There has been no definitive ruling as to whether the NRC has jurisdiction to consider matters which do bear directly on questions pending before a court. The former Appeal Board considered it inappropriate to do so, at least where the court had not specifically requested it, based on considerations of comity between the court and the agency. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365 (1976); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 179 (1985), citing 28 U.S.C. § 2347(c).

The NRC must act promptly and constructively in effectuating the decisions of the courts. Upon issuance of the mandate, the court's decision becomes fully effective on the Commission, and it must proceed to implement it. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 783-784 (1977). Neither the filing nor the granting of a petition for certiorari to the Supreme Court operates as a stay, either with respect to the execution of the judgment below or of the mandate below by the lower courts. Id. at 781.

The NRC may rely upon a district court decision striking down a state statute even if that district court ruling has been appealed, at least so long as the district court's decision appears reasonable. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 37 (2004).

When the U.S. Court of Appeals has stayed its mandate pending final resolution of a petition for rehearing en banc on the validity of an NRC regulation, the regulation remains in effect, and the Board is bound by those rules until that mandate is issued. Cleveland

Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-53, 16 NRC 196, 205 (1982).

Where a party petitioning the Court of Appeals for review of the 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).

The pendency of a criminal investigation by the Department of Justice does not necessarily preclude other types of inquiry into the same matter by the NRC. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The pendency of a Grand Jury proceeding does not legally bar parallel administrative action. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 191 n.27 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

#### **5.16 Procedure on Remand**

(Also see Section 4.6)

#### **5.17 Mootness and Vacatur**

The Commission is not subject to the jurisdictional limitations placed upon federal courts by the "case or controversy" provision in Article III of the Constitution. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), ALAB-714, 17 NRC 86, 93 (1983), citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979). Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the outcome. The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed. Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). A case may not be moot when the dispute is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). The exception applies only to cases in which the challenged action was in its duration too short to be litigated, and there is a reasonable expectation that the same complaining party will be subject to the same action again. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 205 (1993).

In an enforcement proceeding concerning a licensee's challenge to a suspension order, a Licensing Board found there was no remaining live controversy and dismissed the proceeding as moot where the Staff (1) unconditionally withdrew the suspension order and (2) gave assurance that the issuance of another suspension order concerning violations of the same license conditions was not fairly "capable of repetition" (quoting the established exception to the mootness doctrine). Safety Light Corp., LBP-05-6, 61 NRC 185, 187 (2005) (referencing Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980)).

The Commission is not bound by judicial practice and need not follow judicial standards of vacatur. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 14-15 (1995).

Therefore, there is no insuperable barrier to the Commission's rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to a Licensing Board's decision. However, this course will not be embarked upon in the absence of the most compelling cause. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), ALAB-714, 17 NRC 86, 93 (1983); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 54 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988). Commission practice is to address novel legal or policy issues and to provide appropriate guidance, and the Commission will review Licensing Board decisions even in moot cases when necessary to clarify important issues for the future. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-05-14, 61 NRC 359, 362 (2005) (reviewing a Licensing Board decision sua sponte).

A case is moot when there is no reasonable expectation that the matter will recur and interim relief or intervening events have eradicated the effects of the allegedly unlawful action. Advanced Medical Systems, CLI-93-8, 37 NRC 181, 185 (1993). The NRC is not strictly bound by the mootness doctrine; however, its adjudicatory tribunals have generally adhered to the mootness principle. Id. See, e.g., Innovative Weaponry, Inc., LBP-95-8, 41 NRC 409, 410 (1995) (the Board determined the issue of whether there was an adequate basis for the Staff's denial to be moot because the license was transferred).

As opposed to unreviewed Licensing Board orders, vacatur of prior Commission decisions in a terminated license transfer proceeding is not warranted because the precedential value of a final determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-04-18, 60 NRC 1, 3 (2004).

While unreviewed Board decisions do not create binding precedent, when the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission may choose as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

The Commission's customary practice is to vacate Board decisions that have not been reviewed at the time the case becomes moot. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-24, 48 NRC 267 (1998).

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