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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
MISSISSIPPI POWER & LIGHT COMPANY, et al.	)	Docket No. 50-416 OLA
	)	
(Grand Gulf Nuclear Station, Unit 1)	)	

LICENSEES' MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER GRANTING PETITIONER INTERVENOR STATUS AND/OR FOR REFERRAL OR CERTIFICATION OF THE QUESTION OF WHETHER THE LICENSING BOARD PROPERLY ADMITTED A MOOT CONTENTION IN THIS PROCEEDING

I. Introduction

On April 23, 1984, the Licensing Board issued a Memorandum and Order admitting Jacksonians United for Livable Energy Policies (JULEP) to the instant proceeding and holding that it proferred two admissible contentions.[1] Licensees subsequently requested and were granted an extension of time from the Appeal Board within which to

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1 Mississippi Power & Light Co., et al. (Grand Gulf Nuclear Station, Unit No. 1), Docket No. 50-416 OLA, Second Order Following Prehearing Conference (Admitting Intervenor and Ruling on Contentions), April 23, 1984 ("April 23, 1984, Memorandum and Order").

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file a Notice of Appeal of the April 23, 1984, Memorandum and Order. As Licensees' new counsel, we have evaluated the record and have concluded that one of the two contentions admitted by the Licensing Board involves an exception to plant Technical Specifications which may not be moot.[2] That contention concerns the Automatic Depressurization System ("ADS") Trip System. Because this contention may not be moot, and there being no other apparent basis for challenging the Licensing Board's admission of the ADS contention, we have concluded that Licensees are prohibited by 10 C.F.R. § 2.714a from appealing any aspect of the April 23, 1984, Memorandum and Order.

Licensees nevertheless continue to maintain that the one-time exception granted for Scram Discharge Volume surveillance testing was a unique exception which is unlikely to recur in the future and that therefore the contention admitted as to such testing, renumbered contention three, is moot. Licensees submit that Congress did not intend for the NRC to hold license amendment hearings on issues that are moot. Given the significant legal and policy questions raised by the admission of renumbered contention three, Licensees request that the

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2 See May 17, 1984 letter from Nicholas S. Reynolds, Counsel to Mississippi Power & Light Company, et al., to Alan S. Rosenthal, Chairman, Atomic Safety and Licensing Appeal Panel. A copy of this letter was provided to the Licensing Board, JULEP, and the NRC Staff when it was sent to the Appeal Board.

Board reconsider its April 23, 1984 Memorandum and Order admitting this contention.[3] Because the questions presented are generic, the Board may wish to certify them to the Appeal Board. If the Licensing Board declines upon reconsideration to dismiss that contention on mootness grounds, Licensees request that the following issue be referred to the Appeal Board:

> Does Section 189(a) require public hearings on license amendments issued upon a finding of no significant hazards when the issues to be litigated in that proceeding are moot?

II. Argument

A. The Licensing Board Should Dismiss Renumbered Contention Three.

1. Renumbered Contention Three is Moot

Orders issued by the Commission, even if immediately effective, may become moot just like any other legally binding order.[4] If the order in dispute is too short in duration to be litigated fully prior to its cessation or expiration and there is a reasonable expectation that the same complaining party would be subjected to the same

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3 Licensees note that the NRC Rules of Practice do not set forth a period of time by which motions for reconsideration need to be filed from decisions (other than initial decisions) of Licensing Boards. Nevertheless, Licensees have filed the instant Motion on an expedited basis to permit a prompt resolution of this issue.

4 Sholly v. United States Nuclear Regulatory Commission, 651 F.2d 780, 784-86 (D.C. Cir.), rehearing denied, 651 F.2d 792 (1980), vacated, 51 U.S.L.W. 3610 (1983).

action again, then the Commission action is not moot.[5] Both elements of this rule must be satisfied. The critical finding which must be made is that the order in question is "capable of repetition, yet evading review."[6] Consequently, agency action which has been completed and will not recur is not subject to attack.[7] These mootness rules are based on Article III of the U.S. Constitution, which limits federal court jurisdiction to "cases" or "controversies" presenting a "live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law."[8]

NRC tribunals have applied the mootness doctrine. However, they have not done so as a constitutional matter because they are not federal courts under Article III.[9] Rather, they have done so in part to avoid wasting agency resources where there is no concrete issue to adjudicate.

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5 Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

6 Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911), cited in Sholly v. United States Nuclear Regulatory Commission, supra, 651 F.2d at 784-85.

7 Murphy v. Benson, 270 F.2d 419 (2d Cir. 1959), cert. denied, 362 U.S. 929 (1960).

8 Hall v. Beals, 396 U.S. 45, 48 (1969).

9 10 C.F.R. §§ 2.785, 2.786 and 2.787 (Appeal Board); 10 C.F.R. § 2.104(d)(2) (Licensing Boards); cf., Tennessee Gas Pipeline Co. v. Federal Power Commission, 606 F.2d 1337, 1380-81 (D.C. Cir. 1979); Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 451 (10th Cir. 1983).

> Because we are not subject to the jurisdictional limitations placed upon the Federal courts by the "case or controversy" provision in Article III of the Constitution, there would appear to be no insuperable barrier to our rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to licensing board decision. Nonetheless, a sensitive regard for the state of our docket -- among other considerations -- suggests that we not embark upon such a course in the absence of the most compelling cause.[10]

Accordingly, the Commission has dismissed as moot a proceeding addressing whether the identity of certain individuals interviewed by NRC investigators had to be disclosed to the Licensing Board. It did so after being informed by the Licensing Board that the Board would not pursue any questions regarding the identities of these individuals.[11] Other decisions by NRC tribunals have likewise recognized and applied the mootness doctrine,[12]

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10 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).

11 Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-30, 18 NRC 1164 (1983).

12 U.S. Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 419 (1982) (denial by Commission of request by applicant to conduct safety-related activities mooted intervenor arguments that activities should not be authorized); Consolidated Edison of New York (Indian Point, Unit No. 2), CLI-81-7, 13 NRC 448, 449 (1981) (legal question regarding status of NRC decision concerning type of cooling system for power reactor pending final

(footnote continued)

particularly in connection with terminated projects, the license applications for which have been withdrawn. In this regard, the Appeal Board has stated that it need not retain on its docket an application which has become purely academic.[13] The Appeal Board has also opined in a different context that "there simply is no need to spend time and resources on a moot inquiry presented in a context which appears most unlikely to recur."[14]

Licensees recognize that NRC tribunals may, to a greater extent than a federal court, issue advisory opinions or abstract declarations without regard to the

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(footnote continued from previous page)
decision by EPA mooted upon completion by EPA of its proceeding); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-697, 16 NRC 1265, 1273 (1982) (criticisms of emergency planning pamphlet by intervenor implicitly rendered moot upon issuance of new pamphlet); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-658, 14 NRC 981, 982 (1981) (appeal rendered moot by stipulation involving issues on appeal); Portland General Electric Company (Trojan Nuclear Plant), ALAB-627, 13 NRC 20, 23 (1981); Public Service Electric and Gas (Salem Nuclear Generating Station, Unit No. 1), Docket No. 50-272-OLA, Order Granting Intervention Petition, November 17, 1983, slip op. at 8 (request for hearing prior to issuance of amendment mooted by issuance of amendment upon finding of no significant hazards consideration).

13 Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-628, 13 NRC 24 (1981); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980).

14 Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-638, 13 NRC 374, 375 (1981) (dismissing referral of ruling by Licensing Board on whether it had jurisdiction to consider need for power).

existence of an actual and immediate controversy.[15] Section 554(e) of the Administrative Procedure Act[16] provides in this regard, as follows:

> The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

However, this authority should not be read to support the litigation of a one time exception in a license amendment, the effectiveness of which has lapsed. Declaratory relief has been granted to avoid a situation in which an applicant must run the risk of either completing actions later found to be unlawful or postponing activities and thereby incurring costs which could otherwise be avoided. As the Commission stated,

> A clarification of the kind requested of an applicant's responsibilities under this Commission's regulations could have an impact upon the time necessary to prepare for hearing, as well as the duration of the hearing itself. It would be a disservice to the applicants, the parties and the licensing board itself if hearing participants engaged their own resources and ours in consideration of

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15 Kansas Gas & Electric Co. (Wolf Creek Nuclear Genrating Station, Unit No. 1), CLI-77-1, 5 NRC 1 (1977) (licensing board has authority to grant declaratory relief as to whether license applicant could proceed with pre-constuction activity over which Commission could possibly have jurisdiction); Washington Public Power Supply System, (WPPSS Nuclear Projects Nos. 3 an 5), LBP-77-15, 5 NRC 643 (1977) (same); see note 10, supra, and accompanying text.

16 5 U.S.C. § 554(e).

> matters which were later found to be beyond this Commission's licensing authority.[17]

NRC tribunals may also issue declaratory relief when there is a "compelling" need to do so,[18] such as where an agency acts in its legislative capacity in an adjudicatory proceeding to announce a new position on a particular issue.[19]

None of these underlying policy considerations is present here. To the contrary, rather than conserving agency resources, litigation of renumbered contention three would be a fruitless exercise, wasteful of agency resources. In addition, the issue which would be addressed has no generic importance. Renumbered contention three admitted in this proceeding is moot in the strictest sense. The Scram Discharge Volume surveillance test authorized by the license amendment has been completed. There were no adverse impacts on public health and safety. It is unlikely that this exception will be sought again.[20] As a result, resolution of the

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17 Wolf Creek, CLI-77-1, supra, 5 NRC at 5. See also Tennessee Gas Pipeline Co. v. Federal Power Commission, supra, 606 F.2d at 1380-81.

18 Prairie Island, ALAB-455, supra, 7 NRC at 54.

19 Tennessee Gas Pipeline Co. v. Federal Power Commission, supra, 606 F.2d at 1380.

20 Affidavit of Larry F. Dale Regarding Scram Discharge Volume Surveillance Testing, May 22, 1984. A copy of this affidavit is attached to this motion.

contention admitted addressing that exception will have no practical effect.

JULEP nevertheless wishes to litigate whether the exception was adequately supported by a sound technical rationale. The difficulty with doing so is that there is no meaningful relief which can be granted to JULEP should it prevail. Nor will anything occur should Licensees prevail. Moreover, because Licensees are unlikely to seek this exception to its Technical Specifications again, this is not an instance where an issue is capable of recurring yet evading review, so that relief as to future activity is warranted.[21] At bottom, "there simply is no need to spend time and resources on a moot inquiry presented in a context which appears most unlikely to recur."[22] Accordingly, the instant proceeding is clearly moot.[23]

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21 Id., Weinstein v. Bradford, supra, 423 U.S. at 149.

22 LaCrosse, ALAB-638, supra, 13 NRC at 375.

23 Licensees do not dispute that the legal issue raised by the grant of intervention remains alive, notwithstanding completion of the surveillance test and the lapsing of the challenged license amendment. That issue, addressed below, is whether under Section 189(a) of the Act a hearing on a license amendment issued on an immediately effective basis and upon a finding of no significant hazards consideration must be held when the activity authorized by the amendment has been completed and the activity is unlikely to recur. See Sholly v. United States Nuclear Regulatory Commission, supra, 651 F.2d at 784-86.

2. Section 189(a) Does Not Require Public Hearings on License Amendments Issued Upon a Finding of No Significant Hazards When the Issues to be Litigated in that Proceeding are Moot

Introduction. Apparently because the issues raised in this appeal are difficult and novel, the Licensing Board decided simply to apply literally the applicable statutory and regulatory provisions. Section 189(a)(1) provides that "in any proceeding . . . for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected. . . ." Section 189(a)(2)(A) provides that "the Commission may issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person." Section 189(a)(2)(A) further authorizes the Commission to issue such amendment on an immediately effective basis "in advance of the holding and completion of any required hearing." This authority is implemented in 10 C.F.R. § 50.58.

The Licensing Board reasoned that Section 189(a) and Commission regulations, particularly 10 C.F.R. § 50.58, mandate a hearing when properly requested even if the license amendment is issued and the matters in dispute are moot. It stated, "[t]o hold otherwise would violate the

integrity of the statutory and regulatory scheme whereby the Commission may act expeditiously on a license amendment without depriving petitioners of their right to a hearing."[24]

Licensees submit that this application of Section 189(a) and 10 C.F.R. § 50.58, plausible as it may at first appear, is on closer analysis erroneous. First, because the wording of the statute does not provide a clear-cut answer to the issue raised in this case and the reading given by the Licensing Board leads to futile hearings, resort to the legislative history of Section 189(a) is necessary. Such legislative history suggests that in cases like this one hearings are not required.

Second, if Section 189(a) were literally applied to this case, then it would be impossible to apply Section 189(b) as written. Section 189(b) provides for judicial review of any final order entered in any proceeding of the kind specified in Section 189(a). In this case no judicial review under Section 189(b) would be possible because, while there may be a final order in a proceeding of the type set forth in Section 189(a), there would be no case or controversy reviewable by a federal court within the meaning of Article III of the U.S. Constitution. Moreover, if there were doubt as to possible collateral effects of any final order issued in this proceeding, the

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24 April 23, 1984, Memorandum and Order at 15.

courts would most likely vacate the order on mootness grounds rather than reviewing it. There is no basis for concluding that Congress intended to create a regulatory scheme in which Commission action is not only futile but inherently void as well.

Legislative History. Resort to legislative history is appropriate to ascertain the intent of Congress as to the ultimate purpose of a statute.[25] Moreover, relevant legislative history may be examined in order to ensure that the application of the express words of the statute fulfills manifest Congressional intent.[26] This is particularly the case where, as here, the statute fails to set forth unambiguous requirements.[27]

The ultimate purpose of Section 189(a)(2) could not be clearer. Following the decision in Sholly v. United States Nuclear Regulatory Commission, supra, the Commission sought legislation authorizing it to issue immediately effective license amendments upon a finding of no significant hazards considerations, notwithstanding the

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25 United States v. Wise, 370 U.S. 405, 414 (1962).

26 Watt v. Alaska, 451 U.S. 259, 266 (1981).

27 2A Sutherland, Statutory Construction ¶ 48.01 at 182 (1973).

pendency of a request for a public hearing on that amendment. Section 189(a)(2) was intended to provide the Commission with that authority.[28]

During debate on Section 189(a)(2), Congress recognized that some license amendments issued on an immediately effective basis could authorize irreversible actions, thereby rendering a subsequent public hearing futile.

> The conferees intend that in determining whether a proposed license amendment involves no significant hazards consideration, the Commission should be especially sensitive to the issue posed by license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility or allowing a facility to operate for a period of time without full safety protections). In those cases, issuing the order in advance of a hearing would, as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. Accordingly, the conferees intend the Commission be sensitive to those license amendments which involve such irreversible consequences.[29]

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28 H. R. No. 22, Part 2, 97th Cong., 1st Sess. 25-26 (1981); S. Rep. No. 113, 97th Cong. 1st Sess. 14-15, reprinted in 1982 U.S. Code Cong. & Ad. News 3592, 3598-3600.

29 H. R. No. 884, 97th Cong., 2d Sess. 37-38, reprinted in 1982 U.S. Code Cong. & Ad. News 3603, 3607-08.

In urging the Commission to be "sensitive" to this class of license amendments, Congress did not proscribe the issuance of immediately effective license amendments that would preclude meaningful public participation. Indeed, doing so would have been inconsistent with the overall purpose of the statute, as set forth above.[30] Rather, Congress intended only that the Commission be very sure that in such cases a finding of no significant hazards is truly warranted. This was made clear during a colloquy between Senators Simpson and Dominici, both of whom were members of the Conference Committee charged with reconciling the House and Senate versions of Section 189(a)(2).[31]

> Mr. Domenici. In the statement of managers, I direct attention to a paragraph in Section 12, the so-called Sholly provision, wherein it is stated that in applying the authority which that provision grants the NRC "should be especially sensitive to the issue posed by license amendments that have irreversible consequences." Is that paragraph in general, or specifically, the words "irreversible consequences" intended to impose restrictions on the Commission's use of that authority beyond the provisions of the statutory language. Can the Senator clarify that, please?

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30 See note 28, supra, and accompanying text.

31 H.R. 889, supra, at 54 and 3621. Because of the active role these and other legislators cited below played in the drafting and managing of Section 189(a)(2), their statements should be accorded substantial weight when construing the statute. See e.g., Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564-65 (1976).

> Mr. Simpson. I shall. It is not the intention of the managers that the paragraph in general, nor the words "irreversible consequences," provide any restriction on the Commission's use of that authority beyond the statutory provision in Section 189a. Under that provision, the only determination which the Commission must make is that its action does not involve a significant hazard. In that context, "irreversibility" is only one of the many considerations which we would expect the Commission to consider. It is the determination of hazard which is important, not whether the action is irreversible. Clearly, there are many irreversible actions which would not pose a hazard. Thus where the Commission determines that no significant hazard is involved, no further consideration need be given to the irreversibility of that action.
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> Mr. Domenici. I thank the Senator for the clarification. That is consistent with my readings of the language.[32]

Senators Hart and Mitchell, also members of the Conference Committee,[33] expressed a similar understanding, as follows:

> Mr. Mitchell. The portion of the statement of managers discussing Section 12 of the report, the so-called Sholly provision, stresses that in determining whether a proposed amendment to a facility operating license involves no significant hazards consideration, the Commission "should be especially sensitive . . . to license amendments that have irreversible consequences." Is my understanding correct that the statement means the Commission should take special care in evaluating, for

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32 134 Cong. Rec. S. 13056 (daily ed. October 1, 1982).

33 H. Rep. No. 884, supra, at 54 and 3621.

> possible hazardous considerations, amendments that involve irreversible consequences?
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> Mr. Hart. The Senator's understanding is correct. As you know, this provision seeks to overrule the holding of the U.S. Court of Appeals for the District of Columbia in Sholly against Nuclear Regulatory Commission. That case involved the venting of radioactive krypton gas from the damaged Three Mile Island Unit 2 reactor -- an irreversible action.
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> As in this case, once the Commission has approved a license amendment, and it has gone into effect, it could prove impossible to correct any oversights of fact or errors of judgment. Therefore, the Commission has an obligation, when assessing the health or safety implications of an amendment having irreversible consequences, to insure that only those amendments that clearly raise no significant hazards issue will take effect prior to a public hearing.[34]

The debate on Section 189(a)(2) in the House of Representatives also reflects this understanding. During consideration of the Conference Report by the House of Representatives, the following colloquy between Congressmen Udall, Markey, Ottinger, and Lujan, all of whom were members of the Conference Committee, occurred:[35]

> Mr. Markey. I note that with respect to Section 12 of the bill, the so-called Sholly provision, the statement of managers emphasized that, in determining whether a proposed amendment to a facility operating license involves no significant hazards consideration, the Commission

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34 134 Cong. Rec. S. 13292 (daily ed. Oct. 1, 1982).

35 H. Rep. No. 884, supra, at 54 and 3621.

should be sensitive to those license amendments that involve irreversible consequences. As chairman of the subcommittee that originated the Sholly provision in this house, do you understand that statement to mean that the Commission should be especially careful in evaluating, for possible hazards considerations, amendments that involve irreversible consequences?

Mr. Ottinger. Yes, that is exactly what I understand our intent to have been. Once a license amendment with irreversible consequences has received the Commission's approval and has gone into effect, as a practical matter it will be impossible to correct any errors that may have entered into the Commission's decision. Therefore we believe that the Commission has an obligation, when assessing the health and safety considerations of amendments having irreversible consequences, to insure that only those amendments that very clearly raise no significant hazards issues will be allowed to take effect before the required hearings can be held.

. . . .

Mr. Lujan. Mr. Speaker, we have not had an opportunity to review the colloquy. We do not know if we necessarily agree with how the question was phrased or how the answer was phrased. I understand it requires additional hearings depending on the answer that the gentleman gave to the gentleman from Massachusetts, and I am not sure that we want to complicate the matter further.

. . . .

Mr. Ottinger. Mr. Speaker, I would like to say to the gentleman from New Mexico that I do not think there is anything in here with which he would disagree. We are just underlining that with respect to our treatment of

> the Sholly provision, that license amendments having irreversible consequences should be handled with particular care by the Commission. They ought not to be granted unless it is quite clear that there are no significant hazards.
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> Mr. Lujan. In answering that, was it clear that no additional hearings are necessary by the Nuclear Regulatory Commission in determining what a significant hazard might be?
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> Mr. Ottinger. This does not change the statute in any way. It just gives guidance to the Commission that they should take particular care when it comes to a matter before them having irreversible consequences.
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> Mr. Lujan. Just to make due diligence, but not necessarily to say that we will have more hearings to be absolutely correct in what the gentleman described a particular hazard as being significant or insignificant.
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> Mr. Ottinger. The colloquy does not affect the statutory authority in any way as regards hearings.[36]

Finally this colloquy between Congressman Udall and Congressman Moorhead, who was also a member of the Conference Committee,[37] is relevant:

> Mr. Moorhead. First, I would like the distinguished chairman to tell me: Is it not true that where the statement of managers speaks or [sic] "irreversibility" in connection with the provisions in the bill relating to the so-called Sholly case, that the conferees intended "irreversibility" to be just one of many factors the Commission may consider in determining

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36 134 Cong. Rec. H.R. 8823 (daily ed. Dec. 2, 1982).

37 H. Rep. No. 884, supra, at 54 and 3621.

> whether a license amendment represents a "significant hazard" or "no significant hazards?"
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> Mr. Udall. Yes, the gentleman is correct; his statement is true.
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> Mr. Moorhead. My second question is: Is it not true also that the conferees intend that the 'significance of the hazard" is far more important in NRC's consideration of a license amendment than "irreversibility"?
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> Mr. Udall. Yes, the gentleman is again correct; his statement is true.
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> Mr. Moorhead. Finally, I ask the chairman: Is it not true that the conferees do not intend the Commission to need to show special sensitivity to "irreversibility" in those cases where the Commission determines that "no significant hazards" are involved?
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> Mr. Udall. Yes, the gentlemen is correct; his statement is true.[38]

Licensees recognize that Congress intended as a general matter for a finding of no significant hazards consideration to have no substantive impact on whether a public hearing will be held.[39] Nevertheless, the foregoing legislative history also suggests to Licensees that Congress did not intend in cases such as this for

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38 134 Cong. Rec. H.R. 8825 (daily ed. Dec. 2, 1982).

39 E.g., H. Rep. No. 884, sup.a, at 37 and 3607 ("The conference agreement maintains the requirement of the current Section 189(a) of the Atomic Energy Act that a hearing on the license amendment be held upon the request of any person whose interest may be affected. The agreement simply authorizes the Commission, in those cases where the amendment involved poses no significant hazards consideration, to issue the license amendment and allow it to take effect before this hearing is held or completed.")

public hearings to be held when doing so would be futile. Congress enacted legislation specifically intended to permit the Commission to issue immediately effective license amendments, notwithstanding the pendency of a hearing request. Congress also recognized that some immediately effective license amendments would involve irreversible consequences, thereby rendering public hearings to be of little or no practical value. As a result, Congress expressed the need for the Commission to be very sure that when issuing such license amendments they clearly involve no significant hazards consideration. Importantly, Congress did not intend to limit the authority of the Commission to issue immediately effective license amendments in cases involving irreversible consequences or to hold any special type of hearing prior to the issuance of such license amendments.

As a result, only one of two conclusions is possible: either Congress intended that hearings of little or no value be held or that the normal rules governing mootness be applied so that in cases such as this a finding of no significant hazards consideration could obviate a public hearing. Because of the recognition of Congress that meaningful public participation may be foreclosed as a practical matter when the Commission issues an immediately effective license amendment authorizing irrevocable

actions, Licensees submit that the latter conclusion is the only reasonable construction of Section 189(a)(2) possible.

In sum, a statute should be construed to avoid absurd results and its internal inconsistencies must be addressed.[40] To conclude that Congress intended for a public hearing to be held even though it recognized the significant limitations, even futility, of such a hearing is perforce an absurd result. The only way to rationalize the apparent inconsistency in Section 189(a)(2) as applied to cases such as this one is to hold that the policy generally favoring public hearings expressed by Congress when it enacted Section 189(a)(2) must give way to the equally valid policy that hearings not be held and public resources not be expended when doing so would be a fruitless exercise. Accordingly, Licensees submit that neither Section 189(a)(2) nor Commission rules require that a hearing be held on a license amendment, the effectiveness of which has lapsed and which involves activities unlikely to recur.

Section 189(b). If Section 189(a) is applied to require hearings on moot issues, then it will be impossible to apply Section 189(b) of the Act in such cases. Section 189(b) provides for judicial review of any

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40 See United States v. Turkette, 452 U.S. 576, 580 (1981); Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978); Commissioner v. Brown, 380 U.S. 563, 571 (1965).

final order entered in a proceeding of the kind specified in Section 189(a). In this case no judicial review under Section 189(b) would be possible. While there may be a final order entered in a proceeding of the type set forth in Section 189(a), there would be no case or controversy within the meaning of Article III of the U.S. Constitution over which a federal court could assert jurisdiction.

As discussed earlier, in order to avoid dismissal on the grounds of mootness, the party petitioning for review would have to show that the underlying decision of the NRC to permit a one-time exception to authorize Scram Discharge Volume Surveillance testing is likely to recur again such that the same complaining party would be subject to the same action by which it was aggrieved originally.[41] JULEY has been and remains unable to make such showing and Licensees maintain that the issues in this proceeding related to Scram Discharge Volume surveillance testing are moot. Because the federal courts are bound by Article III to adjudicate only cases or controversies, and because the moot license amendment has lapsed by its own terms, the federal courts could not

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41 Weinstein v. Bradford, supra. See notes 4-8, supra, and accompanying text.

review the final order entered in this license amendment hearing as it applies to the Scram Discharge Volume surveillance testing contention.[42]

Indeed, a reviewing court would most likely vacate any final order before it on review which is moot to assure that the unreviewed order does not have any collateral effects. For example, it is theoretically possible that a final decision adverse to a licensee could be used as the basis for a charge that the licensee violated NRC requirements when it performed a surveillance test. Though there may be numerous defenses to such an enforcement proceeding, nevertheless the enforcement action would be a result of the unreviewable agency action. It is possible that the affected licensee could be bound by res judicata or collaterally estopped from litigating facts giving rise to the enforcement action.

> In United States v. Munsingwear, Inc. 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36, this Court expressed the view that

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42 E.g., City of Houston v. Federal Aviation Administration, 679 F.2d 1184, 1199 (5th Cir. 1982) (dismissing as moot challenge to interim rule governing distances of non-stop flights into airport); see also Boston Community Media Committee v. Federal Communications Commission, 509 F.2d 516, 517 (D.C. Cir. 1975) (FCC Order disapproving agreement in connection with assignment of radio broadcast moot when parties abandoned plans to complete assignment); Louisiana v. Federal Power Commission, 503 F.2d 844, 863 (5th Cir. 1974) (issue as to lawfulness of natural gas curtailment plans held moot when plans were abandoned); Alton & Southern Railway Co. v. International Association of Machinists and Aerospace Workers, 463 F.2d 872, 875-882 (D.C. Cir. 1972) (dismissing on mootness grounds preliminary injunction as to possible future stike activity).

> a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness. We there held that that principle should be implemented by the reviewing court's vacating the unreviewed judgment below. We think the principle enunciated in Munsingwear at least equally applicable to unreviewed administrative orders, and we adopt its procedure here.[43]

Other courts and NRC tribunals have vacated moot orders on this basis.[44]

This relationship between the licensing hearing NRC would hold under Section 189(a)(2) and judicial review of the final order entered in that proceeding confirms the suggestion in the legislative history that hearings need not be held on immediately effective license amendments

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43 Mechling Barge Lines v. United States, 368 U.S. 324, 329 (1961) (footnote omitted).

44 United States v. Federal Maritime Commission, 694 F.2d 793, 795 (D.C. Cir. 1982) (en banc, per curiam); National Association of Independent Television Producers and Distributors v. Federal Communications Commission, 516 F.2d 760, 765 (D.C. Cir. 1975); Tennessee Gas Pipeline Co. v. Federal Power Commission, supra, 606 F.2d at 1382-83; Consumers Power Co. (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50 (1982); Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-638, 13 NRC 374 (1981); Rochester Gas & Electric Corporation (Sterling Power Project Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980); Prairie Island Nuclear Generating Plant, Units 1 and 2, ALAB-455, supra, 7 NRC at 55; but see Public Service Company of Oklahoma (Black Fox Station Units 1 and 2), ALAB-723, 17 NRC 555 (1983).

which have lapsed and which raise no recurring issues. Regardless of who prevailed in a hearing on such amendments, the other party could by seeking judicial review most likely obtain a court judgment vacating the final order entered in the hearing. Absent clear legislative history establishing that Congress intended to hold futile administrative hearings, the Licensing Board should apply Section 189(a)(2) in the only reasonable manner and rule that hearings on this moot license amendment involving no significant hazards consideration are not required.[45]

P. Referral Or Certification To The Appeal Board Is Warranted.

Because the questions presented by this motion are generic, the Licensing Board may wish to certify them to the Appeal Board pursuant to 10 C.F.R. § 2.730(f). Alternatively, should the Licensing Board decide not to reconsider its April 23, 1984, Memorandum and Order Licensees request that the Licensing Board certify pursuant to 10 C.F.R. § 2.718(i) the following question to the Appeal Board:

> Does Section 189(a) require public hearings on license amendments issued upon a finding of no significant hazards when the issues to be litigated in that proceeding are moot?

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[45] Cf. Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 197 (1980).

The issue presented by this motion is appropriate for referral under 10 C.F.R. §§ 2.730(f) and certification under 2.718(i). As explained by the Appeal Board, interlocutory review is appropriate when the challenged licensing board ruling either (1) threatens the party adversely affected by irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or serious manner.[46] The first prong of this standard encompasses whether a failure to address an issue would seriously harm the public interest.[47]

Applying this standard,[48] the Appeal Board has undertaken discretionary review in a variety of circumstances: when a licensing board conditionally admitted contentions even though they did not meet the

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46 Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, March 16, 1984, slip opinion at 5.

47 Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981).

48 This same standard is applied whether the review is pursuant to §2.730(f) (referral) or §2.718(i) (certification). Midland, ALAB-634, supra, 13 NRC at 99; Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-50, 15 NRC 1746, 1754 n.7 (1982); see Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP 82-62, 16 NRC 565, 567 (1982) (§2.718(i) certification). Cases involving §2.718(i) applying this identical standard are cited in support of this Motion in addition to cases interpreting §2.730(f).

specificity requirements of the regulations,[49] when an applicant was denied permission to begin offsite construction,[50] when proprietary information was ordered disclosed,[51] where attorney disqualification was at issue,[52] and where a licensing board ordered sequestration of all witnesses.[53]

Although interlocutory appeals are not favored in NRC practice,[54] an application of the factors governing referral and certification demonstrates that interlocutory review is appropriate here. Specifically, failure to address the issue set forth above would seriously harm the public interest in that a precedent would be established that NRC must hold futile hearings on license amendments, the effectiveness of which has lapsed. It would also affect the structure of this proceeding in a pervasive

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49 See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982), reversed on other grounds, CLI-83-19, 17 NRC 1041 (1983).

50 See Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293 (1976), aff'd CLI-77-1, supra.

51 See Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976).

52 See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-332, 3 NRC 785 (1976).

53 See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565 (1977).

54 Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, May 7, 1974, slip opinion at 10-11.

matter. Moreover, there is little or no likelihood that the issue proposed for interlocutory review will be subject to normal appellate review. Potential unreviewability was an important factor in the Appeal Board's decision to accept a referral in Catawba: "as we have been told without contradiction, [the questions referred by the Licensing Board] have immediate recurring importance but, for practical reasons, will escape appellate scrutiny once the initial decision has issued."[55]

If Licensees prevail on renumbered contention three, they will be unable to challenge the construction of Section 189(a) upon which a hearing in this proceeding is based. This is because only those parties aggrieved by a final decision may invoke the jurisdiction of the Appeal Board.[56] As a result, a precedent would have been established that hearings on moot license amendments must be commenced by NRC.

In addition, if JULEP decides to appeal a favorable decision for Licensees, it certainly will not raise a mootness argument. Nor may Licensees raise the mootness argument in response to any appeals filed by JULEP.[57]

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55 Catawba, ALAB-687, supra, 16 NRC at 465.

56 South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982).

57 See Rochester Gas & Electric Corp., ALAB-502, 8 NRC 383, 393 n. 21 (1978).

Accordingly, unless the Licensing Board rules in favor of JULEP as to renumbered contention three, review of the issue proposed for certification will as a practical matter be foreclosed.[58]

The fact that Appeal Board review of the issue is unlikely absent certification or referral, takes on added significance given the generic implications of the Licensing Board decision. Under the precedent established by the April 23, 1984 Memorandum and Order, it is possible that the Commission will have to commit its resources to holding essentially futile adjudicatory hearings. Before such a significant legal and policy decision is made, the Appeal Board should review the matter, especially in light of its well-established policy of not hearing matters unless presented within the framework of a live case or controversey.[59] In this regard the Commission has instructed that "if a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the

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58 Licensees recognize that if all contentions admitted in a proceeding are moot and intervention is nevertheless granted, then an appeal under 10 C.F.R. § 2.714a would lie. However, were the Appeal Board to wait for such a proceeding to review the issue proposed for interlocutory review, it is possible that hearings would have already been held on moot contentions based on the precedent established here.

59 See notes 9-14, supra, and accompanying text.

Appeal Board or the Commission."[60] Clearly the commitment of agency resources to hold futile hearings raises such a legal or policy question.

V. CONCLUSION

In light of the foregoing, Licensees submit that the Licensing Board should reconsider its April 23, 1984, Memorandum and Order and dismiss on mootness grounds renumbered contention three. In view of the legislative history of Section 189(a)(2), the inefficient use of agency resources should a hearing on that contention be held, and the anomalous interface between the results of such a hearing and judicial review, Licensees submit that hearings should not be commenced on this license amendment, which has lapsed and which is unlikely to recur. Alternatively, Licensees urge the Licensing Board to certify or refer the question set forth above to the Appeal Board.

Respectfully submitted,

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May 21, 1984

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60 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
MISSISSIPPI POWER & LIGHT COMPANY, et al.	)	Docket No. 50-416 OLA
	)	
(Grand Gulf Nuclear Station, Unit 1)	)	

AFFIDAVIT OF LARRY F. DALE REGARDING SCRAM DISCHARGE VOLUME SURVEILLANCE TESTING

On August 1, 1983, Licensees for the Grand Gulf Nuclear Station, Unit 1, applied for an exception to Technical Specification 4.0.4 which prohibited reactor start-up without prior completion of scram discharge volume surveillance testing. This exception was necessary because reactor start-up was required prior to performing the scram discharge volume surveillance test.

On September 23, 1983, the NRC issued Amendment No. 10 to the operating license for Grand Gulf. Among other things that amendment granted on a one-time basis the exception to Technical Specification 4.0.4 regarding scram discharge volume surveillance testing providing the test was completed within seventy-two hours after achieving the prerequisite control rod configuration. The test was conducted on October 12, 1983. It had no adverse impact on public health and safety.

It is unlikely that Licensees will seek this exception to Technical Specification 4.0.4 again. The exception was needed because of circumstances associated with initial plant start-up. These circumstances are unlikely to recur in the future.

L. F. Dale

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AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

L. F. Dale, being duly sworn, states that he is Director of Nuclear Licensing & Safety, of Mississippi Power & Light Company; that he is authorized on the part of said Company to sign and file with the Nuclear Regulatory Commission this statement with regard to Scram Discharge Volume Surveillance Testing on behalf of Company, Middle South Energy, Inc. and South Mississippi Electric Power Association; that he signed the foregoing statement as Director of Nuclear Licensing & Safety, of Mississippi Power & Light Company; and that the statements made and the matters set forth therein are true and correct to the best of his knowledge, information and belief.

L F Dale
L. F. Dale

SUBSCRIBED AND SWORN TO before me, a Notary Public, in and for the County and State above named, this 22nd day of May, 1984.

(SEAL)

Paul J Richardson
Notary Public

My commission expires:
My Commission Expires Oct. 23, 1987

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
MISSISSIPPI POWER & LIGHT COMPANY, et al.	)	Docket No. 50-416
	)	
(Grand Gulf Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensees' Motion For Reconsideration Of Memorandum and Order Granting Petitioner Intevenor Status and/or for Referral or Certification of the Question of Whether the Licensing Board Properly Admitted a Moot Contention in this Proceeding" was served upon the following by hand delivery on May 24, 1984, by deposit in the United States mail (*) on May 23, 1984 or by express mail (**) on May 23, 1984:

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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