

# INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - March 1985



**U. S. NUCLEAR REGULATORY COMMISSION**

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Index 1

**INDEXES TO  
NUCLEAR REGULATORY  
COMMISSION ISSUANCES**

**January - March 1985**

**U.S. NUCLEAR REGULATORY COMMISSION**

## Foreword

Digests and indexes for issuances of the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions of Rulemaking are presented in this document. These digests and indexes are intended to serve as a guide to the issuances.

Information elements common to the cases heard and ruled upon are:

- Case name (owner(s) of facility)
- Full text reference (volume and pagination)
- Issuance number
- Issues raised by appellants
- Legal citations (cases, regulations, and statutes)
- Name of facility, Docket number
- Subject matter of issues and/or rulings
- Type of hearing (for construction permit, operating license, etc.)
- Type of issuance (memorandum, order, decision, etc.).

These information elements are displayed in one or more of five separate formats arranged as follows:

### 1. Case Name Index

The case name index is an alphabetical arrangement of the case names of the issuances. Each case name is followed by the type of hearing, the type of issuance, docket number, issuance number, and full text reference.

### 2. Digests and Headers

The headers and digests are presented in issuance number order as follows: the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking.

The header identifies the issuance by issuance number, case name, facility name, docket number, type of hearing, date of issuance, and type of issuance.

The digest is a brief narrative of an issue followed by the resolution of the issue and any legal references used in resolving the issue. If a given issuance covers more than one issue, then separate digests are used for each issue and are designated alphabetically.



### **3. Legal Citations Index**

This index is divided into four parts and consists of alphabetical or alphanumerical arrangements of Cases, Regulations, Statutes, and Others. These citations are listed as given in the issuances. Changes in regulations and Statutes may have occurred to cause changes in the number or name and/or applicability of the citation. It is therefore important to consider the date of the issuance.

The references to cases, regulations, statutes, and others are generally followed by phrases that show the application of the citation in the particular issuance. These phrases are followed by the issuance number and the full text reference.

### **4. Subject Index**

Subject words and/or phrases, arranged alphabetically, indicate the issues and subjects covered in the issuances. The subject headings are followed by phrases that give specific information about the subject, as discussed in the issuances being indexed. These phrases are followed by the issuance number and the full text reference.

### **5. Facility Index**

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**DIGESTS**  
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**CLI-85-1 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station). Docket No. 50-322-OL-4 (Low Power); OPERATING LICENSE; February 12, 1985; MEMORANDUM AND ORDER**

**A** Upon review of the Licensing Board's October 29, 1984 decision (LBP-84-45, 20 NRC 1343) granting Applicant's request for an exemption from the requirements of 10 C.F.R. Part 50, Appendix A, General Design Criterion 17 and authorizing certain low-power testing, the Commission allows that decision to become effective.

**B** Under its regulations at 10 C.F.R. § 50.47(d), the Commission may issue a low-power operating license to a facility, notwithstanding the absence of either NRC or Federal Emergency Management Agency (FEMA) approval of the facility's offsite emergency plan and without a predictive finding of reasonable assurance that a full-power license will eventually issue, so long as the prerequisites for a low-power license are met. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-83-17, 17 NRC 1032, 1034 (1983).

**C** In conducting its review for effectiveness purposes of a Licensing Board decision authorizing an exemption from General Design Criterion (GDC) 17 (10 C.F.R. Part 50, Appendix A), the Commission will place special weight on equitable considerations. These considerations include the safety significance of full compliance with GDC 17 at the power levels involved, the public interest in full compliance, the intrinsic value to early discovery of problems during low-power testing, the length and cost of the whole licensing proceeding, and the good-faith efforts of the applicant to comply fully with GDC 17.

**D** In considering a request for exemption under 10 C.F.R. § 50.12, the views of a State or local government are not entitled to conclusive weight on the ground that they represent the "public interest." Congress charged the NRC with licensing and regulating nuclear power safety, and the Commission cannot delegate this responsibility by treating State or local government views on the issues as conclusive.

**CLI-85-2 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP (Restart); SPECIAL PROCEEDING; February 25, 1985; MEMORANDUM AND ORDER**

**A** The Commission determines that the Licensing Board should issue decisions on two issues on which hearings have been completed. The Commission further determines that no further hearings are warranted within the restart proceeding. The Commission, however, institutes a new proceeding to consider what action should be taken concerning individuals possibly involved in falsification of leak rate data at Unit 2. On another matter involving a condition of restart imposed by the Appeal Board that a specified Licensee employee will have no supervisory responsibilities over the training of nonlicensed personnel, the Commission offers the employee the opportunity to request a hearing on whether that condition should be imposed.

**B** The traditional standard to determine a motion to reopen a record considers whether: (1) the motion is timely; (2) it addresses significant safety (or environmental) issues; and (3) it might have led to a different result had the newly proffered material been considered initially. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).

**C** When directed by the Commission to address specific matters in a licensing proceeding, the parties have an obligation to comply with the direction. Any clear disregard for the Commission's order will be subject to appropriate sanction.

**DIGESTS**  
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- D 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.
- E Any interested person with the requisite standing may seek to intervene in a § 189a licensing proceeding. To establish standing, an individual must at a minimum show (1) the action being challenged could cause injury in fact to that individual, and (2) such injury is within the zone of interests protected by the Atomic Energy Act. See, e.g., *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610 (1976).
- F It is unresolved in the courts whether an individual who suffers economic injury as a result of a board's decision to bar him from working in a certain job would be within the zone of interests protected by the Atomic Energy Act. See, e.g., *Consumers Power Co. (Palisades Nuclear Power Facility)*, ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).
- G The Due Process Clause of the Fifth Amendment prohibits a federal agency from depriving an individual of liberty or property interests without providing that individual an opportunity for a hearing. Individuals indirectly affected by government action may not have any hearing rights. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).
- H A person's liberty interest is implicated where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, or where the government's action imposed a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).
- I Merely making a discharged employee less attractive for employment is not a deprivation of liberty. See, e.g., *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977).
- J To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it, and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Roth*, supra, 408 U.S. at 577.
- K The government may not prevent an individual from working in his chosen profession without providing him notice and an opportunity to request a hearing. See, e.g., *Orr v. Trinter*, 444 F.2d 128 (6th Cir.), cert. denied, 408 U.S. 943 (1971), although there is no hearing requirement where the only thing at stake is a specific job with no claim of entitlement. See *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).
- L The Energy Reorganization Act of 1974 (42 U.S.C. § 5851) and the Commission's regulations (10 C.F.R. § 50.7) protect employees from discrimination for raising health and safety issues.
- CLI-85-3 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; March 15, 1985; MEMORANDUM AND ORDER
- A The Commission authorizes the issuance to the Applicant of a full-power operating license for the Waterford Steam Electric Station, Unit 3. At the same time it declines to stay the effectiveness of its Decision for a 2-week period as requested by Intervenor. Issuance of the Decision is without prejudice to the Intervenor's motions to reopen that are currently before the Atomic Safety and Licensing Appeal Board.
- B The standard for an operating licensing decision is whether there is reasonable assurance of public health and safety to allow plant operation, either for the full licensing term or until additional analysis is completed that would provide additional assurance for the full-term license.

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ALAB-795 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155-OLA (Spent Fuel Pool Modification); OPERATING LICENSE AMENDMENT, January 9, 1985; MEMORANDUM AND ORDER

A Finding no errors that require corrective action, the Appeal Board affirms on sua sponte review a series of Licensing Board decisions that ultimately authorized a license amendment permitting the expansion of the Big Rock Point Nuclear Power Plant spent fuel pool.

B An appeal board's affirmance on sua sponte review of a licensing board's decision does not signify approval of everything said and done by the board below. Thus, an appeal board will not give stare decisis effect to licensing board conclusions on legal issues not brought to it by way of an appeal. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978). Such an affirmance only connotes agreement with the ultimate resolution of those issues crucial to the result reached. See Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 208 n.4 (1974).

ALAB-796 PORTLAND GENERAL ELECTRIC COMPANY, et al. (Trojan Nuclear Plant), Docket No. 50-344-OLA; OPERATING LICENSE AMENDMENT, January 10, 1985; MEMORANDUM AND ORDER

A The Appeal Board in this operating license amendment proceeding declines to undertake sua sponte review of a Licensing Board's decision that was based on the proposed findings of fact and conclusions of law stipulated by the parties and adopted by the Licensing Board.

ALAB-797 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE, January 17, 1985; MEMORANDUM AND ORDER

A The Appeal Board grants a motion by the NRC staff for clarification and/or reconsideration of an earlier Appeal Board decision, ALAB-792, 20 NRC 1585 (1984), that held that the Board has jurisdiction to rule on intervenors' motion to reopen the record in this operating license proceeding.

B When an appeal board has finally determined some issues in a proceeding and others are still pending before it, the board has jurisdiction over new matters raised by a party if there is a "reasonable nexus" or "a rational and direct link" between the new issues and those pending. A total identity or commonality of issues is not required. See, e.g., Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980).

C A party cannot properly import wholly unrelated, discrete issues into a closed proceeding by combining them, in a single motion to reopen, with another issue that is related to a matter pending before an appeal board. In such a case the appeal board could sever the unrelated material from the matter over which it had retained jurisdiction.

D Jurisdictional disputes in NRC proceedings do not have Constitutional dimensions.

E In determining jurisdictional disputes in NRC proceedings, an adjudicatory board may take into account practical considerations, like efficiency in the disposition of the matter at hand and fairness to the parties. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983).



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ALAB-798 KANSAS GAS & ELECTRIC COMPANY, et al. (Wolf Creek Generating Station, Unit 1), Docket No. 50-482-OL, OPERATING LICENSE, February 5, 1985, DECISION

A Finding no error requiring corrective action, the Appeal Board affirms on sua sponte review a Licensing Board initial decision (LBP-84-26, 20 NRC 53 (1984)) that authorized the issuance of an operating license for the Wolf Creek facility.

ALAB-799 HOUSTON LIGHTING & POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. 50-498-OL, 50-499-OL, OPERATING LICENSE, February 6, 1985, DECISION

A Because the Licensing Board's substantive determination in a partial initial decision (LBP-84-13, 19 NRC 659) that the applicant is likely to be able to meet the character and competence requirements necessary to obtain an operating license for the South Texas plant is expressly subject to change in light of forthcoming hearings, the Appeal Board declines to review that determination. It affirms the Licensing Board's ruling on the standard to be applied in measuring character and competence and various other rulings.

B Generally, appeal boards do not review licensing board determinations that do not constitute a final resolution on the merits. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 190 (1983).

C The Commission's regulatory scheme recognizes that an applicant is bound to make errors necessitating correction during the course of construction of a nuclear power plant. See, e.g., 10 C.F.R. § 50.55(e); 10 C.F.R. Part 50, Appendix B, § XVI.

D Plainly, whether a plant was properly built bears on whether it can be operated safely. Construction quality assurance issues are a frequent component of operating license proceedings. See, e.g., Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 345 (1983).

E Neither the Atomic Energy Act nor the Commission's case law provide a complete definition of character or competence. Prior decisions simply identify the factors that are pertinent to an inquiry into those matters.

F Although no cases are precisely on point, the clear import of prior appeal board decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses.

G Denial of a license requires a finding that it is not possible for the ascertained quality assurance failings either to be cured or to be overcome to the extent necessary to reach an informed judgment that the facility has been properly constructed. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

H A review of the totality of circumstances is required to permit a reasonable prediction regarding whether an applicant for an operating license can and will comply with the safety and environmental standards imposed by statute and the Commission's regulations and procedures.

I Even an applicant's poor past conduct need not automatically foreclose a finding that it now possesses the requisite high degree of character or competence to obtain an operating license.

J That a board reaches conclusions and makes findings contrary to those urged by a party does not establish bias. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

K A mere demonstration that a board erred by curtailing cross-examination is not sufficient to warrant appellate relief. The complaining party must demonstrate actual prejudice — i.e., that the ruling had a substantial effect on the outcome of the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984).

L The authority of a board to demand cross-examination plans is encompassed by the board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. 10 C.F.R. §§ 2.718(e), 2.757(c). See also Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). Indeed, 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).

M Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. See 10 C.F.R. § 2.762(d).



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- N It is firmly established that the scope of cross-examination is ordinarily limited to matters raised in direct testimony. See *Waterford*, supra, 17 NRC at 1096 and cases cited.
- O The use of prefilled, written testimony generally is permitted by the Administrative Procedure Act in licensing cases and authorized by the Commission's Rules of Practice, 5 U.S.C. § 556(d); 10 C.F.R. § 2.743(b).
- P The use of witness panels is a long-standing practice in licensing hearings, consistent with Commission policy. See 10 C.F.R. Part 2, Appendix A, § V(d)(4).
- Q A party may not raise on appellate review licensing board practices it did not object to at the hearing stage.
- R To justify overturning a licensing board's scheduling decision, an appeal board must be satisfied that the licensing board set a schedule that deprives a party of its right to procedural due process. *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-459, 7 NRC 179, 188 (1978). See also *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-719, 17 NRC 387, 391 (1983).
- S An appellant carries the burden of presenting an appeal board with an adequate brief in the first instance and bears the risk of any oversight by the board if it fails to do so. A failure to brief issues adequately deprives the appeal board precisely of that assistance which the Rules of Practice are designed to have an appellant provide, i.e., to flesh out the bare bones of claims on appeal and to present the board with sufficient information or argument to allow an intelligent disposition of the issues. *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2)*, ALAB-793, 20 NRC 1591, 1619 n.133 (1984), quoting *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-270, 1 NRC 473, 475 (1975), and *United States v. White*, 454 F.2d 435, 439 (7th Cir. 1979). See also *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1255 (1982); *Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2)*, ALAB-573, 10 NRC 775, 786-87 (1979).
- T The five-factor test normally used to determine whether to grant a nontimely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date, should also be applied to determine whether one intervenor may be allowed to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding. See 10 C.F.R. §§ 2.714(a)(1), (b).
- U 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 C.F.R. §§ 2.104(c), 2.760a.
- V Where only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. Under NRC procedure, however, it does serve to remove the withdrawing party's contentions from litigation. *Project Management Corp. (Clinch River Breeder Reactor Plant)*, ALAB-354, 4 NRC 383, 391-92 (1976).
- W The mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor. *Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CL' 71-36, 14 NRC 1111, 1113-14 (1981). Safety or environmental matters not the subject of contentions or raised by a board sua sponte are left for nonadjudicatory resolution by the NRC staff. *Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3)*, ALAB-319, 3 NRC 188, 189-90 (1976).
- X Under principles announced in *Prairie Island*, an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975).
- Y The Commission's regulations require that, at the outset of a case, each intervenor submit a list of the contentions which it seeks to have litigated. 10 C.F.R. § 2.714(b). Moreover, one may not introduce affirmative evidence on issues raised by another intervenor's contentions. *Prairie Island*, supra, 8 AEC at 869 n.17.
- Z Because contentions can be withdrawn or settled through negotiation, a non-sponsoring party assumes at least some risk that the pursuit of its interests may not be wholly within its con-

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trial Clinch River, *supra*, 4 NRC at 392. See Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977).

AA Participation of the NRC staff in a licensing proceeding is not tantamount to participation by a private intervenor. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983). By analogy, the availability of staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor two under 10 C.F.R. § 2.714(a).

BB If, in the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 C.F.R. § 2.714(a). Gulf States Utilities Co. (River Bend Station, Units 1 and 2, ALAB-444, 6 NRC 760, 795 (1977)).

ALAB-800 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-4 (Low Power); OPERATING LICENSE; February 21, 1985; DECISION

A The Appeal Board affirms with one exception the conclusions reached in the Licensing Board's October 29, 1984 initial decision that granted the applicant's request for an exemption from certain regulatory requirements and authorized low power testing of the Shoreham facility. See LBP-84-5, 20 NRC 1343. The Appeal Board reverses the Licensing Board's conclusion on one matter, remands it to the Board for further proceedings, and vacates the exemption as to certain phases of low power operation.

B Under 10 C.F.R. § 50.12(a), the Commission may grant such exemptions from the requirements of its regulations as it determines are authorized by law; will not endanger life, property, or the common defense and security; and are otherwise in the public interest.

C The Commission ordinarily does not undertake an immediate effectiveness review in an operating license proceeding unless the initial decision authorizes facility operation at greater than five percent of rated power. 10 C.F.R. § 2.764(f)(1).

D Unless the Commission otherwise explicitly so directs in its immediate effectiveness determination, an appeal board is not to give any weight to any statement reflecting that determination. 10 C.F.R. § 2.764(g).

E Section 2.764(f)(2)(ii) of 10 C.F.R. allows the parties to a proceeding to submit to the Commission within ten days of an initial decision brief comments pointing out matters which, in their view, pertain to the immediate effectiveness issues before the Commission.

F The Commission is the ultimate arbiter within this agency of what is meant by the provisions of its own regulations and the language contained in its own opinions. Nonetheless, absent the availability of a definitive Commission pronouncement, it often falls to the appeal board to undertake to resolve disputes between parties as to the proper interpretation and application of a particular Commission regulation or formal opinion.

G Each application for a license to operate a nuclear power plant must include a physical security plan that addresses how the applicant intends to comply with Part 73 of the Commission's regulations pertaining to the protection of the plant. See 10 C.F.R. §§ 50.34(c), 73.1(b)(1)(i). Among other things, Part 73 prescribes various requirements for the protection of "vital equipment." See 10 C.F.R. §§ 73.55, 73.2(i).

H Under the Commission's regulation, vital equipment includes any equipment or system, the failure or destruction of which could directly or indirectly endanger the public health and safety by exposure to radiation. 10 C.F.R. § 73.2(i).

ALAB-801 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; March 22, 1985; MEMORANDUM AND ORDER

A Finding the existing record inadequate on which to rule on a motion to reopen made by intervenors, the Appeal Board defers ruling on the motion. With limited exception, it strikes the brief and affidavits submitted by the NRC staff in opposition to the motion and calls for additional information from the staff and the applicant.

B It is each party's job — applicant, intervenor, and staff alike — to present its respective position in an intelligible form to the decisionmaker. An appeal board is neither advocate nor clerk for any party that appears before it.

C An appeal board is required to state "the reasons or basis" for its conclusions. See Administrative Procedure Act, 5 U.S.C. § 557(c). It cannot properly fulfill this responsibility if the

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- raw material with which it must work — i.e., the pleadings and other matter that make up the record — is grossly inadequate.
- D Legal counsel — through whom a party expresses its position — must bear a large responsibility for the form and quality of submissions made in licensing proceedings.
- E The NRC staff's conduct and contribution must conform to the same standards applicable to other parties.
- F Where a party (particularly, where represented by legal counsel) submits a helter-skelter collection of materials, it must live with the consequences. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1368 n.22 (1984).
- ALAB-802 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE, March 26, 1985; DECISION.
- A The Appeal Board in this operating license proceeding denies intervenor's request to reopen the record to receive further evidence on the issue of quality assurance, and affirms the Licensing Board's partial initial decision (LBP-83-77, 18 NRC 1365 (1983)), which found applicants' quality assurance program for the Perry Plant adequate.
- B Neither the Administrative Procedure Act nor the Commission's Rules of Practice require an adjudicatory tribunal to ensure that a party appearing before it is represented by counsel. Rather, it is the responsibility of the party itself not merely to decide whether it wishes to be represented by counsel but, in addition, to take the necessary measures to implement its decision. See generally Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-47 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).
- C There is not a bright line separating proper and excessive involvement on the part of the tribunal hearing the evidence. A trial judge must have great latitude in that regard, especially where certain of the parties are represented by lay persons and the judge concludes that they are in need of assistance.
- D More than a mere disagreement among staff members is necessary to compel testimony by staff witnesses not otherwise scheduled to testify. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-715, 17 NRC 162 (1983).
- E The Commission's Rules of Practice do not prohibit the admission of hearsay evidence. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-12 (1976).
- F The requirement in 10 C.F.R. Part 50, Appendix B, Criterion XVI, that quality assurance deficiencies be identified and corrected promptly does not require that they must all be corrected as quickly as humanly possible.
- G Although ultimately all deficiencies of potential safety significance must be corrected, it is not necessary to rectify all of them at once. How rapidly a particular deficiency need be cured will depend upon such factors as its nature and significance, the stage of plant construction, and whether the deficiency might shortly be covered up by further construction work.

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LBP-85-1 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility).  
Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE; January 9,  
1985; MEMORANDUM AND ORDER

- A Licensing Board rules that, in permitting document inspection after having screened its files to remove privileged documents, Applicant waived its right to subsequently assert attorney-client or work product privileges. Licensing Board also rules that only parties must respond to requests for documents and that State agencies which are not parties to a proceeding need not so respond. However, such State agencies may be subject to subpoenas seeking documents.
- B In determining whether an inadvertent disclosure of a privileged document operates to waive the privilege, Licensing Board considers the precautions taken to prevent disclosure, the effectiveness of those precautions, whether the documents were produced under the compulsion of a rigorous schedule, and the promptness of the disclosing party's objection on discovering the disclosure.
- C Under 10 C.F.R. § 2.741, only parties must respond to document requests.
- D Subpoenas may be issued to State agencies which are not parties to a proceeding in order to obtain documents.

LBP-85-2 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OL&OM, 50-330-OL&OM (ASLBP Nos. 78-389-03-OL, 80-429-02-SP); OPERATING LICENSE/ENFORCEMENT; January 23, 1985; PARTIAL INITIAL DECISION

- A The Licensing Board issues a Partial Initial Decision in a consolidated operating license/enforcement proceeding involving a facility as to which construction has been halted (but as to which the operating license application has not been withdrawn). The Decision resolves, subject to specified conditions or technical specifications, various technical issues arising out of the excessive settlement of soils upon which safety structures are founded. The Board also denies the Applicant's motion for reconsideration of an earlier order concerning the procedural steps which the NRC must follow when seeking to impose new seismic criteria on a facility at the operating license stage of review.
- B Although the conformance of a structure with applicable safety standards may depend both on the adequacy of design of the structure and on the manner in which the design is implemented, the adequacy of design is conceptually different from the sufficiency of design implementation and need not necessarily be considered in the same decision.
- C The circumstance that construction is in progress (or has even been completed) cannot legally have any effect on a Licensing Board's evaluation of the adequacy of a structure's design. However, should problems with a design being followed be uncovered during construction, those problems may be taken into account in assessing the technical adequacy of the design. Cf. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 415 (1961).
- D At the operating license stage of review, an applicant must provide, and the NRC Staff reviews, "current information . . . which has been developed since issuance of the construction permit, relating to site evaluation factors," including the geologic and seismic matters comprehended by 10 C.F.R. Part 100. 10 C.F.R. § 50.34(b)(1).
- E Where the NRC Staff seeks to apply new seismic criteria during its operating license review from those applied at the construction permit stage of review, and where there has been a progression in seismological review techniques in the intervening period, the Staff need not follow the backfitting procedures set forth in 10 C.F.R. § 50.109.

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- F A progression in seismological review techniques may constitute "current information which has been developed since issuance of the construction permit," within the meaning of 10 C.F.R. § 50.34(b)(1), thus calling for a reevaluation at the operating license stage of review without need to resort to the backfit standards of 10 C.F.R. § 50.109.
- G Where an operating license and a show cause proceeding are being carried on simultaneously and are consolidated, and where the proceedings would utilize different procedural rules, the rules governing the operating license proceeding would apply in consolidated hearings on joint issues.
- H Use of site-specific response spectra to define the vibratory ground motion at a site of the safe shutdown earthquake is consistent with 10 C.F.R. Part 100, Appendix A, §§ IV(a), V(a)(1) and VI(a).
- I The terms "important to safety" and "safety-related," when applied to seismic design requirements, are used interchangeably in 10 C.F.R. Part 100, Appendix A.
- J An inadequacy in seismological data may warrant requiring, pursuant to 10 C.F.R. Part 100, Appendix A, § V(a)(1)(iv), that the controlling earthquake be larger than the maximum earthquake that has occurred historically within the tectonic province.
- K The following technical issues are discussed: Dewatering; Differential settlement of structures; Ground acceleration value resulting from safe shutdown earthquake; Quality assurance; Safe shutdown earthquake (intensity, resulting vibratory ground motion); Seismic design criteria; Seismic shakedown; Site-specific response spectra (SSRS); Soil compaction; Soil density; Soil liquefaction; Structural design — cantilever designs; Structural design — evaluation of cracks; Tectonic provinces; Underground piping — corrosion; Underpinning of safety structures.
- LBP-85-3 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE, January 23, 1985; MEMORANDUM AND ORDER
- A Licensing Board rules on petitions for reconsideration and clarification of its Memorandum and Order ruling on the admissibility of contentions (LBP-84-42, 20 NRC 1296). In response to Staff's motion, Licensing Board rules that Kerr-McGee's contention (which seeks a determination that its plan for permanently disposing of mill tailings at its West Chicago is acceptable) is an acceptable contention, that Staff's obligation to supplement the record on NEPA issues springs from the People's contention rather than Kerr-McGee's, that Staff must circulate a supplemental impact statement to accomplish this supplementation, and that the Board will not refer its ruling admitting Kerr-McGee's contention to an appeal board for interlocutory review. The Board denies the People's motion for reconsideration of its ruling removing references to Part 61 from one of their subcontentions on the ground that Part 61 is inapplicable and grants their motion for reconsideration of the denial of another subcontention which seeks to require Staff to respond to certain comments on the DES.
- B Under the Administrative Procedure Act, the Atomic Energy Act, and the Commission's Rules of Practice, an application cannot be denied without stating reasons for the denial. These reasons must indicate why the application does not comply with the statute and regulations under which it is filed. *SEC v. Chenery Corp.*, 318 U.S. 80, 94; 87 L. Ed. 626, 636 (1943); *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2)*, ALAB-770, 19 NRC 1163 (1984); 5 U.S.C. § 555(e); 10 C.F.R. § 2.103(b).
- C Where an FES disregards broad areas of environmental impact or fails to apprise the public of the nature of the proposed action and its expected consequences, recirculation of the statement is necessary.
- D Admission of a contention which will require further Staff review does not result in unusual delay which justifies referral for interlocutory review. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 464 (1982), rev'd on other grounds, CLI-83-19, 17 NRC 1041 (1983).
- LBP-85-4 GENERAL ELECTRIC COMPANY (GETR Vallecitos), Docket No. 50-70-OLR (ASLBP No. 83-481-01-OLR); OPERATING LICENSE RENEWAL, February 13, 1985; MEMORANDUM AND ORDER
- A Having earlier concluded that petitioner has standing to participate in this proceeding, the licensing board reviews his contentions and concludes that five should be admitted despite



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the fact that four of the five raise matters which were the subject of an earlier proceeding concerning this reactor.

- B The doctrine of collateral estoppel may not be used to prevent litigation of contentions which raise subjects litigated in a prior proceeding concerning the same reactor where the intervenor propounding the contentions was not in privity with the intervenor in the prior proceeding.

- C In order to prevent relitigation of matters litigated in a prior proceeding concerning the same reactor, the Licensing Board invites motions for summary disposition which rely on the record of the prior proceeding. Intervenor is, in response, to indicate why that record is inadequate and why further proceedings are necessary. The Licensing Board will officially notice the record in the prior proceeding and render a decision whether further evidentiary hearings are necessary.

**LBP-85-5 CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant). Docket No. 50-400-OL (ASLBP No. 82-472-03-OL). OPERATING LICENSE; February 20, 1985; PARTIAL INITIAL DECISION ON ENVIRONMENTAL CONTENTIONS**

- A The Licensing Board decides in the Applicants' and Staff's favor three environmental issues that had been the subject of an evidentiary hearing. The Board denies a petition for waiver of the "need for power" rule, holding that the petitioner had not shown that application of the rule in this case would be inconsistent with its intended purpose.

- B The following technical issues are discussed: Appropriate Time Periods for Considering Health Effects; Effects of Attachment of Radionuclides to Fly Ash Particles; Effects of Coal Particulates Associated with the Fuel Cycle.

**LBP-85-6 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2). Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; February 26, 1985; MEMORANDUM AND ORDER**

- A The Licensing Board grants an intervenor's request for a hearing on the effect (if any) on the lead Applicant's character and competence of its asserted failure to notify NRC (including the Licensing Board) on a timely basis of a report by Quadrex Corporation (a consultant) on the engineering design activities of the project's former architect-engineer-constructor. The Board also denies reconsideration of an earlier order which, inter alia, dismissed the same intervenor's attempt to litigate certain substantive issues derived from the Quadrex Report.

- B Insofar as it relates to reports required to be furnished by construction permit holders, the coverage of 10 C.F.R. Part 21 is similar, albeit somewhat narrower, than the coverage of 10 C.F.R. § 50.55(e). Items reported pursuant to § 50.55(e) need not again be reported to satisfy Part 21.

- C Certain deficiencies representing a significant breakdown in a quality assurance program are reportable under 10 C.F.R. § 50.55(e)(1)(i) but not under 10 C.F.R. Part 21.

- D Under 10 C.F.R. § 50.55(e), a construction permit holder must notify NRC of certain deficiencies in design or construction. The deficiencies specified by 10 C.F.R. § 50.55(e)(1)(i) and (ii) apply to design or construction, whereas the deficiencies specified by 10 C.F.R. § 50.55(e)(1)(iii) and (iv) are only deficiencies in construction, not design.

- E Deficiencies representing a significant breakdown in any portion of the quality assurance program, within the meaning of 10 C.F.R. § 50.55(e)(1)(i), may include deficiencies in designs which are not final and have not been "approved and released for construction," within the meaning of 10 C.F.R. § 50.55(e)(1)(ii).

- F Even though several quality assurance deficiencies may not in themselves be reportable as significant quality assurance breakdowns, collectively they may nevertheless be greater than the sum of their individual parts and be reportable as a significant quality assurance breakdown under 10 C.F.R. § 50.55(e)(1)(i).

- G Operating license proceedings are not NRC's primary vehicle for ascertaining the existence of, or penalties for, violations of 10 C.F.R. § 50.55(e). But such violations may be considered in such proceedings in the context of an applicant's character or competence to complete and/or operate a nuclear plant.

- H A failure to adhere to the reporting requirements of 10 C.F.R. § 50.55(e) does not per se reflect an operating license applicant's lack of managerial character or competence, particularly where the NRC Staff believes that the reporting requirements have been satisfied. But a party is

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nevertheless free to attempt to demonstrate that any particular failure to report was motivated by deficiencies in character or competence.

- I A long line of Appeal Board decisions has obligated applicants to keep licensing or appeal boards informed of newly developing information bearing on issues pending before such boards. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 408-12 (1975); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357-60 (1984). Where there is "reasonable doubt" about the materiality of information, it should be disclosed "for the board to decide its true worth." TMI, supra, 19 NRC at 1358.

LBP-85-6A PUBLIC SERVICE ELECTRIC AND GAS COMPANY, et al. (Hope Creek Generating Station), Docket No. 50-354-OL; OPERATING LICENSE; February 28, 1985; ORDER TERMINATING PROCEEDING

- A In this Order, the Licensing Board grants the parties' Joint Motion, dismissing all remaining contentions and terminating the proceeding.

LBP-85-7 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant), Docket No. 50-537-CP (ASLBP No. 75-291-12-CP); CONSTRUCTION PERMIT; March 11, 1985; MEMORANDUM AND ORDER GRANTING APPLICANTS' MOTION TO DISMISS PROCEEDING

- A The Board, imposing certain conditions on redress of the site, grants the Applicants' motion to authorize revocation of the Limited Work Authorization and to dismiss this construction permit proceeding without prejudice.

- B Section 50.10(c) of 10 C.F.R. generally prohibits an applicant from starting site or construction work before the applicant obtains a construction permit or a Limited Work Authorization. However, 10 C.F.R. § 50.12 provides for exemptions from § 50.10(c), upon a consideration and balancing of several factors, including "[w]hether redress of any adverse environment impact from conduct of the proposed activities can reasonably be effected should such redress be necessary."

- C The Board, exercising its responsibility under 10 C.F.R. § 2.107(a) to consider whether terms should be prescribed for the withdrawal of an application, predicates its granting of the Applicants' motion to authorize revocation of their Limited Work Authorization and to dismiss the proceeding without prejudice upon the adequacy of the Applicants' site redress plan, and upon clarification of what the responsibilities of the Applicants and the Staff are in the event an alternate use is found for the site before redress is complete.

- D A condition of the Board's granting the Applicants' motion to dismiss this construction permit proceeding is that if an alternate use is found for the construction site before redress of the site is complete, the Applicants, under the Staff's review, will carry out, to the greatest extent possible consistent with the alternate use, the redress plans approved in this Order.

LBP-85-8 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; March 15, 1985; MEMORANDUM

- A Responding to the remand by the Appeal Board in ALAB-799, 21 NRC 360 (1985), the Licensing Board explains why it does not invoke its authority under 10 C.F.R. § 2.760a to consider sua sponte certain previously dismissed contentions.

- B In an operating license proceeding, a licensing board is constrained from reviewing an issue sua sponte unless a "serious safety, environmental, or common defense and security matter exists." 10 C.F.R. § 2.760a (emphasis supplied). The Commission must be advised of a board's intent to consider an issue sua sponte. When so advising the Commission, a board must provide more than a conclusory statement of the issue's significance.

- C The circumstance that a particular contention no longer being pursued has already been admitted to a proceeding is not in itself sufficient to satisfy the standard for sua sponte review, nor is the incompleteness of Staff review of the issue.



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- D        A licensing board may take into account the pendency and likely efficacy of NRC Staff nonadjudicatory review in determining whether or not to invoke its sua sponte review authority.
- E        Emergency Planning Zones must currently extend "about 10 miles" in radius from a plant. 10 C.F.R. §§ 50.47(b)(10), (c)(2), and 10 C.F.R. Part 50, Appendix E, § I, n.1.
- F        The fact that evacuation of particular individuals would require them to begin their journey by heading toward a plant will not necessarily be fatal to the effectiveness of an emergency plan. The effectiveness of any plan will depend upon the particular circumstances in question.
- LBP-85-9    HOUSTON LIGHTING & POWER COMPANY, et al. (South Texas Project, Units 1 and 2). Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; March 29, 1985; MEMORANDUM AND ORDER.
- A        The Licensing Board denies an intervenor's late-filed contention on soil stability but, as part of its consideration of the lead Applicant's competence, directs a hearing on certain soils questions.
- B        Late-filed contentions may be admitted only after balancing all five of the factors set forth in 10 C.F.R. § 2.714(a)(1). Factors (ii) and (iv), concerning representation of a party's interest in a contention by other means or parties, are entitled to relatively less weight than the others.
- C        Factor (ii), involving other means for a party to protect its interest, is limited to the availability of other fora in which the party itself might protect its interest and is not satisfied through nonadjudicatory resolution of issues by license applicants or the NRC Staff (whose programs do not focus on the interests of particular parties). Nor is factor (iv), involving representation by other parties, satisfied through participation by applicants or the NRC Staff.
- D        The most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding, is the extent to which the intervenor may reasonably be expected to assist in developing a sound record.

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DD-85-1 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289, 50-320, and (Oyster Creek Nuclear Generating Station), Docket No. 50-219, REQUEST FOR ACTION, January 15, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition submitted by Joanne Doroshow on behalf of the Three Mile Island Alert, Inc., and other named Petitioners requesting action with respect to the Three Mile Island Nuclear Station (TMI) Units 1 and 2 and the Oyster Creek Nuclear Generating Station.

B Where the Commission has before it the Petitioners' allegations in another proceeding, it is inappropriate to use 10 C.F.R. § 2.206 procedures to initiate a show cause proceeding.

DD-85-2 COMMONWEALTH EDISON COMPANY (Zion Station, Unit 1), Docket No. 50-295, IMMEDIATE ACTION REQUEST, January 23, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a Petition by Edward Gogol alleging inadequacies in the containment integrated leak rate test performed in 1981 at Zion Nuclear Power Station, Unit 1. The Petition sought a variety of relief including immediate NRC action to deal with the threat raised by the alleged inadequate leak rate test of the Zion Unit 1 facility and the completion of an adequate and properly supervised retesting of the facility. Petitioner also requested copies of all documents collected by either the licensee or the NRC in the course of the retest.

B Discrepancies in the Containment Integrated Leak Rate Test (CILRT) for the Zion Nuclear Power Station, Unit 1 required retesting of the facility to demonstrate compliance with 10 C.F.R. Part 50, Appendix J.

C It is not necessary for the NRC to issue orders in response to a petition pursuant to 10 C.F.R. 2.206 when the licensee agrees to take remedial measures similar to those requested by the petition.

DD-85-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443, 50-444, REQUEST FOR ACTION, March 18, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a Petition of the New England Coalition on Nuclear Pollution requesting that the Nuclear Regulatory Commission take action to remedy alleged violations and deficiencies associated with construction of the Seabrook facility. Specifically, the Petition contends that construction activities are being conducted in violation of the terms of the construction permit and the Commission's quality assurance requirements, specifically 10 C.F.R. Part 50, Appendix B. Based on these alleged violations and deficiencies, the Petitioner seeks immediate suspension of construction.

B Organizational changes at and financing of the Seabrook facility did not have the effect of removing the entity solely accountable and responsible for design and construction of the facility. Consequently, design and construction activities continue to be conducted in accordance with the terms of the construction permit.

C The quality assurance program at the Seabrook facility, including Criterion I calling for the program to have adequate authority and organizational freedom, satisfies the requirements of 10 C.F.R. Part 50, Appendix B. Staffing of the Licensee's quality assurance program with employees of another company would not be inappropriate if it remained clear that those employees were ultimately responsible to the Licensee. Nor does the Licensee necessarily compromise its authority and organizational freedom to supervise quality assurance by becoming heavily indebted to its contractors and other creditors.

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DD-85-4 THE DETROIT EDISON COMPANY, et al. (Enrico Fermi Atomic Power Plant, Unit 2), Docket No. 50-341, REQUEST FOR ACTION, March 20, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of Nuclear Reactor Regulation denies a request filed by the Safe Energy Coalition of Michigan which requested initiation of an investigation and formal proceeding to ensure adequate resolution of certain safety issues prior to issuance of an operating license for Fermi-2.

B The following technical issues are discussed: Emergency response information system, discrepancies between drawings and as-built systems, radwaste systems, fire protection, Mark I containment design.

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