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3.1 Licensing Board

3.1.1 General Role/Power of Licensing Board

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

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

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

A decisionmaking body must confront the facts and legal arguments presented by the parties and articulate the reasons for its conclusions on disputed issues, i.e., take a hard look at the salient problems. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 366 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 836 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982).

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

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

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

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

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

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

As a general principle multiple boards should not be established if it would likely result in duplicative work or conflicting rulings. Private Fuel Storage, L.L.C., supra, at 312.

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

If an intervenor cannot present his case, the proper method to institute a proceeding by which the NRC would conduct its own investigation is to request action under 10 CFR § 2.206. It is not the Board's function to assist intervenors in preparing their cases and searching for their expert witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982). A Licensing Board is not an intervenor's advocate and has no independent obligation to compel the appearance of an intervenor's witness. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

Licensing Boards have the authority to call witnesses of their own, but the exercise of this discretion must be reasonable and like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South

Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

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

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

3.1.1.1 Role and Authority of the Chief Judge

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

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

3.1.2 Scope of Jurisdiction of Licensing Board

3.1.2.1 Jurisdiction Grant From Commission

A Licensing Board has only the jurisdiction and power which the Commission delegates to it. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 725 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). See also Consolidated Edison Co. of N.Y.; Power Authority of the State of N.Y. (Indian Point, Unit No. 2, Indian Point, Unit No. 3), LBP-82-23, 15 NRC 647, 649 (1982); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 680 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991). Nevertheless, it has the power in the first instance to rule on the scope of its jurisdiction when it is challenged. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Duke Power Co. (Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 905 (1987); Public Service Co. of New

Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). Once a board determines it has jurisdiction, it is entitled to proceed directly to the merits. Zimmer, supra, 18 NRC at 646, citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980).

The NRC possesses the authority to change its procedures on a case-by-case basis with timely notice to the parties involved. National Whistleblower Center v. NRC, 208 F.3d 256, 262 (D.C. Cir. 2000) quoting City of West Chicago v. NRC, 701 F.2d 632, 647 (7th Cir. 1983) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294, 94 S.Ct. 1757, 40 L. Ed. 2d 134 (1974)).

A Licensing Board's jurisdiction is defined by the Commission's notice of hearing. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 2 NRC 785, 790 (1985). See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1) LBP-87-23, 26 NRC 81, 84 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 504, 506 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20-21 (1991).

A Licensing Board generally can neither enlarge nor contract the jurisdiction conferred by the Commission. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974) Three Mile Island, supra, 26 NRC at 476; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-19, 30 NRC 55, 58, 59-60 (1989).

Where certain issues sought to be raised by an intervenor are not fairly within the scope of the issues for the proceeding as set forth in the Commission's notice of hearing, such additional issues are beyond the jurisdiction of the Licensing Board to decide. Union Electric Co. (Callaway Plant, Units 1 2), LBP-78-31, 8 NRC 366, 370-371 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 337-338, 344-345 (1991).

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

Absent special circumstances, a Licensing Board may consider ab initio whether it has power to grant relief that has been specifically sought of it. Every tribunal possesses

inherent rights and duties to determine in the first instance its own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

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

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

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

A Licensing Board which has been authorized to consider only the question of whether fundamental flaws were revealed by an exercise of an applicant's emergency plan does not also have the authority to retain jurisdiction to determine whether the flaws have been corrected. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988).

3.1.2.1.1 Effect of Commission Decisions/Precedent

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 859, 871-72 (1986).

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

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

Licensing Boards are bound to comply with directives of a higher tribunal, whether they agree with them or not. The same is true with respect to Commission review

of Appeal Board action and judicial review of agency action. Any other alternative would be unworkable and would unacceptably undermine the rights of the parties. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983).

The Commission has inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before Licensing Boards. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 34 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (the Commission directed the Licensing Board to suspend consideration of certain issues), reconsid. denied, CLI-92-6, 35 NRC 86 (1992); Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85 (1992).

If a licensee files for bankruptcy, the Commission may step in to secure, to the maximum extent possible, assets to be used eventually remediate a contaminated site, including intervening in bankruptcy proceedings and entering into settlement. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 224 (2000).

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

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

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

A Licensing Board for an operating license proceeding does not have general jurisdiction over the already authorized ongoing construction of the plant for which an

operating license application is pending, and it cannot suspend the previously issued construction permit. An intervenor wishing to halt such construction must file a petition under 10 CFR § 2.206 with the appropriate Commission official. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1103 (1982). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 870-871 (1984). A member of the public may challenge an action taken under 10 CFR § 50.59 (changes to a facility) only by means of a petition under 10 CFR § 2.206. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

3.1.2.2.A Scope of Authority in Construction Permit Proceedings

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

In Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582, 589-91 (1977), the Appeal Board determined that a second Licensing Board, constituted after an initial decision in a construction permit proceeding had been issued and the jurisdiction of the original Licensing Board had terminated, lacks authority to grant a petition for untimely intervention unless specifically delegated this authority by the Commission's regulations or one of the five notices or orders discussed in Section 3.1.2.1., supra. The Appeal Board reasoned that Commission regulations providing for the automatic termination of the jurisdiction of the original Licensing Board revealed a policy for reasonable, timely termination of litigation. This policy would be frustrated if the second Licensing Board could, merely by its creation, reactivate and "inherit" the expired authority of the original Board. Since a Licensing Board has no independent authority to initiate adjudicatory proceedings (Id. at 592), and since the requisite authority was neither "inherited" nor specifically granted the second Board, that Board lacked authority to grant an untimely petition for intervention. Thus, the mere designation of a Licensing Board to entertain a petition does not in itself confer the requisite authority to grant the petition. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-389, 5 NRC 727 (1977). As a corollary, a Licensing Board cannot order a hearing in the absence of a pending construction permit or operating license proceeding, or some other proceeding which might arise upon the issuance of one of the five notices or orders listed above. South Texas, supra, 5 NRC at 592; Florida Power & Light Co. (St. Lucie Plant, Units 1 & 2) (Turkey Point, Units 3 & 4), LBP-77-23, 5 NRC 789 (1977). A Licensing Board is vested with the power to dismiss an application with prejudice. See 10 CFR §§ 2.107(a), 2.721(d). Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

A Licensing Board is required to issue an initial decision in a case involving an application for a construction permit even if the proceeding is uncontested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 489 (1984), citing, 10 CFR § 2.104(b)(2) and (3).

The general role of the Licensing Board is outlined in Appendix A to Part 2 of 10 CFR. In contested construction permit proceedings, the Board must make a determination as to the issues set out in 10 CFR Part 2, Appendix A, § VI(c)(1) and (3) as well as any issues raised by the parties. In an uncontested CP proceeding, the Board must make the determinations listed in 10 CFR Part 2, Appendix A, § VI(c)(2) and (3).

Although the limited work authorization and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. Clinch River, supra, 19 NRC at 492, citing, 10 CFR §§ 2.714(f),(g) (formerly, 10 CFR §§ 2.714(e),(f)).

3.1.2.2.B Scope of Authority in Operating License Proceedings

Where the Commission's notice of hearing is general and only refers to the application for an operating license, a Licensing Board has jurisdiction to consider all matters contained in the application, regardless of whether the matters were specifically listed in the notice of hearing. Catawba, supra, 22 NRC at 791-92 (application for an operating license contained proposal for spent fuel storage).

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

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

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

A Licensing Board for an operating license proceeding is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the Board sua sponte. 10 CFR § 2.760a; Consumers Power Co. (Midland Plant,

Units 1 & 2), ALAB-674, 15 NRC 1101, 1102-03 (1982), citing, Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2, & 3), ALAB-319, 3 NRC 188, 190 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1933 (1982), citing, 10 CFR § 2.760a; Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 579 (1988). Specifically, the Board's jurisdiction is limited to a determination of findings of fact and conclusions of law on matters put into controversy by the parties to the proceeding or found by the Board to involve a serious safety, environmental or common defense and security question. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1969-70 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 & n.1 (1986), vacating, LBP-86-3, 23 NRC 69 (1986).

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

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

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

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

The Licensing Board may assert jurisdiction over Part 70 material licensing issues raised in conjunction with an ongoing Part 50 licensing proceeding where the Part

70 materials license is integral to the project undergoing licensing consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 862-65 (1984), aff'd, ALAB-765, 19 NRC 645, 650-51 (1984), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976).

In a previously uncontested operating license proceeding, a Licensing Board has the jurisdiction to entertain a late-filed petition to intervene and to decide the issues raised by it until the Commission exercises its authority to license full power operation. The Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of record. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1380-1381 (1982).

In operating licensing proceedings as to radiological safety matters, the Board is to decide those issues put in controversy by the parties (10 CFR Part 2, Appendix A, § VIII(b)). In addition, the Board must require evidence and resolution of any significant safety matter of which it becomes aware regardless of whether the parties choose to put the matter in controversy. 10 CFR Part 2, Appendix A, § VIII(b). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524-25 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 362 (1973).

A Licensing Board has authorized the issuance of a full power operating license for the Seabrook facility even though several emergency planning issues remanded by the Appeal Board and a number of intervenors' motions for the admission of new contentions were still pending before the Licensing Board. The Board believed that the issuance of a full power operating license prior to the resolution of these open matters was appropriate where the Board determined that none of the open matters involved significant safety or regulatory matters which would undermine the Board's ultimate conclusion that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Seabrook facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-33, 30 NRC 656, 657-58 (1989), appeal dismissed as moot, ALAB-947, 33 NRC 299, 378 & n.331 (1991), citing, Massachusetts v. NRC, 924 F.2d 311, 330-32 (D.C. Cir. 1991). The Commission conducted an immediate effectiveness review pursuant to 10 CFR § 2.764, and determined that the Licensing Board's authorization of the issuance of a full power operating license should be allowed to take effect. The Commission denied the intervenors' motion for relief in the nature of mandamus on the ground that there was no clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending the completion of remand proceedings or resolution of all pending matters. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229-231 (1990).

3.1.2.3 Scope of Authority in License Amendment Proceedings

A Licensing Board's power in a license amendment proceeding is limited by the scope of the proceeding. Thus, in considering an amendment to transfer part ownership of a

facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 CFR Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978).

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

3.1.2.4 Scope of Authority to Rule on Petitions and Motions

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

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a Licensing Board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

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

Licensing Boards lack authority to consider a motion for an Order to Show Cause pursuant to 10 CFR § 2.202 and 2.206. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

Licensing Boards also lack authority to consider claims for damages. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

In NRC proceedings in which a hearing is not mandatory but depends on the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon intervention petitions. If a petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73

(1978); Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981). Thus, an "intervention" hearing board established solely for the purpose of passing on petitions to intervene does not have the additional authority to proceed beyond that assignment and to entertain filings going to the merits of matters in controversy between the petitioners and the applicant. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-18, 33 NRC 394, 395-96 (1991). An "intervention" board cannot, for example, rule on motions for summary disposition. Stanislaus, 5 NRC at 1177-1178.

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

A Licensing Board established for an operating license proceeding has authority to consider materials license questions where matters regarding a materials license bear on issues in the operating license application. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

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

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

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

Where the Staff has acted to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order or to enter into an

agreement to take such actions to settle a proceeding, its actions are subject to review by the presiding officer. Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994).

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

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

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

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

3.1.2.5 Scope of Authority to Reopen the Record

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

A Licensing Board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of an appeal or the expiration of the period during which the Commission can exercise its right to review the record. See 10 CFR §§ 2.717(a), 2.760(a), 2.718(j), 2.786; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-83-12, 17 NRC 466, 467 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 683 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Three Mile Island, supra, 16 NRC at 1324. Until an appeal from an initial decision has been filed, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983). Where no appeal from

an initial decision has been filed within the time allowed and the period for sua sponte review has not expired, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Limerick, supra, 17 NRC at 757.

The Licensing Board lacks the jurisdiction to consider a motion to reopen the record after a petition to review a final order has been filed. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000), n.3, citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); cf. Curators of the University of Missouri 9TRUMP-S project), CLI-95-1, 41 NRC 71, 93-94 (1995).

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the Board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

3.1.2.6 Scope of Authority to Rule on Contentions

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 CFR Part 2, Subpart G includes the authority to permit an applicant for license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, 10 CFR § 2.714, and the right to file late contentions under certain conditions, 10 CFR § 2.714(a). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-1307 (1984).

Where a Licensing Board has retained jurisdiction following issuance of initial decision to conduct further proceedings, it has jurisdiction to consider the admissibility of new contentions which are not related to any matter previously litigated. Zimmer, supra, 17 NRC at 467.

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

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

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

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

3.1.2.7 Authority of Licensing Board to Raise Sua Sponte Issues

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

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

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

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

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

A Licensing Board's inherent power to shape the course of a proceeding should not be confused with its limited authority under 10 CFR § 2.760a to shape the issues of the proceeding.

The latter is not a substitute for or a means to accomplish the former. Sua sponte authority is not a case management tool. Accordingly, the apparent need to expedite a procedure or monitor the Staff's progress in identifying and/or evaluating potential safety or environmental issues are not factors that authorize a Board to exercise its sua sponte authority. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113 (1981).

The incompleteness of Staff review of an issue is not in itself sufficient to satisfy the standard for sua sponte review. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516, 519 (1985), citing, Comanche Peak, supra, 14 NRC at 1114. However, a Board may take into account the pendency and likely efficacy of NRC Staff non-adjudicatory review in determining whether or not to invoke its sua sponte review authority. South Texas, supra, 21 NRC at 519-523, citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982), reconsideration denied, CLI-83-4, 17 NRC 75 (1983), and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-75, 18 NRC 1254 (1983).

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

The Board's authority to consider substantive issues is limited by the sua sponte rule, but the same limitation does not apply to its consideration of procedural matters, such as confidentiality issues arising under 10 CFR § 2.790. While it would not always be appropriate for the Board to take up proprietary matters on its own, where the Board finds the Staff's review unsatisfactory, sua sponte review of those matters may be necessary. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 288 (1982).

A Board may raise a procedural question, such as whether a portion of its record should be treated as proprietary or released to the public, regardless of whether the full scope of the question has been raised by a party. Point Beach, supra.

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

Board inquiries related to admitted contentions do not create sua sponte matters requiring notification of the Commission. That the Board gives advance notification to a party that related questions may be asked does not convert those questions into sua sponte issues requiring notification of the Commission. Nor is notification required when a Board has already completed action on a procedural matter and no further obligation has been imposed on a party. The sua sponte rule is intended to preclude major, substantive inquiries not related to subject matter already before the Board, not minor procedural matters. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-12, 15 NRC 354, 356 (1982).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 CFR §§ 2.760a, 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980). An adjudicatory board's decision to exercise its sua sponte authority must be based on evidence contained in the record. A board may not engage in discovery in an attempt to obtain information upon which to establish the existence of a serious safety or environmental issue. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986).

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

A Licensing Board has ruled that exercise of its sua sponte authority to examine certain serious issues is not dependent on either (1) the presence of any party to raise or pursue those issues in the proceeding, or (2) the particular stage of the proceeding. Thus, the Licensing Board determined that it could properly retain jurisdiction over an intervenor's admissible contentions even though the intervenor had been dismissed from the proceeding prior to the issuance of a notice of hearing. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-32, 32 NRC 181, 185-86 (1990), overruled, CLI-91-13, 34 NRC 185, 188-89 (1991). The Commission made clear that a Licensing Board does not have the authority to raise a sua sponte issue in an operating license or operating license amendment proceeding where all parties in the proceeding have withdrawn or been dismissed. If the Board believes that serious safety issues remain to be addressed, it should refer those issues to the NRC Staff for review. Turkey Point, supra, 34 NRC at 188-89.

The NRC's regulations do not contain provisions conferring jurisdiction on Licensing Boards to impose fines sua sponte. The powers granted to a Licensing Board by 10 CFR § 2.718 to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order do not include the power to impose a civil penalty. 10 CFR § 2.205(a) confers the authority to institute a civil penalty proceeding only upon the NRC's Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director, Office of Inspection and Enforcement. A Licensing Board becomes involved in a civil penalty proceeding only if the person charged with a violation requests a hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982); see 10 CFR § 2.205(f).

It is appropriate for the Board to address issues concerning the confidentiality of a portion of its record, regardless of whether the issue was raised by a party. Such an

action is within the Board's general authority to respond to a "proposal" that a document be treated as proprietary and is not a prohibited sua sponte action of the Board. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216, 220 (1982); LBP-82-6, 15 NRC 281 (1982); and LBP-82-12, 15 NRC 354 (1982).

3.1.2.8 Expedited Proceedings; Timing of Rulings

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

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

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

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

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

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

When time pressures cause special difficulties for intervenors, discovery against intervenors may be restricted in order to prevent interference with their preparation for a hearing. A presiding officer has discretionary power to authorize specially tailored proceedings in the interest of expedition. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 NRC 862, 863 (1981).

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

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

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

3.1.2.9 Licensing Board's Relationship with the NRC Staff

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

The rule against delegation applies even to issues a Licensing Board raises on its own motion in an operating license proceeding. Byron, supra, 19 NRC at 211, citing, Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The rule against delegation applies, in particular, to quality assurance issues. Byron, supra, 19 NRC at 212, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). However, where there is nothing remaining to be adjudicated on a quality assurance issue, the adequacy of a 100 percent reinspection of a contractor's work may be delegated to the Staff to consider post-hearing. Byron, supra, 19 NRC at 216-17.

On the other hand, with respect to emergency planning, the Licensing Board will accept predictive findings and post-hearing verification by Staff of the formulation and implementation of aspects of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in Dart on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361-362 (1991).

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

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

A Licensing Board does not have the power, under 10 CFR § 2.718 or any other regulation, to direct the Staff in the performance of its independent responsibilities. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

Whether a Board may modify an order or action of the Staff depends on the relationship of the order to the subject matter of a pending proceeding. If closely

related, a Staff order may not be issued, or is subject to a stay until resolution of the contested issue. If far removed from the subject matter of a pending proceeding, a Staff order should not be considered by the Board. Finally, there are matters which are properly the subject of independent Staff action, but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board is also appropriate. Nuclear Fuel Services Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1082 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979).

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

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a Licensing Board interfere in the review activities of the Staff. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

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

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's functions should bring the matter to the Commission's attention or certify the matter to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). Ordinarily, Licensing Boards should not decide whether a given action significantly affects the environment without the record

support provided by the Staff's environmental review. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330 (1981).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

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

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

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

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

Should a Staff review demonstrate the need for corrective action, the decision on the adequacy of such a corrective action is one that the Licensing Board may not delegate. Case law suggests that even in cases where a Board resolves an issue in an applicant's favor leaving the Staff to perform what is believed to be a confirmatory review, the Staff should inform the Board should it discover that corrective action is

warranted. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 520 n.21 (1983).

3.1.2.10 Licensing Board's Relationship with States and Other Agencies (including CEQ)

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

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

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

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

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

As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the Council on Environmental Quality. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power

Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 461 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 228-29 (9th Cir. 1988).

Although the Commission will take cognizance of activities before other legal tribunals when the facts so warrant, it should not delay its licensing proceedings or withhold a license merely because some other legal tribunal might conceivably take future action which may later impact upon the operation of a nuclear facility. Palo Verde, supra, 16 NRC at 1991, citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978); Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units and 3), ALAB-171, 7 AEC 37, 39 (1974); and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 900 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 & n.9 (1985), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 847 (1985).

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

Under the Atomic Energy Act of 1954, as amended, NRC regulates most uses of source material, including depleted uranium, in the U.S. and U.S. territories. However, NRC does not regulate most of the activities conducted by the U.S. Department of Energy, including, for example, testing performed at DOE test sites, or battlefield and direct support activities thereof involving source material by the armed forces outside of U.S. territories. Therefore, NRC did not regulate the testing performed at DOE's Nevada Test Site, nor did it regulate the military use of DU munitions in Operation Desert Storm, Serbia, Okinawa, or Kosovo. NRC cannot grant the petition or take any other regulatory action with respect to military activities that it does not regulate. U.S. Department of Defense Users of Depleted Uranium, DD-01-1, 53 NRC 103, 104 (2001).

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

While the Commission agrees that CEQ's regulations are entitled to substantial deference where applicable, the CEQ regulations apply only to federal actions to which NEPA applies. In adopting the CEQ regulations, the Commission stated that the NRC is not bound by those portions of the CEQ's NEPA regulations that have some substantive impact on the way in which the Commission performs its regulatory functions. 49 Fed. Reg. 9352 (Mar. 12, 1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991).

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

3.1.2.11 Conduct of Hearing by Licensing Board

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

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

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

The procedures set forth in the Rules of Practice are the only ones that should be used (absent explicit Commission instructions in a particular case) in any licensing proceeding. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.718; 10 CFR Part 2, Appendix A.

A Board must use its powers to assure that the hearing is focused upon the matters in controversy and that the hearing process is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1152 (1984), citing, 10 CFR Part 2, Appendix A, § V. A Board may limit cross-examination, redirect a party's presentation of its case, restrict the introduction of reports and other material into evidence, and require the submittal of all or part of the evidence in written form as long as the parties are not thereby prejudiced. Shoreham, supra, 20 NRC at 1151-1154, 1178.

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

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

While a Licensing Board should endeavor to conduct a licensing proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 730 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 558 (1986).

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

In order that a proper record is compiled on all matters in controversy, as well as sua sponte issues raised by it, a hearing board has the right and responsibility to take an active role in the examination of witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 893 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498-499 (1985). Although a Board may exercise broad discretion in determining the extent of its direct participation in the hearing, the Board should avoid excessive involvement which could prejudice any of the parties. Perry, supra, 21 NRC at 499. This does not mean that a Licensing Board should remain mute during a hearing and ignore deficiencies in the testimony. A Board must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 741 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

Pursuant to 10 CFR § 2.718, the Licensing Board has the duty to conduct a fair and impartial hearing under the law, which includes the responsibility to impose upon all

parties to a proceeding the obligation to disclose all potential conflicts of interest. Fundamental fairness clearly requires disclosure of potential conflicts so as to enable the Board to determine the materiality of such information. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-73, 16 NRC 974, 979 (1982). See also Georgia Power Co. (Vogtle Electric Generating Plant Units 1 and 2), LBP-93-8, 37 NRC 292, 299-301 (1993).

A Board may refer a potential conflict of interest matter to the NRC General Counsel, who is responsible for interpreting the NRC's conflict of interest rules. Once the matter has been handled in accordance with NRC internal procedures, a Board will not review independently either the General Counsel's determination on the matter or the judgment on whether any punitive measures are required. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 583-584 (1985).

The Commission also outlined examples of sanctions a Licensing Board may impose on a participant in a proceeding who fails to meet its obligations. A Board can warn the offending party that its conduct will not be tolerated in the future, refuse to consider a filing by that party, deny the right to cross-examine or present evidence, dismiss one or more of its contentions, impose sanctions on its counsel, or in severe cases dismiss the party from the proceeding. In selecting a sanction, a Board should consider the relative importance of the unmet obligation, potential for harm to other parties or the orderly course of the proceedings, whether the occurrence is part of a pattern of behavior, the importance of any safety or environmental concerns raised by the party, and all of the circumstances (13 NRC 452 at 454). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191, 194-95 (1992).

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

3.1.2.11.1 Powers/Role of Presiding Officer

The presiding officer has the duty to conduct a fair and impartial hearing, to maintain order and to take appropriate action to avoid delay. Specific powers of the presiding officer are set forth in 10 CFR § 2.718. While the Licensing Board has broad discretion as to the manner in which a hearing is conducted, any actions pursuant to that discretion must be supported by a record that indicates that such action was based on a consideration of discretionary factors. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978).

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

The presiding officer in an informal adjudicatory proceeding has the discretion to allow or require oral presentations by any party where it is necessary to create an adequate record for decision. Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 110-112, 127 & n.194 (1991), citing, 10 CFR § 2.1235(a), clarified, LBP-91-34, 34 NRC 159 (1991).

In accordance with 10 CFR § 2.1235, when the credibility of various affiants is at the center of the parties' dispute, the Presiding Officer must convene an oral presentation session to receive testimony. Frank J. Calabrese Jr. (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 85 (1997).

The presiding officer in a materials licensing proceeding is authorized to submit written questions to the applicant in order to develop a complete hearing record. However, such authority may not be exercised until a notice of hearing has been published and the hearing file has been created. Rockwell International Corp. (Rocketdyne Division), LBP-89-29, 30 NRC 299, 302-303 nn. 5, 10 (1989), citing, 10 CFR § 2.1233(a) and 54 Fed. Reg. 8269 (February 28, 1989). Upon discretionary interlocutory review, the Appeal Board clarified the role of the presiding officer under the 10 CFR Part 2, Subpart L informal adjudication procedures. Although the presiding officer is given substantial discretion and an enhanced role as a technical fact finder, the authority to control the development of the hearing record may be exercised only after: (1) a determination of whether the petitioners have the requisite standing and interests to intervene, 10 CFR § 2.1205(g); (2) the preparation of the hearing file by the NRC Staff, 10 CFR § 2.1231(a), (b); and (3) the parties' submittal of their initial evidentiary presentations, 10 CFR § 2.1233(a). Only after the issues have been defined by the parties is it then appropriate for the presiding officer to submit written questions to the parties. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-18 (1989), aff'd, CLI-90-5, 31 NRC 337, 339 (1990). A presiding officer has denied intervenors leave to respond to an NRC Staff response to questions which the presiding officer had addressed to all the parties where the intervenors failed to describe sufficiently the alleged deficiencies in the Staff response. Curators of the University of Missouri, LBP-91-14, 33 NRC 265, 266 (1991). The presiding officer may encourage the parties to reach a settlement. However, the presiding officer may not participate in any private and confidential settlement negotiations among the parties. Any settlement conference conducted by the presiding officer pursuant to 10 CFR § 2.1209(c) must be open to the public, absent compelling circumstances. Rockwell, supra, 30 NRC at 720-21, aff'd, CLI-90-5, 31 NRC 337, 339-340 (1990).

The presiding officer in a Subpart L informal adjudicatory proceeding, who was concerned about an incomplete hearing file, ordered the Staff to include in the hearing file any NRC report (including inspection reports and findings of violation) and any correspondence between the NRC and the licensee during the previous 10 years which the intervenors could reasonably believe to be relevant to any of their admitted areas of concern. Curators of the University of Missouri, LBP-90-22, 31 NRC 592, 593 (1990), citing, 10 CFR § 2.1231(b). See Curators of the

University of Missouri, LBP-90-33, 32 NRC 245, 250 (1990) (only NRC reports or correspondence with the licensee must be included in the hearing record). The presiding officer further directed the Staff to serve all such relevant documents on the parties, since there was no local public document room and the burden on the Staff to provide a copy of publicly available documents to the intervenors' attorney was minuscule. Curators of the University of Missouri, LBP-90-27, 32 NRC 40, 42-43 (1990).

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

In a Subpart L case, a presiding officer may propose ways of narrowing issues, of settling deadlines for completion of aspects of a case, of identifying issues for a settlement on legal briefs, and for eliciting procedural suggestions from the parties. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

In the context of the record before the presiding officer, including the arguments of the participants, if the presiding officer's reasons for rejecting an intervenors contentions "may be reasonably discerned," the presiding officer has provided an adequate explanation for that contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 290-91 (1988).

Exercising his or her general authority to simplify and clarify the issues, see 10 C.F.R. § 2.714(f), a presiding officer can recast what a petitioner sets out as two contentions into one. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 22 (1996).

3.1.3 Quorum Requirements for Licensing Board Hearing

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

3.1.4 Disqualification of a Licensing Board Member

3.1.4.1 Motion to Disqualify Adjudicatory Board Member

The rules governing motions for disqualification or recusal are generally the same for the administrative judiciary as for the judicial branch itself, and the Commission has

followed that practice. Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 NRC 385, 386 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998).

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

(1) all disqualification motions must be timely filed. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973). In particular, any question of bias of a Licensing Board member must be raised at the earliest possible time or it is waived. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 384-386 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 (1984). The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for disqualification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1081-1082 (1984); Seabrook (ALAB-757), supra, 18 NRC at 1361.

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

(3) a disqualification motion, as with all other motions, must be served on all parties or their attorneys. 10 CFR §§ 2.701(b), 2.730(a).

Disqualification of a Licensing Board member, either on his own motion or on motion of a party, is addressed in 10 CFR § 2.704. Strict compliance with Section 2.704(c) is required. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981). A motion to disqualify a member of a Licensing Board is determined by the individual Board member rather than by the full Licensing Board. Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21 n.26 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1186 n.1 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-6, 11 NRC 411 (1980). In those cases where a party's motion for disqualification of a Board member is denied and the Board member does not recuse himself, Section 2.704(c) explicitly requires that the Licensing Board refer the matter to the Appeal Board or the Commission. Allens Creek, supra, 13 NRC at 86; Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978); Public Service Co. of New Hampshire

(Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998).

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

Nevertheless, as to the affidavit requirement, the Appeal Board has held that the movant's failure to file a supporting affidavit is not crucial where the motion to disqualify is founded on a fact to which the Licensing Board itself had called attention and is particularly narrow thereby obviating the need to reduce the likelihood of an irresponsible attack on the Board member in question through use of an affidavit. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978).

An intervenor's status as a party to a proceeding does not of itself give it standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). However, a party requesting disqualification may attempt to establish by reference to a Board member's overall conduct that a pervasive climate of prejudice exists in which the party cannot obtain a fair hearing. A party may also attempt to demonstrate a pattern of bias by a Board member toward a class of participants of which it is a member. Seabrook, supra, 18 NRC at 1187-1188. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1199 n.12 (1983).

3.1.4.2 Grounds for Disqualification of Adjudicatory Board Member

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

Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Puget Sound

Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 34 (1979).

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

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

An administrative trier of fact is subject to disqualification if:

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

Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal site), ALAB-494, 8 NRC 299, 301 (1978); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984), citing, Public Service Electric and Gas Co. (Hope Creek Generating station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

The fact that a member of an adjudicatory tribunal may have a crystallized point of view on questions of law or policy is not a basis for his or her disqualification. Shoreham, supra, 20 NRC at 34, citing, Midland, supra, 6 AEC at 66; Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988).

In its decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982), the Commission made clear that Licensing Board members are governed by the same disqualification standards that apply to Federal judges. Hope Creek, supra, 19 NRC at 20. The current statutory foundation for the disqualification standards is found in 28 U.S.C., Sections 144 and 455. Section 144 requires a Federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. Hope Creek, supra, 19 NRC at 20. Section 455(a) imposes an objective standard which is whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. Hope Creek, supra, 19 NRC at 21-22; Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998).

Under 28 U.S.C. § 455(b)(2), a judge must disqualify himself in circumstances where, inter alia, he served in private practice as a lawyer in the "matter in controversy." In

accord with 28 U.S.C. § 455(e), disqualification in such circumstances may not be waived. Hope Creek, supra, 19 NRC at 21.

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

An administrative trier of fact is subject to disqualification for the appearance of bias or prejudgment of the factual issues as well as for actual bias or prejudgment. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568 (1985); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-11, 47 NRC 302, 330-331 (1998).

Disqualifying bias or prejudice of a trial judge must generally stem from an extra-judicial source even under the objective standard for recusal which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Preliminary assessments, made on the record, during the course of an adjudicatory proceeding, based solely upon application of the decision-maker's judgment to material properly before him in the proceeding, do not compel disqualification as a matter of law. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1364-1365 (1982), citing, United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973); In Re International Business Machines Corporation, 618 F.2d 923, 929 (2d Cir. 1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1197 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721 (1985).

The fact that a Board member's actions are erroneous, superfluous, or inappropriate does not, without more, demonstrate an extrajudicial bias. Matters are extrajudicial when they do not relate to a Board member's official duties in a case. Rulings, conduct, or remarks of a Board member in response to matters which arise in administrative proceedings are not extrajudicial. Seabrook (ALAB-749), supra, 18 NRC at 1200. See also Seabrook (ALAB-748), supra, 18 NRC at 1188; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 640-41 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A judge will not be disqualified on the basis of: occasional use of strong language toward a party or in expressing views on matters arising from the proceeding; or actions which may be controversial or may provoke strong reactions by parties in the

proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Limerick, supra, 22 NRC at 721; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

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

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

3.1.4.3 Improperly Influencing an Adjudicatory Board Decision

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

3.1.5 Resignation of a Licensing Board Member

The Administrative Procedure Act requirement that the official who presides at the reception of evidence must make the recommendation or initial decision (5 U.S.C. § 554(d)) includes an exception for the circumstance in which that official becomes "unavailable to the agency." When a Licensing Board member resigns from the Commission, he becomes "unavailable" (10 CFR § 2.704(d)). Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 101 (1977). Resignation of a Board member during a proceeding is not, of itself, grounds for declaring a mistrial and starting the proceedings anew. Id. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977) was affirmed generally and on the point cited herein in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

"Unavailability" of a Licensing Board member is dealt with generally in 10 CFR § 2.704(d).

3.2 Export Licensing Hearings

3.2.1 Scope of Export Licensing Hearings

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

The focus of section 134 of the Atomic Energy Act of 1954, as amended, is on discouraging the continued use of high-enriched uranium as reactor fuel and not its per se prohibition. Transnuclear, Inc., CLI-94-1, 39 NRC 17 (1994); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333 (1998).

3.2.2 Standing to Intervene in Export License Hearings

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

An organization's institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient to confer standing as a matter of right under section 189a of the Atomic Energy Act of 1954, as amended. Transnuclear, Inc., (Export of Enriched Uranium), CLI-99-15, 49 NRC 366, 367 (1999).

3.2.3 Hearing Requests

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

3.3 Hearing Scheduling Matters

3.3.1 Scheduling of Hearings

As a general rule, scheduling is a matter of Licensing Board discretion which will not be interfered with absent a "truly exceptional situation". 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).

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

(1) the likelihood that early findings would retain their validity:
(2) the advantage to the public interest and to the litigants in having early, though possibly, inconclusive, resolution of certain issues:

(3) the extent to which early hearings on certain issues might occasion prejudice to one or more litigants, particularly in the event that such issues were later reopened because of supervening developments.

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

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

The Atomic Safety and Licensing Board (ASLB) interpreted agency jurisprudence as reflecting a general reluctance to base the dismissal of contentions on pleading defects or procedural defects, including defects of timing. At the same time, the ASLB judged that the Commission expects its presiding officers to set schedules, expects that parties will adhere to those schedules, and expects that presiding officers will enforce compliance with those schedules. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000) (citing Sequoia Fuels Corp., (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994); Yankee Atomic Electrical Co., (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996); Statement of Policy on Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)).

An ASLB may not schedule a hearing for a time when it is known that a technical member will be unavailable for more than one half of one day unless there is no reasonable alternative to such scheduling. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 238 (1974).

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

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

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 CFR

2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet to be filed operating license application. Shearon Harris, supra, ALAB-577, 11 NRC 18, 27-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Section 2.104(a) of the Commission's Rules of Practice contemplates determination of a need for a hearing in the public interest on an operating license, only after application for such a license is made. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 27-28 (1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

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

3.3.1.1 Public Interest Requirements re Hearing Schedule

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

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

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

3.3.1.2 Convenience of Litigants re Hearing Schedule

Although the convenience of litigants is entitled to recognition, it cannot be dispositive on questions of scheduling. Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684-685 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

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

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

3.3.1.3 Adjourned Hearings

(RESERVED)

3.3.2 Postponement of Hearings

3.3.2.1 Factors Considered in Hearing Postponement

Where there is no immediate need for the license sought, the ASLB decision as to whether to go forward with hearings or postpone them should be guided by the three factors listed in the Douglas Point case; namely:

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

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

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

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

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

The Commission historically has been reluctant to suspend pending adjudications to await developments in other proceedings, but situations may arise where efficiencies might be gained from suspending an adjudication due to the presence of overlapping issues in multiple NRC proceedings. Atlas Corp. (Moab, Utah Site), LBP-00-4, 51 NRC 53 (2000).

3.3.2.2 Effect of Plant Deferral on Hearing Postponement

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

3.3.2.3 Sudden Absence of ASLB Member at Hearing

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

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

3.3.2.4 Time Extensions for Case Preparation Before Hearing

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

The Appeal Board granted Staff's request for an extension of a deadline for filing written testimony but called the matter to the attention of the Commission, which has supervisory authority over the Staff. In granting the extension, made as a result of the Staff's inability to meet the earlier deadline due to assignment of Staff to Three Mile Island related matters, the Board rejected the intervenor's suggestion that it hold a hearing to determine the reasons for, and reasonableness of, the extension request. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12 (1979).

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

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

3.3.3 Scheduling Disagreements Among Parties

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

3.3.4 Appeals of Hearing Date Rulings

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

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

hearing, not a perfect one. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978).

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

3.3.5 Location of Hearing

(RESERVED)

3.3.5.1 Public Interest Requirements re Hearing Location

(RESERVED)

3.3.5.2 Convenience of Litigants Affecting Hearing Location

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-531 (1979).

3.3.6 Consolidation of Hearings and of Parties

Consolidation of hearings is covered generally by 10 CFR § 2.716. Consolidation of parties is covered generally by 10 CFR § 2.715a.

A Board, on its own initiative, may consolidate parties who share substantially the same interest and who raise substantially the same questions, except when such action would prejudice one of the intervenors. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986), citing, 10 CFR § 2.715a and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

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

Under 10 CFR § 2.716, consolidation is permitted if found to be conducive to the proper dispatch of the Board's business and to the ends of justice. Dairyland Power Cooperative (La Crosse Boiling Water Reactor, Operating License and Show Cause), LBP-81-31, 14 NRC 375, 377 (1981). See Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-13A, 35 NRC 205, 205-206 (1992) (a 10 CFR 2, Subpart G proceeding and a 10

CFR 2, Subpart L proceeding were consolidated as a Subpart G proceeding), explained, LBP-92-16A, 36 NRC 18, 19-22 (1992).

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

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

Upon discretionary interlocutory review of the Bloomsburg consolidation order, LBP-92-13A, supra, the Commission found that the Licensing Board and the presiding officer had exceeded their authority by consolidating the Subpart G and Subpart L proceedings. The consolidation order converted the informal Subpart L proceeding into a formal Subpart G proceeding without the authorization of the Commission in violation of 10 CFR § 2.1209(k), which requires a presiding officer in a Subpart L proceeding to use the Subpart L informal hearing procedures unless he recommends and receives Commission approval to apply other procedures. However, the Commission deferred to the judgment of the Licensing Board and presiding officer, and authorized the consolidation of the Subpart G and Subpart L proceedings as a Subpart G proceeding. The Commission noted the potential commonality of issues in the proceedings and the desire to avoid potential procedural complications. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 87, 89-91 (1992).

The Commission may in its own discretion order the consolidation of two or more export licensing proceedings, and may utilize 10 CFR § 2.716 as guidance for deciding whether or not to take such action. Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328-1329 (1977). Note, however, that persons who are not parties to either of two adjudicatory proceedings have no standing to have those proceedings consolidated under Section 2.716. Id. at 1328. Where proceedings on two separate applications are consolidated, the Commission may explicitly reserve the right to act upon the applications at different times. Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-78-4, 7 NRC 311, 312 (1978). See also Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 894 (1987).

3.3.7 In Camera Hearings

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

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

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

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

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

3.4 Issues for Hearing

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1269, 1286 (1983).

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

The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency plans are fundamentally flawed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 31-33 (1993).

Emergency planning implementing procedures - the how-to and what-to-do details of the plan- should not become the focus of the adjudicatory process. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 406-07 (2000), citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 140-42 (1995).

The Commission has accepted question of whether the applicants' financial assurance arrangement is lawful under C.F.R. § 50.75 as genuine disputes of law and fact admissible at a hearing. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 302 (2000). Other issues which have been recognized as appropriate in a hearing on a license transfer are whether NRC approval of the transfers will deprive the Commission of authority to require the applicant to

conduct remediation under decommissioning, and whether, under those circumstances, the applicant would no longer have access to the decommissioning trust for remediation it would need to complete. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 307 (2000).

The issue of management capability to operate a facility is better determined at the time of the operating license application, than years in advance on the basis of preliminary plans. Carolina Power Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated. Lack of either technical competence or character qualifications on the part of a licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application. In making determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. However, not every licensing action throws open an opportunity to engage in an inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute. The issue of character is a proper matter for inquiry in a license transfer proceeding. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). See also Piping Specialists, Inc. 36 NRC 156, 163, n.5 (1992); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 189 (1999).

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

Since the Appendix I (of 10 CFR 50) rule itself does not specify health effects, and there is no evidence that the purpose of the Appendix I rulemaking was to determine generally health effects from Appendix I releases, it follows that health effects of Appendix I releases must be litigable in individual licensing proceedings. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 276 (1980). See also Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-105, 16 NRC 1629, 1641 (1982), citing, Black Fox, supra, 12 NRC at 264.

Upon certification the Commission held that in view of the fact that the TMI accident resulted in generation of hydrogen gas in excess of hydrogen generation design basis assumptions of 10 CFR § 50.44, hydrogen gas control could be properly litigated under Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR § 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guidelines values. Metropolitan Edison Company (Three Mile Island, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980). See also Illinois Power Co. (Clinton Power Station, Unit 1), LBP-82-103, 16 NRC 1603, 1609 (1982), citing, Three Mile Island, supra, 11 NRC at 675.

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

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

The Commission may entirely eliminate certain issues from operating license consideration on the ground that they are suited for examination only at the earlier construction permit stage. Short of that, the Commission has considerable discretion to provide by rule that only issues that were or could have been raised by a party to the construction permit proceeding will not be entertained at the operating license stage except upon such a showing as "changed circumstances" or "newly discovered evidence." Commission practice, however, has been to determine the litigability of issues at the operating license stage with reference to conventional res judicata and collateral estoppel principles. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 696-97 (1982).

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

Under 10 C.F.R. § 50.33(f)(2), the sufficiency vel non of the transferee's supplemental funding does not constitute grounds for a hearing; and the parent company guarantee is supplemental information and not material to the financial qualifications determination. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 299-300 (2000), citing, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000).

Petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing, Oyster Creek, CLI-00-5, 51 NRC at 207-08.

The Commission does not require "absolute certainty" in financial forecasts. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing, North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 20, 221-22. Challenges by interveners to financial qualifications "ultimately will prevail only if [they] can demonstrate relevant certainties significantly greater than those that usually cloud business outlooks." Power

Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), quoting, Seabrook, CLI-99-6, 49 NRC at 222.

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

New licensees must meet all the requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. For the issue to be admissible at a license transfer hearing, the petitioner must allege with supporting facts that the new licensee is likely to violate the NRC's emergency planning rules. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

A plant's proximity to various cities, towns, entertainment centers, and military facilities is not relevant to the question whether to approve the license transfer to that plant. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

The Commission no longer conducts antitrust reviews in license transfer proceedings. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168, 174 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Texas Gas and Electric Cp (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, "Antitrust Review Authority: Clarification," 56 Fed. Reg. 44,649 (July 19, 2000).

The Commission has denied a petitioner's request to arrange for an independent analysis of plants' conditions based on historical problems in NRC's region I since such an inquiry would go considerably beyond the scope of the license transfer proceeding. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing, Vermont Yankee, CLI-00-20, 52 NRC at 171 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Final Rule, "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

3.4.1 Intervenor's Contentions - Admissibility at Hearing

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

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

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

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

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

Petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing, Oyster Creek, CLI-00-6, 51 NRC at 207-08.

As a general rule, Licensing Boards should not accept in individual license proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission. As a corollary, certain issues included in an adjudicatory proceeding may be rendered inappropriate for resolution in that proceeding because the Commission has taken generic action during the pendency of the adjudication. There may nonetheless be situations in which matters subject to generic consideration may also be evaluated on a case-by-case basis where such evaluation is contemplated by, or at least consistent with, the approach adopted in the rulemaking proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889-90 (1983), aff'd, CLI-84-11, 20 NRC 1 (1984).

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

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

A Licensing Board may, on its own motion, explore issues which the parties themselves have not placed in controversy. 10 CFR § 2.760a; Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). This power, however, is not a license to conduct fishing expeditions and, in operating license proceedings, should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious safety or environmental issue remains. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-74-28, 8 AEC 7 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985). The Commission's Indian Point ruling has been incorporated into the regulations in modified form at 10 CFR § 2.760a.

When a Licensing Board in an operating license proceeding considers issues which might be deemed to be raised sua sponte by the Board, it should transmit copies of the order raising such issues to the Commission and General Counsel in accordance with the Secretary's memo of June 30, 1981. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-923 (1981).

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

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

The Commission has directed that when a Licensing Board or an Appeal Board raises an issue sua sponte in an operating license proceeding, it must issue a separate order making the requisite findings, briefly state its reasons for raising the issue, and forward a copy of the order to the OGC and the Commission. Comanche Peak, CLI-81-24, supra; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987). A Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that reasonable minds could inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 697 (1981).

In an operating license proceeding where a hearing is convened as a result of intervention, the Licensing Board will resolve all issues raised by the parties and any issues which it raises sua sponte. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). The decision as to all other matters which need to be considered prior to issuance of the operating license is the responsibility of the NRC Staff alone. Indian Point, supra, 3 NRC at 190; Portland General Electric Co.

(Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 58 (1984). Once the Licensing Board has resolved all contested issues and any sua sponte issues, the NRC Staff then has the authority to decide if any other matters need to be considered prior to the issuance of an operating license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-23, 14 NRC 159 (1981). The mere acceptance of a contention does not justify a Board's assuming that a serious safety, environmental, or common defense and security matter exists or otherwise relieve it of the obligation under 10 CFR § 2.760a to affirmatively determine that such a situation exists. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981).

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

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

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

3.4.3 Issues Not Addressed by a Party

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

3.4.4 Separate Hearings on Special Issues

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

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

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

The Appeal Board's holding in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), that any early findings made by a Licensing Board, in circumstances where the applicant had disclosed an intent to postpone construction for several years, would be open to reconsideration "only if supervening developments or newly available evidence so warrant", does not support a later Licensing Board's action in imposing a similar limitation on the right to raise issues which were not encompassed by the early findings. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979), reconsid. denied, ALAB-539, 9 NRC 422 (1979).

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

3.4.5 Construction Permit Extension Proceedings

Section 185 of the AEA, 42 U.S.C. §2235, provides that a construction permit will not expire and no rights under the permit will be forfeited unless two circumstances are present: (1) the facility is not completed, and (2) the latest date for completion has passed. If construction is complete, no further extension of the completion date is required. Comanche Peak, CLI-93-10, 37 NRC at 201. Commission regulations provide that the substantial completion of a facility's construction satisfies the AEA's requirements regarding completion of the facility. See 10 CFR §§ 50.56 and 50.57(a)(1) (1993). Comanche Peak, CLI-93-10, 37 NRC at 201 n.35.

The filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the licensee may lawfully continue construction activities pending a final determination of its application. Comanche Peak, CLI-93-10, 37 NRC at 201, 202 (1993).

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

A licensee's substantial completion of construction, lawfully undertaken during the pendency of petitioner's challenge to a construction extension request, renders moot any controversy over further extension of the completion date in the construction permit. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993).

Unless an applicant is responsible for delays in completion of construction and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such a proceeding and is proven true, the Atomic Energy Act and implementing regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed. WPPSS, supra, ALAB-722, 17 NRC at 553.

3.4.5.1 Scope of Construction Permit Extension Proceedings

The focus of any construction permit extension proceeding is to be whether "good cause" exists for the requested extension. Determination of the scope of an extension proceeding should be based on "common sense" and the "totality of the circumstances," more specifically whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and, prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1227, 1229-30 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980). See Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984).

The NRC's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension; the same limitation to apply to any interested person seeking to challenge the request for an extension. The most "common sense" approach to the interpretation of Section 185 of the Atomic Energy Act and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. WPPSS, supra, 16 NRC at 1228-1229; Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 550-51 (1983); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-846, 19 NRC 975, 978 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121 (1986).

The only question litigable in a construction permit extension proceeding -- whether the licensee has demonstrated "good cause" for the extension -- is no longer of legal

interest after the licensee has lawfully completed construction under the permit and requires no further extension of the completion date. Comanche Peak, supra, CLI-93-10, 37 NRC at 204.

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

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

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

An intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. WPPSS, supra, LBP-84-9, 19 NRC at 504, aff'd, ALAB-771, 19 NRC at 1190.

The Licensing Board should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives. It is not the Board's mission to superintend utility management when it makes business judgments for which it is ultimately responsible. WPPSS, supra, ALAB-771, 19 NRC at 1190-91, citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 757-58 (1978).

3.4.5.2 Contentions in Construction Permit Extension Proceedings

The test for determining whether a contention is within the scope of a construction permit extension proceeding is a two-pronged one. First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatory." If both prongs are met, the delay is without "good cause." WPPSS, supra, CLI-82-29, 16 NRC at 1231; ALAB-722, 17 NRC at 551; Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-84-9, 19 NRC 497, 502 (1984), aff'd, ALAB-771, 19 NRC 1183, 1189 (1984).

"Dilatory conduct" in the sense used by the Commission in defining the test for determining whether a contention is within the scope of a construction permit extension proceeding means the intentional delay of construction without a valid purpose. WPPSS, supra, ALAB-722, 17 NRC at 552; WPPSS, supra, LBP-84-9, 19 NRC at 502, aff'd, ALAB-771, 19 NRC at 1190.

Intervenors in a construction permit extension proceeding may only litigate those issues that (1) arise from the reasons assigned to the requested extension, and (2) cannot abide the operating license proceeding. Northern Indiana Public Service Co. (Bailly

Generating Station, Nuclear-1), LBP-80-31, 12 NRC 699, 701 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1301 (1982).

Contentions having no discernible relationship to the construction permit extension are inadmissible in a permit extension proceeding; a show-cause proceeding under 10 CFR § 2.206 is the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-81-6, 13 NRC 253, 254 (1981), citing, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980); Shoreham, supra, 15 NRC at 1302; Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 979 (1984).

An intervenor's concerns about substantive safety issues are inadmissible in a construction permit extension proceeding. Such concerns are more appropriately raised in an operating license proceeding or in a 10 CFR 2.206 petition for NRC Staff enforcement action against the applicant. Comanche Peak, supra, 23 NRC at 121 & n.6, 123.

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

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

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

Numerous, repetitious cited violations or other incidents may form the basis for a contention questioning the adequacy of a maintenance or surveillance program, even though none of the individual violations or other incidents rises to the level of a serious safety issue. When sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may be in order. Pacific Gas and Electric Co., supra, LBP-93-1, 37 NRC 5, 19 (1993).

3.4.6 Result of Withdrawal of a Party

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

A co-sponsored issue need not be dismissed as a result of the withdrawal of one of the sponsoring parties. Power Authority of the State of New York, et. al. (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), LBP-01-5, 53 NRC 136, 137 (2001).

3.5 Summary Disposition

3.5.1 Applicability of Federal Rules Governing Summary Judgment

In Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974), the Appeal Board found that summary disposition, governed by 10 CFR § 2.749, was analogous to and had a judicial counterpart in Rule 56 of the Federal Rules of Civil Procedure which authorizes the filing of a motion for summary judgment. See also Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-754 (1977); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986).

Decisions arising under the Federal Rules may serve as guidelines to Licensing Boards in applying 10 CFR 2.749. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Perry, supra, 6 NRC at 754; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878-879 (1974). Subsequent decisions of Licensing Boards have analogized 10 CFR § 2.749 to Rule 56 to the extent that the Rule applied in the cases in question. See, e.g., Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787 n.51 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878 (1974). (See also 5.8.5) Further, because the Commission's summary disposition rules borrow extensively from Rule 56 of the Federal Rules of Civil Procedure, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for the Commission's rules. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167 (1995) citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). Thus, pursuant to Rule 56(c) and by analogy the Commission's summary disposition rule, "[o]nly disputes facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

By and large, the rules and standards established by the courts for granting or denying a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will be applied by Licensing Boards in their consideration of motions for summary disposition under 10 CFR § 2.749. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974).

3.5.2 Standard for Granting/Denying a Motion for Summary Disposition

Under the Rules of Practice, 10 CFR Part 2, a motion for summary disposition should be granted if the Licensing Board determines, with respect to the question at issue, that there is

no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. 10 CFR § 2.749(d).

Under the concept of summary disposition (or summary judgment), the motion is granted only where the movant is entitled to judgment as a matter of law, where it is quite clear what the truth is and where there is no genuine issue of material fact that remains for trial. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), LBP-73-29, 6 AEC 682, 688 (1973); Private Fuel Storage, L.L.C., LBP-99-23, 49 NRC 485, 491 (1999); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001). A contention will not be summarily dismissed where the Licensing Board determines that there still exist controverted issues of material fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 640-41 (1981). Admission as a party to a Commission proceeding based on one acceptable contention does not preclude summary disposition nor guarantee a party a hearing on its contentions. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 n.15 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Section 2.749, like Rule 56, is a procedural device to be used as part of a screening mechanism for eliminating unnecessary consideration of assertions which do not involve factual controversy. Use of summary disposition to resolve tenuous issues raised in petitions to intervene has been encouraged by the Commission and the Appeal Board. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 (1981); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981). If the issue is demonstrably insubstantial, it should be decided pursuant to summary disposition procedures to avoid unnecessary and possibly time-consuming hearings. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Once an applicant has submitted a motion that makes a proper showing for summary disposition, the litmus test of whether or not to grant the summary disposition motion is whether Intervenor has presented a genuine issue as to any material fact that is relevant to its allegation that could lead to some form of relief. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288 (1994).

The Commission has encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-425 (1973).

A Licensing Board will deny intervenors' motion for summary disposition where the intervenors have not raised any litigable issues because of their failure to submit admissible contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2),

LBP-89-38, 30 NRC 725, 741 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484, 490 n.19 (1991).

If there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should have been permitted or required to proceed further, the motion must be denied. General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). As the Board rules on such a motion, all statements of material facts required to be served by the moving party must be deemed to be admitted, unless controverted by the statement required to be served by the opposing party. 10 CFR § 2.749. Motions for summary disposition under Section 2.749 are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient. The asserted facts must be material and of a substantial nature, not fanciful or merely suspicious. Where neither an answer opposing the motion nor a statement of material fact has been filed by an intervenor, and where Staff and applicants have filed affidavits to show that no genuine issue exists, the motion for summary judgment will not be defeated. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 NRC 593, 595-96 (1982). The legal standards governing motions for summary disposition pursuant to 10 CFR § 2.749 were reiterated by the Commission in Advanced Medical Systems, Inc., CLI-93-22, 38 NRC 98, 102-03 (1993), reconsideration denied, CLI-93-24, 38 NRC 187 (1993); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 239-40 (1993).

A grant of summary disposition is proper where the pleadings and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 CFR § 2.749(d). Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-86-27, 24 NRC 255, 261 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC 495, 498, 506 (1988); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 475 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-9, 28 NRC 271, 272-73 (1989); All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-44, 32 NRC 433, 447 (1990); Rhodes-Sayre & Associates, Inc., LBP-91-15, 33 NRC 268, 271-72 (1991). The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact and evidence must be viewed in the light most favorable to the party opposing summary judgment. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Dr. James E. Bauer (Order Prohibiting Involvement in NRC Licensed Activities), LBP-95-7, 41 NRC 323, 329 (1995).

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

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

The regulations do not require merely the showing of a "material issue of fact" or an "issue of fact." They require a genuine issue of material fact. To be genuine, the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983). Absent any probative evidence supporting the claim, mere assertions of a dispute as to material facts does not invalidate the licensing Board's grant of summary disposition. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 309-310 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

3.5.3 Burden of Proof With Regard to Summary Disposition Motions

Based on judicial interpretations of Rule 56, the burden of proof with respect to summary disposition is upon the movant who must demonstrate the absence of any genuine issue of material fact. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 102 (1993); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Adickes v. Kress and Co., 398 U.S. 144, 157 (1970); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 460, 461-62 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 665 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 67, 69 (1990), aff'd, ALAB-950, 33 NRC 492 (1991); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994); Cameo Diagnostic Centre, Inc., LBP-94-34, 40 NRC 169, 171 (1994), citing Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Private Fuel Storage, L.L.C., LBP-99-31, 50 NRC 147, 152 (1999); Private Fuel Storage, L.L.C., LBP-99-42, 50 NRC 295, 301 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 112 (2000). Summary disposition is not appropriate when the movant fails to carry its burden setting forth all material facts pertaining to its summary disposition motion. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 466 (1995). Thus, if a movant fails to make

the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention. La Crosse, supra, 16 NRC at 519. See Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 435 (1984), reconsid. den. on other grounds, LBP-8415, 19 NRC 837, 838 (1984).

Agency caselaw indicates that a summary disposition opponent is entitled to the favorable inferences that may be drawn from any evidence submitted. See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, aff'd, CLI-94-11, 40 NRC 55 (1994). This authority, however, does not relieve the opposing party from the responsibility, in the face of well pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for any purported material factual disputes. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (table). Private Fuel Storage, L.L.C., LBP-99-35, 50 NRC 180, 194 (1999).

When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. Where the movant has satisfied his initial burden and has supported his motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983). If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained or may take other appropriate action. 10 CFR § 2.729(c). Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 103 n.16 (1993). Prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Medical Systems, supra, CLI-93-22 at 108.

All material facts set forth in the motion and not adequately controverted by the response are deemed to be admitted. 10 CFR § 2.749(a). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 61 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991), aff'd, CLI-93-22, 38 NRC 98 (1993). A party opposing the motion may not rely on a simple denial of material facts stated by the movant but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are insufficient. 10 CFR § 2.749(b); Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632-33 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC

495, 498, 504-06 (1988); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542 & n.5 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 451 (1991), aff'd, CLI-92-8, 35 NRC 145 (1992). The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or the fact will be deemed admitted. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

When the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebuttal evidence or submit an affidavit explaining why it is impractical to do so. Where a party opposing the motion is unable to file affidavits in opposition in the time available, he may file an affidavit showing good reasons for his inability to make a timely response in which case the Board may refuse summary disposition or grant a continuance to permit proper affidavits to be prepared. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 103 (1993). 10 CFR § 2.749(c). A party which seeks to conduct discovery to respond to a summary disposition motion must file an affidavit which identifies the specific information it seeks to obtain and shows how that information is essential to its opposition to the summary disposition motion. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992).

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

The party filing the summary disposition motion has the burden of demonstrating the absence of any genuine issue of material fact. The opposing party must append to its response a statement of material facts about which there exists a genuine issue to be heard. If the responding party does not adequately controvert material facts set forth in the motion, the party faces the possibility that those facts may be deemed admitted. See 10 C.F.R. § 2.749(a). Private Fuel Storage, L.L.C., LBP-99-23, 49 NRC 485, 491 (1999). If the evidence before the Board does not establish the absence of a genuine issue of material fact, then the motion must be denied even if there is no opposing evidence. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). Nevertheless, a party opposing a motion cannot rely on a simple denial of the movant's material facts, but must set forth specific facts showing there is a genuine issue of material fact. See 10 C.F.R. § 2.749(b). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 92-93 (1996).

Even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. An intervenor that does respond to a motion for summary disposition but that fails to file the required "separate statement" should be no worse off than one who fails to respond at all. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 62 (1983).

Nonetheless, where a proponent of a contention fails to respond to a motion for summary disposition, it does so at its own risk; for, if a contention is to remain litigable, there must at least be presented to the Board a sufficient factual basis "to require reasonable minds to inquire further." La Crosse, supra, 16 NRC at 519-20, citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-93-12, 38 NRC 5 (1993). To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact. Poller v. Columbia Broadcasting Co. Inc., 368 U.S. 464 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1954); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981). The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974) and cases cited therein at pp. 878-879. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963); Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 450 (1991), aff'd, CLI-92-8, 35 NRC 145 (1992). The opposing party need not show that he would prevail on the issues but only that there are genuine issues to be tried. American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1967); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418 (1986). The fact that the party opposing summary disposition failed to submit evidence controverting the disposition does not mean that the motion must be granted.

A petitioner asserted numerous statements of fact, none of which were deemed to show any genuine dispute of law or fact existed. These included a statement as to the identity of certain state officials, statements about the actions and policies of the Utah Legislation and the Governor, statements about the petitioner's proposed ISFSI (which was not the subject of the licensing proceeding), an the petitioner's claims for monetary damages arising from actions taken by the State of Utah. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 125-26 (2000).

3.5.4 Contents of Motions for/Responses to Summary Disposition

The general requirements as to contents of motions for summary disposition and responses thereto are set out in 10 CFR § 2.749.

Under the NRC Rules of Practice, there is required to be annexed to a motion for summary disposition a "separate, short and concise statement of the material facts as to which the

moving party contends that there is no genuine issue to be heard." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982), citing, 10 CFR § 2.749(a). Where such facts are properly presented and are not controverted, they are deemed to be admitted. La Crosse, supra, 16 NRC at 520; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288, 293-94 (1994) citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 239-40 (1993); see Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 305 (1985).

As to affidavits in support of a motion for a summary disposition, a document submitted with a verified letter in which the attestation states that the person is "duly authorized to execute and file this information on behalf of the applicants" is not sufficient to make the document admissible into evidence pursuant to § 2.749(b). An affidavit must be submitted by a person to show he is competent to testify to all matters discussed in the document. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 755 (1977). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 500-501 (1991).

Although 10 CFR § 2.749(b) does not expressly require that the affidavit be based on a witness' personal knowledge of the material facts, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418-419 (1986).

Movant's papers which are insufficient to show an absence of an issue of fact, cannot premise a grant of summary judgment. Similarly, a response opposing a motion for summary judgment must have a statement of material facts. Mere allegations and denials will not suffice, but there must be a showing of genuine issues of fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); 10 CFR § 2.749(b); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 229, 231 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-88-23, 28 NRC 178, 182 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 662-65 (1988). In that connection, it would frequently not be sufficient for an opponent to rely on quotations from or citations to published work of researchers who have apparently reached conclusions at variance with the movant's affiants. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 436 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

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

An opponent's allegation of missing information without a showing of its materiality is insufficient to defeat a motion for summary disposition. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 687-88 (1989), vacated and reversed, ALAB-944, 33 NRC 81, 140-48 (1991).

The hearsay nature of an investigator's interview report with a witness does not bar its consideration in deciding whether to grant summary disposition, particularly in the absence of any evidence suggesting the report's inherent unreliability or any material objection to the statement of facts recounted in the interview report. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The NRC staff's subsequent decision to rescind an enforcement order does not constitute an admission that disputed facts remained regarding the sufficiency of the order when issued. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

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

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

An answer filed in response to a summary disposition motion, in support of the motion, was not considered by the Licensing Board because 10 CFR § 2.749 provided only for answers "opposing the motion." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557 (1979). Subsequently, the holding in Salem, supra, was rendered invalid by a change to 10 CFR § 2.749(a) which specifically permits responses in support of, as well as in opposition to, motions for summary disposition. 45 Fed. Reg. 68919 (Oct. 17, 1980).

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

In an action challenging a civil penalty for violations of both the Commission's regulations and the facility's license condition, the Board held prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 107-08 (1993).

For purposes of summary disposition, health effects contentions have been differentiated from other contentions. An opponent of summary disposition in the health effects area must have some new (post-1975) and substantial evidence that casts doubt on the BEIR estimates. Furthermore, he must be prepared to present that evidence through qualified witnesses at the hearing. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 437 (1984), reconsid. den., LBP-84-15, 19 NRC 837, 838 (1984), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 277 (1980).

Similarly, where a licensee opposing summary disposition in an enforcement proceeding does not contest occurrence of the essential facts contained in signed statements or reports of interview of former licensee employees, general objections to the Staff's reliance on such documents or bald assertions that the employees were "disgruntled" workers are insufficient to show a concrete, material issue of fact that would defeat summary disposition. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1984), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In opposing summary disposition by seeking to establish the existence of a genuine dispute regarding a material factual issue, a party must present sufficiently probative evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence that is "merely colorable" or is "not significantly probative" will not preclude summary judgment). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86 n. 9 (1996). Further, a party's bald assertion, even when supported by an expert, will not establish a genuine material factual dispute. See United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981) (in the context of summary judgment motion, an expert must back up his opinion with specific facts) see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 807 (9th Cir. 1988) (expert's study based on "unsupported assumptions and unsound extrapolation " cannot be used to support summary judgment motion). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 103 (1996). A party that had discovery following the filing of the dispositive motion generally cannot interpose claims based on a lack of information as the valid basis for a genuine material factual dispute. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 101-102 (1996).

3.5.5 Time for Filing Motions for Summary Disposition

A motion for summary disposition may be filed at any time during a proceeding. 10 CFR § 2.749(a), 54 Fed. Reg. 33168, 33181 (August 11, 1989); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); 46 Fed. Reg. 30328, 30330, 30331 (June 8, 1981). If the Licensing Board determines that there are not genuine issues of material fact, it may grant summary disposition even before discovery is

otherwise completed if the party opposing the motion cannot identify what specific information it seeks to obtain through further discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.749(c); Fed. R. Civ. P. 56(f); Sec. & Exch. Comm'n v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981); Donofrio v. Camp, 470 F.2d 428, 431-432 (D.C. Cir. 1972). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992).

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

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

10 CFR § 2.749 permits a Board to deny summarily motions for summary disposition which occur shortly before a hearing where the motion would require the diversion of the parties' or the Board's resources from preparation for the hearing. The Regents of the University of California (UCLA Research Reactor), LBP-82-93, 16 NRC 1391, 1393 (1982).

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

3.5.6 Time for Filing Responses to Summary Disposition Motions

Section 2.749(a) requires that responses to motions for summary disposition be filed within 20 days after service of the motion. But see Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 436 (1985) (the Licensing Board extended the time period for the Applicants' response to an intervenor's motion for summary disposition where the Applicants, pursuant to a Management Plan to resolve design and quality assurance issues, were gathering information to establish the adequacy and safety of the plant).

A party who seeks an extension of the time period for the filing of its response to a motion for summary disposition should not merely assert the existence of potential witnesses who might be persuaded to testify on its behalf. A party should provide some assurances that the potential witnesses will appear and will testify on pertinent matters. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872. 26 NRC 127, 143 (1987).

A movant for summary disposition is generally prohibited from filing a reply to another party's answer to the motion. 10 CFR § 2.749(a). However, pursuant to its general authority under 10 CFR § 2.718(e), a Licensing Board may lift the prohibition if the movant can establish a compelling reason or need to file a reply. Long Island Lighting Co. (Shoreham Nuclear

Power Station, Unit 1), LBP-87-26, 26 NRC 201, 204 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499-500 (1991).

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

With the consent of the parties, the Board may adopt a somewhat more lenient standard for granting summary disposition than is provided under 10 CFR § 2.749. For example, the Board may grant summary disposition whenever it decides that it can arrive at a reasonable decision without benefit of a hearing. That test would permit the Board to grant summary disposition under some circumstances in which it would otherwise be required to find that there is a genuine issue of fact requiring trial. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-25, 19 NRC 1589, 1591 (1984).

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

The Board may not dictate to any party the manner in which it presents its case. The Board may not substitute its judgment for the parties' on the merits of their case in order to summarily dismiss their motions, but it must deal with the motions on the merits before reaching a conclusion. UCLA Research Reactor, supra, 16 NRC at 1394, 1395.

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

Pursuant to 10 CFR § 2.749, once a party has filed a motion for summary disposition the Licensing Board is expressly prohibited by the rule from entertaining any further supporting statements. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-37, 40 NRC 288 (1994).

In an interesting approach seeking to avoid relitigation of matters considered in a prior proceeding concerning the same reactor, a Licensing Board invited motions for summary

disposition which rely on the record of the prior proceeding. In response, the intervenor was expected to indicate why the prior record was inadequate and why further proceedings might be necessary. The Licensing Board planned to take official notice of the record in the prior proceeding and render a decision as to whether further evidentiary hearings were necessary. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 408 (1985).

Where the existing record is insufficient to allow summary disposition, it is not improper for a Licensing Board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition motion. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 752 (1977).

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

A summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same allegation. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631632 (1982).

3.5.7.1 Operating License Hearings

A Board may grant summary disposition as to all or any part of the matters involved in an operating license proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 634 (1986), citing, 10 CFR § 2.749(a). In a construction permit proceeding, summary disposition may only be granted as to specific subordinate issues and may not be granted as to the ultimate issue of whether the permit should be authorized. 10 CFR § 2.749(d).

In an operating license proceeding, where significant health and safety or environmental issues are involved, a Licensing Board should grant a motion for summary disposition only if it is convinced from the material filed that the public health and safety or the environment will be satisfactorily protected. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977); 10 CFR § 2.760a; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986).

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

3.5.7.2 Construction Permit Hearings

While, as a general rule, summary disposition can be granted in nearly any proceeding as to nearly any matter for which there is no genuine issue of material fact, there is an exception under NRC Practice. In construction permit hearings, summary disposition may not be used to determine the ultimate issue as to whether the CP will be granted.

10 CFR § 2.749(d). See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

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

3.5.7.3 Amendments to Existing Licenses

Summary disposition may be used in license amendment proceedings where a hearing is held with respect to the amendment. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). See, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 566-567 (1979); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985).

3.5.8 Summary Disposition: Mootness

When summary disposition is being sought based on a contention's mootness in light of revised information submitted by an applicant in response to NRC Staff requests for additional information (RAI), a summary disposition motion is not premature because the information was not incorporated into a license application amendment until after the disposition motion was filed. Regardless of the situation prior to the submission of the application amendment, given there is no material dispute that the application currently contains RAI information, nothing precludes the entry of summary disposition. Private Fuel Storage, LLC, LBP-99-23, 49 NRC 485, 493 (1999).

When summary disposition is being sought based on a contention's mootness in light of revised information submitted by the applicant, a challenge to the validity of the revised information does not support the notion there is a controversy, factual or otherwise, regarding the existing contention so that summary disposition is inappropriate; instead, this is an argument in favor of a new contention. Private Fuel Storage, LLC, LBP-99-23, 49 NRC 485, 493 (1999).

3.5.9 Content of Summary Disposition Order

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

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

3.5.10 Appeals from Rulings on Summary Disposition

As is the case under Rule 56 of the Federal Rules, a denial of a motion for summary disposition is interlocutory and, therefore, not appealable. Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93 (1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 331 (1985). This applies as well to denials of partial summary disposition. Waterford, cited in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551 (1981). An order granting summary disposition of an intervenor's sole contention is not interlocutory since the consequence is intervenor's dismissal from the proceeding. As such, it is immediately appealable. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981). An order summarily dismissing some, but not all, of an intervenor's contentions which does not have the effect of dismissing the intervenor from the proceeding is interlocutory in nature and an appeal must await the issuance of an initial decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1198 n.3 (1985); Turkey Point, supra, 22 NRC at 331.

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

Reluctance to certify a Licensing Board's summary disposition decision to the Commission, claiming that it is a ruling as a matter of law, is outweighed by both the fact that there are often factual elements and also the Commission's admonition that "boards are encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible in the proceeding." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 136 (2000).

3.6 Other Dispositive Motions/Failure to State a Claim

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

3.7 Attendance at and Participation in Hearings

An intervenor may not step in and out of participation in a particular issue at will. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975). According to one Licensing Board, an intervenor who raises an issue and then refuses to actively participate in the hearing may lose his right to appeal the Licensing Board's decision. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156 (1976). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-851, 24 NRC 529, 530 (1986), citing, Consumers Power Co. (Midland Plant,

Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), review declined, CLI-83-2, 17 NRC 69 (1983). A party's total failure to assume a significant participational role in a proceeding (e.g., his failure to appear at hearings and to file proposed findings), at least in combination with other factors militating against his being retained as a party, will, upon motion of another party, result in his dismissal from the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558, 560 (1976).

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

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

The appropriate sanction for willful refusal to attend a prehearing conference is dismissal of the petition for intervention. In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the Staff at the prehearing conference. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

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

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

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

3.8 Burden and Means of Proof

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

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

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

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

Under Commission practice, the applicant for a construction permit or operating license always has the ultimate burden of proof. 10 CFR § 2.732. The degree to which he must persuade the board (burden of persuasion) should depend upon the gravity of the matters in controversy. Virginia Electric & Power Company (North Anna Power station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17, n.18 (1975).

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

An applicant has the burden of proving, prior to the issuance of a full-power license, that there is reasonable assurance that adequate protective measures can and will be taken in an emergency. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-836, 23 NRC 479, 518 (1986), citing, 10 CFR § 50.47(a)(1). However, an applicant is not required to prove and reprove essentially unchallenged factual elements of its case. An

intervenor may not merely assert a need for more current information without having raised any questions concerning the accuracy of the applicant's submitted facts. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-857, 25 NRC 7, 13 (1987).

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

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

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 215-16 (1996), (citing, 55 Fed. Reg. 27,645, 27646 (1990); St Joseph Radiology Associates, Inc. (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic), LBP-92-34, 36 NRC 317, 321-22 (1992)); Aharon Ben-Haim, Ph.D. (Upper Montclair, New Jersey), LBP-97-15, 46 NRC 60, 61 (1997). (See General Matters-Immediate Effectiveness Review).

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

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

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

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

3.8.1 Duties of Applicant/Licensee

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

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

In general, if a party has doubts about whether to disclose information, it should do so, as the ultimate decision with regard to materiality is for the decisionmaker, not the parties. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982).

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

3.8.2 Intervenor's Contentions - Burden and Means of Proof

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

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

An intervenor must come forward with sufficient evidence to require reasonable minds to inquire further, and it has an obligation to reveal pursuant to a discovery request what the

evidence is. That requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination. Seabrook, supra, 17 NRC at 589.

This requirement has, on occasion, been questioned by the courts in those situations in which the information is in the hands of the Staff and/or applicant. See, e.g., York Committee for a Safe Environment v. NRC, 527 F.2d 812 at n.12 (D.C. Cir. 1975).

The scope of the "burden of going forward" rule has also been questioned by the courts. In Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir, 1976), the Court of Appeals indicated that an intervenor, in commenting on a draft EIS, need only bring sufficient attention to an issue "to stimulate the Commission's consideration of it" in order to trigger a requirement that the NRC consider whether the issue should receive detailed treatment in an EIS. The court stated that this test does not support the imposition of the burden of an affirmative evidentiary showing. Id. at n.13. Aeschliman was reversed in this regard by the U.S. Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978). Therein, the Court held that it is "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Id. at 553. The Court found that the NRC's use of " a threshold test," requiring intervenors to make a "showing sufficient to require reasonable minds to inquire further," was well within the agency's discretion. Id. at 554. See also Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric station, Units 1 and 2), ALAB-693, 16 NRC 952, 957 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978).

While the outlines of an intervenor's burdens with respect to its contentions may not be fully defined, it is clear that the Commission's rules do not preclude an intervenor from building its case defensively, on the basis of cross-examination. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Zion station, Units 1 & 2), ALAB-226, 8 AEC 381, 389 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-505 (1973).

The "threshold test," restored by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978), goes only to the matter of the showing necessary to initiate an inquiry into a specific alternative which an intervenor (or prospective intervenor) thinks should be explored, and not to the placement of the burden of proof once such an inquiry actually has been undertaken in an adjudicatory context. Public Service Co. of New Hampshire (Seabrook station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982), the Board required intervenors to file a Motion Concerning Litigable Issues, by which the burden of going forward on summary disposition (but not the burden of proof) was placed on the intervenors. However, applicant and Staff would have to respond and intervenors reply. Thereafter, the standard for summary disposition would be the same as required under the rules. This special procedure was appropriate because time pressures had caused the Board to apply a lax standard for admission of contentions, depriving applicants of full notice of the contentions in the proceeding, and because applicants had already shown substantial grounds for summary disposition of all contentions in the course of a hearing that had already been completed. The Motion for Litigable Issues was intended to parallel the Motion for Summary Disposition in all but one respect--that intervenor was required to file first and to come forward with evidence indicating the existence of genuine issues of fact before applicant had to file a summary disposition

motion. Applicant retained the burden of proof demonstrating the absence of genuine issues of fact, just as it would if it had originated the summary disposition process by its own motion. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-88, 16 NRC 1335, 1339 (1982).

3.8.3 Specific Issues - Means of Proof

3.8.3.1 Exclusion Area Controls

The applicant must demonstrate constant total control of the entire exclusion area except for roads and waterways. As to those, only a showing of post-accident control is necessary. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 393-395 (1975). Note also that in certain situations there may be very narrow stretches of land (e.g., a narrow strand of beach below the mean high tide line) the lack of total control of which might readily be viewed as de minimus. Where such a de minimus situation exists, strict application of the constant total control requirements may be inappropriate. Id. at 394-395.

3.8.3.2 Need for Facility

NEPA implicitly requires that a proposed facility exhibit some benefit to justify its construction or licensing. In the case of a nuclear power plant, the plant arguably has no benefit unless it is needed. Thus, a showing of need for the facility is apparently required to justify the licensing thereof. This need can be demonstrated either by a showing that there is a need for additional generating capacity to produce needed power or by a showing that the nuclear plant is needed as a substitute for plants that burn fossil fuels that are in short supply. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-354 (1975). See also Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978). A plant may also be justified on the basis that it is needed to replace scarce natural gas as an ultimate energy resource ("i.e., to satisfy residential and business energy requirements now being directly met by natural gas"). Wolf Creek, 7 NRC at 327. In evaluating a utility's load forecast, "the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made." Wolf Creek, 7 NRC at 328. Because of the uncertainty involved in predicting future demand and the serious consequences of not having generating capacity available when needed, an isolated forecast which is appreciably lower than all others in the record may be accepted only if the Board finds that the isolated ground." Wolf Creek, 7 NRC at 332.

Prior to rule changes precluding the consideration of need for power in operating license adjudications, it was held that a change in the need for power at the operating license stage must be sufficiently extensive to offset the environmental and economic costs of construction before it may be raised as a viable contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 684 (1981). Under the current rules, need for power now may be litigated in operating license proceedings only if it is shown, pursuant to 10 CFR § 2.758, that special circumstances warrant waiver of the rules prohibiting litigation of need for power. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 889-890 (1984), citing, 10 CFR 51.53(c); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 (1985).

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

Considerable weight should be accorded the electrical demand forecast of a State utilities commission that is responsible by law for providing current analyses of probable electrical demand growth and which has conducted public hearings on the subject. A party may have the opportunity to challenge the analysis of such commission. Nevertheless, where the evidence does not show that such analysis is seriously defective or rests on a fatally flawed foundation, no abdication of NRC responsibilities under NEPA results from according conclusive effect to such a forecast. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 240-241 (1978).

The U.S. Supreme Court has noted that there is little doubt that under the Atomic Energy Act of 1954 (AEA), State public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). But this Commission's responsibilities regarding need for power have their primary roots in NEPA rather than the AEA. NEPA does not foreclose the placement of heavy reliance on the judgment of local regulatory bodies charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligations to meet customer demands. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 388-389 (1978).

3.8.3.3 Burden and Means of Proof in Interim Licensing Suspension Cases

Several cases have set forth the requirements as to burden of proof and burden of going forward in interim licensing suspension cases. These rulings were promulgated in the context of the Commission's General Statement of Policy on the Uranium Fuel Cycle (41 Fed. Reg. 34707, Aug. 16, 1976) but presumably would be applicable in similar contexts that may arise in the future.

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

3.8.3.4 Availability of Uranium Supply

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

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

3.8.3.5 Environmental Costs

(RESERVED)

3.8.3.5.1 Cost of Withdrawing Farmland from Production

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

3.8.3.6 Alternate Sites Under NEPA

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

3.8.3.7 Management Capability

Under the Atomic Energy Act, the Commission is authorized to consider a licensee's character or integrity in deciding whether to continue or revoke its operating license. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). A licensee's ethics and technical proficiency are both legitimate areas of inquiry insofar as consideration of the licensee's overall management competence is at issue. Three Mile Island, supra, 19 NRC at 1227; Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156, 153 (1992).

Candor is an especially important element of management character because of the Commission's heavy dependence on an applicant or licensee to provide accurate and timely information about its facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985), citing, Three Mile Island, supra, 19 NRC at 1208; Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156 (1992).

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

Areas of inquiry to determine if a utility is capable of operating a facility are outlined in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit no. 1), CLI-80-5, 11 NRC 408 (1980); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659 (1984).

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

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

Like "negligence," the standard of "reasonable management conduct" requires considerable judgement by the trier of fact. As there is no precedent directly on point regarding lack of reasonable management conduct by a non-expert manager, it is appropriate, therefore, for the Licensing Board to be very careful not to apply a standard that is too demanding and that benefits too much from hindsight. Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156, 166, n.13 (1992).

3.9 Burden of Persuasion (Degree of Proof)

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

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

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

3.9.1 Environmental Effects Under NEPA

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

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

3.10 Stipulations

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

3.11 Official Notice of Facts

Under 10 CFR § 2.743(i), official notice may be taken of any fact of which U.S. Courts may take judicial notice. In addition, Licensing Boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. Pursuant to 10 C.F.R. § 2.743(i), the Commission may take official notice of publicly available documents filed in

the docket of a Federal Energy Regulatory Commission proceeding. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996). In any event, parties must have the opportunity to controvert facts which have been officially noticed.

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

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

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

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

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

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

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

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

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

In the same vein, it would appear that nothing would preclude a Licensing Board from taking official notice of reports and documents filed with the agency by regulated parties, provided that parties to the proceeding are given adequate opportunity to controvert the matter as to which official notice is taken. See. e.g., Market Street Ry Co. v. Railroad Commission of California, 324 U.S. 548, 562 (1945) (agency's decision based in part on officially noticed monthly operating reports filed with agency by party); State of Wisconsin v. FPC, 201 F.2d 183, 186 (1952), cert. den., 345 U.S. 934 (1953) (regulatory agency can and should take official notice of reports filed with it by regulated company).

The Commission may take official notice of a matter which is beyond reasonable controversy and which is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991), citing, Government of Virgin Islands v.

Gereau, 523 F.2d 140, 147 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991).

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

Official notice of information in another proceeding is permissible where the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 n.3 (1982), citing, United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-530 (1945); 10 CFR 2.743(i).

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

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

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

The Commission's reference to various documents in the background section of an order and notice of hearing does not indicate that the Commission has taken official notice of such documents. A party who wishes to rely upon such documents as evidence in the hearing should offer the documents as exhibits before the close of the record. Three Mile Island Inquiry, supra, 25 NRC at 688-89.

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

3.12 Evidence

10 CFR § 2.743 generally delineates the types and forms of evidence which will be accepted and, in some cases must be submitted in NRC licensing proceedings.

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

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

Technical analyses offered in evidence must be sponsored by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 (1983), citing, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754-56 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 n.22 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 350-51 (1988). A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

3.12.1 Rules of Evidence

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

3.12.1.1 Admissibility of Evidence

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

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

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

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

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

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

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

The Final Safety Analysis Report (FSAR) is conditionally admissible as substantive evidence, but once portions of the FSAR are put into controversy, applicants must present one or more competent witnesses to defend them. San Onofre, supra, 17 NRC at 366.

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

This same standard applies to proceedings conducted under the informal adjudication procedures of 10 CFR Part 2, Subpart L. The presiding officer in such proceedings may strike, on motion or on the presiding officer's own initiative, any portion of a written presentation or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable. Rockwell International Corp. (Rocketdyne Division), LBP-90-10, 31 NRC 293, 298 (1990), citing, 10 CFR § 2.1233(e).

3.12.1.1.1 Admissibility of Hearsay Evidence

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

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

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

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

The fact that the NRC Staff's charges in support of an enforcement order may be "hearsay" allegations does not provide sufficient reason to dismiss those claims ab initio. See Oncology Services Corp., LBP-93-20, 38 NRC 130, 135 n.2 (1993) (hearsay evidence generally admissible in administrative hearing if reliable, relevant, and material). Rather, so long as those allegations are in dispute, the validity and sufficiency of any "hearsay" information upon which they are based

generally is a matter to be tested in the context of an evidentiary hearing in which the Staff must provide adequate probative evidence to carry its burden of proof. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

3.12.1.2 Hypothetical Questions

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

3.12.1.3 Reliance on Scientific Treatises, Newspapers, Periodicals

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

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

An intervenor in a materials licensing proceeding who relies upon newspaper articles to support its written presentation, 10 CFR § 2.1233(d), must include a clearly cross-referenced set of copies of the articles containing numbered pages and dates of publication. Rockwell International Corp. (Rocketdyne Division), LBP-90-11, 31 NRC 320, 323 (1990).

3.12.1.4 Off-the-Record Comments

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

3.12.1.5 Presumptions and Inferences

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

In any NRC licensing proceeding, a FEMA (Federal Emergency Management Agency) finding will constitute a rebuttable presumption on questions of adequacy and implementation capability of emergency planning. Long Island Lighting Co. (Shoreham

Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 702 (1983), citing, 10 CFR § 50.47(a)(2).

When a party has relevant evidence within his control which he fails to produce, it may be inferred that such evidence is unfavorable to him. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

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

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

3.12.1.6 Government Documents

NRC adjudicatory boards may follow Rule 902 of the Federal Rules of Evidence, waiving the need for extrinsic evidence of authenticity as a precondition to admitting official government documents to allow into evidence government documents. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 49 (1979).

3.12.2 Status of ACRS Letters

Section 182(b) of the Atomic Energy Act of 1954 and 10 CFR § 2.743(g) of the Commission's Rules of Practice require that the Advisory Committee on Reactor Safeguards (ACRS) letter be proffered and received into evidence. However, because the ACRS is not subject to cross-examination, the ACRS letter cannot be admitted for the truth of its contents, nor may it provide the basis for any findings where the proceeding in which it is offered is a contested one. Arkansas Power & Light Co. (Arkansas Nuclear-1, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

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

A Licensing Board may rely upon conclusions of the ACRS on issues that are not controverted by any party. 10 CFR Part 2, Appendix A, § V(f)(1),(2). However, the contents of an Advisory Committee on Reactor Safeguards (ACRS) report cannot, of itself, serve as an underpinning for findings on health and safety aspects of licensing proceedings. Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 518 (1983), citing, Arkansas Power and Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

3.12.3 Presentation of Evidence by Intervenors

An intervenor may not adduce affirmative evidence on an issue that he has not raised himself unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17 (1974). Nevertheless, an intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), affirming, ALAB-244, 8 AEC 857, 867-888 (1974).

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

3.12.4 Evidentiary Objections

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

3.12.5 Statutory Construction; Weight

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

If an NRC regulation is legislative in character, the rules of interpretation applicable to statutes will be equally germane to determining that regulation's meaning. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 143.

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

Where the meaning of a regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. We must enforce the regulation as written. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145.

The Licensing Board may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written. To discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145.

The "best source of legislative history" is the congressional reports on a particular bill. See Alabama Power Co., 692 F.2d. at 1368. Perry, Davis-Besse, supra, 36 NRC at 302, aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Statement of witnesses during a congressional hearing that are neither made by a member of Congress nor referenced in the relevant committee report are normally to be accorded little, if any, weight. See Kelly v. Robinson, 479 U.S. 36, 50 n. 13 (1986). Perry, Davis-Besse, 36 NRC at 302 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

A legislative body will be afforded a large measure of deference in its choice of which aspects of a particular evil it wishes to eliminate. See e.g. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). Perry, Davis-Besse, 36 NRC at 307 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.12.5.1 Due Process

An equal protection challenge to an economic classification is reviewed under the rational basis standard, which requires that any classifications established in the challenged statute must rationally further a legitimate government objective. See. e.g. Nordlinger v. Hahn, 120 L. Ed. 2d 1, 12 (1992). Perry, Davis-Besse, 36 NRC at 306 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.12.5.2 Bias or Prejudgment, Disqualification

In reviewing an agency decision allegedly subject to bias, including improper legislative influence, the independent assessment of an adjudicatory decision-maker regarding the merits of the parties' legal (as opposed to factual) positions will attenuate any earlier impropriety. See Gulf Oil Corp. v. FPC, 563 F.2d 588, 611-12 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978). Perry, Davis-Besse, 36 NRC at 308 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.13 Witnesses at Hearing

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

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

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

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

Where the credibility of evidence turns on the demeanor of a witness, an appellate board will give the judgment of the trial board, which saw and heard the testimony, particularly great deference. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1218 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). However, demeanor is of little weight where other testimony, documentary evidence, and common sense suggest a contrary result. Three Mile Island, supra, 19 NRC at 1218.

3.13.1 Compelling Appearance of Witness

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

A NRC subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance. United States v. Powell, 379 U.S. 48, 57-58 (1964); Construction Products Research Inc. v. United States, 73 F.3d 464, 469-71 (2d Cir.), cert. denied, 519 U.S. 927 (1996). St. Mary's Medical Center, CLI-97-14,

46 NRC 287, 291 (1997). The NRC may begin an investigation "merely on suspicion that the law is being violated, or even just because it wants assurances that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). The NRC's subpoena power is essentially analogous to the broad subpoena powers accorded to a grand jury. Powell, 379 U.S. at 57; Morton Salt Co., 338 U.S. at 642-43; Oklahoma Press Co. v. Walling, 327 U.S. 186, 209 (1946). St. Mary's Medical Center, CLI-97-14, 46 NRC 287, 291 (1997).

The Rules of Practice preclude a Licensing Board from declining to issue a subpoena on any basis other than that the testimony sought lacks "general relevance." In ruling on a request for a subpoena, the Board is specifically prohibited from attempting "to determine the admissibility of evidence." 10 CFR § 2.720(a); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 93 (1977).

3.13.1.1 NRC Staff as Witnesses

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

The Rules of Practice do not permit particular Staff witnesses to be subpoenaed. But a licensing board, pursuant to 10 C.F.R. § 2.720(h)(2), may upon a showing of exceptional circumstances, require the attendance and testimony of NRC personnel. Where an NRC employee has taken positions at odds with those espoused by witnesses to be presented by the Staff, on matters at issue in a proceeding, exceptional circumstances exist. The Board determined that differing views of such matters are facts differing from those likely to be presented by the Staff witnesses and, on that basis, required the attendance and testimony of named NRC personnel. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-96-8, 43 NRC 178, 180-81 (1996).

3.13.1.2 ACRS Members as Witnesses

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

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

3.13.2 Sequestration of Witnesses

In Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565 (1977), the Appeal Board considered a Staff request for discretionary review of a Licensing Board ruling which excluded prospective Staff witnesses from the hearing room while other witnesses

testified. The Appeal Board noted that while sequestration orders must be granted as a matter of right in Federal district court cases, NRC adjudicatory proceedings are clearly different in that direct testimony is generally pre-filed in writing. As such, all potential witnesses know in advance the basic positions to be taken by other witnesses. In this situation, the value of sequestration is reduced. Moreover, the highly technical and complex nature of NRC proceedings often demands that counsel have the aid of expert assistance during cross-examination of other parties' witnesses.

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

3.13.3 Board Witnesses

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

In the interest of a complete record, the Staff may be ordered to submit written testimony from a "knowledgeable witness" on a particular issue in a proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-607, 12 NRC 165, 167 (1980).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Thus, while Licensing Boards have the authority to call witnesses of their own, the exercise of this discretion must be reasonable and, like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Applying the criteria of Summer, supra, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff

had apparently ignored in a motion for summary disposition of a health effects contention. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

3.13.4 Expert Witnesses

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his expertise. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of the expert should be established by showing either academic training or relevant experience or some combination of the two. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978). As to academic training, such training that bears no particular relationship to the matters for which an individual is proposed as an expert witness is insufficient, standing alone, to qualify the individual as an expert witness on such matters. Diablo Canyon, LBP-78-36, 8 NRC at 571. In addition, the fact that a proposed expert witness was accepted as an expert on the subject matter by another Licensing Board in a separate proceeding does not necessarily mean that a subsequent Board will accept the witness as an expert. Diablo Canyon, LBP-78-36, 8 NRC at 572.

A witness is qualified as an expert by knowledge, skill, experience, training, or education. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing, Fed. R. Evid. 702. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

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

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

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

A witness testifying to the results of an analysis need not have at hand every piece of datum utilized in performing that analysis. In this area, a rule of reason must be applied. It is not

unreasonable, however, to insist that, where the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated. North Anna, supra, 10 NRC at 27.

A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

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

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his or her expertise. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

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

Agency caselaw indicates that the qualifications of an expert are established by showing either academic training or relevant experience, or some combination of the two. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

3.13.4.1 Fees for Expert Witnesses

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

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

3.14 Cross-Examination

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

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

The authority of a Board to demand cross-examination plans is encompassed by the Board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. 10 CFR §§ 2.718(e), 2.757(c). Such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 377 (1985). 10 CFR § 2.743 clearly gives the presiding officer the discretion to require the submittal of a cross-examination plan from any party seeking to conduct cross-examination. The plan must contain a brief description of the issues on which cross-examination will be conducted, the objectives to be achieved by cross-examination, and the proposed line of questions designed to achieve those objectives. 10 CFR § 2.743(a), (b)(2), 54 Fed. Reg. 33168, 33181 (August 11, 1989). Civil penalty proceedings and proceedings for the modification, suspension, or revocation of a license are exempt from these requirements. 10 CFR § 2.743(b)(3).

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

Even if cross-examination is wrongly denied, such denial does not constitute prejudicial error per se. The complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding. Waterford, supra, 17 NRC at 1096; San Onofre, supra, 15 NRC at 697 n.14; San Onofre, supra, 15 NRC at 1384; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151

(1984); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 76 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 495 (1986).

Cross-examination, though subject to restriction, is a fundamental right conferred on parties to formal adjudication in NRC proceedings by the Administrative Procedure Act and by the Commission's Rules of Practice. Cross-examination during a deposition, which might suffice under truly exceptional circumstances, is not otherwise a ready substitute for cross-examination before the presiding officer. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), LBP-83-29, 17 NRC 1117, 1120 (1983).

3.14.1 Cross-Examination By Intervenors

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

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

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

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

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

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

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

While an intervenor has a right to cross-examine on any issue in which he has a discernible interest, the Licensing Board has a duty to monitor and restrict such cross-examination to avoid repetition. CLI-75-1 supra, 1 NRC 1. The Board is explicitly authorized to take the necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination, and the Board may properly limit cross-examination which is merely repetitive. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Prairie Island, supra, ALAB-244, 8 AEC 857, 868. Moreover, cross-examination must be strictly limited to the scope of the direct examination. Prairie Island, CLI-75-1, 1 NRC 1 and ALAB-244, 8 AEC 857 at 867. As a general proposition, no party has a right to unfettered or unlimited cross-examination and cross-examination may not be carried to unreasonable lengths. The test is whether the information sought is necessary for a full and true disclosure of the facts. Prairie Island, supra, ALAB-244, 8 AEC 857, 869 n.16; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1674-1675 (1982), citing, Section 181 of the Atomic Energy Act; Section 7(c) of the APA, 5 U.S.C. 556(d). This limitation applies equally to cross-examination on issues raised sua sponte by the Licensing Board in an operating license proceeding. Id. at 8 AEC 869.

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

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

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

A Licensing Board has the authority to direct that parties to an operating license proceeding conduct their initial cross-examination by means of prehearing examinations in the nature of

depositions. Pursuant to 10 CFR § 2.718, a Board has the power to regulate the course of the hearing and the conduct of the participants, as well as to take any other action consistent with the APA. See also 10 CFR § 2.757, 10 CFR Part 2, App. A, IV. In expediting the hearing process using the case management method contained in Part 2, a Board should ensure that the hearings are fair, and produce a record which leads to high quality decisions and adequately protects the public health and safety and the environment. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1677 (1982), citing, Statement of Policy, supra, 13 NRC at 453.

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

3.14.2 Cross-Examination by Experts

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

3.14.3 Inability to Cross-Examine as Grounds to Reopen

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

3.15 Record of Hearing

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

3.15.1 Supplementing Hearing Record by Affidavits

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

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

3.15.2 Reopening Hearing Record

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

Although the standard for reopening the record in an NRC proceeding has been variously stated, the traditional standard requires that (1) the motion be timely, (2) significant new evidence of a safety question exist, and (3) the new evidence might materially affect the outcome. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 800 n.66 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 476 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1260 (1984), rev'd in part on other gnds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-8, 21 NRC 1111, 1113 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986).

The traditional standard for reopening applies in determining whether a record should be reopened on the basis of new information. The standard does not apply where the issue is whether the record should be reopened because of an inadequate record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985).

Reopening a record is an extraordinary action. To prevail, the petitioners must demonstrate that their motions are timely, that the issues they seek to litigate are significant, and that the information they seek to add to the record would change the results. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 915 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1207 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1216 (1985).

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

licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983).

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

Reopening the record is within the Licensing Board's discretion and need not be done absent a showing that the outcome of the proceeding might be affected and that reopening the record would involve issues of major significance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-46, 15 NRC 1531, 1535 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station), 10 NRC 775, 804 (1978); Public Service Co. of New Hampshire (Seabrook Station), 6 NRC 33, 64, n.35 (1977); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973).

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

The Board must be persuaded that a serious safety matter is at stake before it is appropriate for it to require supplementation of the record. Texas Utilities GeneratingCo. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 NRC 415, 418 (1983). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 412 n.5, 413 (1987).

In proceedings where the evidentiary record has been closed, the record should not be reopened on TMI related issues relating to either low or full power absent a showing, by the moving party, of significant new evidence not included in the record, that materially affects the decision. Bare allegations or simple submission of new contentions is not sufficient, only significant new evidence requires reopening. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The factors to be applied in reopening the record are not necessarily additive. Even if timely, the motion may be denied if it does not raise an issue of major significance. However, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1143 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

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

3.15.3 Material Not Contained in Hearing Record

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 n.33 (1986). The Licensing Board may not base a decision on factual material which has not been introduced into evidence. However, if extra-record material raises an issue of possible importance to matters such as public health, the material may be examined on review. If this examination creates a serious doubt about the decision reached by the Licensing Board, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-352 (1978). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-937, 32 NRC 135, 150-152 (1990).

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

3.16 Interlocutory Review via Directed Certification

3.17 Licensing Board Findings (See also Standards for Reversing Licensing Boards § 5.6)

The findings of a Licensing Board must be supported by reliable, probative and substantial evidence in the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184 (1975). It is well settled that the possibility that inconsistent or even contrary views could be drawn if the views of an opposing party's experts were accepted does not prevent the Licensing Board's findings from being supported by substantial evidence. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 866 (1975).

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

opportunity to impeach the evidence through cross-examination or to refute it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

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

The Board's initial decision should contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3, & 4), ALAB-256, 1 NRC 10, 14 n.8 (1975). Despite the fact that a number of older cases have held that a Licensing Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 449 F.2d 1069 (D.C. Cir 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). While the Seabrook Appeal Board found that the deficiencies in the initial decision were not so serious as to require reversal, especially in view of the fact that the Appeal Board itself would make findings of fact where necessary, the Appeal Board made it clear that a Licensing Board's blatant failure to follow the Appeal Board's direction in this regard is ground for reversal of the Licensing Board's decision.

Notwithstanding its authority to do so, the Appeal Board was normally reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright 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. Seabrook, supra, 6 NRC at 42. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 530-31 (1988). Note, however, that in at least one case the Appeal Board did search the record where (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy and (2) it did not take an extended period of time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 368 (1978).

The admonition that Licensing Boards must clearly set forth the basis for their decisions applies to a Board's determination with respect to alternatives under NEPA. Thus, although a Licensing Board may utilize its expertise in selecting between alternatives, some explanation is necessary. Otherwise, the requirement of the Administrative Procedure Act that conclusions be founded upon substantial evidence and based on reasoned findings "become[s] lost in the haze of so-called expertise." Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

When evidence is presented to the Licensing Board in response to appellate instruction that a matter is to be investigated, the Licensing Board is obligated to make findings and issue a

ruling on the matter. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 368 (1978).

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

Licensing Boards have an obligation "to articulate in reasonable detail the basis for [their] determination." A substantial failure of the Licensing Board in this regard can result in the matter being remanded for reconsideration and a full explication of the reasons underlying whatever result that Board might reach upon such reconsideration. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410-412 (1978).

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

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

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

Where evidence may have been introduced by intervenors in an operating license proceeding, but the construction permit Licensing Board made no explicit findings with regard to those matters, and at the construction permit stage the proceeding was not contested, the operating license Licensing Board will decline to treat the construction permit Licensing Board's general findings as an implicit resolution of matters raised by intervenors. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 79 n.6 (1979).

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

There is no requirement mandated by the Atomic Energy Act nor the Commission's regulations that a Licensing Board may not resolve a contested issue if any form of confirmatory analysis is ongoing as of the close of the record on that issue, where a

Licensing Board is able to make the basic findings prerequisite to the issuance of an operating license based on the existing record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 519 (1983), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622, 1628 (1985), review denied, CLI-85-14, 22 NRC 177, 178 (1985).

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

3.17.1 Independent Calculations by Licensing Board

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

3.18 Res Judicata and Collateral Estoppel

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

Thus, as a general rule, it appears that res judicata principles may be applied, where appropriate, in NRC adjudicatory proceedings. Consistent with those principles, res judicata does not apply when the foundation for a proposed action arises after the prior ruling advanced as the basis for res judicata or when the party seeking to employ the doctrine had the benefit, when he obtained the prior ruling, of a more favorable standard as to burden of proof than is now available to him. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

The common law rules regarding res judicata do not apply, in a strict sense, to administrative agencies. Res judicata need not be applied by an administrative agency where there are overriding public policy interests which favor re-litigation. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing, International Harvester Co. v. Occupational Safety and Health Review Commission, 628 F.2d 982, 986 (7th Cir. 1980).

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

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

A change in external circumstances is not required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to which an old policy applied. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing, Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969).

An Agency must be free to consider changes that occur in the way it perceives the facts, even though the objective circumstances remain unchanged. Clinch River, supra, 16 NRC at 420, citing, Maxwell, supra; FTC v. Texaco, 555 F.2d 867, 874 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), rehearing denied, 434 U.S. 883 (1977).

Principles of collateral estoppel, like those of res judicata, may be applied in administrative adjudicatory proceedings. U.S. v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982); Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 25 n.40 (1984), citing, Farley, supra; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 n.2 (1994); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995).

Collateral estoppel precludes re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. Davis-Besse, supra; Farley, supra. As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues." Safety Light, 41 NRC at 442, citing Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

The application of collateral estoppel does not hinge on the correctness of the decision or interlocutory ruling of the first tribunal. Moore's Federal Practice, para. 0.405[1] and [4.1] at 629, 634-37 (2d ed. 1974); Davis-Besse, supra; Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995). It is enough that the tribunal had jurisdiction to render the decision, that the prior judgment was rendered on the merits, that the cause of action was the same, and that the party against whom the doctrine is asserted was a party to the earlier litigation or in privity with such a party. Davis-Besse, supra. Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties. Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-640, 13 NRC 487, 543 (1981). In virtually every case in which the doctrine of collateral estoppel was asserted to prevent litigation of a contention, it was held that privity must exist between the intervenor advancing the contention and the intervenor which

litigated it in the prior proceeding. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 404 (1985) and cases cited. But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-200 (1981). Conversely, that parties to the former action were not joined to the second action does not prevent application of the principle. Dreyfus v. First National Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir. 1970), cert. denied, 400 U.S. 832 (1970); Hummel v. Equitable Assurance Society, 151 F.2d 994, 996 (7th Cir. 1945); Davis-Besse, supra, 5 NRC 557. Where circumstances have changed (as to context or law, burden of proof or material facts) from when the issues were formerly litigated or where public interest calls for re-litigation of issues, neither collateral estoppel nor res judicata applies. Farley, supra, 7 AEC 203; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 286 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 56-57 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 445 (1995). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 126-127 (1992); Ohio Edison Company (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Company; Toledo Edison Company (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1) LBP-92-32, 36 NRC 269, 285 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). Furthermore, under neither principle does a judicial decision become binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. 2 Davis, Administrative Law Treatise, 18.12 at pp. 627-28. Cf. US v. Radio Corp. of America, 358 U.S. 334, 347-52 (1959). Where application of collateral estoppel would not affect the Commission's ability to control its internal proceedings, however, a prior court decision may be binding on the NRC. Davis-Besse, supra.

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-575 (1979). Whatever other public policy factors may outweigh the application of the doctrine of collateral estoppel, the correctness of the earlier determination of an issue is not among them. Simply stated, issue preclusion does not depend on the correctness of a prior decision. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995).

There is no basis under the Atomic Energy Act or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages; principles of res judicata and collateral estoppel then come into play. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 464 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1044 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1081 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). A contention already litigated between the same parties at the construction permit stage may not be re-litigated in an operating license proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 78-82 (1982); Shearon Harris, supra, 23 NRC at 536.

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

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

When certain issues have been adequately explored and resolved in an early phase of a proceeding, an intervenor may not re-litigate similar issues in a subsequent phase of the proceeding unless there are different circumstances which may have a material bearing on the resolution of the issues in the subsequent proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 402-403 (1990). "To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree such as might place before the court an issue different in some respect from the one decided in the initial case." Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995) citing 1B Moore's Federal Practice ¶0.448, at III.-642 (2d ed. 1995). Similarly, "a change or development n the controlling legal principles" or a "change [in] the legal atmosphere" may make issue preclusion inapplicable. Safety Light, 41 NRC at 446; citing Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948).

Collateral estoppel requires presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 (1983), citing, Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986), see also Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 445 (1995). In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in

privity with a party to the earlier litigation. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Shearon Harris, supra, 23 NRC at 536; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993).

The doctrine of collateral estoppel traditionally applies only when the parties in the case were also parties (or their privies) in the previous case. A limited extension of that doctrine permits "offensive" collateral estoppel, i.e., the claim by a person not a party to previous litigation that an issue had already been fully litigated against the defendant and that the defendant should be held to the previous decision because he has already had his day in court. Parklane Hosiery Co., Inc. v. Leo M. Shore, 439 U.S. 322 (1979), see also Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995). At least one Licensing Board has held that, in operating license proceedings, estoppel may also be applied defensively, to preclude an intervenor who was not a party from raising issues litigated in the construction permit proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-201 (1981). This would not appear to be wholly consistent with the Appeal Board's ruling in Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Station, Units 1 and 2), ALAB-640, 13 NRC 487. 543 (1981).

The Licensing Board which conducted the San Onofre operating license hearing relied upon similar reasoning. The Board held that, although "identity of the parties" and "full prior adjudication of the issues" are textbook elements of the doctrines of res judicata and collateral estoppel, they are not prerequisites to foreclosure of issues at the operating stage which were or could have been litigated at the construction permit stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 82 (1982). When an issue was known at the construction permit stage and was the subject of intensive scrutiny, anyone who could have (even if no one had) litigated the issue at that time can not later seek to do so at the operating license hearing without a showing of changed circumstances or newly discovered evidence. San Onofre, supra, 15 NRC at 78-82. The Appeal Board subsequently found that the Licensing Board had erred. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 353-354 (1983). The doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as having their day in court. There is no public policy reason why the Agency's administrative proceedings warrant a looser standard. San Onofre (ALAB-673), supra, 15 NRC at 696. The Appeal Board also disagreed with the Licensing Board's statement that organizations or persons who share a general point of view will adequately represent one another in NRC proceedings. San Onofre (ALAB-673), supra, 15 NRC at 695-696.

The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another is whether legal accountability between the two groups or virtual representation of one group by the other is shown. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 n.3 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 1 and 2), ALAB-673, 15 NRC 688, 695-96 (1982) (dictum).

An operating license Board will not apply collateral estoppel to an issue which was considered during an uncontested construction permit hearing. When there are no adverse parties in the construction permit hearing, there can be neither privity of parties nor "actual litigation" of the issue sufficient to support reliance on collateral estoppel. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 622-624 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 506 (1989) (collateral estoppel does not apply to an issue which was reviewed by the NRC Staff, but which was not previously the subject of a contested proceeding).

An intervenor in an operating license proceeding, who was not a party in the construction permit proceeding, is not collaterally estopped from raising and re-litigating issues which were fully investigated in the construction permit proceeding. However, the intervenor has the burden of providing even greater specificity than normally required for its contentions. The intervenor must specify how circumstances have changed since the construction permit proceeding or how the Licensing Board erred in the construction permit proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 539-40 (1986). Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 n.5 (1983).

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

The Commission will give effect to factual findings of Federal courts and sister agencies when those findings are part of a final judgment, even when the party seeking estoppel effect was not a party to the initial litigation. Although the application of collateral estoppel would be denied if a party could have easily joined in the prior litigation, the Commission will apply collateral estoppel even though it is alleged that a party could have joined in, if the prior litigation was a complex antitrust case. Furthermore, FERC determinations about the applicability of antitrust laws are sufficiently similar to Commission determinations to be entitled to collateral estoppel effect. Even a shift in the burden of persuasion does not exclude the application of collateral estoppel when it is apparent that the FERC opinion did not arrive at its antitrust conclusions because of the burden of persuasion. On the other hand, the decision of a Federal district court on a summary judgment motion is not a final judgment entitled to collateral estoppel effect, particularly when the court did not fully explain the grounds for its opinion and when its decision was issued after the hearing board had already begun studying the record and had formed factual conclusions which were not adequately addressed in the district court's opinion. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167, 1173-80, 1189-90 (1981). The repose doctrines of res judicata, collateral estoppel, laches and the law of the case are applicable in NRC adjudicatory proceedings generally and all may be applied in antitrust proceedings because 'litigation has the same conclusive power in antitrust as elsewhere.' Ohio Edison Company (Perry Nuclear Power Plant, Unit 1); Cleveland Electric Illuminating Company; Toledo Edison Company (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 285 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

The repose doctrine of law of the case acts to bar re-litigation of the same issue in subsequent stages of the same proceeding. Perry, 36 NRC at 283, supra, citing Arizona v. California, 460 U.S. 605, 618 (1983). The repose doctrines of res judicata and collateral estoppel are somewhat related. As described by the Supreme Court: under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). Both doctrines thus bar re-litigation by the same parties of the same substantive issues. Res judicata also bars litigation of an issue that could have been litigated in the prior cause of action. Perry, 36 NRC at 284-85, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

To establish the defense of laches, which is an equitable doctrine that bars the late filing of a claim if a party would be prejudiced because of its actions during the interim were taken in reliance on the right challenged by the claimant, "the evidence must show both that the delay was unreasonable and that it prejudiced the defendant.' Van Bourg v. Nitze, 388 F. 2d 557, 565 (D.C. Cir. 1967) (quoting Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966). Perry, 36 NRC at 286, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). It is well established that the absence of "subject matter" jurisdiction may be raised at any time in a proceeding without regard to timeliness considerations. Perry, 36 NRC at 387, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Summary disposition may be denied on the basis of res judicata and collateral estoppel. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14 (1980), affirming, LBP-79-27, 10 NRC 563 (1979).

3.19 Termination of Proceedings

3.19.1 Procedures for Termination

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

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

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

Where an amendment to an operating license has been noticed, and a petition for intervention has been filed, but the application for amendment is withdrawn prior to the Licensing Board ruling on the intervention petition and issuing a Notice of Hearing as provided in 10 CFR § 2.105(e)(2), the Commission, not the Licensing Board, has jurisdiction over the withdrawal of the application. See 10 CFR § 2.107(a). Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-93-16, 38 NRC 23 (1993), aff., CLI-93-20, 38 NRC 83 (1993). However, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances. CLI-93-20 at 85.

If a licensing board has not yet issued a Notice of Hearing in a proceeding pursuant to 10 C.F.R. § 2.105(e)(2), the authority to approve a withdrawal of the application resides in the Commission rather than the Board. GPU Nuclear Corp. (Oyster Creek Nuclear Generating Station), CLI-99-29, 50 NRC 331, 332 (1999); see 10 C.F.R. § 2.107(a); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 82 (1993). Cf. 10 C.F.R. § 2.717(a).

Termination of a proceeding with prejudice is not warranted where there has been no demonstration that there has been substantial prejudice to an opposing party or to the public interest. That an opposing party may "linger in uncertainty"about a future application does not constitute such a demonstration. In addition, termination with prejudice would be inappropriate in the absence of any information that would justify precluding the site from such future use. Northern States Power Company (Independent Spent Fuel Storage Installation), LBP-97-17, 46 NRC 227, 231-232 (1997).

Under 10 C.F.R. §2.107(a), when a Notice of Hearing has not been issued, the Atomic Safety and Licensing Board has the authority to grant a motion to terminate a proceeding by the Petitioners. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-97-13, 46 NRC 11, 12 (1997). However, the licensing board lacks jurisdiction to terminate a matter pending before the Commission itself. In addition, where rulings on intervenors' standing were those of the Commission, the licensing board lacks jurisdiction to accord a "with prejudice" termination with respect to such standing rulings. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999).

3.19.2 Post-Termination Authority of Commission

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

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

3.19.3 Dismissal

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

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POST HEARING MATTERS

4.0 POST HEARING MATTERS

4.1 Settlements and Stipulations

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

10 CFR § 2.759 expressly provides, and the Commission stresses, that the fair and reasonable settlement of contested initial licensing proceedings is encouraged. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 283 (1979). This was reiterated in the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981); see also Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-94-10, 39 NRC 126 (1994); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma), LBP-97-19, 46 NRC 237, 238 (1997).

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

Parties may seek appointment of a settlement judge in accordance with the Commission's guidance in Rockwell Int'l Corp., CLI-90-05, 31 NRC 337 (1990).

When a party requests to withdraw a petition pursuant to a settlement, it is appropriate for a licensing board to review the settlement to determine whether it is in the public interest. 10 C.F.R. § 2.759. See also Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomic (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256-57 (1996); John Boschuk, Jr. (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-15, 48 NRC 57, 59 (1998); Lourdes T. Boschuk (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-16, 48 NRC 63, 65 (1998); Magdy Elamir, M.D. (Newark, NJ), LBP-98-25, 48 NRC 226, 227 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13 (1998). (See also 3.18.1). When the board has held extensive hearing and has analyzed the record, it may not need to see the settlement agreement in order to conclude that the withdrawal of the petitioner is in the public interest. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 NRC 59, 63-65 (1996).

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

Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-30, 36 NRC 227 (1992).

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

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

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

As true with court proceedings requiring judicial approval of settlements, see, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Jeff D. V. Andrus, 899 F.2d 753, 758 (9th Cir. 1989); In re Warner Communications Sec. Litig., 798 F2d 35, 37 (2d Cir. 1986), a presiding officer does not have the authority to revise the parties' settlement agreement without their consent. A presiding officer thus must accept or reject the settlement with the provisions proposed by the parties. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996).

When the parties agree to settle an enforcement proceeding, the Licensing Board loses jurisdiction over the settlement agreement once the Board's approval under 10 C.F.R. § 2.203 becomes final agency action. Thereafter, supervisory authority over such an agreement rests with the Commission. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996) (citing Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) , CLI-80-12, 11 NRC 514, 417 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757-58 (1983). The Commission looks with favor upon settlements. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13, 16 (1998).

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

In examining a settlement of a enforcement proceeding, the Commission divides its public-interest inquiry into four parts: (1) whether, in view of the agency's original order and risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 202-224 (1997).

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

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

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

The issue is not whether the matter before the Board presents the best settlement that could have been obtained. The Board's obligation instead is merely to determine whether the agreement is within the reaches of the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 257 (1996); Special Testing Laboratories, Inc., LBP-99-2, 49 NRC 38, 38 (1999). If the agreement is not in the public interest, the Board may require an adjudication of any issues that require resolution prior to termination of the proceeding. Sequoyah Fuels, supra, 44 NRC at 256. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998).

10 CFR § 2.203 sets forth the Board's function in reviewing settlements in enforcement cases. It provides that (1) settlements are subject to the Board's approval; (2) the Board, in considering whether to approve a settlement, should "accord[] due weight to the position of the staff"; and (3) the Board may "order such adjudication of the issues as [it] may deem to be required in the public interest to dispose of the proceeding". Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

4.2 Proposed Findings

Each party to a proceeding may file proposed findings of fact and conclusions of law with the Licensing Board. Despite the fact that a number of older cases have held that a

Licensing Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Power Station, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), the Appeal Board has indicated that a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). 10 CFR § 2.754 permits the Licensing Board to vary its regularly provided procedures by altering the ordinary regulatory schedule for findings of fact. The NRC Staff is permitted to consider the position of other parties before finalizing its position. Consumers Power Co. (Big Rock Point Plant), LBP-82-51A, 16 NRC 180, 181 (1982).

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

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

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

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

A pro se licensee in a civil penalty proceeding will not be held to strict compliance with the format requirements for proposed findings if it can make a convincing showing that it cannot comply with all the technical pleading requirements of 10 CFR § 2.754(c). Unlike intervenors who voluntarily participate in licensing proceedings, a pro se licensee, who has requested a hearing, must participate in a civil penalty proceeding in order to protect its property interests. A Licensing Board will use its best efforts to understand and rule on the

merits of the claims presented. Tulsa Gamma Ray, Inc., LBP-91-40, 34 NRC 297, 303-304 (1991).

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

4.2.1 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings of fact and conclusions of law only with respect to issues which that party placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.754(c), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

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

4.2.2 Failure to File Proposed Findings

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

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

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

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

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

Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61 n.3 (1984). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1213 n.18 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-84-47, 20 NRC 1405, 1414 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-87-13, 25 NRC 449, 452-53 (1987).

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

The failure to file proposed findings is subject to sanctions only in those instances where a Licensing Board has directed such findings to be filed. That is the extent of the adjudicatory board's enforcement powers under 10 CFR § 2.754. Fermi, supra, 17 NRC at 23.

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

4.3 Initial Decisions

After the hearing has been concluded and proposed findings have been filed by the parties, the Licensing Board will issue its initial decision. This decision can conceivably constitute the ultimate agency decision on the matter addressed in the hearing provided that it is not modified by subsequent Commission review. Under 10 CFR § 2.764, the Licensing Board's decision authorizing issuance of an operating license is to be considered automatically stayed until the Commission completes a sua sponte review to determine whether to stay the decision. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27, 29 (1981).

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

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

With respect to authorization of issuance of construction permits, 10 CFR § 2.764(e) provides for Commission review, within 60 days of any Licensing Board decision that would

otherwise authorize licensing action, of any stay motions timely filed. If none are filed, the Commission will within the same period of time conduct a sua sponte review and decide whether a stay is warranted. In so deciding the Commission applies the procedures set out in 10 CFR § 2.788. With regard to operating licenses, 10 CFR § 2.764(f) provides for the immediate effectiveness of a Licensing Board's initial decision authorizing the issuance of an operating license for fuel loading and low power testing (up to 5% of rated power). However, a Licensing Board's authorization of the issuance of an operating license at greater than 5% of rated power is not effective until the Commission has determined whether to stay the effectiveness of the decision.

10 C.F.R. 2.764(e) does not apply to manufacturing licenses. A manufacturing license can become effective before it becomes final. The Commission does not undertake an immediate effectiveness review of a Licensing Board decision authorizing its issuance. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), CLI-82-37, 16 NRC 1691 (1982). A Licensing Board decision on a manufacturing license becomes effective before it becomes final because the issuance of a manufacturing license does not conclude the construction permit process, such a license does not present health and safety issues requiring immediate review. Cf. 46 Fed. Reg. 47764, 47765 (September 30, 1981).

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

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

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

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

precise significance of what is being said in terms of what is being decided. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), ALAB-336, 4 NRC 3 (1976).

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

Thus, a prior Licensing Board ruling in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977), to the effect that a Board need not justify its findings by discounting proffered testimony as unreliable appears to be in error insofar as it is contrary to the Appeal Board's guidance in Seabrook. Although normally the Appeal Board was disinclined to examine the record to determine whether there is support for conclusions which the Licensing Board failed to justify, it evaluated evidence in one case because (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy, and (2) it did not take much time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 368 (1978).

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

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

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

4.3.1 Reconsideration of Initial Decision

A Licensing Board has inherent power to entertain and grant a motion to reconsider an initial decision. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 646 (1974). (See also 4.5)

A presiding officer in a materials licensing proceeding retains jurisdiction to rule on a timely motion for reconsideration of his or her final initial decision even if one of the parties subsequently files an appeal. Curators of the University of Missouri,

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

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

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

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

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

4.4 Reopening Hearings

Hearings may be reopened, in appropriate situations, either upon motion of any party or sua sponte. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Sua sponte reopening is required when a Board becomes aware, from any source, of a significant unresolved safety issue, Vermont Yankee, supra, or of possible major changes in facts material to the resolution of major environmental issues. Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). Where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 352 (1978). For reopening the record, the new evidence to be presented need not always be so significant that it would alter the Board's findings or conclusions when the taking of new evidence can be accomplished with little or no burden upon the parties. To exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved (10 CFR § 2.756). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). An Appeal Board indicated that it might be sympathetic to a motion to reopen a hearing if documents appended to an appellate brief constituted newly discovered evidence and tended to show that significant testimony in the record was false. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3); (Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

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

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

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

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

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

The Licensing Board also lacks the jurisdiction to consider a motion to reopen the record after a petition to review a final order has been filed. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000), n.3, citing, Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); cf. Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995).

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3),

ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985).

Where finality has attached to some, but not all, issues, new matters may be considered when there is a reasonable nexus between those matters and the issues remaining before the Board. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306-07 (1988). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1714 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-930, 31 NRC 343, 346-47 (1990). The focus is on whether and what issues are still being reviewed. Waterford, supra, 20 NRC at 1589 n.4, citing, North Anna, supra, 9 NRC at 708.

A Board has no jurisdiction to consider a motion to reopen the record in a proceeding where it has issued its final decision and a party has already filed a petition for Commission review of the decision. The motion to reopen the record should be referred to the Commission for consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773, 775 (1985).

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

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

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

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. A person or organization which was not a party to the proceeding may not file a motion to

reopen the record unless it has filed for, and been granted, late intervention in the proceeding under 10 CFR § 2.714(a)(1). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 (1992), affirmed, Dow v. NRC, 976 F.2d 46 (D.C. Cir. 1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 76 (1992). Stringent criteria must be met in order for the record to be reopened. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123 (1994). Pursuant to 10 CFR § 2.734, a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

> (a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
> (2) The motion must address a significant safety issue.
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
> (b) The motion must be accompanied by one or more affidavits which set forth factual and/or technical bases for the movant's claim. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.734(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . . Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123-24 (1994).

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

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1,

5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 82 & n.18 (1990).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.13, 34 (1990), aff'd, ALAB-936, 32 NRC 75 (1990).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 CFR 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Id. at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Id. at 1367 n.18; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Turkey Point, supra, 25 NRC at 962; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 43132 (1989).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

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

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

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

4.4.1.1 Time for Filing Motion to Reopen Hearing

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

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider

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

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.73-4(a)(1). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-927, 31 NRC 137, 139 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Seabrook, supra, 31 NRC at 140.

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

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

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v.

NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

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

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

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

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

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

4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

4.4.2 Grounds for Reopening Hearing

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been

reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

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

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 Z 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Co.

(William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1),

ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-861, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 71 n.17 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 283 n.8, 284, 292 (1989), aff'd, ALAB-940, 32 NRC 225, 241-44 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.10 (1990), aff'd, ALAB-936, 32 NRC 75 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 443 n.47 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 486 n.3 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

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

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

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

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

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, 11 NRC at 887.

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

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

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

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2),

LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

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

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243-44 (1990). This standard also applies to an applicant's design quality assurance program. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775,

19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant re-litigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

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

4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

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

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

The burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

4.5 Motions to Reconsider

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

Motions for reconsideration of Licensing Board decisions must be filed within 10 days of the date of issuance of a challenged order. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139 (1994).

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

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

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

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

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

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

Reconsideration motions afford an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a controlling decision of law that was overlooked. New arguments are improper. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), citing Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

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

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

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or on appeal cannot be raised on a motion for reconsideration. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

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

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998); see also Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1977). Private Fuel Storage, L.L.C., LBP-99-39, 50 NRC 232, 237 (1999).

Additionally, an argument raised for the first time in a motion to reconsider does not serve as a basis for reconsideration of admission of a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 292 (1988).

Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and

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

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

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

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

A Board cannot reconsider a matter after it loses jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

In accordance with 10 CFR §§ 2.771, 2.1259(b), a dissatisfied litigant in a 10 C.F.R. Part 2, Subpart L informal adjudicatory proceeding can seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992).

Motions for reconsideration are for the purpose of pointing out errors in the existing record, not for stating new arguments. However, A Licensing Board may decide within its discretion to consider such new arguments where there is no pressure in the present status of a case. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 145 (1993).

4.6 Procedure on Remand

4.6.1 Jurisdiction of the Licensing Board on Remand

The question as to whether a Licensing Board, on remand, assumes its original plenary authority or, instead, is limited to consideration of only those issues specified in the remand order was, for some time, unresolved. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-389, 5 NRC 727 (1977). Of course, jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of review of the decision. Issues to be

Board has limited jurisdiction in a remanded proceeding and may consider only what has been remanded to it. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 11, 12 (1987) (the Licensing Board properly rejected an intervenor's proposed license conditions which exceeded the scope of the narrow remanded issue of school bus driver availability).

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

Where the Commission remands an issue to a Licensing Board it is implicit that the Board is delegated the authority to prescribe warranted remedial action within the bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

4.6.2 Jurisdiction of the Board on Remand

Jurisdiction over previously determined issues is not necessarily preserved by the pendency of other issues in a proceeding. Three Mile Island, supra, 19 NRC at 983, citing, North Anna, supra, 9 NRC at 708-09; Seabrook, supra, 8 NRC at 695-96.

4.6.3 Stays Pending Remand to Licensing Board

10 CFR § 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 2.788, 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 and 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 and 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 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

4.6.4 Participation of Parties in Remand Proceedings

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

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5.0 APPEALS

Prior 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. 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. § 2.786 (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. § 2.714a.

The standards for granting interlocutory review have remained essentially the same. Under Appeal Board and Commission case law interlocutory review was permitted 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. § 2.786(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 cited. The following section refers to some Appeal Board decisions that may be useful in understanding NRC practice.

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. 2.786, in response to an appeal filed pursuant to section 2.714a, or on its own motion (sua sponte).

5.1.1 Commission Review Pursuant to 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 CFR § 2.786(b)(4). The considerations set out in section 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., and Forrest L. Roudebush (d.b.a. PSI Inspection and d.b.a. Piping Specialists, Inc., Kansas City, Missouri), CLI-92-16, 36 NRC 351 (1992). In re: 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).

The standards for Commission review in 10 CFR § 2.786(b)(4) have been incorporated into Subpart L in 10 CFR § 2.1253. Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.), CLI-95-4, 41 NRC 248, 249 (1995).

Under 10 C.F.R. § 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 general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), n. 6.

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).

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 and 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. § 2.786, 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, L.P. (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997).

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).

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 N.H. (Seabrook Station, Units 1 and 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 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990).

Sua sponte review may be appropriate to ensure that there are no significant safety issues requiring corrective action. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984).

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, 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).

Although the absence of an appeal does not preclude appellate review of an issue contested before a Licensing Board, caution is exercised in taking up new matters not previously put in controversy. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978). In the course of its review of an initial decision in a construction permit proceeding, the Appeal Board was free to sua sponte raise issues which were neither presented to nor considered by the Licensing Board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979). On review it may be necessary to make factual findings, on the basis of record evidence, which are different from those reached by a Licensing Board. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). On appeal a Licensing Board's regulatory interpretation is not necessarily followed even if no party presses an appeal on the issue. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 135 n.10 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978). A decision reviewing a Board order may be based upon grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and, where appropriate, evidence. Id.

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 and 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 and Power Co. (North Anna Nuclear Power Station, Units 1 and 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).

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 CFR § 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 2.714a

NRC regulations contain a special provision (10 CFR § 2.714a) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene.

Under 10 CFR § 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. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant (Units 1 & 2), ALAB-823, 26 NRC 154, 155 (1987), citing 10 C.F.R. 2.714a; Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-683, 16 NRC 160 (1982), citing, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986); Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 82 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991). Only the petitioner denied leave to intervene can take an appeal of such an order. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 n.7 (1983), citing, 10 CFR § 2.714a(b). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but denying certain contentions. 10 CFR § 2.714(b); 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. 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 CFR § 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 CFR § 2.714a where it neither wholly denies nor grants a petition for leave to intervene/ request for a hearing. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 252 (1993).

A State participating as an "interested State" under 10 CFR § 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 (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 and 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 CFR § 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 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 CFR § 2.714(c); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 CFR § 2.714a. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978). Similarly, 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. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986); Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

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).

Once the time prescribed in section 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 and 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 and 3), ALAB-713, 17 NRC 83, 85 (1983), citing, Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 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 and 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 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). In re: Aharon Ben-Haim, Ph.D., CLI-99-14, 49 NRC 361, 363 (1999).

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. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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. of N.Y. (Indian Point Station, 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 and 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 CFR § 2.715(c), a nonparty 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).

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 CFR § 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 CFR § 2.786(d), formerly § 2.786(b)(6)). 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 Company 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 and 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 and 2), ALAB-573, 10 NRC 775, 789 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 n.8 (1982), citing, Black Fox, supra, 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. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). In such an appeal, other parties may file briefs in support of or opposition to the appeal. Id.

(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 and 2), ALAB-556, 10 NRC 30 (1979); Carolina Power and 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 and 2), LBP-86-24, 24 NRC 132, 135 & n.3 (1986); Carolina Power and 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).

The Commission has long construed its Rules of Practice to allow the Staff to petition for review of initial decisions. 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 CFR § 2.715 allows a nonparty to file a brief amicus curiae with regard to matters before the Commission. The nonparty must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion. 10 CFR § 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. § 2.715(d). Louisiana Energy Services, L.P. (Claiborne Enrichment Center),CLI-97-7, 45 NRC 437, 438-39 (1997).

The opportunity of a nonparty 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 and 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 and 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. §2.715(d). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Consolidated Edison Co. of N.Y., Inc. (Indian Point, 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. § 2.786(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. § 2.715(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, CLI-96-3, 43 NRC 16, 17 (1996).

Petitioner is free to monitor the proceedings and file a post-hearing amicus curiae brief at the same time the parties to the proceeding file their post-hearing 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).

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, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, 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 Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n.21 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 914 (1981); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 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 and 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. 10 CFR § 2.762(d)(1), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

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 No. 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 and 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. Shoreham, supra, 20 NRC at 1151, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 and 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 CFR § 2.786(b). The general rules for an appeal from a Licensing Board decision wholly granting or denying intervention, are set out in 10 CFR 2.714a.

Under 10 C.F.R. § 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 general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), n.6.

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 their 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 plainly states that a "petition for review . . . must be no longer than ten (10) pages." See 10 C.F.R. § 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 and 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 to 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 and 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., Inc. (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 and 2), LBP-83-77, 18 NRC 1365, 1394-1395 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636-37 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-933, 31 NRC 491, 496-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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. Seabrook, supra, 33 NRC at 13. One may not appeal from an order delaying a ruling, when appeal will lie from the ruling itself. Houston Lighting and 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 and 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).

The requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 CFR § 2.714a, and appeals from initial decisions. Waterford, supra, 16 NRC at 895 n.2.

Licensing board rulings denying waiver requests pursuant to 10 CFR § 2.758, which are interlocutory, are not considered final for purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995), questioning Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-920, 30 NRC 121, 125-26 (1989).

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 (1996).

Judicial review of administrative agency's jurisdiction should rarely be exercised before final decision from agency; sound judicial policy dictates that there be exhaustion of administrative remedies. 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 (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 an LWA or a CP 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 OL 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, Inc. (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); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (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. Greenwood, supra.

As previously noted, an appeal is taken by the filing of a petition for review within 15 days after service of the initial decision. 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. of N.Y., Inc. (Indian Point Station, 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 and Light Co. (Grand Gulf Nuclear

Station, Units 1 and 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 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 hearing. 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 and 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); 10 CFR Part 2, App. A, IX(d)(4); 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 and 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 CFR § 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 and 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 and 2), ALAB-659, 14 NRC 983 (1981).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). 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. Greenwood, supra, 7 NRC at 571.

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 and 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 CFR § 2.714a, will be denied as untimely where it was filed almost 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 and 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. of N.Y. (Indian Point Station, 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. § 2.786(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. Seabrook, supra, 5 NRC at 517.

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 and 2), ALAB-669, 15 NRC 453, 466 n.25 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 15 (1981).

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 and 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. 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. Where petitioner has submitted a complex set of pleadings that includes numerous detailed footnotes, attachments, and incorporations by reference. The Commission deems waived any arguments not raised before the Board or not clearly articulated in the petition for review. See Hydro Resources, Inc., CLI-01-4, 53 NRC at 46; Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 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).

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 and 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 and 2), ALAB-691, 16 NRC 897, 907 (1982), citing, Hartsville, supra; 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 and 2), ALAB-828, 23 NRC 13, 20 (1986); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358, 361 n.120 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and 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, Oklahoma 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 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, Public Service Electric and 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 and 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 (PID) has been appealed, supervening factual developments relating to major safety issues considered in the PID 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).

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 and 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).

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 and 2), ALAB-726, 17 NRC 755, 757 n.3 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 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 and 2), ALAB-828, 23 NRC 13, 20 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 496 n.28 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). Cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 131 n.2 (1985). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 812 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 229-30 (9th Cir. 1988). 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 and 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 and 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, L.P. (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49, 51 (1997), citing Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), 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 and 2), ALAB-244, 8 AEC 857, 864 (1974); Consumers

Power Co. (Midland Plant, Units 1 and 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 CFR § 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); Marble Hill, supra. 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 and 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).

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).

The normal deference that an appellate body owes to the trier of the facts 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 and 3), ALAB-680, 16 NRC 127, 133 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 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., ALAB-303 supra; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (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, 811 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); Florida Power and 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 and 2), ALAB-932, 31 NRC 371, 397-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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. Catawba, supra, 4 NRC at 402-405. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

Where Board's decision for the most part rests on its own carefully rendered fact 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, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998); Kenneth G. Pierce (Shorewood, Illinois), 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).

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. 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), affirming LBP-00-12, 51 NRC 247, 269-280 (2000).

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).

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 and 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 and 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), reconsidered, 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 FES

or adequate attention at the Licensing Board hearing. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 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 CFR § 2.203 and New York Shipbuilding Co., 1 AEC 842 (1961). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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, Oklahoma 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 about its proximity-based standing claims. Atlas Corp. (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997).

5.6.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973).

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, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001). Where a Licensing Board has permitted a petitioner to amend his petition to cure defects prior to issuance of a final order, allowance of an opportunity to amend will not be disturbed on appeal absent a showing of gross abuse of discretion. Prairie Island, supra.

Similarly, 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. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532 (1991).

The Commission generally defers to the presiding officer's determinations regarding standing, absent an error of law or an abuse of discretion. 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 and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

Licensing Boards have broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 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 and 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 and 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 and 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 and 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).

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 and 2), ALAB-714, 17 NRC 86, 97 (1983). The provision for stays in 10 CFR § 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 CFR § 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 Department 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 and 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 supra. See also Toledo Edison Co. (Davis-Besse Nuclear Power Plant), ALAB-25, 4 AEC 633, 634 (1971). More recently, however, amendments to 10 CFR § 2.788 on stays pending review have made it clear that 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. 10 CFR § 2.788(f).

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. §2.788. 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). See also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 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 CFR § 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 2.788 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. of N.Y., Inc. (Indian Point Station, No. 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. § 2.788(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. § 2.788(e). Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-3, 47 NRC 7 (1998); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-4, 47 NRC 111, 112 (1998).

Where a party files a stay motion with the Commission pursuant to 10 CFR § 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 2.788. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma 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 and 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 and 2), ALAB-647, 14 NRC 27 (1981); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric and 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 and 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 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 and 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds, 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 and 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 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, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

5.7.1.2 Stays of Board Proceedings, Interlocutory Rulings & 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 limited work authorizations, Public Service Co. of Indiana, Inc. (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 CFR 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 CFR 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 CFR § 2.788(e). Nuclear Fuel Services, Inc. and New York State Energy Research and 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); 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 CFR § 2.788. Such a request is more properly a petition for immediate enforcement action under 10 CFR § 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 2.788(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 CFR § 2.730(g). Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma 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 CFR § 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 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

The provisions of 10 CFR § 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 unlikely 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 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

Note that 10 CFR § 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 2.788, 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 and 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 CFR § 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. 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 7 NRC 160.

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 five factors for late intervention found in 10 CFR § 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).

5.7.1.3 10 C.F.R. § 2.788 & Virginia Petroleum Jobbers Criteria

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982); 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. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies long-standing 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, 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 2.788(b)(2) of 10 C.F.R. 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).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers (now set forth in 10 CFR § 2.788) 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 and 2), CLI-81-27, 14 NRC 795 (1981).

Stays pending appellate review are governed by 10 C.F.R. § 2.788. In determining whether to grant a stay, the Commission will consider:

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

See 10 C.F.R. § 2.788(e). 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 the 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 Intervenor's stay motion during its consideration of the Intervenor's petition for review because it saw no possibility of irreparable injury. The record indicates that the injury asserted by Intervenor could not occur until at least July 2, 2001, when the Licensee expects to place spent fuel pools C and D into service following testing. Even after July 2, the additional spent fuel stored at Shearon Harris will total no more that 150 fuel elements in the short term (i.e. during 2001). Moreover, Intervenor's claim of injury-offsite radiation exposure in the event of a spent fuel pool accident-is speculative. These facts taken together result in a small likelihood of an accident occurring , and does 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 and 2), ALAB-820, 22 NRC 743, 747-48 & n.20 (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 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Accord Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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).

Where the four factors set forth in 10 CFR § 2.788(e) are applicable, no single one of the factors is, of itself, necessarily dispositive. 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 and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). 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., ALAB-221 supra; 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

The factor which has proved most crucial with regard to stays of Licensing Board decisions is the question of irreparable injury to the movants if the stay is not granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 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 and 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Department 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 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 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 and 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 and 2), CLI-90-3, 31 NRC 219, 258 (1990); Hydro Resources. Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 n.5 (1998). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas and 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 and 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). A party must reasonably demonstrate, and not merely allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998).

In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978), the Appeal Board stressed the importance of the irreparable injury requirement, stating that 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 Appeal Board to stay. Jamesport, supra.

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. Davis-Besse, supra. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. 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). 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 Corporation, id. at 8. Discovery in a license amendment case does not constitute irreparable injury. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-8, 37 NRC 292, 298 (1993).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10

CFR 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) and Hornblower and Weeks-Hemphill Noyes, Inc. v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

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 and 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, Oklahoma 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 NEPA decisionmaking process. Seabrook, supra, 31 NRC at 258 n.62. 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. 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 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 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 and 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and 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 Company of Oklahoma (Black Fox Station, Units 1 and 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 and 2), CLI-90-3, 31 NRC 219, 260 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), 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 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co., ALAB-415, 5 NRC 1435, 1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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, Oklahoma 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 and 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 and 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).

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 CFR § 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, Catawba, supra, 20 NRC at 1635; Hydro Resources. Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 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, Oklahoma 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 and 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 and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

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 CFR § 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 2.788, 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 and 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 and 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 and 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 and 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 7 NRC 160.

5.7.5 Immediate Effectiveness Review of Operating License Decisions

Under 10 CFR § 2.764(f)(2), upon receipt of a Licensing Board's decision authorizing the issuance of a full power operating license, the Commission will determine, sua sponte, whether to stay the effectiveness of the decision. Criteria to be considered by the Commission include, but are 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 speaks, the Licensing Board's decision is considered to be automatically stayed. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-13, 22 NRC 1, 2 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 National Environmental Policy Act (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 CFR 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 and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 (1987), aff'd, 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 CFR § 2.786 for appellate review of

the Licensing Board's conclusions. Shearon Harris, supra, 25 NRC at 4 n.3, citing, 10 CFR § 2.764(9).

Before a full power license can be issued for a plant, the Commission must complete its immediate effectiveness review of the pertinent Licensing Board decision pursuant to 10 CFR § 2.764(f)(2). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 n.26 (1982).

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, Unit 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 and 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); and Houston Lighting and Power Co. (South Texas Project, Units 1 and 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 and 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 and 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 and 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 and 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-4, 29 NRC 243, 244 (1989).

In determining the fairness of a Licensing Board's scheduling decisions, the totality of the relevant circumstances disclosed by the record will be considered. Seabrook, supra, 25 NRC at 421; Seabrook, ALAB-889, supra, 27 NRC at 269.

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. Seabrook, supra, 25 NRC at 421, 425-427. 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 and 2), ALAB-541, 9 NRC 436, 438 (1979).

5.8.2 Discovery Rulings

5.8.2.1 Rulings on Discovery Against Nonparties

An order granting discovery against a nonparty is final and appealable by that nonparty 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 CFR § 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 and Power Co. (South Texas Project, Units 1 and 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 CFR § 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 Company (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

5.8.4 Order Denying Summary Disposition

As is the case under Rule 56 of the Federal Rules of Civil Procedure, an order denying a motion for summary disposition under 10 CFR § 2.749 is not immediately appealable. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93 (1974). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 CFR § 2.714a exception to the prohibition on interlocutory appeals, and may not be appealed. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977). (See also 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).

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 Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 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).

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 and 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).

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 and 2), ALAB-778, 20 NRC 42, 45 n.1 (1984), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 Rulings on Civil Penalties

In a civil penalty case, an order by the Administrative Law Judge affirming the Director of Inspection and Enforcement's order imposing civil penalties on a licensee, but at the same time granting a request for a hearing to present facts to support mitigation of the amount of the penalty, is not appealable. An appeal at this point is foreclosed by 10 CFR § 2.730(f). Section 2.730(f) is a rule of general applicability governing civil penalty proceedings to the same extent as it does licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

5.8.12 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 influenced improperly the outcome of the hearing merit 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 and 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 3.11.4.

5.8.13 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).

5.8.14 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. (Paducah, Kentucky, and Piketon, Ohio), 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. (Paducah, Kentucky, and Piketon, Ohio), 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 No. 1 & No. 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 CFR § 2.786. Section 2.786(b) provides that such a petition is to be filed within fifteen 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 section 2.714a appeal is mandatory. The Commission upon taking review, pursuant to § 2.786, may order the filing of appropriate briefs. See 10 C.F.R. 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 and 2), ALAB-836, 23 NRC 479, 485 n.2 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 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 Elec. & 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 and 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 and 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 CFR § 2.714a(a) requires the filing of a notice of appeal and a supporting brief within 10 days after service of a Licensing Board order wholly denying a petition for leave to intervene. 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. § 2.786, it will issue an order asking for the filing of appropriate briefs. This order will typically set the schedule for filing dates and appropriate page limits for briefs. See 10 C.F.R. § 2.786(d).

The Commission may consider an untimely appeal if the appellant can show good cause for failure to file on time. Seabrook, supra, 34 NRC at 265-66.

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. Wolf Creek, supra.

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. Wolf Creek, ALAB-424, supra. 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. Id. at 126.

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 five days to the time period for filing. 10 C.F.R. § 2.710.

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 and 2), ALAB-568, 10 NRC 554, 555 (1979).

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).

10 CFR § 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. 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.4 (1980).

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 and 3; Perry Nuclear Power Plant, Units 1 and 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. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

Although the Commission's Rules of Practice do not specifically require that a brief include a statement of the facts of the case, those facts relevant to the appeal should be set forth. The statement of facts set forth in the brief on appeal should include an

exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769, 771 n.2 (1977).

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 and 2), ALAB-355, 4 NRC 397 (1976); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Florida Power and 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. Id.; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 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). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 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 and 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 and 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 and Gas Co., 687 F.2d 732 (3d Cir. 1982); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (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). 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 and 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 and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power and 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 and Light Co. and North

Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 Company (Zion Station, Units 1 and 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 and 2), ALAB-669, 15 NRC 453, 481 (1982), citing, Salem, supra, 14 NRC at 49-50. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 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 may be properly dismissed for inadequate briefing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). See 10 CFR § 2.762(d).

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 inadequate briefs make its arguments impossible to resolve. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976). See Carolina Power and 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 and 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 and 2), ALAB-813, 22 NRC 59, 71 (1985), Carolina Power and 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 and 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power and 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 and 2), ALAB-872, 26 NRC 127, 131 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Electric and 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 and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). Nonetheless, NRC 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. Susquehanna, supra, 16 NRC at 956, citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 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 and 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 and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing, Public Service Electric and 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, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 and 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. of N.Y. (Indian Point Station, Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power and 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).

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 and 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. (Bailly 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 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).

A brief filed in support of an appeal under 10 CFR § 2.714a from a decision granting and/or denying in whole a petition for leave to intervene is not required to contain a table of cases and a table of authorities. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 54-55 (1992). The appellant's brief must contain a statement of the case with applicable procedural history. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-388, 5 NRC 640 (1977). The Commission, at its discretion, may waive the requirement for a statement of the case. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 55 n.2 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table).

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 and 2), ALAB-862, 25 NRC 144, 150 (1987) (footnote

omitted); Louisiana Energy Services, L.P., (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, L.P. (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997).

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 CFR §§ 2.763; 2.786(d). 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 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992).

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) (citing, In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 23 n.1 (1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992)).

A late intervention petitioner may request oral argument on its petition. Comanche Peak, supra, 36 NRC at 69 n.4.

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. Point Beach, 15 NRC at 279.

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 and 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 and 2), ALAB-666, 15 NRC 277, 279 (1982).

5.11.3 Oral Argument by Nonparties

Under 10 CFR § 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 CFR § 2.714a), there is no right to appeal any interlocutory ruling by a Licensing Board. 10 CFR § 2.730(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983); 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).

Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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), citing, Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25 (2000).

A Licensing Board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate. Rulings which do neither are interlocutory. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are interlocutory and 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). In the same vein see Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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).

Commission practice generally disfavors interlocutary review, recognizing an exception in 10 C.F.R. § 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-01-1, 53 NRC 1, 5 (2001), citing, 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).

The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994). See 10 CFR § 2.730(f). An exception to this rule will be made in compelling circumstances where, for example, there is an emergency situation requiring an immediate, final determination of the issue. Id. The practice of simultaneously seeking interlocutory appellate review of grievances by way of directed certification and Licensing Board reconsideration of the same rulings is disfavored. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

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 and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

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 and 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, CLI-00-2, 51 NRC at 80.

While the Commission does not ordinarily review interlocutory orders denying extentions of time, but 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).

Licensing board rulings denying waiver requests pursuant to 10 CFR § 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 (see 10 CFR 2.730(f)), the criteria in section 2.786(g)(1)&(2) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). The criteria in section 2.786(g)(1)&(2) are not new. They are essentially a codification of the standards that governed review of interlocutory matters prior to the July 1991 revision to the NRC appellate procedures. See 56 Fed. Reg. 29,403 (June 27, 1991); 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). Therefore, cases prior to promulgation of section 2.786(g) may provide useful guidance in this area. See e.g. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981); Houston Lighting and 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 Department 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 and 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 and 2), ALAB-858, 25 NRC 17, 20-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc. (2929

Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-22, 48 NRC 215, 216-17 (1998). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 278-79 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

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. § 2.786(1) & (2); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 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). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and 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 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Perry, supra, 15 NRC at 1110; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 568 (1982), citing, Marble Hill, supra, 5 NRC at 1192; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 and 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 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 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 437 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 360-62 (1990); 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); 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).

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).

Commission practice generally disfavors interlocutary review, recognizing an exception in 10 C.F.R. § 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-01-1, 53 NRC 1, 5 (2001), citing, 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).

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 CFR § 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 CFR § 2.786(b)(4). However, it is the standards listed in 10 CFR § 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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), 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 and 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 and 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 and 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." Midland, supra.

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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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-today basis; were we to do so, 'we would have little time for anything else.'" (citations omitted). 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 Department 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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 (1998). The Commission does not ordinarily review Board orders denying extension of time. However, the Commission may review such interlocutory orders pursuant to its general supervisory jurisdiction over agency adjudications. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 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, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 19 (2001). When the Commission considers whether to exercise "pendent" discretionary review over otherwise nonappealable issues, factor 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.

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 and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 NRC

419 (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, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18-19 (2001), citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981). Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18-19 (2001).

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 first criterion in section § 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 and 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 and 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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), 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 and 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 and 2), ALAB-639, 13 NRC 469, 473 (1981).

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, Oklahoma 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, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-7 (1994); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987). 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 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985).

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, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

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 (Independent Spent Fuel Storage Facility), CLI-98-7, 47 307, 310 (1998).

Review of interlocutory rulings pursuant to the second criterion of § 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:

An Appeal Board conducted discretionary interlocutory review of a presiding officer's rulings issued during the early stages of a materials licensing proceeding where the Appeal Board determined that the presiding officer's rulings, which interpreted and implemented the informal hearing procedures in 10 CFR Part 2, Subpart L, had fundamentally altered the very shape of the proceeding. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

The Commission conducted discretionary interlocutory review of a decision by a Licensing Board and a presiding officer to consolidate a 10 CFR Part 2, Subpart G proceeding and a 10 CFR Part 2, Subpart L proceeding as a Subpart G proceeding. The consolidation order not only raised a novel and important jurisdictional question concerning the authority of the Licensing Board and the presiding officer, but it also affected the Subpart L proceeding in a pervasive and unusual manner by converting the proceeding into a more formal Subpart G proceeding. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1992).

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, Oklahoma 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, Oklahoma 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).

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 and 2), ALAB-741, 18 NRC 371, 378 n. 11 (1983), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and-2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983);

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma 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).

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. In re. 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. Perry, supra, ALAB-675, 15 NRC at 1112-1113. 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. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station, unit 1), ALAB-861, 25 NRC 129, 135; 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 and 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));Perry, supra, 16 NRC at 1756, citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982); Private Fuel Storage, CLI-00-2, 51 NRC at 79-80; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001). 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. Seabrook, supra, 23 NRC at 592-593. 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 late-filed contentions have been admitted by the Board in accordance with 10 CFR § 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 and 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) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 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 and 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. ALAB-817, 22 NRC 470, 474 (1985). In Duke Power Co. (Catawba Nuclear Station, units 1 and 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 2.714(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. Catawba, ALAB-687, 16 NRC at 464-65.

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).

5.12.3 Responses Opposing Interlocutory Review

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

5.12.4 Certification of Questions for Interlocutory Review and Referred Rulings

Although generally precluding interlocutory appeals, 10 CFR § 2.730(f), does allow a Licensing Board to refer a ruling to the Commission. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64 (1994). The Commission need not, however, accept the referral. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and

2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 475 (1985).

The Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, does not call for a marked relaxation of the standard that the discretionary review of interlocutory Licensing Board rulings authorized by 10 CFR §§ 2.730(f) and 2.718(l) should be undertaken only in the most compelling circumstances. Rather, it 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 and Power Co. (North Anna Power Station, Units 1 and 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); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998). 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., 20 NRC at 1583. 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).

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 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

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 and 2), ALAB-421, 6 NRC 25, 27 (1977); Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 2; Indian Point, Unit 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 CFR § 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 CFR § 2.730(f). Developments occurring subsequent to the filing of a motion for directed certification to the appellate tribunal may strip the question raised in the motion for certification 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).

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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 n.3 (1998).

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 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

A party seeking certification under Section 2.718(l) must, at a minimum, establish that a referral under 10 CFR § 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 and 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 and 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 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982).

The case law standards governing review of interlocutory orders have been codified in 10 CFR § 2.786(g) which provides that the Commission may conduct discretionary interlocutory review of a certified question, 10 CFR § 2.718(l), or a referred ruling, 10 CFR § 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 "Criteria for Interlocutory Review").

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 and 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 and 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 and 2), ALAB-374, 5 NRC 417 (1977).

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. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 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 reconsideration 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 decision maker. 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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., Inc. (Sheffield, Illinois 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 60 days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

Petitions for reconsideration of Commission decisions denying review will not be entertained. 10 C.F.R. § 2.786(e). A petition for reconsideration after review may be filed. 10 C.F.R. § 2.786(e).

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 and 2B), ALAB-418, 6 NRC 1, 2 (1977). Babcock and Wilcox, LBP-92-35, 36 NRC at 357, supra. A reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See Summer, CLI-81-26, 14 NRC at 790; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1, 3-4 (1988). Babcock and Wilcox, supra.

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) (Emphasis from original).

The Commission has granted reconsideration to clarify the meaning or intent of certain language in its earlier decision. The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 390-91 (1995).

Reconsideration is at the discretion of the Commission. The Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 234 n.6 (1995) (quoting, 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. § 2.786(e). Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

10 CFR § 2.771 provides that a party may file a petition for reconsideration of a final decision within 10 days after the date of that decision.

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, L.P. (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 and 2), ALAB-735, 18 NRC 19, 25-26 (1983).

A majority vote of the Commission is necessary for reconsideration of a prior Commission decision. U.S. Department 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 10 C.F.R. Part 2, Subpart L requires the Commission to set aside wrongly issued licenses when the post-licensing hearing uncovers fatal defects, it does not require the Commission to set aside licenses when it uncovers defects which are promptly curable. Hydro Resources, Inc., CLI-00-15, 52 NRC 65 (2000).

5.15 Jurisdiction of 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 2), ALAB-395, 5 NRC 772, 783-784 (1977). Neither the filing nor the granting of a petition for Supreme Court certiorari 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.

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 and 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. Three Mile Island, supra, 18 NRC at 191 n.27.

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 and 2), ALAB-714, 17 NRC 86, 93 (1983), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 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. Comanche Peak, 37 NRC at 205.

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. Comanche Peak, 17 NRC at 93; 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). Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993); (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). The NRC is not strictly bound by the mootness doctrine, however, its adjudicatory tribunals have generally adhered to the mootness principle. Innovative Weaponry, Inc. (Albuquerque, New Mexico), LBP-95-8, 41 NRC 409, 410 (1995). Based on the mootness principle, the Board in Innovative Weaponry determined the issue of whether there was an adequate basis for the Staff's denial to be moot because the license was transferred. Id.

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, L.P (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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