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NUCLEAR REGULATORY COMMISSION ISSUANCES

August 1992

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NUCLEAR REGULATORY COMMISSION ISSUANCES

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This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

B. Paul Cotter, Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-440-A
50-346-A
(Applications to Suspend
Antitrust Conditions)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

August 12, 1992

The Commission denies City of Cleveland's appeal of a Prehearing Conference Order, LBP-91-38, 34 NRC 229 (1992), which granted Applicants' hearing petitions. The Commission determines that its broad authority to amend licenses at the request of licensee extends to requests for amendments to antitrust conditions. The Commission also denies City of Cleveland's motion for revocation of the Commission's referral of the hearing requests to the Licensing Board. The Commission determines that the Licensing Board's development of a detailed record and analysis of the complex issues raised in this proceeding will aid the Commission in any review that may be undertaken.

ATOMIC ENERGY ACT: AUTHORITY TO AMEND OPERATING LICENSES

Amendments to operating licenses are contemplated under both the Atomic Energy Act (AEA) and the Commission's implementing regulations. *See* AEA §§ 161, 182, 183, 187, 189, 42 U.S.C. §§ 2201, 2232, 2233, 2237, 2239 (1988); 10 C.F.R. §§ 50.90, 50.92 (1992).

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Hearing rights provided in section 189 of the Atomic Energy Act may be invoked not only by interested members of the public but also by license applicants or licensees. 42 U.S.C. § 2239(a)(1) (1988).

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Although a license applicant or licensee may have a right to a hearing under section 189 of the AEA if its interest is adversely affected (e.g., if a license or amendment application is denied or a license is suspended or revoked), a hearing must still be requested; otherwise Staff's decision is final. *See* 10 C.F.R. §§ 2.103(b), 2.105(a), 2.108(b), 2.1205 (1992).

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

The Commission has jurisdiction under sections 103, 161, and 189 of the AEA to entertain Applicants' request to amend their licenses to suspend the effect of antitrust conditions. Neither the statutory language nor the legislative history of section 105 of the AEA suggests that Congress intended antitrust license conditions to be immutable, irrespective of whether the conditions have become unjust over time. Neither *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977), nor *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977), prohibit suspension of antitrust conditions at a licensee's reque

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Staff's consideration of Applicants' amendment request was not a "hearing" that satisfies section 189 of the AEA; Staff's determination was administrative in nature and does not suffice as an adjudicatory review of the application request.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Atomic Safety and Licensing Board (Licensing Board) granted hearing petitions of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company (Applicants) in a Prehearing Conference Order dated October 7, 1991. LBP-91-38, 34 NRC 229. The City of Cleveland (Cleveland), an intervenor in the instant dockets, appealed this order on the grounds that this proceeding lacks a legal basis. Cleveland also sought revocation of the Commission's referral of the hearing requests to the Licensing Board. For the reasons stated below, we *deny* Cleveland's appeal and *deny* the motion to revoke the referral.

The effect of our order is simply to allow the Board and parties to proceed to resolve the question of whether Applicants were properly denied suspension of antitrust conditions attached to their licenses. However, as we explain below, the basis for our decision involves intricate considerations relating to our regulatory authority.

II. BACKGROUND

This matter began when Ohio Edison Company filed an application in September 1987 for an amendment to suspend the antitrust conditions in the operating license for the Perry Nuclear Power Plant. In May 1988, Toledo Edison Company and Cleveland Electric Illuminating Company filed a joint application also requesting relief from the Perry antitrust conditions and additionally seeking suspension of the antitrust conditions in the Davis-Besse nuclear plant licenses. After considering public comments and advice from the Department of Justice's Antitrust Division, the Nuclear Regulatory Commission (NRC) Staff in April 1991 denied the Applicants' requests. 56 Fed. Reg. 20,057 (May 1, 1991). The Applicants petitioned for a hearing on the Staff's denial of the requested amendment. The Applicants' hearing petitions were filed with the Office of the Secretary (Secretary) of the Commission in accordance with Staff's notice of denial of the Applicants' amendment requests. After receiving the requests for a hearing, petitions for intervention, and Cleveland's opposition to a hearing, the Secretary referred the requests and petitions to the Licensing Board for appropriate action.[1]

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[1] *See* Memorandum from S.J. Chilk, Secretary, to B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel (June 7, 1991).

The Licensing Board ruled on the requests for hearing and petitions for intervention and other threshold procedural matters in its Prehearing Conference Order, LBP-91-38, *supra*. Pursuant to 10 C.F.R. § 2.714a, Cleveland filed its appeal of LBP-91-38. The Applicants and Staff opposed the appeal. Additionally, on December 19, 1991, Cleveland filed a motion, also opposed by Staff and Applicants, for Commission revocation of the referral of the hearing petitions to the Licensing Board and also for Commission adoption of NRC Staff's April 24, 1991 decision denying the Applicants' amendment requests.

III. THE LICENSING BOARD'S DECISION

In determining whether to grant the Applicants' hearing requests, the Licensing Board addressed Cleveland's four main objections to entertaining such a hearing: (1) the Applicants were not "person[s] whose interest may be affected" by this proceeding such that they are entitled to a hearing under section 189a(1) of the Atomic Energy Act (AEA);[2] (2) section 189a(1) does not enumerate the subject matter of this proceeding as being subject to a hearing, i.e., the denial of a request for suspension of antitrust conditions; (3) Applicants have already had their hearing before Staff; and (4) the Commission lacks the authority to grant the relief requested.[3]

In LBP-91-38, the Licensing Board easily dismissed Cleveland's first three arguments. The Licensing Board concluded that Applicants are considered "persons" within the meaning of the AEA and that their "interests" are affected by the outcome of this proceeding because it is their amendment request that was denied.[4] Although the Licensing Board conceded that a "suspension" is not typically considered an amendment, the Licensing Board nevertheless concluded that the word suspension is used in the instant applications to characterize Applicants' request to have the antitrust conditions nullified, and as such is "by any reasonable interpretation" a request for an "amendment" of the existing operating licenses.[5] Furthermore, the Licensing Board found that Staff's review was not an adjudicatory determination regarding the merits of the application to which Applicants are entitled under section 189a. Although an administrative denial by Staff regarding an amendment application may be dispositive, the statute requires a hearing if the Applicants request one.

The Licensing Board found more problematic Cleveland's fourth argument regarding whether the Commission has the authority to suspend antitrust conditions after the issuance of the operating license. Recognizing the Commis-

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[2] 42 U.S.C. § 2239(a)(1) (1988).
[3] LBP-91-38, *supra*, 34 NRC at 237.
[4] *Id.* at 238.
[5] *Id.* at 238-39.

sion's limited antitrust jurisdiction under section 105 of the AEA,[6] the Licensing Board nevertheless determined that the Commission has the statutory authority to amend antitrust conditions under the general provisions contained in section 189a of the AEA and implemented in 10 C.F.R. § 50.90 providing for amendments to licenses at the licensees' request.

IV. ARGUMENTS BEFORE THE COMMISSION

On appeal, Cleveland argues that the Licensing Board erred in relying on section 189a of the AEA for authority to conduct the antitrust review sought by Applicants.[7] Cleveland argues that section 189a is purely procedural in nature and does not grant a substantive right to amend the operating license. In addition, according to Cleveland, section 189 confers hearing rights on the public only, not on the Applicants. Cleveland further maintains that the Licensing Board misinterpreted the statute and its implementing regulations (specifically, 10 C.F.R. § 50.90) regarding the authority of the Commission to conduct postlicensing antitrust review. Cleveland interprets prior Commission decisions, namely, *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977) (*South Texas*), and *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977) (*St. Lucie*), to hold that any postlicensing antitrust review is prohibited. In addition, Cleveland argues that the Commission's authority to enforce antitrust license conditions does not include the authority to delete or modify those same conditions.

Finally, Cleveland maintains that section 105 of the AEA provides the only authority for the Commission to conduct antitrust review, and because that section does not provide authority to conduct postlicensing review, a licensee cannot confer this jurisdiction simply because it volunteers to undergo the amendment process.[8]

The NRC Staff maintains that the Licensing Board was correct in determining that the Commission has authority to conduct a hearing regarding the amendment

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[6] 42 U.S.C. § 2135 (1988).

[7] *See* Brief of City of Cleveland, Ohio, in Support of Notice of Appeal of Prehearing Conference Order Granting Request for Hearing at 36-37 (Oct. 23, 1991) (Cleveland's Brief).

[8] Cleveland has moved for leave to file a reply to the Applicants' and Staff's briefs opposing Cleveland's appeal. Cleveland's reply was attached to the motion. NRC Staff opposes this motion, and has requested that, if the motion is granted, Staff should be permitted to respond to Cleveland's reply. *See* NRC Staff's Answer in Opposition to the Motion of the City of Cleveland, Ohio, for Leave to File a Reply Brief at 2 (Dec. 26, 1991). We find that the reply adds nothing of substance to Cleveland's position. It essentially provides additional comments regarding the same arguments that were addressed in Cleveland's original brief. For these reasons, Cleveland's motion for leave to file a reply to its brief in support of its appeal of LBP-91-38 is *denied*.

or modification of license conditions, including antitrust conditions.[9] According to Staff, section 105 of the AEA limits the Commission's authority to initiate antitrust review. However, Staff contends that section 105 does not specifically address license amendments sought by licensees and thus cannot be interpreted as limiting the Commission's general authority to amend licenses that it issues. Staff argues that *South Texas* and *St. Lucie* address only whether the NRC can impose new restrictions due to alleged anticompetitive behavior by a licensee, but do not specifically address license amendments sought by licensees. Moreover, the Staff contends that the Commission's broad statutory power to impose conditions in a license includes the power to relax such conditions if circumstances warrant.

The Applicants' arguments are essentially the same as those of NRC Staff.[10] However, in addition, Applicants emphasize that their requests here should not entail a traditional "antitrust review" under section 105. More specifically, the Applicants argue that the purpose of a traditional section 105 antitrust review is to determine whether licensees are or were acting anticompetitively in order to determine whether new antitrust conditions are warranted on a license. Applicants agree that this type of antitrust review is limited under section 105. In this proceeding, Applicants argue that a traditional "antitrust review" is not required to resolve the questions raised, but rather that statutory interpretation of section 105 of the AEA is necessary.[11] In support of their argument, Applicants note that a threshold question now before the Licensing Board, as agreed to by all the parties, is whether the Commission has the general authority to retain antitrust license conditions under certain circumstances.[12] Therefore, according to Applicants, the limitations on postlicensing "antitrust review" do not apply in this case.

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[9] NRC Staff's Brief in Opposition to the City of Cleveland's Appeal of Prehearing Conference Order Granting Request for Hearing (Nov. 21, 1991).

[10] Applicants' Brief in Opposition to the Appeal of the City of Cleveland, Ohio, of the Licensing Board's Prehearing Conference Order (Nov. 21, 1991).

[11] *Id.* at 5-8.

[12] The parties informed the Licensing Board that they all agreed upon the following as the "bedrock" legal issue in this proceeding:

> Is the Commission without authority as a matter of law under section 105 of the Atomic Energy Act to retain antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of the electricity from alternative sources, all as appropriately measured and compared?

And, the parties further agreed to address the following issue:

> Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

See Letter from R. Goldberg and C. Strother, Jr., Counsel for the City of Cleveland, to Judges Miller, Bechhoefer, and Bollwerk (Nov. 7, 1991).

V. ANALYSIS

A. The Commission's General Authority Over Licenses

It is clear that the Commission can amend licenses. Amendments to licenses are contemplated under both the AEA and the Commission's implementing regulations.[13] Although, as Cleveland points out, section 189 does not provide the substantive standard by which the proposed amendment should be judged, section 189a does provide a right to a hearing and prescribes procedural requirements attaching to certain specified NRC actions, including proceedings to amend licenses.

Contrary to Cleveland's assertions, the hearing rights provided in section 189 may be invoked not only by interested members of the public but also by license applicants or licensees. Section 189a(1) provides in its pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award of royalties under sections 153, 157, 186c, or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.[14]

Apparently Cleveland concedes that Applicants are "persons" within the meaning of AEA § 11, 42 U.S.C. § 2014 (1988), and have an interest affected by this proceeding. However, Cleveland maintains that the language contained in section 189a(1), which states that a person whose interest is affected by a proceeding shall be admitted as a party to the proceeding, cannot be referring to the Applicants here because only persons other than the Applicants are required to establish standing and must be admitted as parties.[15] Cleveland's interpretation misses the purpose behind section 189, which is to provide an opportunity for hearing *upon the request of any person whose interest may be affected by a proceeding* enumerated in that section. Although a license applicant or licensee may have a right to a hearing under section 189 if its interest is adversely affected (e.g., if a license or amendment application is denied or a license is suspended or revoked), a hearing must still be requested.[16] Cleveland seems to assume that the Commission will always automatically hold a hearing upon a Staff denial

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[13] *See* AEA §§ 161, 182, 183, 187, 189, 42 U.S.C. §§ 2201, 2232, 2233, 2237, 2239 (1988); 10 C.F.R. §§ 50.90, 50.92 (1992).

[14] 42 U.S.C. § 2239(a)(1) (1988).

[15] Cleveland's Brief at 38-41.

[16] *See, e.g.*, 10 C.F.R. §§ 2.105(d)(1), 2.202(a)(3) (1992).

of an amendment application.[17] This is incorrect. In general, and in particular regard to an amendment proceeding, a hearing must be requested; otherwise Staff's decision is final.[18] Although we agree with Cleveland that Applicants in this case do not have to file intervention petitions under 10 C.F.R. § 2.714 to establish standing, the Applicants nevertheless had to and did file a timely demand for a hearing. In this respect, it was necessary for the Licensing Board to review the Applicants' demand for hearing and it was not until their hearing petitions were granted that the Applicants were "admitted" as parties.

Cleveland contends that the lack of Commission case law establishing applicants' and licensees' rights under section 189, together with the cases that hold that section 189 confers hearing rights on the public,[19] supports the argument that section 189 does not confer rights on the Applicants here. However, the cases cited by Cleveland do not state that section 189 confers hearing rights on the public only. In fact, one case upon which Cleveland relies, *Bellotti v. NRC*, assumes in the context of defining the rights of other persons in enforcement proceedings that licensees have a right to a hearing.[20] The dearth of case law regarding a licensee's or an applicant's right to a hearing under section 189a(1) is a reflection of long-standing, unchallenged Commission interpretation that the Commission must provide the opportunity for a hearing to a licensee or applicant in certain circumstances.[21] Cleveland has not persuaded us that we should employ any other interpretation of section 189.

B. The Commission's Authority to Amend Antitrust License Conditions

Although the Commission has the authority to amend conditions of licenses it issues, the more difficult question raised by Cleveland is whether this general authority is applicable when a license condition involves antitrust matters,

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[17] In further support of its argument that section 189a(1) only confers hearing rights on parties other than applicants, Cleveland points out that in a proceeding involving a construction permit an applicant need not request a hearing; a hearing is automatically provided for under the AEA. Therefore, according to Cleveland, it would not make sense for section 189a(1) to apply to applicants for construction permits, because they would be required to request a hearing that already must be conducted. Cleveland's Brief at 40-41. However, the mandatory hearing for construction permits is the exception, not the rule, under section 189.

[18] *See* 10 C.F.R. §§ 2.103(b), 2.105(d), 2.108(b), 2.1205 (1992).

[19] Cleveland cites several cases that address public participation in certain NRC proceedings under section 189a(1). Cleveland's Brief at 39-40, *citing Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1446 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985); *Bellotti v. NRC*, 725 F.2d 1380, 1383, 1386 (D.C. Cir. 1983); *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980) (per curiam), *vacated as moot and remanded*, 459 U.S. 1194 (1983).

[20] In *Bellotti*, the dissenting opinion criticizes the majority for making third-party hearing rights dependent on the licensee requesting a hearing. This argument necessarily assumes the right of the licensee to request a hearing, and the dispute was whether others' hearing rights should depend on whether licensee asserted this right. 725 F.2d at 1386 (Wright, J., dissenting).

[21] Such interpretation reaches back to the earliest days of the regulatory program established under the AEA of 1954 and is reflected in the early procedural regulations of the Atomic Energy Commission, our predecessor agency. *See* 21 Fed. Reg. 804 (1956).

or whether any postlicensing amendment to an antitrust condition would be inconsistent with limitations in section 105c of the AEA. This specific question is not addressed directly by Congress in the AEA or its legislative history, and it has not been squarely addressed in any other Commission decision. Cleveland argues that amendments to antitrust conditions are not permitted because they are not enumerated in section 105, which is the only section in the AEA that contains express language regarding antitrust authority.

As Cleveland points out, the *South Texas* and *St. Lucie* decisions address the limits of the NRC's authority to conduct antitrust review. We agree that these cases stand for the principle that, in accord with the underlying policy of section 105c, the NRC cannot initiate antitrust review to impose new antitrust conditions after the operating license has been issued, except under limited circumstances, not applicable here. However, as we will explain in more detail below, these cases do not squarely resolve the issue at hand, i.e, whether the Commission has the authority to suspend or modify the antitrust conditions already in a license, at the request of a licensee, pursuant to the Commission's general authority to amend conditions in licenses that it issues.

The specific question before the Commission in *South Texas* was at what point may an antitrust proceeding under section 105c be ordered subsequent to the issuance of the construction permit but prior to the issuance of the operating license. The proceeding was initiated after one of the joint holders of a construction permit petitioned for antitrust review because of alleged anticompetitive behavior by Houston Lighting and Power Company (HL&P), a co-holder of the construction permit. HL&P moved the Commission to waive the requirement that initiation of operating license antitrust review procedures await submission of the final safety analysis report that accompanies the operating license application.[22] The Commission's decision in that proceeding did not address just this narrow question, but also discussed the Commission's overall antitrust responsibilities.

In *South Texas*, the Commission reviewed the legislative history regarding the 1970 amendments to section 105c.[23] The 1970 amendments to section 105c subjected all applicants for a section 103 facility license to a mandatory initial antitrust review by the Attorney General and, in the case of any contested adverse antitrust aspects, an adjudicatory hearing before the Commission at the construction permit stage.[24] In addition, if significant changes have occurred after the earlier antitrust review, an adjudicatory hearing would be conducted at the operating license stage to determine any adverse implications of these

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[22] 5 NRC at 1303.
[23] *Id.* at 1312-16.
[24] Section 105c, 42 U.S.C. § 2135(c) (1988).

changes.[25] In light of this significant hurdle placed in the licensing process, Congress constructed section 105c in such a way that it essentially prohibited postlicensing antitrust review undertaken to determine adverse antitrust aspects of a license. This prohibition was intended to eliminate the uncertainty of further antitrust review after the licensee had already invested considerable resources.[26]

In light of these restrictions on postlicensing antitrust review, the Commission concluded in *South Texas* that the NRC does not have broad antitrust policing powers independent of licensing which could be relied upon as authority for postlicensing antitrust review undertaken to place *new* conditions in a license.[27] In general, "the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105."[28] This conclusion was based not only on the statutory language and its legislative history, but also was found to be consistent with the Commission's overall responsibilities.[29] As the Commission observed in *South Texas*, the Commission is in a unique position prior to the issuance of the initial operating license to identify and correct incipient anticompetitive influences that may flow from access to nuclear power. Therefore, at the prelicensing stage, section 105c provides for Department of Justice and Commission involvement and public participation. However, at the postlicensing stage the Commission is not so uniquely situated; the Department of Justice's Antitrust Division, the Federal Trade Commission, and the federal courts provide antitrust enforcement alternatives.

Cleveland argues, in essence, that it would be inconsistent with our *South Texas* decision to find that the Commission's general authority to amend licenses is not limited by section 105 even though the policing power is so limited. Cleveland construes the holding in *South Texas* too broadly. Although we held that the Commission does not have broad antitrust policing power to add new antitrust conditions to the license, the Commission indicated that the policing power under section 186 of the AEA remains to ensure compliance with antitrust conditions attached to the license pursuant to section 105c review.[30] Although the power to enforce the conditions may not necessarily contemplate the power to relieve licensees of previously imposed conditions, the Commission's assertion of that power supports the view that provisions other than section 105c may be

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[25] Section 105c(2), 42 U.S.C. § 2135(c)(2) (1988).

[26] *See* Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. 37-38 (1969) (remarks of Rep. Holifield, JCAE Chairman).

[27] 5 NRC at 1317.

[28] *Id.*

[29] *Id.* at 1316-17.

[30] Interpreting dictum from *City of Statesville v. AEC*, 441 F.2d 962 (D.C. Cir. 1969), the Commission noted that it does have "continuing police power over the conditions properly placed on licenses, after [section] 105(c) antitrust review." 5 NRC at 1317.

relied upon to address antitrust issues raised by conditions in NRC licenses.[31] Moreover, congressional deliberation on the 1970 amendments to section 105c did not include any discussion regarding when or whether a licensee could request the NRC to suspend or modify antitrust license conditions. Therefore, the legislative history cannot be interpreted as prohibiting the suspension of antitrust conditions as requested in this case.

St. Lucie,[32] the other decision upon which Cleveland relies, also offers little guidance regarding whether the NRC can consider suspension of antitrust conditions at the request of a licensee. That case involved the question of whether the Commission has authority to conduct antitrust review if significant changes occurred after a license had been issued. The petitioners sought both leave to intervene out of time and an antitrust hearing concerning three operating plants. The plants had been previously licensed without antitrust review as research and development facilities under section 104b. In petitioners' view, the plants were really commercial generating facilities that should be subject to section 103 requirements, including antitrust review.[33] Relying on section 186a of the AEA, the petitioners argued that under the Commission's broad powers to revoke a license the Commission has the authority to order antitrust review after the operating license has been issued.[34] The Atomic and Safety and Licensing Appeal Board rejected these arguments. The Appeal Board found that after *South Texas* it was clear that "the NRC's supervisory antitrust jurisdiction over a nuclear reactor licensee does not extend over the full 40-year term of the operating license but ends at its inception," except as necessary to enforce the terms of the license, to revoke one fraudulently obtained, or to issue a new license if a plant is sold or is significantly modified.[35]

The Applicants' request here does not fall within one of the exceptions enumerated in *St. Lucie* which would provide for postlicensing antitrust review. However, that decision again did not address the issue at hand, whether the Commission may act on a request to suspend the effect of existing antitrust conditions. Therefore, although *St. Lucie* does not provide authority to suspend antitrust conditions at a licensee's request, neither does it preclude it. The

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[31] As the Licensing Board pointed out in LBP-91-38, "the Commission's recognition of the 'policing' power was in the context of its authority to *enforce* existing conditions, a circumstance that may not encompass these licensees' requests to be relieved of previously imposed conditions." 34 NRC at 244 n.42 (emphasis in original). However, if the Commission has the power to enforce conditions, it seems that it could also suspend their effect. The Commission could simply choose not to enforce a condition and achieve the same result with less opportunity for the beneficiaries of the antitrust conditions to be heard. *See Union of Concerned Scientists v. NRC*, 711 F.2d 370, 382-83 (D.C. Cir. 1983).

[32] 6 NRC 221 (1977). The Commission declined review of the Appeal Board's decision. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-77-26, 6 NRC 538 (1977).

[33] 6 NRC at 224.

[34] *Id.* at 225.

[35] *Id.* at 226.

conclusion that *St. Lucie* was not entirely determinative on the issue of the Commission's authority to review antitrust matters is further supported by the decision of the U.S. Court of Appeals for the District of Columbia Circuit on review.[36] The Court of Appeals indicated that the question of whether section 105 is the Commission's exclusive grant of antitrust authority was beyond the scope of that proceeding and, thus, the question was left open.

Our conclusion that neither *St. Lucie* nor *South Texas* prohibits suspension of antitrust conditions at a licensee's request is further supported by *dicta* in *Davis-Besse*, a later Appeal Board decision involving the same Applicants as in the present proceeding.[37] In *Davis-Besse*, the Appeal Board indicated that antitrust license conditions may be removed or modified after the issuance of the operating license. The Appeal Board suggested that if antitrust license conditions, which seemed fair at the time they were imposed, prove to be inequitable in the future, the Director of Nuclear Reactor Regulation has the authority to modify license conditions.[38]

In addition to its arguments that suspension of the antitrust conditions in this license would be inconsistent with section 105c and Commission precedent, Cleveland argues that the Licensing Board ignored the effect that removal of the antitrust conditions would have on the beneficiaries of the conditions. According to Cleveland, to adopt a rule that would limit its ability to seek relief from anticompetitive behavior through imposition of new license conditions, but allow the licensee to change existing conditions at any time, would adversely affect Cleveland's ability to provide an affordable, reliable power supply to those served by its municipal system. Thus, Cleveland maintains, the beneficiary of an antitrust license condition would be placed in the difficult position of having to defend the appropriateness of existing conditions from attack by the licensee, but would not be afforded the corresponding opportunity of being able to seek imposition of new conditions in a license.[39] Moreover, according to Cleveland,

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[36] *Fort Pierce Utilities Authority v. United States*, 606 F.2d 986, 1001 n.17 (D.C. Cir.) *denied*, 444 U.S. 842 (1979).

[37] *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265 (1979).

[38] *Id.* at 294. The Appeal Board indicated that the requests for modification of license conditions would be handled by the Director of Nuclear Reactor Regulation under 10 C.F.R. §§ 2.200-2.204 and 2.206. While those sections of Part 2 are typically used in enforcement proceedings and Applicants' requested suspension in this case is more properly categorized as a license amendment rather than a request for enforcement action, the principle that the Commission has the authority to modify antitrust conditions at a licensee's request remains intact.

[39] The question whether parties may request that additional antitrust conditions be placed in the license if a licensee, in effect, restores NRC antitrust jurisdiction by seeking suspension of antitrust conditions, was raised by American Municipal Power-Ohio, Inc. (an intervenor), at the prehearing conference held on September 19, 1991, in this proceeding. *See* Prehearing Conference Transcript at 186-87. The Licensing Board did not squarely address this question in LBP-91-38. Nor need we decide it at this time. However, such an approach may not be inconsistent with the underlying philosophy of section 105c and could be sound policy. Congress placed a limitation on postlicensing antitrust review to provide certainty to the licensee that it would not be drawn into continuing antitrust proceedings before the Commission. When the licensee initiates a proceeding to suspend or modify the antitrust conditions, the policy of insulating the licensee from continuing antitrust proceedings may not hold the same, if any, force.

review of Applicants' request in this case and others in the future would threaten to involve the Commission unendingly in antitrust matters.[40]

We recognize that under Applicants' and Staff's theory of antitrust jurisdiction a party such as Cleveland may not come to the Commission for relief from a licensee's anticompetitive behavior unless that behavior is proscribed by existing antitrust conditions. However, an aggrieved party is not left without a remedy. As indicated in *South Texas*, the Department of Justice's Antitrust Division can provide assistance in obtaining relief from anticompetitive behavior, and the Federal Trade Commission as well as the federal courts provide antitrust enforcement forums.[41]

We conclude that the Commission does have jurisdiction under sections 103, 161, and 189 of the AEA to entertain Applicants' request on its merits. As the agency empowered to issue nuclear plant licenses, only the Commission can grant the relief — if it is warranted — requested by the Applicants in this proceeding. If we were to determine that the NRC lacks the authority to suspend the antitrust license conditions (and if this determination were upheld), then the conditions would remain frozen in place for the life of the license no matter how unsuitable. Although Congress could have limited the NRC's authority in this manner, neither the statutory language nor the legislative history of section 105 suggests that Congress intended such a result. We do not accept the proposition that antitrust license conditions are immutable, irrespective of whether the conditions have become unjust over time.[42]

We should emphasize that our decision today goes no further than to determine that the Commission has authority to amend a license at the request of the licensee to suspend the effect of antitrust conditions. Any such suspension by its very nature may be rescinded, and the conditions would then, once again, have full force.[43]

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[40] Cleveland's Brief at 32-33.

[41] 5 NRC at 1316.

[42] Furthermore, judicial precedent suggests the same conclusion that the Commission has authority to modify license conditions that prove to be unjust after time, due to changes in law or facts. A court can modify terms of an injunctive decree involving antitrust restrictions if the reasons for imposing the restrictions are no longer present or if the conditions have become unfairly burdensome. "The Court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" *System Federation v. Wright*, 364 U.S. 642, 647 (1961) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)). This principle applies to the quasi-judicial role of the Commission as well. "An agency, like a court can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965); *see also Gun South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989).

[43] *See San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984) ("The lifting of a suspension does nothing to alter the original terms of a license; indeed, it *removes* a significant impediment to the enforcement of those terms.") (emphasis in original), *aff'd en banc*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986).

C. Cleveland's Motion for Revocation

Having decided that the NRC has authority to suspend the effect of antitrust conditions in a license at the licensee's request, we must address Cleveland's motion for revocation of the referral of the Applicants' hearing requests to the Licensing Board. We deny Cleveland's motion for two reasons. First, Staff's administrative review was not a substitute for the adjudicatory hearing to which Applicants are entitled in that the decision rendered by Staff was a denial of a request for a license amendment. Second, due to the complexity of the issues raised in this proceeding, further development by the Licensing Board prior to any final Commission decision is appropriate.

Cleveland's arguments that Staff's denial is a final Commission decision pursuant to 10 C.F.R. § 2.101 are unavailing.[44] Section 2.101 is only applicable in this proceeding insofar as it sets out procedural requirements for information to be included in a license. The procedural requirements in section 2.101 regarding the disposition of antitrust matters are not applicable. The review under section 2.101(e) is limited to whether significant changes have occurred and is conducted in proceedings involving applications for operating licenses, not in amendment proceedings such as this.[45]

Moreover, contrary to Cleveland's suggestions,[46] Staff's consideration of Applicants' amendment request was not a "hearing" that satisfies section 189. Staff's decision is administrative in nature and does not suffice as an adjudicatory review of the application request. As the Licensing Board pointed out in LBP-91-38, NRC process requires after Staff denial of an amendment application that an applicant be informed of the denial and its opportunity for a hearing, and if a hearing is requested it must be conducted by an adjudicatory tribunal.[47]

While the Commission could elect to consider the matter in the first instance,[48] review by the Licensing Board at this time is more suitable. The Board's development of a detailed record and analysis of the complex issues raised in

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[44] *See* Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision at 2-3 (Dec. 19, 1991) (Cleveland's Motion).

[45] However, under 10 C.F.R. § 2.101(e), a significant changes review is undertaken if an amendment request involves the transfer of control of the operating license from the original owner(s) of a facility to another entity. Although that circumstance does not involve the issuance of a new license, a review of any adverse antitrust implications raised by the new ownership has never been undertaken. *See, e.g.*, the Director of Nuclear Reactor Regulation's Reevaluation and Affirmation of No Significant Change Finding Pursuant to Seabrook Nuclear Station, Unit 1 Antitrust Post-Operating License Review (Apr. 9, 1992).

[46] Cleveland's Motion at 3-4.

[47] LBP-91-38, 34 NRC at 239. *See generally Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980) (determination of hearing request in show-cause proceeding did not rest with Staff but with Commission or its delegated adjudicatory tribunal); *see also* 10 C.F.R. §§ 2.105(d), 2.1205 (1992).

[48] *See Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1129 (D.C. Cir. 1969); *see also Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

this proceeding will aid the Commission in any review that may be undertaken. In addition, if the Applicants win on the "bedrock" issue, an evidentiary hearing may be required to determine the actual cost of Perry/Davis-Besse power. Such a hearing would be appropriately conducted by the Licensing Board.[49] Accordingly, we see no good reason to adopt Cleveland's suggestion that we remove all further proceedings from the Licensing Board.[50]

VI. CONCLUSION

For the above reasons, Cleveland's appeal of LBP-91-38 is *denied*, and LBP-91-38 is *affirmed* insofar as it granted Applicants' hearing petitions. In addition, for the aforementioned reasons, Cleveland's motion for revocation of the Secretary's referral to the Licensing Board of Applicants' hearing requests and for adoption of Staff's April 24, 1991 decision as a Commission decision is also *denied*.

It is so *ORDERED*.

For the Commission[51]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

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[49] *See supra* note 12.

[50] In light of our decision to deny Cleveland's motion for revocation, Applicants' motion for additional time to file a reply to Cleveland's motion is denied. *See* Applicants' Answer to "Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission's Decision" (Dec. 24, 1991). In addition, Cleveland's motion for leave to file a reply to Applicants' answer is also denied because the reply raises no new substantive issues that require a response.

[51] Commissioners Rogers and Curtiss were not present for the affirmation of this order. If they had been present, they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-445-OL&CPA
50-446-OL

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Units 1 and 2)

August 12, 1992

The Commission denies Petitioners' requests for late intervention in the Comanche Peak OL proceedings and the Unit 1 CPA proceeding, which were closed in 1988 pursuant to a settlement agreement. The Commission further denies Petitioners' motions to intervene and to reopen the record in the Unit 2 proceeding, finding that Petitioners have failed to satisfy the criteria for late intervention and for reopening of the record. The Commission further denies the requests for protective orders, for suspension of the Unit 1 operating license, and for oral argument on the motions before it.

RULES OF PRACTICE: OPERATING LICENSE (SUSPENSION) (2.206 PETITION)

Once the Commission has issued an operating license for a unit, that action effectively closes out an opportunity for a hearing on that license or on any construction permit amendments. Any subsequent challenge to that unit's license must take the form of a petition under 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202.

RULES OF PRACTICE: ORAL ARGUMENT

Because oral argument is clearly discretionary under 10 C.F.R. § 2.763, the Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. The Commission may deny requests for oral argument when based on the party's written submissions that it fully understands the positions of the participants and has sufficient information upon which to base its decision.

RULES OF PRACTICE: ORAL ARGUMENT

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.763)

A petitioner is not barred from requesting oral argument on a petition for late intervention. The requirement in 10 C.F.R. § 2.763 that a request for oral argument be made in a "brief" only applies to pleadings that constitute an "appeal."

RULES OF PRACTICE: NONTIMELY INTERVENTION

For the Commission to grant a petition for late intervention, a petitioner must demonstrate a favorable balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). Those five factors are: (1) good cause, if any, for failure to file on time; (2) the availability of other means for protecting the petitioner's interest; (3) the extent to which the petitioner's participation might reasonably assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The test for "good cause" is not simply when a petitioner becomes aware of the material it seeks to introduce into evidence. Instead, the test is when the information became available *and* when a petitioner reasonably should have become aware of that information. In essence, not only must a petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS

When an intervention is extremely untimely and the petitioner utterly fails to demonstrate any good cause for late intervention, it must make a compelling case that the other four factors weigh in its favor in order to satisfy the late-filing standard.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS TO PROTECT INTERVENOR'S INTEREST)

A petitioner has satisfied the second prong of the five-factor "late intervention test" where there is currently no ongoing proceeding and therefore no other means by which that petitioner's interest can be protected. 10 C.F.R. § 2.714(a)(1)(ii).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER PARTIES TO PROTECT INTERVENOR'S INTEREST)

A petitioner has satisfied the fourth prong of the five-factor "late intervention test" where there is currently no ongoing proceeding and therefore no other party able to represent that petitioner's interest. 10 C.F.R. § 2.714(a)(1)(iv).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENOR'S INTEREST)

In evaluating the five factors to be met by a petitioner seeking a grant of late intervention, the second and fourth factors are the least important of the five.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (ASSISTANCE IN DEVELOPMENT OF SOUND RECORD)

When a petitioner addresses the third criterion, "the extent to which [its] participation might reasonably assist in developing a sound record," it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (DELAY OF PROCEEDING)

Barring the most compelling countervailing considerations, an inexcusably tardy intervention petition stands little chance of success if its grant would likely occasion an alteration in hearing schedules or the establishment of an entirely new hearing.

RULES OF PRACTICE: REOPENING OF RECORD

Section 2.734(b) of 10 C.F.R. requires that a motion to reopen the record must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim. If a petitioner fails to comply with this requirement, the Commission may deny a request to reopen the record because of this defect alone.

RULES OF PRACTICE: INTERVENTION (INTEREST)

Once the Commission has determined that a petitioner cannot become a party to a proceeding based on the record before it, a petitioner cannot seek to reopen the record of that proceeding.

RULES OF PRACTICE: REOPENING OF RECORD (TIMELINESS)

The "timeliness" requirement of 10 C.F.R. § 2.734 is not whether a motion to reopen is filed within 24 hours of a petition for late intervention; instead, the test is whether the information upon which the movant relies could have been presented to the NRC at an earlier date.

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

The purpose underlying a grant of confidentiality is to preserve the alleger's identity from public disclosure where such disclosure could cause harm to the alleger. However, even a *known* alleger can be granted confidentiality by the NRC Staff if that person can demonstrate that some harm might otherwise befall them or their sources.

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

A grant of confidentiality is not dependent on an individual's success in seeking a grant of intervention or reopening of the record.

RULES OF PRACTICE: OPERATING LICENSE (SUSPENSION) (2.206 PETITION)

A petitioner may not request suspension of an operating license as part of a petition for late intervention. Those matters are more properly placed before the NRC under the procedures specified in 10 C.F.R. § 2.206.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion for late intervention and a motion to reopen the record by Sandra Long Dow, representing the "Disposable Workers of Comanche Peak Steam Electric Station" ("Disposable Workers"), and R. Micky Dow (collectively "Petitioners"). Petitioners seek to reopen the Comanche Peak operating license and construction permit amendment proceedings which are closed pursuant to a settlement agreement in 1988. Petitioners have also filed a motion seeking oral argument on their motions before the Commission. The Texas Utilities Electric Company ("TU Electric") and the NRC Staff oppose all three requests.

For the reasons stated below, we find that oral argument is unnecessary in this situation. We also find that Petitioners have failed to satisfy the requirements for late intervention. Even assuming *arguendo* that those requirements were satisfied, Petitioners have failed to satisfy the requirements to reopen the record.

II. BACKGROUND

On November 20, 1991, these same Petitioners filed a motion to reopen the record in the underlying Comanche Peak proceedings. We denied their request, pointing out that only a "party" could seek to reopen the record but that even if Petitioners had been "parties" to the underlying proceedings, their submissions were not sufficient to meet the reopening criteria. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1 (1992) ("CLI-92-1"). However, we also pointed out that "[b]ecause the NRC has not yet issued the license for Unit 2, there remains in existence an operating

license 'proceeding' that was initiated for Comanche Peak . . . ." *See* CLI-92-1, 35 NRC at 6 n.5.

On February 20, 1992, Petitioners filed a petition for late intervention not only in the Unit 2 operating license ("OL") proceeding but also in both the Unit 1 OL proceeding and the Unit 1 construction permit amendment ("CPA") proceeding. Neither of the latter proceedings now exists. On February 21, 1991, Petitioners filed a motion to reopen the record in all three proceedings, assuming *arguendo* that they had satisfied the criteria for late intervention. We directed that both the Staff and TU Electric file consolidated responses to the two motions and established a response time that took into account an anticipated supplement to the Petitioners' motions. Petitioners filed their supplement on March 13, 1991. Both TU Electric and the Staff responded in opposition to the two pleadings as supplemented.

On April 4, 1992, Petitioners filed a motion requesting an oral argument on the other two motions, alleging "material false statements" and "perjury" by the Staff and TU Electric in their responses to Petitioners' motions. TU Electric and the Staff have responded in opposition to the request for oral argument.

III. ANALYSIS

A. The Unit 1 Proceedings

Initially, Petitioners have disregarded our statement in CLI-92-1 that only the proceeding for the issuance of the operating license for Unit 2 was available for late intervention and potential reopening. Instead, Petitioners seek late intervention in both the Unit 1 OL and CPA proceedings. However, these proceedings are no longer available to them. The NRC has issued the operating license for Unit 1. That action has closed out the Notice of Opportunity for a Hearing for both the Unit 1 operating license, 44 Fed. Reg. 6995 (Feb. 5, 1979), and the Unit 1 construction permit amendment. 51 Fed. Reg. 10,480 (Mar. 26, 1986). Any challenge to the Unit 1 license must take the form of a petition under 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202. In fact, Petitioners have already filed such a petition which is now under consideration by the Staff. Thus, we summarily reject Petitioners' request insofar as it requests late intervention in the Unit 1 OL and CPA proceedings.

B. The Unit 2 Proceeding

1. The Motion for Oral Argument

We are unclear as to what Petitioners actually seek in their request for oral argument. Petitioners use the terms "oral argument" and "hearings"

interchangeably in their motion. Under our regulations, the terms clearly imply different concepts. "Oral argument" as contemplated by our regulations is an appellate-style argument, without witnesses. However, under NRC regulations the word "hearings" generally refers to an evidentiary procedure, which is what Petitioners' original motion seeks. Accordingly, we have treated Petitioners' request as a request for oral argument on the motion for late intervention and the motion to reopen the record.

Our regulations provide that "[i]n its discretion, the Commission may allow oral argument upon the request of a party made in the notice of appeal or brief, or upon its own initiative." 10 C.F.R. § 2.763. Because oral argument is clearly "discretionary," we have previously held that a party seeking oral argument must explain "how [oral argument] would assist us in reaching a decision." *In re Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 23 n.1 (1989). We have denied requests for oral argument when "based on [written] submissions [the Commission] fully understands the positions of the participants and has sufficient information upon which to base its decision." *Advanced Nuclear Fuels Corp.* (Import of South African Enriched Uranium Hexafluoride), CLI-87-9, 26 NRC 109, 112 (1987).

Petitioners make two arguments in support of their request.[1] First, they allege that responses filed by the Staff and the Licensee to their motions are "wrought with inaccuracies." Request at 2.[2] In addition, Petitioners allege that the responses are "rift [*sic*] with material false statements . . . that border if not completely encompass perjury." *Id.*[3] However, Petitioners do not provide any examples of these alleged statements. We will not accept bare allegations of such statements — without more — as support for a motion for agency action.

Moreover, as the Petitioners concede — Request at 6 — they could seek permission to reply to these pleadings in writing. Contrary to Petitioners' view, we do not believe that such a reply would "inundate" the record or "confuse" us. *Id.* Thus, Petitioners have failed to demonstrate that they could not counter any alleged misstatements by the Staff and Licensee by seeking leave to file a reply and responding to the alleged misstatements in writing.

Second, Petitioners argue that "it would be in the best interest of the public to hold oral argument . . . ." Request at 2. *See also* Request at 5. However, we do not see how the public interest would be better served in this instance with

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[1] Petitioners include other arguments, but in our judgment these arguments go to their requests for late intervention and to reopen the record. Accordingly, we will deal with these other arguments when we address the merits of Petitioners' motions now pending.

[2] Petitioners filed two pleadings before us entitled "Motion for . . . ." In order to develop a convenient shorthand to distinguish between these two pleadings when citing to them, we will refer to the Motion for Oral Argument as the "Request" and the Motion to Reopen the Record as the "Motion."

[3] Because Petitioners' pleading contains this allegation, it has been forwarded to the Office of Inspector General for appropriate action.

an oral argument as opposed to a decision based solely upon the written public record. In sum, we believe that we "understand the positions of the participants and [have] sufficient information upon which to base [our] decision." *Advanced Nuclear Fuels Corp., supra.* Accordingly, we exercise our discretion to deny the request for oral argument.[4]

2. *The Motion for Late Intervention*

Petitioners can seek late intervention in the Unit 2 OL proceeding. That proceeding is still open for late intervention because that license has not been issued. However, in addition to the criteria that must be addressed in their petition under 10 C.F.R. § 2.714(a)(2), Petitioners must also demonstrate that a balancing of the five criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of their intervention. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-09 (1988) ("CLI-88-12"), *aff'd, Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 246 (1990). Those five factors are: (1) good cause, if any, for failure to file on time; (2) the availability of other means for protecting Petitioners' interest; (3) the extent to which Petitioners' participation might reasonably assist in developing a sound record; (4) the extent to which Petitioners' interest will be represented by existing parties; and (5) the extent to which Petitioners' participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1)(i)-(v). Reviewing Petitioners' Motion for Late Intervention, we find that Petitioners have failed to satisfy these five criteria.

a. Good Cause for Late Intervention

Petitioners allege that they have good cause for the lateness of their filing because

> [p]etitioners were not involved in this issue when it first came to light, and/or when the original licensing hearings were in session. They only became involved in this matter in January, 1991. [Subsequently] they received more and more information . . . and, then, based on vast portions of their evidence, became convinced that the hearings needed to be reopened in order to get this material on the record, as they believed that it would have prevented the licensing [of Comanche Peak], had it been brought to the attention of the original Atomic Safety [and] Licensing Board.

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[4] We reject the Staff's argument that Petitioners cannot request oral argument on a petition for late intervention. Because the pleadings before us do not constitute an "appeal," the requirement that a request for oral argument be made in a "brief" does not apply. *See generally* 10 C.F.R. § 2.763.

Petition at 1-2. In essence, Petitioners allege that they have demonstrated "good cause" because they themselves have just come into possession of information which they believe would have had an impact on the Comanche Peak licensing proceeding. However, our jurisprudence has specifically held that such an allegation standing alone does not satisfy the "good cause" requirement.

The test for "good cause" is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available *and* when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

For example, the discovery of information that was publicly available 6 months prior to the date of the petition has been held insufficient to establish "good cause" for late intervention. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). In that case, the Appeal Board rejected the concept that the "discovery" of information already publicly available would constitute "good cause" for late intervention. Quite simply,

> [a] subjective test of this kind provides an incentive for remaining uninformed and creates the prospect of collateral factual contests aimed at ascertaining the state of mind of the prospective intervenor. We would not allow a *party* to the proceeding to press a newly recognized contention . . . unless the party could satisfy an objective test of good cause. Among other things, . . . the party seeking to reopen must show that the issue it now seeks to raise *could not have been raised earlier*. . . . We see no reason to employ a different and more lenient good cause standard for the late petitioner for intervention than for a party who is already in the proceeding and seeks to raise new issues.

ALAB-707, 16 NRC at 1765 (emphasis in original) (citation omitted) (footnote omitted).

In this case, Petitioners may have only recently become aware of certain information, but they do not demonstrate that this information is only now available for the first time, i.e., could not have been raised earlier. Instead, the information that Petitioners seek to introduce is extremely dated information. For example, all information relied on by Petitioners in their previous motion to reopen (filed on November 20, 1991) was over a year old at the time and all but two documents had been in the public domain for a much longer period of time. *See* CLI-92-1, 35 NRC at 7-9. Thus, that information cannot constitute "good cause" for late intervention.

In their request for late intervention, Petitioners name two individuals, Ron Jones and Dobie Hatley, who would be prospective witnesses if Petitioners

were allowed to intervene. *See* Petition at 3.[5] Petitioners claim that "[t]hese two individuals who . . . have held their silence, out of fear of reprisal, are now willing to come forward and testify, for the first time in four years." *Id.* However, as the Staff points out, both persons claim that they *were* willing to testify in the original proceeding. *See* Jones Statement attached to Petition; Hatley Statement attached to Motion to Reopen. Staff Response at 9. In fact, as the Staff also points out, Ms. Hatley's testimony was actually filed before the Licensing Board in 1984 by the intervenor in that proceeding, the Citizens Association for Sound Energy ("CASE"). *Id.* Thus, the mere availability of these individuals does not constitute "good cause" for Petitioners' late intervention. Furthermore, neither of these individuals states what new information they have to provide that is not already in the public domain.

In an effort to provide Petitioners with a complete evaluation of the information they allege supports their late intervention, we have also reviewed the allegations contained in their Motion to Reopen the Record, the Supplement, and the Motion for Oral Argument. However, the information in those documents does not constitute "newly discovered" information that would support a finding of "good cause" for late intervention.

In the Motion to Reopen the Record, Petitioners allege that TU Electric attempted to cover up fire watch violations. Motion at 4. However, TU Electric itself reported those violations to the NRC in October of 1990. *See* NRC Response at 24; *see also* Affidavit of Amarjit Singh, Exhibit B to NRC Staff Response. The Staff issued a Notice of Violation on the issue. *See* Exhibit C to NRC Staff Response. Thus, not only was the NRC aware of the issue, but the NRC has reviewed TU Electric's resolution of the issue and has approved it. *See* Singh Affidavit, *supra*. Petitioners do not offer any additional information on this issue that could constitute "good cause" for late intervention.

Petitioners also allege that they have discovered evidence about "on-site and off-site waste dumps for both toxic and radiation contaminated materials . . . ." Motion at 4. However, Petitioners concede that various organizations have had access to this information since August 1990, including CASE and the Texas Water Commission ("TWC"), an agency of the State of Texas. Moreover, another organization, the Citizens for Fair Utility Regulation ("CFUR") has already presented this issue to the NRC in the form of a request for enforcement action under 10 C.F.R. § 2.206. *See* DD-91-4, 34 NRC 201 (1991). In its decision on that petition, the NRC Staff reviewed this information and determined that (1) the information did not raise a "substantial concern . . . regarding the safe operation of [Comanche Peak]," (2) that no violations of NRC regulations had been identified, and (3) that the NRC Staff would monitor

[5] As the Staff notes, this is the only substantive information in the petition itself to support Petitioners' request. Moreover, as the Staff also notes, Mr. Hatley's statement is neither notarized nor made under oath.

proceedings before the TWC to determine if any other action was necessary after conclusion of those proceedings. 34 NRC at 207. Petitioners do not explain how their information could supplement the information already in the public domain or why it could not have been presented sooner.[6]

Next, Petitioners submit nine Nonconformance Reports ("NCRs") which they allege "show significant errors in the seismic restraint compression fitting crimps . . . ." Motion at 3. However, these NCRs were filed and resolved in 1984. Petitioners do not explain why this issue could not have been raised sooner. Petitioners also allege that other NCRs "were never placed in the record or addressed." *Id.* However, Petitioners do not provide these NCRs that were allegedly "withheld" or offer any other specifics about them. Absent such an explanation, these vague allegations cannot constitute "good cause" for late intervention.

In their Supplement, Petitioners allege that Ms. Hatley altered the records in TU Electric's files regarding the NCRs and that the NRC cannot rely on those written records for an analysis of the NCRs. Supplement at 4. However, the NCRs were resolved *after* Ms. Hatley left Comanche Peak. *See* NRC Staff Response at 26-27, 32-33; *see also* Affidavit of Robert M. Latta, attached as Exhibit F to the Staff Response. Thus, it appears that Ms. Hatley could not have affected the resolution of these NCRs and, accordingly, this information does not constitute "good cause" for late intervention.[7]

Next, Petitioners submit an anonymous handwritten note dated January 30, 1992, regarding an incident at Comanche Peak in which a worker was injured. However, the note itself documents that the incident was reported to the NRC. Moreover, that incident, which occurred on October 6, 1991, has long been public knowledge and has been resolved by the NRC. *See* Affidavit of William D. Johnson, attached as Exhibit E to the NRC Staff Response. Again, this does not constitute "new" information that would constitute "good cause" for late intervention.

Finally, Petitioners submit a group of documents that appear to be related to claims by Joseph J. Macktal regarding a disputed settlement agreement. However, there is no showing that these documents are "new." In fact, many

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[6] Petitioners also allege that they have taken samples from these dumps and that these samples have been tested as radioactive. Motion at 5. In addition, Petitioners allege that they offered to provide this material to the Region IV Staff but that the Staff refused to accept the information or even to open an allegation file on the issue. *Id.* The Staff has not responded to this allegation other than to point out — correctly — that Petitioners have not provided any documentation of these tests. Staff Response at 25-26. However, the Staff should contact Petitioners to see if documentation exists and take appropriate followup action.

[7] Ms. Hatley alleges that she "was asked to falsify records and documents and drawing numbers etc in order to pass audits of the NRC[,]" Hatley Statement at 1, implying that she did so. She also states that she "would like to testify and have my concerns in the record . . . ." *Id.* We direct the Staff to communicate with Ms. Hatley in an effort to obtain whatever additional information she wishes to present. Ms. Hatley can "place her concerns on the record" by providing documents to or meeting with the NRC Staff. The Staff should follow up on any allegations provided by Ms. Hatley in this regard.

of these same documents were also submitted to the NRC as attachments to Petitioners' November 20, 1991 Motion to Reopen the Record. As we noted then, this "information is simply not timely in any sense of the word." CLI-92-1, 35 NRC at 8. For example, in this group of documents only the legal memorandum is less than 2½ years old.

Moreover, there is no showing that any of this information is not already well known. In fact, Mr. Macktal's claims have been well documented before the NRC, as reflected by the fact that many of the documents cited by Petitioners are NRC documents. In addition, the Commission reviewed Mr. Macktal's claims as they related to Comanche Peak. *See, e.g.*, CLI-89-6, 29 NRC 348 (1989), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990); *Macktal*, CLI-89-12, *supra*; *In re Joseph J. Macktal*, CLI-89-14, 30 NRC 85 (1989); *In re Joseph J. Macktal*, CLI-89-18, 30 NRC 167 (1989).

Furthermore, both the DOL and the NRC have acted on Mr. Macktal's allegations. For example, the DOL has voided the settlement agreement that Mr. Macktal claimed illegally prevented him from testifying before the NRC. *See Macktal v. Brown & Root*, Docket No. 86-2332 (Nov. 14, 1989). Furthermore, the NRC has adopted a regulation specifically preventing the type of agreement that Mr. Macktal alleges that he was "coerced" into signing. *See* 10 C.F.R. § 50.7(f). Finally, Mr. Macktal has explained all his concerns to the NRC Staff during a transcribed interview. Thus, the responsible federal agencies have reviewed Mr. Macktal's concerns and these materials do not constitute "good cause" for late intervention.

In conclusion, we find that Petitioners have failed to demonstrate "good cause" for their attempt to intervene in the OL proceeding for Unit 2, 13 years after TU Electric's request for an operating license was published in the *Federal Register*.[8]

b. The Remaining Four Factors

"[W]here no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong." *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). "When the intervention is extremely untimely . . . and the petitioner utterly fails to demonstrate any 'good cause' for late intervention, it must make a 'compelling' case that the other four factors weigh in its favor." *Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 610 (citing cases). As we will demonstrate

[8] Petitioners attempt to resurrect their claims from their earlier attempt to reopen the record which we denied in CLI-92-1 by incorporating those claims into this petition. However, as we pointed out then, with only two exceptions, those records had long been in the public domain. In fact, many of them dealt with Mr. Macktal's claims and — as we have seen above — those have been resolved. Thus, even factoring those documents into the arguments and allegations presented here, Petitioners have failed to demonstrate "good cause" for late intervention.

below, we do not find that Petitioners have made a compelling case here on the remaining four factors.

The NRC Staff concedes that Petitioners satisfy the second and fourth prongs of the test. Assuming *arguendo* that Petitioners have an "interest" in the proceeding, i.e., that they have standing to participate in the proceeding, there is no other means by which that interest can be protected. Likewise, because there is currently no proceeding, there is no other party able to represent their interest. However, these two factors are the least important of the five factors. *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894-95 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C. Cir. 1982); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); *Fermi*, ALAB-707, *supra*, 16 NRC at 1767.

More importantly in our view, Petitioners have failed to satisfy the third prong of the test: that they have the ability to contribute to the development of a sound record. As we noted in a similar situation, "the Appeal Board has repeatedly stressed the importance of providing specific and detailed information in support of factor (iii)." *Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 611. "'When a petitioner addresses this [third] criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.'" *Id.*, *quoting Grand Gulf*, ALAB-704, *supra*, 16 NRC at 1730. *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983).

In this case, Petitioners alleged that they would introduce "a massive amount of evidentiary material . . . [and] witnesses who had extensive testimony" Petition at 3. However, as we noted above, Petitioners have identified only two prospective witnesses, Mr. Ron Jones and Ms. Dobie Hatley. Furthermore, they have failed to summarize their testimony, except to state that Mr. Jones had discovered "massive wiring violations" and evidence of drug use in the control room. *Id.*

Additionally, as we have also noted above, the documentary evidence specifically identified by Petitioners or submitted as attachments to their pleadings and the information contained therein is already in the public domain and is generally extremely out of date. Moreover, Petitioners have failed to demonstrate any disagreement with the NRC's resolution of the matters they have raised. Thus, Petitioners have failed to demonstrate how this evidence would create a record that would assist us in determining whether we should issue an operating license to Unit 2. Moreover, Petitioners have completely failed to address how their concerns — many of which date from the 1984 time frame — would have been affected by the extensive corrective programs undertaken at the plant since that time. *See, e.g., Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 611. In

sum, we find that the third factor weighs heavily against granting Petitioners' request for late intervention.

Moreover, the fifth factor — the possibility of delay and expansion of the hearings — also weighs heavily against granting Petitioners' request. "[I]ndeed — barring the most compelling countervailing considerations — an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules." *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (1975) (opinion of Mr. Rosenthal speaking for the entire Board on this point).

In this case, there is currently no formal proceeding at all. Thus, granting the petition will result in the establishment of an entirely new formal proceeding, not just the "alteration" of an already established hearing schedule. Moreover, as we noted in an earlier *Comanche Peak* opinion, "there will be an inevitable delay while [petitioner] acquaints itself with the proceedings." CLI-88-12, *supra*, 28 NRC at 611. As we noted there, "[t]he petition indicates that [the petitioner] apparently has no knowledge of the extensive proceedings that have occurred . . . ." *Id.* In that case, we found that because a former intervenor had been absent from the proceedings for six years, there would be an inevitable delay while the petitioner reacquainted itself with the proceedings.

In this case, Petitioners have *never* been involved in the formal proceedings involving Comanche Peak and they have only been involved in matters related to Comanche Peak since last spring. At no time have Petitioners demonstrated that they are familiar with the factual background of the extensive proceedings that occurred from 1979 through 1988. Nor have they demonstrated any familiarity with NRC rules and procedures. Thus, we find that there will inevitably be a long delay while Petitioners prepare for the hearing process.

In sum, we find that Petitioners have not established "good cause" for their request for late intervention. Moreover, we find that they have failed to make a "compelling" case on the remaining four factors. While they arguably satisfy the two minor factors, those factors are clearly insufficient, standing alone, to satisfy the balancing test required for late intervention. *See, e.g., Fermi*, ALAB-707, *supra*, 16 NRC at 1767; *Grand Gulf*, ALAB-704, *supra*, 16 NRC at 1730-31. Moreover, Petitioners clearly fail to satisfy the two remaining major factors, the ability to contribute to the development of a record and delay and/or expansion of the proceedings. Thus, we find that Petitioners have failed to demonstrate a favorable balancing of the five factors required for granting a petition for late intervention and we hereby deny their request.[9]

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[9] In view of this finding, we need not reach the question of Petitioners' standing. However, we have strong doubts that Petitioners could satisfy our standing requirements. First, the Dows themselves live in Pennsylvania

(Continued)

3. The Motion to Reopen the Record

As the Commission pointed out in CLI-92-1, a person cannot seek to reopen the record unless that person first becomes a party to the proceeding. CLI-92-1, 35 NRC at 6. Because we have determined above that Petitioners cannot become parties to the Unit 2 OL proceeding based on the record now before us, we find that they cannot seek to reopen the record of the proceeding.

Additionally, as the Staff correctly points out, Petitioners have failed to satisfy the requirements of our regulations which provide that a motion to reopen the record "must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim that the [reopening] criteria have been satisfied." 10 C.F.R. § 2.734(b). We have denied requests to reopen the record because of this defect. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989). Neither of the attachments to the Motion to Reopen the Record meets this requirement.

Moreover, Petitioners have again misinterpreted the "timeliness" requirement. The issue is not whether the motion to reopen is filed "within 24 hours of the petition for late intervention." Motion at 2. Instead, the test is whether the information upon which the movant relies could have been presented to the NRC at an earlier date. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973).

Here, as we noted above — and in CLI-92-1 — the material relied upon by Petitioners has been in the public domain for some time and has — generally — been acted upon either by the DOL or the NRC. In those cases where either the DOL or the NRC has acted on the material, Petitioners have failed to allege some reason for taking additional action, i.e., they have failed to allege where either agency acted incorrectly. For example, as we noted above, both the NRC and the DOL have acted on the concerns raised by Mr. Joseph J. Macktal. As another example, TU Electric reported — on its own — the fire-watch violations raised by Petitioners, and the NRC has already acted on that issue by issuing a Notice of Violation. In both cases, Petitioners have failed to allege any inadequacy in the resolution of these issues.

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while Comanche Peak is in Texas. Thus, it is unlikely the Dows themselves have standing. Moreover, the Staff raises several possibly valid concerns regarding the standing of the Disposable Workers organization. *See* Staff Response at 17-20. *See also Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1333-34 (1982); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

C. Request for Protective Orders

Petitioners request protective orders for seven (7) named persons — including both Mr. and Ms. Dow — and six (6) unnamed persons under 10 C.F.R. § 2.734(c). Motion at 6. Assuming *arguendo* that this request constitutes a request for "confidentiality" status under NRC Manual Chapter 0517, we deny that request at this time. Quite simply, such requests should not be granted on a blanket basis; instead, they are fact-specific and should be granted only on a fact-specific showing that the requesting party meets the requirements of Manual Chapter 0517.

Turning to the specific requests, we are unclear why Petitioners request a protective order for known individuals. In a similar situation, we questioned how a person who was a known critic of Comanche Peak could demonstrate how he could be harmed if his name became associated with additional allegations. "The purpose underlying a grant of confidentiality is to preserve the alleger's identity from public disclosure where such disclosure could cause harm to the alleger." *Macktal*, CLI-89-12, *supra*, 30 NRC at 24. Nevertheless, in that case we pointed out that if the petitioner could demonstrate that some harm might befall him — or his sources, for example — the Staff would be empowered to grant that request. However, the burden was on the petitioner to demonstrate that harm to the Staff. *Id.* The same is true of the individuals who are named by Petitioners in this case.

Turning to the unnamed individuals, they also can seek "confidentiality" status from the NRC Staff even though we have denied both intervention and reopening of the record. The NRC's guidelines for confidentiality are set forth in NRC Manual Chapter 0517. They — like the seven named individuals — should address their individual requests to the Allegations Coordinator of Region IV or the Allegations Coordinator in the Office of Nuclear Reactor Regulation at NRC Headquarters.

D. Request for Suspension of License(s)

Petitioners also request that we suspend the operating licenses for both Unit 1 and Unit 2 — presumably during the pendency of the hearing sought by Petitioners — for alleged deficiencies in the labeling of pressure valves and limit switches.[10] Motion at 6-7. However, as the Staff notes, again, this matter has already been reviewed and resolved by the Staff. *See* Affidavit of William D. Johnson. Moreover, this is a matter more properly placed before the Staff under 10 C.F.R. § 2.206. Petitioners currently have a section 2.206 petition pending before the Staff; accordingly, we deny this request and refer this issue

[10] We presume that Petitioners mean the Unit 2 construction permit. Unit 2 does not have an operating license.

to the Staff for their consideration as an additional issue in conjunction with the current petition under section 2.206.

IV. CONCLUSION

For the reasons stated above, we (1) deny Petitioners' request for oral argument; (2) summarily deny Petitioners' requests for late intervention in the Comanche Peak, Unit 1 proceedings; and (3) find that Petitioners have failed to satisfy a balancing of the five factors necessary for late intervention in the Comanche Peak Unit 2 OL proceedings. Moreover, assuming *arguendo* that Petitioners were eligible to participate in the Unit 2 OL proceeding, they have failed to meet the standards necessary to reopen the record of that proceeding. Finally, we deny the requests for protective orders and for a suspension of the Unit 1 operating license.

It is so ORDERED.

For the Commission[11]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

[11] Commissioners Rogers and Curtiss were not present for the affirmation of this order; if they had been present, they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2

SAFETY LIGHT CORPORATION, *et al.*
(Bloomsburg Site Decontamination
and License Renewal Denials)

August 12, 1992

On review of an order, LBP-92-13A, 35 NRC 205 (1992), which consolidated an informal proceeding under Subpart L of 10 C.F.R. Part 2 with a formal proceeding under Subpart G, the Commission determines that the Licensing Board and the Presiding Officer exceeded their authority by not seeking prior Commission authorization for consolidation in view of the requirement in 10 C.F.R. § 2.1209(k) (1992) that the Commission approve application of alternative hearing procedures for Subpart L proceedings. The Commission authorizes, however, the consolidation of the proceedings.

RULES OF PRACTICE: COMMISSION SUPERVISORY AUTHORITY OVER ADJUDICATIONS

Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself.

RULES OF PRACTICE: COMMISSION GRANTING OF PETITION FOR REVIEW

In the interest of reaching an expeditious resolution of a novel issue raised in a proceeding, the Commission may grant a petition for review without awaiting a reply from any responding party. Because the grant of a petition only indicates that an issue is worthy of Commission consideration, respondents are not prejudiced if they are provided a subsequent opportunity to present their views on the merits of the issue accepted for review.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although the Commission conducts review of interlocutory orders of presiding officers sparingly, the Commission may take review of an interlocutory order to remove doubt as to the proper resolution of an unusual or novel question or to cure an error, particularly when the matter bears on the underlying authority of the presiding officer to take certain action in a proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although the Commission's supervisory power extends to circumstances that do not meet the standards for review specified in 10 C.F.R. § 2.786(b) and (g), the Commission adheres as a general rule to the standards codified in those regulations.

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

The unprecedented consolidation of a Subpart G and a Subpart L proceeding raised a substantial and important jurisdictional question and affected the Subpart L proceeding in a pervasive and unusual manner such that discretionary interlocutory review by the Commission of the consolidation order was warranted.

RULES OF PRACTICE: INFORMAL HEARINGS

A hearing on the denial of a materials license is ordinarily governed by the informal hearing procedures in Subpart L of 10 C.F.R. Part 2; Commission approval is required for the application of alternative procedures in such proceedings.

RULES OF PRACTICE: RULES OF GENERAL APPLICABILITY

Although procedures in Subpart G of 10 C.F.R. Part 2 may have general application to all types of Commission proceedings other than rulemaking, application of Subpart G must be determined in the context of the special rules that are applied to other proceedings. In any conflict between a general rule in Subpart G and a special rule in another subpart, the special rule governs. *See* 10 C.F.R. §§ 2.2, 2.3 (1992).

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

Although the concept of consolidation of proceedings embodied in 10 C.F.R. § 2.716 (1992) is not in itself inconsistent with Subpart L procedures, conversion of a Subpart L proceeding into a Subpart G proceeding through consolidation of proceedings requires Commission authorization in order to give proper effect to limitation specified in 10 C.F.R. § 2.1209(k) (1992) with respect to the adoption of alternative hearing procedures in Subpart L proceedings.

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

As a general practice, the Commission defers to the Licensing Board's judgment on the consolidation of proceedings, absent the most unusual circumstances.

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

The common litigants, the potential commonality of issues, and the avoidance of unnecessary litigation over procedural matters weighs in this case in favor of consolidation of a Subpart L proceeding with a Subpart G proceeding.

MEMORANDUM AND ORDER

I. INTRODUCTION

In our order of July 2, 1992 (unpublished), we granted the Nuclear Regulatory Commission (NRC) Staff's petition for interlocutory review of an order dated June 11, 1992, LBP-92-13A, 35 NRC 205, which consolidated two proceedings before an Atomic Safety and Licensing Board. One proceeding concerns the Staff's denial of applications for renewal of materials licenses. The other

proceeding concerns a decommissioning order, the effectiveness of which is contingent on the sustaining of Staff's license denial.

The controversy centers initially on the authority of the Presiding Officer and the Licensing Board to consolidate the proceedings and the consequent application of formal, as opposed to informal, hearing procedures to the license denial proceeding. Staff contends that the informal hearing procedures in Subpart L of 10 C.F.R. Part 2, rather than the formal hearing procedures under Subpart G applicable to the contingent order proceeding, should apply to the license denial proceeding.[1] Subpart L normally contemplates that the presiding officer will render a decision based on the review of an identified hearing file and other written submissions of the parties. *See* 10 C.F.R. §§ 2.1231, 2.1233 (1992). By consolidating the denial proceeding with the contingent order proceeding, the June 11 consolidation order converted the license denial proceeding from a Subpart L to a Subpart G proceeding. Subpart G of 10 C.F.R. Part 2 provides more formal, trial-type hearing procedures, including discovery and cross-examination that are not routinely available under Subpart L.[2]

We asked the parties, the Licensing Board, and the Presiding Officer to provide us their views on several questions related to the consolidation of the proceedings and the applicability of particular hearing procedures. Although we have determined that the Licensing Board and the Presiding Officer did not have the authority to consolidate the two proceedings without Commission approval, we now authorize consolidation.

II. BACKGROUND

The unusual circumstances that led to our decision to review the June 11 order began with Staff's denial on February 7, 1992, of pending applications for renewal of byproduct material licenses and its concurrent issuance of a contingent decommissioning order to Safety Light Corporation and other corporations (hereinafter "Licensees").[3] The Staff relied on the Licensees' alleged failure to comply with the financial assurance requirements of 10 C.F.R. § 30.35 (1992) as the primary basis for license denial. The Staff's order was issued under 10 C.F.R. § 2.202 (1992) and established decommissioning criteria

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[1] 10 C.F.R. §§ 2.1201-2.1263 (1992).

[2] 10 C.F.R. §§ 2.700-2.790 (1992).

[3] Letter from Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, to Jack Miller, President, Safety Light Corp., and Ralph T. McElvenny, Chairman, USR Industries, Inc. (Feb. 7, 1992). Staff denied renewal of two licenses: License No. 37-00030-02, which authorized possession of byproduct material in the form of contaminated facilities and equipment at the Bloomsburg, Pennsylvania site for purposes of decontamination and disposal; and License No. 37-00030-08, which principally authorized possession and use of tritium for research, development, and manufacture of products for further distribution. The Commission recognizes that USR Industries and its subsidiaries dispute the Staff's assertion of jurisdiction over them, just as they denied NRC's jurisdiction with respect to earlier Staff orders. *See* ALAB-931, 31 NRC 350 (1990).

and standards for the Licensees' site in Bloomsburg, Pennsylvania, *contingent* on the effectiveness of the Staff's license denial.[4] At the time Staff issued its license denial and contingent order, a proceeding (the "OM" proceeding) was pending on two Staff orders issued in 1989 to compel the same Licensees to undertake site characterization and decontamination and to establish a $1 million escrow fund to be used for such purposes.[5]

On February 27, 1992, the Licensees requested a hearing on the license denial and the contingent order. The Secretary of the Commission referred the Licensees' request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action in accordance with 10 C.F.R. §§ 2.772(j), 2.1261 (1992).[6] Relying on the procedures in Subpart G of Part 2, 10 C.F.R. §§ 2.700-2.790, the Chief Administrative Judge established a three-member Atomic Safety and Licensing Board to preside over proceedings on the license denial and contingent order.[7]

However, on April 13, 1992, the Staff moved the Licensing Board to refer the case back to the Chief Administrative Judge to correct the allegedly erroneous establishment of the three-member Board and to reassign the proceedings to a single presiding officer under Subpart L of 10 C.F.R. Part 2, the procedures that normally apply to hearings involving materials licensing matters. The Staff argued in its motion that both the license denial *and* the contingent order should be governed by Subpart L rather than Subpart G. In the Staff's view, the contingent order, though it was issued under section 2.202 and referenced certain Subpart G procedures, "flowed" from the license denial and should be considered under Subpart L.

In a June 1 order (unpublished), the Licensing Board granted the Staff's motion in part by referring the license denial back to the Chief Administrative Judge for consideration of whether it should be severed from the proceeding and a single presiding officer appointed under Subpart L to conduct the license denial proceeding. Although the Board expressed concern over the potential inefficiency that creation of a separate proceeding on the denial could engender, the Board agreed with Staff that section 2.1201(a) appeared to direct that the hearing on the license denial be conducted under Subpart L. The Board rejected Staff's argument that its contingent order could be heard under Subpart L in view of the order's explicit reliance on section 2.202 and the direction in sections 2.700 and 2.1201(b) that hearings on section 2.202 orders be conducted in

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[4] Order Establishing Criteria and Schedule for Decommissioning the Bloomsburg Site, 57 Fed. Reg. 6136 (Feb. 20, 1992).

[5] 54 Fed. Reg. 12,035 (Mar. 23, 1989); 54 Fed. Reg. 36,078 (Aug. 31, 1989).

[6] Memorandum for B. Paul Cotter, Jr., Chief Administrative Judge, from Samuel J. Chilk, Secretary (Mar. 17, 1992).

[7] 57 Fed. Reg. 10,932 (Mar. 31, 1992). The Licensing Board members were the same as were assigned to the "OM" proceeding.

accordance with Subpart G. Acting on the Licensing Board's referral, the Chief Administrative Judge accepted the Board's analysis and severed the license denial from the contingent order and appointed Judge Moore, the chair of the Licensing Board in the contingent order proceeding, as the Presiding Officer in the license denial proceeding in accordance with Subpart L. Unpublished Memorandum (Designating Presiding Officer) (June 9, 1992).

On June 11, however, the Licensing Board in the contingent order proceeding and Judge Moore as the Presiding Officer for the license denial proceeding decided that "the consolidation of these two proceedings for all purposes will be in the best interests of justice and be most conducive to the effective and efficient resolution of the issues and the proceedings." LBP-92-13A, *supra*, 35 NRC at 205. They relied on 10 C.F.R. § 2.716 (1992) as a basis for consolidation of the two proceedings as a Subpart G proceeding. They also indicated that the Staff had conceded that they could take such action. *Id.* at 206 n.*, *citing* Prehearing Conference Transcript (Tr.) 61 (May 8, 1992). They did not consolidate the proceedings with the preexisting "OM" proceedings under Subpart G, but held out the possibility that such action might be taken in the future.

The Staff sought reconsideration of the Board's June 11 order in a prehearing conference called at Staff's request on June 18, 1992. The Staff denied that it had conceded the Board's power to consolidate the two proceedings and suggested that Staff counsel's comments had been misinterpreted. The Board rejected Staff's request for reconsideration and for a stay of the proceedings while the Staff sought Commission review. Tr. 161, 167.

The Staff sought Commission review of the Board's consolidation order in a petition for review filed on June 26, 1992. We decided to take review in our July 2 order and invited the parties, the Presiding Officer, and the Licensing Board to offer us their views on the following questions related to the determination to consolidate the proceedings:

> 1. Should the proceeding concerning the denials of the applications for renewal of the licenses be conducted in accordance with the informal procedures set forth in Subpart L? If not, what special circumstances or issues warrant the application of other procedures?
>
> 2. If the proceeding concerning denial of the applications for renewal of the licenses is conducted under Subpart L, should the proceeding under Subpart G on the decommissioning order, and/or the proceedings under Subpart G on the March and August 1989 orders, be held in abeyance pending decision in the Subpart L proceeding?
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> 3. If the proceeding concerning denial of the applications for renewal of the licenses is conducted under Subpart G, should that proceeding be consolidated with the proceeding on the order of February 7, 1992, for decommissioning, and/or the ongoing proceedings concerning the March and August 1989 orders? In particular, to what extent are the same interests affected and the same questions raised in these proceedings?

III. ANALYSIS

A. The Propriety of Commission Review

At the outset we note Licensees' suggestion that we should have awaited their response to the Staff's petition for review before we decided to step into this matter. Although the Licensees do not claim that they were in any way prejudiced by our action, they suggest that we would have had a greater appreciation of the "painstaking effort" undertaken by the Licensing Board to unravel the knotted strands of the Safety Light proceedings.[8] Moreover, Licensees suggest that Staff omitted any discussion from its petition of the "careful and methodical process" that the Licensing Board undertook to arrive at its decision and for that reason alone Staff's petition should be denied.[9]

Although we could have waited to consider a response from Licensees to Staff's petition before acting, we were not required to do so. Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself.[10] In view of the novel question presented by the Licensing Board's and Presiding Officer's assertion of authority to consolidate the two proceedings and in the interest of reaching an expeditious resolution of the issue, we granted review. Because our July 2 order merely decided that the issue was worthy of our consideration, Licensees have been afforded a full opportunity to have their views heard on the substantive issues.

We are mindful of Licensees' caution that we exercise our interlocutory review authority sparingly, lest we discourage responsible actions by presiding officers or licensing boards in managing our proceedings. We certainly do not leap forward to scrutinize every interlocutory directive or procedural order of the presiding officers or boards, but adhere as a general rule to the stringent standards for interlocutory review which are codified in 10 C.F.R. § 2.786(g) (1992).[11] Nonetheless, no matter how otherwise sensible or thoughtful the actions of a licensing board or presiding officer may be, we do no harm to

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[8] Response of USR Industries, Inc., and Safety Light Corporation to the Nuclear Regulatory Commission's July 2, 1992 Order at 3-5 (July 13, 1992) (hereinafter Licensees' Response). Staff asks that we grant leave under 10 C.F.R. § 2.786(b)(3) (1992) to consider Staff's views filed in response to Licensees' opposition to its petition for review. NRC Staff's Reply to Response of USR Industries, *etc.*, at 3 n.4. Our leave is not required, because our July 2 order itself permitted a reply to Licensees' filing.

[9] Licensees' Response at 5. We see no merit to Licensees' suggestion that Staff omitted significant information from its petition or that Staff otherwise exceeded the bounds of advocacy in its petition. Staff's petition makes fair reference to the events that ultimately precipitated its petition. In any event, we have access to the docket of this proceeding and are well aware of the filings and orders that preceded our action.

[10] 10 C.F.R. §§ 2.718(l), 2.786(a), 2.1209(d) (1992); *see Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269 (1991), *reconsideration denied*, CLI-92-6, 35 NRC 86 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990).

[11] *See Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-26, 4 NRC 608 (1976).

the orderly conduct of adjudicatory proceedings by intervening to remove doubt as to the proper resolution of an unusual or novel question or to cure an error, particularly when the issue bears on the underlying authority of the presiding officer or licensing board to take action in a proceeding.

Although our supervisory power extends to circumstances that do not meet the standards for review under 10 C.F.R. § 2.786(b)(4) and (g), our decision to take review in this case fully satisfies those standards. In view of the unprecedented nature of the consolidation which arguably exceeded the bounds of the Licensing Board's and Presiding Officer's delegated authority, we believe that a substantial and important jurisdictional question has been raised.[12] As has been repeated many times in NRC proceedings, licensing boards and presiding officers possess only the powers granted to them by regulation or Commission order.[13] The consolidation order certainly affected the license denial proceeding in a pervasive and unusual manner by converting it from a Subpart L proceeding into a Subpart G proceeding.[14]

B. Authority to Consolidate Subpart G and Subpart L Proceedings

For the reasons that follow, we believe that the Licensing Board and the Presiding Officer exceeded their powers in the June 11 order. Under the Commission's regulations, a hearing on the denial of a materials license is ordinarily governed by the informal hearing procedures in Subpart L of 10 C.F.R. Part 2; hearings on section 2.202 orders are governed by the trial-type procedures set forth in Subpart G. 10 C.F.R. §§ 2.700, 2.1201 (1992). The Licensees did not indicate in their hearing requests the procedures that they expected to be applied in any hearing nor did they express a preference for procedures.[15] The Licensing Board in its June 1 order and the Chief Administrative Judge in his June 9 order correctly construed sections 2.700 and 2.1201 in determining that the hearing on the license denial is governed by Subpart L and that the hearing on the Staff's contingent decontamination order is governed by Subpart G. The terms of those regulations leave little doubt as to their applicability to the proceedings on those respective actions.[16]

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[12] *See* 10 C.F.R. § 2.786(b)(4)(ii), (iii) (1992).

[13] *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1977).

[14] *See* 10 C.F.R. § 2.786(g)(2) (1992).

[15] Under Subpart J., a licensee may seek the application of procedures other than Subpart L when a hearing request is made. 10 C.F.R. § 2.1205(b) (1992).

[16] Staff does not raise on review its earlier argument that the contingent order, because it "flowed" from the license denial, could be handled under Subpart L. Although the establishment of the decommissioning criteria might have been handled by some other procedural means, Staff chose to impose the requirements through an enforcement order under 10 C.F.R. § 2.202 (1992) and relied specifically on Subpart G procedures on intervention in its order.

However, the subsequent consolidation of the license denial and the decontamination order proceedings does not appear to be consistent with the governing procedural regulations. The Licensing Board and Presiding Officer rely on 10 C.F.R. § 2.716 (1992) as a rule of general applicability in Subpart G which authorized them to consolidate the two proceedings.[17] Although Subpart G procedures may be generally applicable to types of proceedings other than rulemaking, application of Subpart G must be determined in the context of the special rules that are applied to other proceedings.[18] Moreover, in any conflict between a general rule in Subpart G and a special rule in another subpart, the special rule governs.[19]

We agree with the Licensing Board and Presiding Officer (and Licensees who make a similar argument) that the concept of consolidation of proceedings embodied in section 2.716 is not in itself inconsistent with Subpart L procedures. The critical inquiry is, however, whether consolidation of a Subpart L proceeding with a Subpart G proceeding can be effected without the Commission's authorization. In Subpart L proceedings, presiding officers are limited to using the procedures in that subpart unless they recommend and receive Commission approval for the application of other procedures. 10 C.F.R. § 2.1209(k) (1992).[20] In this case, the consolidation order converts the Subpart L proceeding into one governed by the procedures of Subpart G. Thus, absent Commission authorization, the Licensing Board's and the Presiding Officer's consolidation of the proceedings evades the provisions of the specific rule in section 2.1209(k). Although consolidation may be an appropriate step, Commission authorization for consolidation is required to ensure that the proper effect is given to the limitation on the application of other hearing procedures specified in section 2.1209(k).

C. Whether Consolidation Should Be Authorized

In its July 17 memorandum issued in response to our order taking review, the Licensing Board and the Presiding Officer elaborated upon their reasons for consolidating the license denial proceeding with the proceeding on the contingent

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[17] LBP-92-16A, 36 NRC 18, 20 n.6 (1992).

[18] 10 C.F.R. § 2.2 (1992).

[19] 10 C.F.R. § 2.3 (1992).

[20] We reiterated in a 1990 rulemaking the necessity of obtaining Commission approval for use of other procedures. Informal Hearing Procedures for Nuclear Reactor Operator Licensing Adjudications, 55 Fed. Reg. 36,801, 36,804 (Sept. 7, 1990). Subpart L provides an exception in section 2.1207 which permits consolidation of proceedings concerning receipt and possession of unirradiated fuel with related proceedings under Subpart G on Part 50 facility licensing upon certification by the licensing board that the issues in the proceedings are substantially identical. In our view, this exception underscores the general rule in section 2.1209(k) otherwise requiring Commission approval of alternative procedures.

order.[21] In their view, the proceedings share a common factual setting and involve common, unresolved, and novel issues concerning personal jurisdiction over USR Industries and its subsidiaries. Consolidation will avoid, they believe, duplicative hearings that would squander the Licensees' limited resources that would otherwise be available for site remediation.

The Licensing Board and the Presiding Officer are also concerned that the doctrine of collateral estoppel may be inapplicable between the two proceedings if the license denial proceeds under Subpart L because of the potential absence of a "mutuality of quality and extensiveness of procedures" between informal proceedings under Subpart L and formal proceedings under Subpart G.[22] By consolidating the proceedings under Subpart G, they believe they can avoid this potential problem and the concomitant risk and expense of having to try some issues twice with possibly inconsistent results. The Board and Presiding Officer also suggest that their action avoids the litigative risk over the propriety of applying Subpart L procedures to the Staff's denial action when that action could also be characterized as a license revocation or other enforcement action subject to Subpart G. LBP-92-16A, *supra*, 36 NRC at 21 n.10.

The Licensees give a number of reasons why they believe the proceedings should be consolidated and conducted in accordance with Subpart G procedures. Response to July 2, 1992 Order at 8-12. Several of these are premised on a perceived common factual basis for the license denial and the contingent order as well as asserted overlap or interrelationship of issues in the denial and contingent order proceedings and the "OM" proceeding on the 1989 orders. The Licensees emphasize in particular the potential interrelationship between the funding requirements for decommissioning under one of the 1989 orders and their alleged failure to meet the funding obligations under 10 C.F.R. § 30.35 (1992) which led to Staff's denial of license renewal. The Licensees also see potentially common issues related to the decommissioning requirements and standards imposed by the 1989 order and the 1992 contingent order.[23]

The Licensees also suggest that Subpart G procedures should apply to the license denial proceeding to permit them to explore the possibility of arbitrary and dilatory action by the Staff in handling the license renewal applications as well as the application of rules in agreement states compatible with 10 C.F.R.

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[21] LBP-92-16A, *supra*, 36 NRC at 20-21. The Board and Presiding Officer state that they did not explain in detail in their July 11 order their reasons for consolidating the proceedings because they believed that Staff counsel had conceded their authority to do so, thereby obviating the need to give a detailed exposition of their rationale. *Id.* at 19 n.2.

[22] *Id.* at 21 n.9, *citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979).

[23] Thus, in response to the Commission's question, the Licensees believe that *all* pending proceedings involving Safety Light's operations should be consolidated, a step that the Licensing Board and the Presiding Officer did not take.

§ 30.35 (1992).[24] The Licensees do little to explain why these issues, to the extent they may be litigable, require application of Subpart G procedures.

Staff insists that the license denial should not be consolidated with any of the other proceedings but should be handled under Subpart L procedures. In Staff's view the license denial involves the discrete issue, primarily legal in nature, of the Licensees' compliance with section 30.35, which can be judged on the basis of the documents submitted by the Licensees and any other documents relevant to Staff's review and determination to deny the applications. Subpart L is particularly well suited, Staff maintains, to the resolution of matters that can rest on review of a written record. With the exception of jurisdictional questions, Staff disputes that the denial proceeding concerns substantially the same issues as the contingent order proceeding or the "OM" proceeding. Staff asserts that the substantive issues involved in the contingent order do not involve any question as to Licensees' compliance with section 30.35. Moreover, Staff maintains that the funding requirements under the 1989 order are not substantially related to compliance with section 30.35. In Staff's view, the Licensees' contentions concerning dilatory and arbitrary conduct on the part of the Staff and unfair application of section 30.35, even if they present litigable matters, do not inherently require application of Subpart G procedures. As to the collateral estoppel effect of a decision reached under Subpart L to a Subpart G proceeding, Staff suggests that the Board and Presiding Officer can avoid the question by proceeding with the resolution of the jurisdictional matters in the "OM" proceeding under Subpart G and then applying that decision to the Subpart L denial proceeding.

Having considered the views of the Licensing Board and the Presiding Officer and the positions of the parties, the Commission has decided to adhere to our general practice of deferring to the Licensing Board's judgment on consolidation of proceedings, absent "the most unusual circumstances."[25] Although consolidation may not be the only way of dealing with some of the thorny problems posed by these proceedings, the Licensing Board and Presiding Officer base their decision on factors that are well within the traditional grounds for consolidating proceedings: i.e., the similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving of time or expense.[26] Accordingly, we consent to the consolidation of the license denial proceeding and the proceeding on the contingent decommissioning order.

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[24] Licensees' Response at 10-12.

[25] *Pebble Springs*, CLI-76-26, *supra*, 4 NRC at 609; *see also Alabama Power Co.* (Alan R. Barton Nuclear Plant, Units 1, 2, 3, and 4; Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-75-12, 2 NRC 373 (1975).

[26] *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 434 (1979).

In reaching our decision, we do not mean to imply that we believe Subpart L procedures are inadequate to resolve the issues bearing on the license denial. Even if Licensees' charges of dilatory conduct by the Staff or discriminatory application of section 30.35 are litigable, nothing in the Licensees' submittal convinces us that the issues in the denial proceeding inherently demand the application of hearing procedures beyond that afforded in Subpart L.[27] Moreover, the possibility that the Staff, rather than denying renewed licenses, could have issued an enforcement action under Subpart B of 10 C.F.R. Part 2 on the basis of Licensees' alleged violation of section 30.35 does not require application of Subpart G procedures in the denial proceeding.[28] If that were so, virtually no license renewal proceeding could be heard under Subpart L, because the fundamental question in any licensing case is whether the applicant meets the requirements of the governing statute and regulations. Subpart L is not inherently inadequate to satisfy the hearing requirements of the Atomic Energy Act or due process in determining such issues. *See City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

Our decision is based instead on the potential commonality of issues in the various *Safety Light* proceedings as well as the additional complications that may arise if we insist that the issues be resolved on two different procedural tracks. Although it is difficult to pinpoint at this early stage precise areas of overlap between the license denial and contingent order proceedings, the Licensing Board's and Presiding Officer's perception that such overlap is likely is difficult to dismiss without committing ourselves to a far closer examination of the issues than we are prepared to undertake at this time.[29]

We are not prepared to hold that a lack of mutuality of procedure exists between Subpart L and Subpart G which would preclude the Commission from giving collateral estoppel effect in Subpart G proceedings to prior decisions in Subpart L proceedings. However, we recognize that consolidation of proceedings here and the consequent conversion of the license denial proceeding into a Subpart G proceeding would certainly avoid the need to litigate the application of the collateral estoppel doctrine. In this sense, consolidation will avoid needless litigation in the interest of reaching a decision on the more important issues in these proceedings.

On balance, if we were to insist under these extraordinary circumstances on the application of Subpart L procedures to the license denial proceeding, we

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[27] Licensees made little more than bald assertions that Subpart G procedures were necessary to address the issues. Licensees' Response to July 2, 1992 Order at 10-12.

[28] *See* LBP-92-16A, *supra*, 36 NRC at 21 n.10.

[29] The parties, the Board, and the Presiding Officer suggest that certain jurisdictional issues are common to all pending proceedings. With respect to the license denial and the "OM" proceeding, we note that there is sharp disagreement between Staff and Licensees over the relevance of the Licensees' funding assurances pursuant to one of the 1989 orders to the Staff's basis for denial of the renewal licenses.

might well undermine the principles of simplicity and efficiency that led us to the adoption of Subpart L in the first instance. A decision to sever the proceedings would not end the haggling over the proper application of procedures to particular issues in these proceedings or the desirability of additional procedures. In these unusual circumstances, the avoidance of additional procedural complications outweighs any added burden that application of Subpart G might impose. We are concerned that the resources available for site remediation not be consumed by unnecessary litigation costs.

We note Staff's concern that consolidation of the proceedings may postpone a decision on some issues that could be decided in advance of others. Our impression is that the Licensing Board is working hard to sort out the issues in the various *Safety Light* proceedings to ensure their timely and rational resolution. We encourage the Licensing Board to use the tools at its disposal, e.g., reasonable limits on discovery and use of summary disposition, to expedite the resolution of these proceedings with due regard to the rights of the parties. We leave to the Licensing Board's sound discretion whether formal consolidation of the "OM" proceeding with these proceedings is appropriate to ensure a prompt and just resolution of the issues.

IV. CONCLUSION

For the reasons stated in this order, we reverse the Licensing Board's and Presiding Officer's order of June 11, 1992, insofar as it consolidated the license denial and the contingent decommissioning order proceedings without prior Commission authorization. However, we now authorize consolidation of these proceedings for the reasons stated in this order.

IT IS SO ORDERED.

For the Commission[30]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

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[30] Commissioners Rogers and Curtiss were not present for the affirmation of this order. If they had been present, they would have affirmed it.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

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*Permanent panel members

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Harry Foreman
Thomas D. Murphy

In the Matter of

Docket No. 030-31758-EA
(ASLBP No. 92-656-01-EA)
(EA 91-154)
(Byproduct Material License
No. 34-26201-01)

RANDALL C. OREM, D.O.

August 6, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

On July 28, 1992, the parties to this enforcement proceeding, the NRC Staff and Randall C. Orem, D.O., filed with the Atomic Safety and Licensing Board (1) a Settlement Agreement that has been accepted and signed by both parties and (2) a joint motion requesting the Board's approval of the Agreement and entry of an order terminating this proceeding, together with a proposed Order. The Board has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the Settlement Agreement and consequent termination of this proceeding is in the public interest. Based upon its review, the Board is satisfied that approval of the Settlement Agreement and termination of this proceeding based thereon are in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and, pursuant to sections 81 and 161 of the Atomic Energy Act of 1954, as

amended (42 U.S.C. § 2111 and 2201), incorporates the Settlement Agreement by reference into this Order. Pursuant to 10 C.F.R. § 2.203, the Board hereby terminates this proceeding on the basis of the Settlement Agreement.

THE ATOMIC SAFETY AND
LICENSING BOARD

Harry Foreman (by I.W.S.)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 6, 1992

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 030-31758-EA
(ASLBP No. 92-656-01-EA)
(EA 91-154)

RANDALL C. OREM, D.O.
(Byproduct Material License
No. 34-26201-01)

SETTLEMENT AGREEMENT

Randall C. Orem, D.O., was the holder of Byproduct Material License No. 34-26201-01 (license) issued pursuant to Parts 30 and 35 of the Commission's regulations. The license authorized the possession and use of radiopharmaceuticals in nuclear medical activities. On November 29, 1991, the NRC Staff (Staff) issued an Order Revoking License (Effective Immediately) to Dr. Orem. 56 Fed. Reg. 63,986 (Dec. 6, 1991). Dr. Orem requested a hearing on that order on December 3, 1991.

An Atomic Safety and Licensing Board (Board) was designated on January 6, 1992 (57 Fed. Reg. 1285 (Jan. 13, 1992)), and a prehearing conference was held, telephonically, on January 29, 1992. At that conference, the pending Office of Investigation's (OI) investigation was discussed. It was explained to Dr. Orem's attorney that additional enforcement sanctions could be imposed or a referral to the Department of Justice could be made based on the outcome of the investigation. Tr. 8-14. As a result of that discussion, Dr. Orem filed, on February 27, 1992, "Motion for Adjournment of Hearing." The Staff did not oppose Dr. Orem's Motion.

On March 19, 1992, the Board issued "Memorandum and Order (Ruling upon Dr. Orem's Motion to Adjourn Hearing)." In that Order, the Board granted the motion, in part. The Board stated that "[t]his proceeding is hereby continued until the completion of the OI investigation or until July 1, 1992, whichever is earlier." Order at 2. The Board also requested the Staff to file a status

report on the OI investigation by June 15, 1992. *Id.* On June 15, 1992, the Staff filed "Status Report," indicating that the best estimate for the completion of the OI investigation would be the end of August or early September 1992. Subsequently, the Staff filed "Supplemental Status Report" on July 1, 1992. In that report, the Staff stated that OI had completed all the necessary field work for the OI investigation, although the actual report was not yet completed. The NRC decided not to take any further action against Dr. Orem.

After discussions between the Staff and Dr. Orem, the parties agree that it is in the public interest to terminate this proceeding without further litigation and agree to the following terms and conditions:

1. Upon Licensing Board approval of the Settlement Agreement, Dr. Orem's request for a hearing dated December 3, 1991, is withdrawn.
2. Upon Licensing Board approval of the Settlement Agreement, the Order Revoking License, dated November 29, 1991, is withdrawn.
3. Upon Licensing Board approval of the Settlement Agreement, Dr. Orem's license is terminated. In agreeing to the termination of his license, Dr. Orem does not admit to any wrongdoing or violation of federal statutes and regulations.
4. The NRC Staff agrees that none of the facts associated with this proceeding will be held against him in the event Dr. Orem submits another application for a specific license on his own behalf or a license amendment application is submitted to name Dr. Orem as an authorized user. If such application is in compliance with the Atomic Energy Act and the Commission's regulations, such application shall be granted.
5. The Staff and Dr. Orem shall jointly move the Atomic Safety and Licensing Board for an Order approving this Settlement Agreement and terminating this proceeding.

6. This agreement shall become effective upon approval by the Licensing Board.

FOR THE NUCLEAR
REGULATORY COMMISSION

Marian L. Zobler
Counsel for NRC Staff

FOR RANDALL C. OREM, D.O.

Georgette J. Siegel
Counsel for Randall C. Orem, D.O.

Dated July 28, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Marshall E. Miller, Chairman
Charles Bechhoefer
G. Paul Bollwerk, III

In the Matter of

Docket Nos. 50-440-A
50-346-A
(ASLBP No. 91-644-01-A)
(Suspension of Antitrust
Conditions)
(Facility Operating Licenses
Nos. NPF-58, NPF-3)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

August 6, 1992

In this Memorandum and Order, the Licensing Board grants a late intervention petition. The Board concludes that (1) recent developments have cured a previously identified deficiency in the Petitioner's standing to intervene in the proceeding, and (2) a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) governing late intervention favors granting the Petitioner party status.

ATOMIC ENERGY ACT: STANDING TO INTERVENE (INJURY IN FACT)

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

A municipal ordinance that makes provisions for all the elements essential to carrying out the construction, operation, and maintenance of a municipal electrical system demonstrates that the enacting municipality's interest in the proceeding as a customer and competitor of a utility applying for suspension of its facility's operating license antitrust conditions is tangible enough to afford the municipality standing.

ATOMIC ENERGY ACT: STANDING TO INTERVENE (ZONE OF INTEREST(S))

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTEREST(S))

Although a municipality's electrical system is in its incipient stage, the municipality's indication that it ultimately may wish to invoke the protection afforded by operating license antitrust conditions imposed pursuant to section 105 of the Atomic Energy Act (AEA), 42 U.S.C. § 2135, makes its expressed interest in preserving those antitrust provisions one that falls within the "zone of interests" created by AEA section 105.

RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD CAUSE FOR LATE FILING)

In the 10 C.F.R. § 2.714(a)(1) five-factor balancing test governing late intervention, the first factor of "[g]ood cause, if any, for failure to file on time" is important because, in the absence of "good cause," there generally must be a compelling showing regarding the other four factors. *See* LBP-91-38, 34 NRC 229, 249 & n.60 (1991).

RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD CAUSE FOR LATE FILING)

Bearing in mind the Appeal Board's observation that "newly acquired" standing is generally unsuitable as a basis for "good cause," *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), the act of an independent utility occurring after the filing deadline that, only consequently, has the effect of affording standing is not

so unmeritorious as to permit intervention only upon a substantially enhanced showing on the other late intervention factors.

RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD CAUSE FOR LATE FILING)

In determining whether "good cause" exists for a late-filed intervention petition, the significance to be placed on the amount of delay "will generally hinge upon the posture of the proceeding at the time the petition surfaces." *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (AVAILABILITY OF OTHER MEANS TO PROTECT PETITIONER'S INTEREST(S))

"[T]he distinctive nature of the Commission's authority to consider and address the validity of the antitrust conditions it imposed leads us to agree with [the Petitioner] that no other forum or means now available can provide equivalent protection for its interest in seeing that the existing license conditions are maintained." LBP-91-38, 34 NRC at 247.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (ADEQUACY OF EXISTING REPRESENTATION)

Challenge to a late intervention petition that seeks to equate the duplication of issues with a similarity of the existing participants' interests is misdirected. *See Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). Rather, the question is, given the matters at issue, will the existing parties effectively represent the Petitioner's interests relative to those matters.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (ADEQUACY OF EXISTING REPRESENTATION)

Argument that a Petitioner's interests can be adequately represented by the existing parties because its witnesses would be available to those parties fails to afford proper recognition to the value of participational rights enjoyed by a party, including conducting cross-examination. *See Duke Power Co.*, ALAB-528, *supra*, 9 NRC at 150 & n.7.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (BROADENING OF ISSUES OR DELAY)

Late-comers to the agency's adjudicatory process generally must take the proceeding as they find it. *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). Nonetheless, the addition of a late-comer brings the possibility that its participation will broaden the issues or otherwise slow the proceeding. This prospect is assessed in the fifth late-filed factor, which quite properly has been denominated as "of immense importance in the overall balancing process." *Id.*

MEMORANDUM AND ORDER

(Granting City of Brook Park Motion for Late Intervention)

For the second time in this proceeding involving the requested suspension of the antitrust conditions in the operating licenses for the Perry Nuclear Power Plant, Unit 1, and the Davis-Besse Nuclear Power Station, Unit 1, we have before us a petition from the City of Brook Park, Ohio (Brook Park), asking permission to intervene out of time. We denied Brook Park's previous request principally for its failure to demonstrate an "injury in fact" sufficient to establish its standing to intervene. *See* LBP-91-38, 34 NRC 229, 251-52 (1991). Brook Park now claims it has cured the standing deficiency identified by the Board and, based on a balancing of the five factors governing late intervention set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), should be afforded party status. We agree on both counts and, accordingly, grant Brook Park's petition.

I.

In a May 1, 1991 *Federal Register* notice, the NRC Staff declared that any interested person desiring a hearing on its denial of the requests of Applicants Ohio Edison Company (OE), Cleveland Electric Illuminating Company (CEI), and Toledo Edison Company (TE) for suspension of the antitrust conditions in the Perry and Davis-Besse licenses must file a petition by May 31, 1991. *See* 56 Fed. Reg. 20,057 (1991). On August 8, 1991, Brook Park filed a petition to intervene out of time. Both the Applicants and the Staff opposed Brook Park's petition as insufficient to establish its standing and as failing to meet the section 2.714(a) standards governing late intervention.

In our October 7, 1991 prehearing conference order, we recognized Brook Park's assertion that it wished to participate in this proceeding to protect its

interest in interconnection access, wholesale power sale, and wheeling services now available under the antitrust conditions in the Perry license. We also noted Brook Park's admission that, despite various feasibility studies, it had not yet reached a decision to institute a municipal electrical system. Referring to counsel's statement during the prehearing conference that the citizens of Brook Park would vote in the near future on amending the city charter to establish a municipal electrical system, we declared:

> If they do so, Brook Park's stake in this proceeding then will cease to be provisional and it will become subject to the same concrete injury in fact that could accrue to [intervenors City of] Cleveland or [American Municipal Power–Ohio, Inc.] as a result of a determination in this proceeding in favor of licensees. At present, however, the abstract, hypothetical nature of the injury to Brook Park is insufficient to establish its standing to intervene in this proceeding.

LBP-91-38, 34 NRC at 252 (footnote omitted). This, we concluded, was dispositive of its intervention request.[1]

Thereafter, the parties to this proceeding submitted summary disposition motions addressing what has been identified as the "bedrock legal" issue,[2] a process that culminated in a June 10, 1992 oral argument on the pending motions. At the conclusion of that argument, counsel for Brook Park came forward and advised the Board that the city had recently enacted an ordinance establishing a municipal electrical system; as a consequence, Brook Park again intended to seek late intervention. *See* Tr. 446-47. Subsequently, on June 15, 1992, Brook Park filed an "amended" late intervention petition in which it seeks either "of right" or discretionary intervention. *See* Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 15, 1992) [hereinafter Brook Park Amended Petition]. In their joint response, the Applicants oppose any grant of party status to Brook Park. *See* Applicants' Answer in Opposition to the Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June

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[1] In addition, we observed that Brook Park's request was lacking under a balancing of the five late intervention factors specified in section 2.714(a)(1). We made particular note of its failure to make a showing about the legal or technical experience it might bring to the proceeding, thereby demonstrating its compliance with late intervention factor three — the extent to which its participation will assist in developing a sound record. *See* LBP-91-38, 34 NRC at 252. Moreover, citing the reasons already expressed for denying its request for intervention as of right, we concluded that discretionary intervention was not appropriate for Brook Park. *See id.* at 252 n.73.

[2] As framed by the parties in a November 7, 1991 letter to the Board, the "bedrock" legal issue is as follows:

> Is the Commission without authority as a matter of law under section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared.

That issue, along with the question of whether the doctrines of res judicata, collateral estoppel, laches, or law of the case bar the Applicants' antitrust license condition suspension requests, is currently under consideration by the Board. If we decide, as the Applicants' assert, that the Commission has no authority in such an instance, then the Board would proceed in a second phase of the proceeding to consider, among other things, the question of exactly what are the actual costs of electricity for the Applicants' facilities and alternative sources.

30, 1992) [hereinafter Applicants' Answer]. In contrast, the Staff has declared that it does not contest the grant of Brook Park's most recent petition.[3] *See* NRC Staff's Answer to Amended Petition of [Brook Park] for Leave to Intervene Out of Time (July 6, 1992) [hereinafter Staff's Answer].

II.

A. We begin our review of Brook Park's renewed intervention request with the issue that played a cardinal role in derailing its initial attempt to become a party — its standing to intervene in this proceeding in accordance with 10 C.F.R. § 2.714(d). In its most recent intervention petition, Brook Park states that, in accordance with section XVIII of the Ohio Constitution, it has now decided to establish and operate a municipal electrical system, which will be in the service area of applicant CEI. *See* Brook Park Amended Petition at 8-9. According to Brook Park, on November 7, 1991, local citizens by a more than three-to-one margin approved a ballot referendum permitting the city to establish a municipal electrical system. Thereafter, following additional review and analysis of the means necessary to establish such a system, on April 21, 1992, Brook Park's City Council unanimously passed Ordinance No. 7711-1992 establishing a municipal utility in accordance with requirements of the Ohio Constitution, Art. XVIII, §§ 4-5. Brook Park also states that, in accordance with section 5 of Article XVIII, this ordinance did not become effective until May 22, 1992.

In our prehearing order, we suggested that action by Brook Park authorizing establishment of a municipal power system would make its interest sufficiently tangible to fulfill the requisite "injury in fact" element of the well-recognized judicial test for standing that governs NRC adjudicatory proceedings. *See* LBP-91-38, 34 NRC at 249 & n.60. The Staff agrees with this assessment. *See* Staff's Answer at 5. The Applicants, however, intimate that our observation was premature. They maintain that the favorable citizen action on the referendum, followed by the passage of the ordinance, does not make Brook Park's interest sufficiently concrete for standing purposes because Brook Park has not shown that it has taken any steps, such as arranging financing, that will result in the actual development of a municipal electrical system. *See* Applicants' Answer at 4 n.8.

The terms of the ordinance passed by the Brook Park City Council to implement the citizen referendum belie this objection. That enactment, entitled "An Ordinance Declaring It Necessary to Establish, Acquire, and Operate a Municipal Electric System," states in its preamble that based upon the prior feasibility studies, the city council determined that "it is in the public interest to

[3] None of the other intervening parties has taken any position regarding the propriety of Brook Park's request.

establish a municipal electric utility owned and operated by" Brook Park. Brook Park Amended Petition, Exh. A at 1 (Brook Park, Ohio, Ordinance No. 7711-1992, preamble (Apr. 21, 1992)). Thereafter, in section 1 the legislation ordains that Brook Park "shall proceed to acquire, construct, own, lease, and operate . . . a public electric utility . . . ." *Id.* (Brook Park, Ohio, Ordinance No. 7711-1992, § 1). Further, under the ordinance the Mayor of Brook Park is "authorized and directed" to perform the "activities necessary" to implement section 1, including developing plans for the establishment, operation, and maintenance of a municipal power system. *Id.* at 1-2 (Brook Park, Ohio, Ordinance No. 7711-1992, § 3). In addition, the ordinance states that "funding for acquisition, construction and improvement" of the power system "shall be obtained" by issuing, to the maximum extent possible, "self-supporting obligations" of the city and that, prior to issuance of such obligations, city "moneys in its general fund or other available funds" may be used to "pay any costs of acquiring, constructing, equipping and operating" the municipal power system. *Id.* at 2 (Brook Park, Ohio, Ordinance No. 7711-1992, §§ 4-5).

There undoubtedly is much to be done before Brook Park has a fully operational municipal electrical system. Nonetheless, in light of the ordinance, it is reasonable to conclude that Brook Park has made a firm commitment to develop a municipal electrical system. The Applicants' suggestions to the contrary notwithstanding, the ordinance makes provisions for all elements essential to carrying out the construction, operation, and maintenance of that system. We thus have no difficulty concluding that Brook Park's interest in this proceeding as a customer and competitor of applicant CEI now is sufficiently tangible to afford it standing. Additionally, while the electrical system presently is in an incipient stage, Brook Park has indicated that it ultimately may wish to invoke the protections afforded by the existing antitrust conditions in the Perry and Davis-Besse licenses imposed pursuant to section 105 of the Atomic Energy Act (AEA), 42 U.S.C. § 2135. This makes its expressed interest in preserving those provisions one that falls within the "zone of interests" created by AEA section 105. Accordingly, with its municipal electrical system program now firmly in place, Brook Park is able to fulfill both prongs of the recognized judicial standard and establish its standing to intervene in this proceeding.

B. Of course, at this point in the proceeding, having standing is not enough to gain party status for Brook Park. As Brook Park recognizes, because its request comes after the deadline for filing intervention petitions, it must establish its right to intervene under a balancing of the additional factors set forth in section 2.714(a)(1) to govern late-filed intervention. We review those factors *seriatim*.

1. Good Cause for Late Filing

To establish its case for late intervention under the first factor — whether good cause exists for the Petitioner's failure to file on time — Brook Park argues that good cause for its failure to file within the time specified in the May 1992 notice of opportunity for hearing lies in its lack of standing to attain party status, a deficiency that was only recently rectified. *See* Brook Park Amended Petition at 13-14. The Staff disagrees. Referencing the Appeal Board's observation in *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), that "[i]f newly acquired standing (or organizational existence) were sufficient of itself to justify permitting belated intervention, the necessary consequence would be that parties to the proceeding would never be determined with certainty until the final curtain fell," the Staff declares that the recent creation of Brook Park's electrical system may not be "good cause" for its failure to file on time. *See* Staff's Answer at 5-6. (Ultimately, however, the Staff finds this not critical by concluding that a balancing of the other four factors supports intervention.) The Applicants likewise assert that Brook Park lacks "good cause" for filing late, although for a different reason. They contend that Brook Park relinquished any "good cause" argument by waiting 2 months after the adoption of Ordinance No. 7711-1992 before filing its intervention petition. *See* Applicants' Answer at 4-6.

As we observed in our prehearing conference order, this first factor is important because, in the absence of "good cause" there generally must be a compelling showing regarding the other four factors. *See* LBP-91-38, 34 NRC at 246 & n.53. Nonetheless, in the circumstances here, any lack of "good cause" for the late filing adds only marginally to the showing that must be made under the other four factors.

Bearing in mind the Appeal Board's observation about the general unsuitability of "newly acquired" standing as a basis for "good cause," we nonetheless find that admonition is tempered here by the fact that the occurrence that created Brook Park's standing, i.e., the citizen referendum and the passage of the ordinance, had no direct relationship to the prosecution of this proceeding by Brook Park. This is not, for instance, a case in which the Petitioner seeks to justify its untimeliness based on its inability to finish chartering the organization created solely to serve as the vehicle for intervention. *See Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330, 331-32, 335-36, *aff'd*, ALAB-238, 8 AEC 656 (1974). Rather, the city's legislative authorization of a municipal electrical system is an act of independent utility that, only consequentially, has the effect of affording it standing in this proceeding. Thus, even if Staff is correct that Brook Park's justification for its delay is insufficient to establish "good cause," its excuse is not so unmeritorious as to permit interven-

tion only upon a substantially enhanced showing on the other late intervention factors.

The same is true regarding the Applicants' complaint about the length of the delay between the April 21, 1992 passage of the Brook Park ordinance and the June 15, 1992 filing of its petition. Assuming *arguendo* that this is actually the period of delay,[4] as the Appeal Board has previously observed, the significance to be placed on the amount of a delay "will generally hinge upon the posture of the proceeding at the time the petition surfaces." *See Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). Here, as the Applicants themselves point out, *see* Applicants' Answer at 5-6, if Brook Park had sought to intervene in April shortly after passage of the ordinance, it would have been too late to participate in the existing parties' briefing of the "bedrock" legal issue without impeding the established schedule. Further, as we describe in more detail in section II.B.5, *infra*, in acknowledging that it must take this proceeding as it finds it at the time it files its petition — with the "bedrock" legal issue fully briefed, argued, and submitted for determination — Brook Park eviscerates any negative impact that otherwise might arise from the claimed 2-month delay about which the Applicants object. Thus, this delay also is insufficient (either alone or in conjunction with the standing justification discussed *supra*) to warrant any enhancement in the showing Brook Park must make on the other four late intervention factors.

2. *Availability of Other Means to Protect Petitioner's Interests*

The Staff notes that the second late intervention factor — the availability of other means to protect Petitioner's interests — is not addressed in Brook Park's petition. Nonetheless, citing the burdensome nature of undertaking a civil action under the antitrust laws, the Staff concludes that the second factor supports Brook Park's intervention. *See* Staff's Answer at 7. Although asserting that Brook Park fails to fulfill this late intervention factor, *see* Applicants' Answer at 7 & n.14, the Applicants make no specific argument as to why factor two does not support intervention, *see id.* at 7-10.

Analyzing the impact of this factor on the late intervention request of American Municipal Power–Ohio, Inc. (AMP–Ohio), in our prehearing conference order we found that "the distinctive nature of the Commission's authority to consider and address the validity of the antitrust conditions it imposed leads

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[4] The Ohio Constitution, Art. XVIII, §5, provides a 30-day period within which local citizens can seek a referendum on an ordinance creating a municipal public utility, thereby staying its effectiveness. *See* Brook Park Amended Petition, Exh. A at 3 (Brook Park, Ohio, Ordinance No. 7711-1992, §9). Brook Park indicates that with this provision, it felt its interest was not sufficiently concrete to warrant moving ahead with intervention until May 22, 1992, the date Ordinance No. 7711-1992 actually became effective. *See id.* at 13-14. This position is not unreasonable and, if accepted, would reduce the period of delay to a little more than 3 weeks.

us to agree with AMP–Ohio that no other forum or means now available can provide equivalent protection for its interest in seeing that the existing license conditions are maintained." LBP-91-38, 34 NRC at 247. The Applicants provide no justification for a contrary result here. Consequently, we conclude that factor two supports Brook Park's late intervention.

3. Petitioner's Assistance in Developing a Sound Record

In addressing the third factor — the extent to which Petitioner's participation in the proceeding will assist in developing a sound record — Brook Park provides an extensive exposition of its counsels' expertise and experience in the creation and development of municipal electrical systems, in the Staff's administrative review process on the Applicants' license condition suspension requests while representing the City of Clyde, Ohio, and in the application of antitrust principles to the utility industry through representation of various intervenors in Federal Energy Regulatory Commission proceedings. *See* Brook Park Amended Petition at 18-20. This, it asserts, establishes that Brook Park is in a sound position to make a contribution to the record of this proceeding.

For their part, the Applicants contend that Brook Park's ability to contribute to the record of this proceeding is negligible. According to the Applicants, the type of knowledge and expertise attributed to Brook Park's counsel is irrelevant because neither Brook Park nor its counsel purport to have any knowledge about the antitrust provisions of the Atomic Energy Act, the focal point of the first portion of this proceeding, nor do they demonstrate any knowledge about the relative cost of nuclear power generation at the Applicants' facilities, the central subject of the proceeding's second phase. *See supra* note 2. The Applicants also declare irrelevant Brook Park's professed interest in maintaining the existing antitrust conditions because this likewise has nothing to do with the issues in this proceeding. *See* Applicants' Answer at 10-13.

The Staff also maintains that Brook Park's showing on this factor is wanting, asserting that its discussion of counsel's legal ability — as opposed to Brook Park's ability to contribute sound evidence — is irrelevant. *See* Staff's Answer at 6 & n.6 (citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982)). The Staff nevertheless concludes that this element supports intervention because of Brook Park's apparent ability, as an entirely new market entrant, to provide firsthand evidence concerning the difficulties in overcoming barriers to entry and the advantages that will be lost by suspension of the license conditions.

Accepting *arguendo* the Applicants' assertion that the focus of the second portion of this proceeding will be the relative costs of nuclear power as compared to other alternative sources, at this juncture we have little difficulty in concluding that Brook Park can assist in developing a sound record. As

Brook Park declares, it "is an emerging municipal system, engaged in the process of exploring and acquiring power supply . . . ." Brook Park Amended Petition at 17. Further, as its petition makes clear, Brook Park already has done studies intended to demonstrate the feasibility and prudence of establishing a municipal electrical system, which undoubtedly included consideration of the relative costs of different electrical supply sources. Moreover, as it moves forward to obtain a power supply for the electrical distribution system it has decided to create, the relative costs of different sources no doubt are important to Brook Park, thereby mandating that it will have on hand, and can provide, useful comparative information. And, to the degree that any second phase to this proceeding involves the issue of barriers to market entry, and whether there has been attenuation of those barriers sufficient to suspend the Perry and Davis-Besse antitrust conditions, the Staff is correct that as a new market entrant Brook Park is in a unique position to provide evidence relative to that question. We conclude, therefore, that factor three weighs in favor of permitting the late intervention of Brook Park.

4. Representation of Petitioner's Interests by Existing Parties

Brook Park contends with respect to the fourth factor — the extent to which Petitioner's interests will be represented by existing parties — that no other party now represents its interests. Its status as a nascent municipal electrical system is, according to Brook Park, a pivotal factor differentiating its interests from those now represented by the other intervening utilities.

This is especially so, Brook Park asserts, for the City of Cleveland, Ohio (Cleveland), because, as a large and well-established utility, it does not face the same competitive challenges as Brook Park. Brook Park also maintains that Cleveland is at least a potential competitor for the supply of a portion of Brook Park's power and energy requirements. *See* Brook Park Amended Petition at 17.

Concerning intervenor AMP–Ohio, which represents numerous Ohio municipal electric companies in acting as a wholesale power supplier, Brook Park notes that it is not an AMP–Ohio member. In addition, Brook Park contends that its interests are not represented by AMP–Ohio because, as a wholesale power supplier, AMP–Ohio does not compete in the retail electric market with any applicant, as will Brook Park. *See id.* at 16-17.

Brook Park also declares inapposite the interests of Alabama Electric Cooperative (AEC), which we admitted to this proceeding as a discretionary intervenor. *See* LBP-91-38, 34 NRC at 248-51. According to Brook Park, AEC is not a competitor in the relevant product and geographic markets previously established in the Commission's antitrust proceeding relative to the Perry and Davis-Besse facilities. *See* Brook Park Amended Petition at 17-18.

Finally, Brook Park declares that its interests as a particular beneficiary of the existing antitrust provisions clearly are different from those represented by the Staff and the Department of Justice in carrying out their broad, public-interest responsibilities. *See id.* at 18. *Compare* LBP-91-38, 34 NRC at 253.

The Applicants vigorously challenge Brook Park's analysis of its interests vis-a-vis those of the other parties to this proceeding. *See* Applicants' Answer at 7-10. They contend that the status of Cleveland as a "potential competitor" is irrelevant because it does nothing to differentiate Cleveland from Brook Park relative to the prosecution, in either phase one or phase two of this proceeding, of their identical, central position that the existing Perry and Davis-Besse antitrust conditions should be retained. Indeed, the Applicants assert that the Staff and the other intervening parties to the proceeding all champion this same central position and Brook Park has failed to show how its legal or factual positions diverge from theirs. The Staff, on the other hand, maintains that Brook Park has shown that it will not occupy the same distribution level as AMP–Ohio, and may be a customer of AMP–Ohio and Cleveland, thereby establishing a basis for concluding that its interests may not be adequately represented by the existing parties. *See* Staff's Answer at 6-7.

As it seeks to equate the duplication of substantive issues with a similarity of participants' interests, the Applicants' challenge is misdirected. *See Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). Rather, the question is, given the matters at issue, will the existing parties effectively represent Brook Park's interests relative to those matters.

In this instance, even when addressing the same matters as existing intervenors, Brook Park's singular status as an emerging municipal power system, in conjunction with its position as a possible customer or competitor of AMP–Ohio and Cleveland, translates into a difference in perspective, and approach, relative to those matters.[5] Moreover, because Brook Park must take this proceeding as it finds it, *see* section II.B.5, *infra*, the problem suggested by the Applicants, i.e., numerous intervenors addressing the same matters, really exists only for phase two of this proceeding and may invite the cure of party consolidation, a remedy we can take up if and when we reach that point. At present, however, that concern does not merit assigning factor four a negative weight in the late-intervention balance.

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[5] Although the Applicants imply that Brook Park's interests can be adequately represented by existing parties because the city's witnesses would be available to those parties, *see* Applicants' Answer at 7 n.16, it has previously been recognized that such an argument fails to afford proper recognition to the value of the participational rights enjoyed by parties, including conducting cross-examination. *See Duke Power Co.*, ALAB-528, *supra*, 9 NRC at 150 & n.7.

5. Petitioner's Participation as Broadening or Delaying the Proceeding

As has often been noted, late-comers to this agency's adjudicatory process generally must take the proceeding as they find it. *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). Nonetheless, the addition of a late-comer brings the possibility that its participation will broaden the issues or otherwise slow the proceeding. This prospect is assessed in the fifth late-filing factor, which quite properly has been denominated as "of immense importance in the overall balancing process." *Id.*

Brook Park contends that its participation will have no appreciable impact on this proceeding's completion. Declaring that it accepts the proceeding as it finds it, with regard to the first phase on the "bedrock" legal issue Brook Park asks only that, to preserve any appellate rights, it be permitted to file a formal statement specifying those portions of the arguments already advanced by the existing parties that it wishes to adopt. Brook Park further declares that if it becomes necessary to advance to phase two, its evidentiary presentation will not involve more than two or three witnesses. *See* Brook Park Amended Petition at 21-22. The Applicants counter by asserting that Brook Park's proposed phase-one submittal is either worthless, as a mere repetition of the other parties' positions, or will involve the formulation of new arguments that, by requiring time for responses, will delay the resolution of the pending summary disposition motion and, therefore, the proceeding. Further, given Brook Park's expressed intent to demonstrate how the removal of the existing antitrust conditions would harm its competitive position, the Applicants characterize Brook Park's participation in phase two as either irrelevant to the appropriate subject matter or as broadening the scope of phase two extraordinarily. *See* Applicants' Answer at 13-14. The Staff concludes that Brook Park's willingness to accept the existing briefing schedules means that this factor weighs in favor of late intervention. *See* Staff's Answer at 7.

To accept the Applicants' argument regarding delay arising from Brook Park's participation in phase one would, as a practical matter, stand this factor on its head. We perceive no basis for penalizing Brook Park for structuring its participation in such a way as essentially to eliminate any delay in the resolution of the pending motions. As for the Applicants' concerns about phase two, we are unable to accept its characterization of the burden imposed by Brook Park's participation because, pending the resolution of the "bedrock" legal issue, the final parameters of the issues to be litigated during that hearing have not yet been specified. This significant factor, therefore, supports late intervention by Brook Park.

6. Conclusion

As we have outlined above, even assuming that Brook Park did not have "good cause" for its late-filed petition, in this instance there is no reason for that factor to take on any particular weight relative to the other four factors. As to the other four, each one, including the important "delay" factor, supports permitting late intervention by Petitioner. As a consequence, we conclude that the balance of the section 2.714(a)(1) late intervention factors (in conjunction with its showing regarding its standing to intervene) now supports Brook Park's admission as a party.

For the foregoing reasons, it is, this sixth day of August 1992, ORDERED that:

1. The June 15, 1992 amended late-filed intervention petition of Brook Park is *granted* and it is admitted as a party to this proceeding.

2. On or before *Monday, August 17, 1992*, Brook Park may file a pleading indicating, by reference to the particular pages, the specific portions of the summary disposition filings of the existing parties it agrees with and wishes to adopt. This pleading is not to include any additional analysis or argument by Brook Park. No responses to this pleading will be entertained.

3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Charles Bechhoefer
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 6, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08681-MLA
(ASLBP No. 92-666-01-MLA)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

August 5, 1992

MEMORANDUM AND ORDER
(Request for Hearing and Stay of License Amendment)

I. REQUEST FOR HEARING

On July 2, 1992, the State of Utah filed a request for hearing on the issuance by the Nuclear Regulatory Commission of Amendment 30 to License No. SUA-1358. The State also requests a stay of the amendment pending completion of the proposed adjudication.[1] Licensee, the Umetco Minerals Corporation (UMC), opposes the hearing request,[2] and the Staff also filed a response in opposition to both the hearing request and the request for a stay.[3] The Staff indicates that it intends to participate as a party if a hearing is granted.

The UMC application for Amendment 30, filed on January 18, 1989, is to perform plant processing tests on 600 wet tons of feed containing source

[1] Request for Hearing and Stay, Utah Department of Environmental Quality and Assistant Attorney General, July 2, 1992.
[2] Letter from R.A. Van Horn, Director of Operations, UMC, to NRC Executive Director of Operations James Taylor, July 16, 1992.
[3] NRC Staff's Response to Request for Hearing by State of Utah, July 30, 1992.

material received from the Teledyne Wah Chang Company in Albany, Oregon. The material for the processing test is not natural ore mined for its uranium content but rather comes from the processing of ore to recover zirconium. It contains greater than 0.05% recoverable uranium, and UMC intends to process the material for its uranium content at its White Mesa Mill, a licensed facility in Blanding, Utah. After processing, UMC intends to dispose of the resulting tailings at the mill's impoundment. The State asserts that the NRC is taking licensing action without first adequately determining whether UMC is actually engaged in waste disposal of material from the Wah Chang Company instead of uranium reprocessing as alleged. As an Agreement State, Utah asserts that it, rather than the NRC, may have jurisdiction over the materials if they are either low-level waste or source material. Further, the State asserts that the NRC's amendment action may hinder the Department of Energy's (DOE) responsibility to assume long-term custodial care of the processed materials. Finally, the State also expresses a concern over the lack of NRC oversight of UMC's tests and the characteristics of the materials to be processed. The State contends, *inter alia*, that a hearing is necessary in order to resolve the nature of the materials being processed, the Licensee's intention in processing the material, and questions concerning title to the material.

In opposing the hearing, UMC cites NRC's regulations, 10 C.F.R. § 2.1205(c)(2)(i) and (ii), requiring that a hearing request must be filed within thirty (30) days after the requestor receives actual notice of a pending application or agency action granting the application, or 180 days after agency action granting the application, whichever is earlier. The Licensee contends that here the State had much more than 30 days' knowledge of the license amendment application prior to filing its hearing request. In support of its position, UMC references specific meetings it had with State environmental officials to discuss the application.[4] In its response, the Staff alleges that the State had actual notice of the pending application as early as April 1989.[5] Because the Presiding Officer is required under the Commission's regulations to determine that requests for hearings are timely filed, we address that issue first.

The applicable regulation, 10 C.F.R. § 2.1205(c)(2), states in its pertinent part that:

> (c) A person other than an applicant shall file a request for a hearing . . . .
>
> . . . .
>
> (2) If a *Federal Register* notice is not published in accordance with paragraph (c)(1), the earlier of —
>
> (i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or

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[4] Umetco Minerals Corporation, July 16, 1992, at 2.

[5] Staff Response at 6-7.

(ii) One hundred and eighty (180) days after agency action granting an application.

Both UMC and the Staff argue that since the State had actual notice of the then-pending license application months before the NRC approved and issued the amendment, a request for hearing was required to be filed within 30 days of such notice. The State rejoins that it was entitled to file, as it did, within 30 days of the agency action granting the license amendment. As the State does not appear to be seriously objecting to the assertion that it had prior notice of the pending application, the question here is whether 10 C.F.R. § 2.1205(c)(2)(i) provides for two windows of opportunity rather than one for filing a request for hearing.[6] Nothing in either the plain language of the regulation or the underlying Statement of Consideration militates against an interpretation providing two such windows of opportunity. There is nothing in the plain language of the regulation to support an opposite conclusion. Indeed, to subscribe to the position advanced by UMC and the Staff, one must conclude, without more, that the word "earlier" modifies both a notice of a pending application and notice of an agency action granting the application as well as the 180-day period set forth in 10 C.F.R. § 2.1205(2)(ii). Neither party has suggested any basis for such an interpretation, nor can it be supplied here. As physically structured and grammatically written, the words "earlier of-" refer to and modify the whole of subsection (i) and the whole of subsection (ii). The modifier "earlier" can neither structurally nor grammatically properly modify both components of subsection (i) as well as subsection (ii). To obtain that result, the regulation would have to be written with three subsections so that the current first subsection would be split into two separately numbered subsections and the current second subsection would become a third subsection. Accordingly, the plain language of section 2.1205(c)(2)(i) provides two windows of opportunity for filing a hearing request. As the U.S. Court of Appeals has suggested, an agency's interpretation of its own rules cannot fly in the face of the language of the rules themselves. *See Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (1983).

In support of this conclusion, the commentary in the Commission's Statement of Consideration refers to the fact that the proposed rule, in section 2.1205(c), provides that a hearing petition will be considered timely if filed within 30 days after the petitioner receives actual notice *of a licensing action*.[7] No rationale is apparent as to why the Commission would wish to require a person to file a hearing request at a time, such as is evident here, when ongoing communications may prevent the necessity for a hearing at all. That expectation would be extinguished only when the NRC approved the action being opposed by the State. It is a more reasonable procedure and, in any event, what the plain

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[6] State of Utah's Supplemental Request for Hearing at 1 (Aug. 31, 1992).
[7] *See* 54 Fed. Reg. 8271 (Feb. 28, 1989).

language of the regulation requires, that when an effort toward resolution fails, a 30-day period would then ensue for requesting a hearing. Here, the State acted within this time frame. Thus the State's request for a hearing was timely filed.

Alternatively, even if the State's petition is found untimely, its lateness is excusable under the provisions of 10 C.F.R. § 2.1205(k). In the circumstances, the fact that the State was engaged in discussions with the Staff, as well as the Licensee, on the requested license amendment makes the delay in filing an earlier request for hearing excusable. Also, the current request by the Staff, *agreed to by Licensee*, to delay processing of the material tends to buttress a finding that a grant of the hearing petition would not result in undue prejudice or injury to the other participants in the proceeding.[8] The fact that the proposed license amendment request was filed over 3-½ years ago, and no action has ensued to the present time, also supports a finding that no undue prejudice would result from the grant of the hearing petition alone.

The applicable regulations also require that the Presiding Officer determine that the specified areas of concern are germane to the subject matter of the proceeding and that the requestor meets the judicial standards for standing.[9] Neither the Licensee nor the Staff addresses the standing or areas of concern submitted in the State's petition.[10] No serious question can be raised on the State's standing in this proceeding. Its petition cites issues of jurisdiction over the materials involved, the proper characteristics of such material, the purpose for which the materials have been received, the failure to place proper conditions on the license amendment, and questions concerning governmental responsibility for the ultimate custody of the materials. These matters setting forth possible injuries in fact are within the zone of interests protected by statute and meet the standards for standing in Commission proceedings.[11] I find that the State has standing to participate and has set forth areas of concern germane to this proceeding.

II. REQUEST FOR STAY

In its petition, the State also requests a stay of the license amendment pending the completion of a hearing. In the Subpart L proceedings, an application for a

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[8] Presiding Officer Telephone Conference at 6-7 (July 30, 1992).

[9] 10 C.F.R § 2.1205(g).

[10] The Staff does allege, with supporting attachments, that substantially identical Utah State concerns have been addressed and resolved with notice and consent of the Commission prior to the issuance of the license amendment. NRC Staff Response at 8 n.14.

[11] *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976).

stay is governed by the provisions of 10 C.F.R § 2.1263 which incorporates the traditional four-stay criteria of 10 C.F.R. § 2.788:

1. Whether the movant has made a strong showing that it is likely to prevail on the merits;
2. Whether the movant has shown that it will be irreparably injured unless a stay is granted;
3. Whether a stay would harm other parties; and
4. Where the public interest lies.

Under the Commission's regulations, 10 C.F.R. § 2.1237(b), the State has the burden of persuasion on these factors. Here, however, the State's petition fails even to address the criteria for a stay set forth in the regulation. Although arguably the third- and fourth-stay criteria might be satisfied by the State's recital of its concerns, the failure to address the first two criteria is fatal to its request. Obviously, the public interest would be served in having the question of jurisdiction finally established. Similarly, the Licensee would not be harmed by a stay because it has agreed to the Staff's request to delay any materials processing until an effort is made to resolve the State's concerns, *supra*. But since the State has made no showing that it is likely to prevail on the merits or that it will be irreparably injured, a stay cannot be granted. The request for a stay is therefore denied.

Order

For the reasons stated, it is, this 5th day of August 1992, ORDERED:

1. The request for hearing by the State of Utah is granted and the request for a stay of Amendment 30 to License No. SUA-1358 is denied.

2. A hearing on the License Amendment will be held and the time and other details concerning the hearing will be published at a future date.

3. Petitions to intervene in this proceeding must be filed within thirty (30) days of this Order appearing in the *Federal Register*. The Licensee and Staff will have ten (10) days to respond after service of any petition.

4. An appeal from this Order, by parties other than the petitioner, may be filed with the Commission within ten (10) days of the service of the Order. 10 C.F.R. § 2.1205(n).

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 5, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of

Docket Nos. 50-348-CivP
50-364-CivP
(ASLBP No. 91-626-02-CivP)

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

August 12, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

In this proceeding, Licensee Alabama Power Company (APCo) has challenged the NRC Staff's imposition of a $450,000 civil penalty for alleged violations of the Commission's requirements in 10 C.F.R. § 50.49 regarding environmental qualification of electrical equipment important to safety. *See* 55 Fed. Reg. 35,203 (1990). During 12 days of hearings in February and May of this year, APCo and the NRC Staff presented numerous witnesses in support of their positions regarding the civil penalty. *See* Tr. 1-2309. Thereafter, the Board established a filing schedule for the parties' proposed findings of fact and conclusions of law. *See* Memorandum and Order (June 1, 1992) (unpublished). Now, by joint motion dated August 6, 1992, the parties request that we approve a settlement stipulation they have provided and terminate this proceeding prior to a merits determination relative to any of the legal or factual matters at issue.

Pursuant to section 234 of the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. § 2282, and 10 C.F.R. § 2.203, we have reviewed the settlement agreement to determine whether approval of the agreement and termination of this proceeding is in the public interest. On the basis of that review, and according due weight to the position of the Staff, we have concluded that the parties' agreement and the termination of this proceeding are consistent with the public interest.*

Accordingly, the joint motion of the parties is *granted* and we *approve* the "Settlement Agreement," which is attached to (not published) and incorporated by reference in this Memorandum and Order. Further, pursuant to AEA sections 103, 161(b), 161(o), and 191, 42 U.S.C. §§ 2133, 2201(b), 2201(o), 2241, and 10 C.F.R. § 2.203, the Board *terminates* this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Peter A. Morris
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 12, 1992

*Previously, we have recognized that counsel for both parties have displayed a laudable spirit of cooperation in litigating this matter, *see* Tr. 1318-19, 2308, an observation that bears repeating in light of their settlement of this otherwise vigorously contested proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08681-MLA
(ASLBP No. 92-666-01-MLA)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

August 12, 1992

MEMORANDUM AND ORDER
(Amendment)

The Order issued on August 5, 1992, should have provided for an appeal of the denial of the State of Utah's (State) request for a stay of the Nuclear Regulatory Commission's grant of a license amendment to the Umetco Minerals Corporation. I now amend that Order to provide an opportunity to the State for an appeal of my decision on the stay request. An appeal may be filed within ten (10) days of the service of this Amendment, or such other times as the Commission may direct.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Thomas D. Murphy

In the Matter of

Docket No. 50-312-DCOM
(ASLBP No. 92-663-02-DCOM)
(Decommissioning Plan)
(Facility Operating License
No. DPR-54)

SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station)

August 20, 1992

In a proceeding concerning a proposed decommissioning plan for a facility, the Licensing Board rules that, because the single petitioner for intervention lacks standing to participate, has submitted no proposed contentions adequate for adjudication and, for that reason, also does not warrant discretionary intervention, the petition should be denied and the proceeding terminated.

RULES OF PRACTICE: INTERVENTION

To participate as a party in an NRC adjudicatory proceeding, a petitioner must initially demonstrate both that it has standing and has proffered at least one viable contention. 10 C.F.R. §§ 2.714(a)(2) and (d)(1)(iii).

RULES OF PRACTICE: STANDING

The Commission applies contemporaneous judicial concepts of standing, which require a petitioner to demonstrate that (1) it has suffered or will likely suffer "injury in fact" from the action under review, an injury that would be redressable by a favorable decision in the proceeding; and (2) the injury falls within the "zone of interests" at least arguably sought to be protected by the statute being enforced.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In determining whether injury in fact has been adequately set forth, a Licensing Board is limited to assertions actually pleaded by the petitioner; it may not assume or presume facts not actually pleaded.

RULES OF PRACTICE: SERVICE OF DOCUMENTS

A licensee must serve relevant documents on other parties, not upon petitioners for intervention. 10 C.F.R. §§ 2.701, 2.712. Adjudicatory documents filed by parties responsive to or bearing upon intervention petitions must be served on the petitioners.

RULES OF PRACTICE: INTERVENTION PETITION (GROUP)

An organization may gain standing in two ways: (1) in its own right, assuming one of its own interests has been or may be adversely affected, or (2) as a representative of one or more of its members, assuming that such members otherwise have standing, the interests it seeks to protect are germane to the organization's purposes, and neither the claim asserted nor the relief requested require the individual member's participation in the lawsuit.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In seeking representational standing, an organization normally must provide affidavits of members who authorize the organization to represent their interests.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

An organization pleading injury to informational interests, such as the failure to receive information appearing in an environmental impact statement, must allege explicit environmental harm with a direct impact upon the petitioner. A generalized claim is not enough.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

The presumption of standing for those living or working within 50 miles of a facility applies only in proceedings involving reactor construction permits, operating licenses, or significant amendments thereto, where there is clear implications for the offsite environment or a clear potential for offsite consequences. In other situations, a petitioner must allege some specific injury.

RULES OF PRACTICE: STANDING (ZONE OF INTERESTS)

Protection of financial interests such as excessive electric rates or higher fuel costs is not within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act.

RULES OF PRACTICE: STANDING (DISCRETIONARY)

The most important criterion for evaluating whether discretionary standing should be granted is the extent to which the participant's participation may reasonably be expected to assist in developing a sound record.

RULES OF PRACTICE: COLLATERAL ESTOPPEL

The NRC may apply collateral estoppel principles, where appropriate. Collateral estoppel requires an identity of issues. It is an equitable doctrine, not required as a matter of law, that should be applied only with a sensitive regard for any changed circumstances or the possible existence of some public interest factors. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203; ALAB-182, 7 AEC 210 (1974).

RULES OF PRACTICE: CONTENTIONS

Incorporating by reference Staff questions to a licensee, without explaining their significance, fails to conform to the pleading requirements for contentions.

RULES OF PRACTICE: CONTENTIONS

As amended in 1989, the Rules of Practice require, with respect to contentions, a specific statement of law or fact to be raised or controverted, a brief explanation of the bases, a concise statement of supporting "facts or expert opinion," together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely, and suffi-

cient information to show a genuine dispute with the applicant (or licensee) on a material issue. If proved, the contention must entitle the petitioner to relief.

NEPA: ENVIRONMENTAL REPORT

The decommissioning environmental review supplements the operating license review and thus need only reflect new information or significant environmental change associated with decommissioning or storage of spent fuel. 10 C.F.R. § 51.53(b).

NEPA: GENERIC ISSUES

The environmental impact of decommissioning can normally be delineated in generic terms through reference to the Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586). To the extent that impacts from decommissioning a particular plant are significantly different from the generic impacts, they may be covered in a supplemental impact statement.

NEPA: SCOPE OF REVIEW

The scope of a decommissioning action must be contrasted with the scope of an action to discontinue facility operation (for which no license is required). Need for power and the environmental effects of replacement power relate to ceasing operations, not to decommissioning.

NEPA: CONSIDERATION OF ALTERNATIVES

An agency need consider only alternatives that lead to the objective of a proposal. For decommissioning, the NRC need consider only alternate forms of decommissioning, together with the "no action" alternative. Resumed operation is an alternative only to the cessation of operations, not to decommissioning.

PREHEARING CONFERENCE ORDER
(Terminating Proceeding)

This proceeding involves consideration of a proposed order approving a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station (hereinafter, Rancho Seco), located near Sacramento, California. For reasons set forth below, the single petition for leave to intervene and request for a hearing that has been filed is deficient in failing to

establish the standing of the Petitioner to participate (either as a matter of right or of discretion) or the adequacy of any proposed contention. Accordingly, we are denying the intervention petition and terminating the proceeding.

I. BACKGROUND

A public referendum on June 6, 1989, required the Sacramento Municipal Utility District (hereinafter SMUD or Licensee) to discontinue operation of Rancho Seco. As a result, SMUD decided to shut down the facility, and it has taken a multistage approach to reach this result.

On June 7, 1989 (the day following the public vote), SMUD discontinued producing power from the facility.[1] Reactor defueling was completed on December 8, 1989.[2] On April 26, 1990, the Licensee continued its scale-down activities by applying to convert the operating license into a possession-only license (POL) that would authorize only the "use and possession" of the facility, not its operation. Following an adjudicatory proceeding during which the Petitioner now before us sought unsuccessfully to intervene, that application was approved by the Commission on March 17, 1992.[3]

The final stage involves a proposed decommissioning plan, leading eventually to termination of the operating license and release of the site for unrestricted use. *See* 10 C.F.R. § 50.82. On May 20, 1991, the Licensee filed its application for termination of its license, including a proposed decommissioning plan.[4] In general, the plan provides for 10 to 20 years of onsite storage (SAFSTOR) followed by the removal of residual radioactivity.[5] On October 21, 1991, SMUD filed a supplement to its environmental report, concerning the impacts of the method of decommissioning it had selected. The NRC Staff began reviewing the application and, on March 12, 1992, requested additional information from the Licensee on both the decommissioning plan and the environmental report. (The Licensee responded on April 15, 1992.)

On March 19, 1992, the NRC published a Notice of Opportunity for Hearing with respect to both the decommissioning plan and the environmental report.[6] One timely request for a hearing and petition for leave to intervene was filed,

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[1] Sacramento Municipal Utility District, Rancho Seco Nuclear Generating Station, Proposed Decommissioning Plan (DP), p. 1-27; *see also* 57 Fed. Reg. 9577 (Mar. 19, 1992).

[2] *Id.*

[3] Amendment 117 to Facility Operating License No. DPR-54, 57 Fed. Reg. 10,193 (Mar. 24, 1992). The effective date of this amendment was made subject to two stays of 10 working days each, leading to an April 24, 1992 effective date for the POL. *See generally* CLI-92-2, 35 NRC 47 (1992).

[4] SECY-92-150, "Quarterly Report on the Status of Prematurely Shut Down Plants," at 4 (furnished to Licensing Board and hearing participants by Memorandum from Chief, Docketing and Services Branch, Office of the Secretary, NRC, dated April 28, 1992).

[5] 57 Fed. Reg. 9577 (Mar. 19, 1992). *See also* DP at 1-1.

[6] 57 Fed. Reg. 9577.

by the Environmental and Resources Conservation Organization (hereinafter, ECO), on April 20, 1992. As noted earlier, ECO had sought unsuccessfully to participate in the POL proceeding. On May 13, 1992, the Commission established this Licensing Board to consider the petition and preside over a hearing if one were ordered.[7]

SMUD and the NRC Staff each opposed ECO's hearing request and intervention petition.[8] Because a petitioner for intervention is permitted by 10 C.F.R. § 2.714(a)(3) to amend its petition without leave of the Board until 15 days prior to the first prehearing conference, the Board, by Memorandum and Order dated May 15, 1992, set schedules for the filing of an amended petition, including contentions, receipt of responses, and a prehearing conference.

ECO filed a timely amendment/supplement to its petition on June 29, 1992. On July 8 and 10, 1992, the Licensee and Staff, respectively, filed responses in opposition to the amended petition. The Board conducted a prehearing conference in Bethesda, Maryland, on July 14, 1992, at which representatives of ECO, SMUD, and the Staff appeared.[9]

Following the prehearing conference, on July 17, 1992, ECO filed two motions: (1) a Motion for an Order to Compel Service, and (2) a Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing. The Licensee opposed both of these motions and filed cross-motions to strike certain portions of each motion; the Staff opposed the second motion but took no position on the first.[10] (The Staff supported the Licensee's motions to strike.[11]) Thereafter, on August 14, 1992, ECO filed two more motions: (1) ECO's Motion to Strike, and (2) its Anticipatory Motion for Leave to File ECO Pleading (seeking leave to file the foregoing Motion to Strike). We treat these motions later in this Opinion.

II. STANDING

To participate as a party in an NRC adjudicatory proceeding, a petitioner must initially demonstrate both that it has standing and that it has proffered

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[7] 57 Fed. Reg. 21,433 (May 20, 1992).

[8] Licensee's Answer, dated May 5, 1992; NRC Staff Response, dated May 11, 1992.

[9] *See* Tr. 1-180. The conference had been announced by a Notice of Prehearing Conference, dated June 23, 1992, published at 57 Fed. Reg. 29,339 (July 1, 1992).

[10] Licensee's Answer in Opposition to Petitioner's Motion for an Order to Compel Service and Licensee's Motion to Strike Portions Thereof, dated July 27, 1992; Licensee's Answer in Opposition to Petitioner's Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing and Licensee's Motion to Strike Portions Thereof, dated July 27, 1992; NRC Staff Response in Opposition to ECO's Contingent Motion to Withhold Any Order Wholly Denying Its Petition for Leave to Intervene, dated August 6, 1992.

[11] NRC Staff Response in Support of Licensee's Motions to Strike Improper Argument in Environmental and Resources Conservation Organization's Filings, dated August 17, 1992.

at least one viable contention. 10 C.F.R. § 2.714(a) and (b). Turning first to standing, the petitioner must demonstrate its interest in the proceeding (10 C.F.R. § 2.714(a)(2)) and the "possible effect of any order that may be entered . . . on [its] interest" (10 C.F.R. § 2.714(d)(1)(iii)).

To determine whether a petitioner has adequately demonstrated its standing, the Commission applies contemporaneous judicial concepts of standing. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Those standards involve a two-pronged test: (1) the petitioner must demonstrate that it has suffered or will likely suffer "injury in fact" from the action under review, an injury that would be redressable by a favorable decision in the proceeding; and (2) the injury must fall within the "zone of interests" at least arguably sought to be protected by the statute being enforced — here, either the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *see Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. ___, ___, 112 L. Ed. 2d 1125, 1134 (1991); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

An organization such as ECO may gain standing in two ways. First, it may demonstrate standing in its own right, assuming one of its own interests has been or may be adversely affected. However, if such interest is informational, such as the failure to receive information appearing in an environmental impact statement, explicit environmental harm with a direct impact upon the petitioner must also be alleged. A generalized claim of informational injury is not enough. CLI-92-2, *supra*, 35 NRC at 57-60; *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991); *see also Lujan v. National Wildlife Federation*, 497 U.S. 871, ___, 111 L. Ed. 2d 695, 712-13 (1990).

Second, an organization may gain standing as a representative of one or more of its members, assuming that such members otherwise have standing, the interests it seeks to protect are germane to the organization's purposes, and neither the claim asserted nor the relief requested require the individual member's participation in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The members must normally provide affidavits authorizing the organization to represent their interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979).

At the outset, we note that both the Licensee and the Staff assert that ECO should be estopped from asserting its standing claims in this proceeding because of their similarity or, indeed, identity with claims unsuccessfully asserted as a basis for standing in the POL proceeding. The NRC may, of course, apply collateral estoppel principles where appropriate. *See, e.g., Alabama Power Co.*

(Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974).

Collateral estoppel is an equitable doctrine, not required as a matter of law, that should be applied only "with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some public interest factor in the particular case . . . ." *Farley*, CLI-74-12, *supra*, 7 AEC at 203-04; ALAB-182, *supra*, 7 AEC at 216. For collateral estoppel to apply, there must be an identity of issues — here, the issue of ECO's standing. *Farley*, ALAB-182, *supra*, 7 AEC at 213.

Despite the similarity of ECO's standing assertions in the POL proceeding and this proceeding, the scope of this decommissioning proceeding appears to be sufficiently different from the POL proceeding to at least raise questions as to whether changed circumstances may be present. Among other matters, the health and safety and environmental effects of the two proceedings do not appear identical.

The Licensee and Staff have not addressed these apparent differences or shown that they would not affect ECO's standing status in this proceeding. In addition, we perceive some public-interest considerations in affording ECO a full opportunity of convincing this Board of its standing. (We, of course, do recognize various prior rulings of the Commission for their precedential value.) We conclude that the Licensee and Staff have not made a sufficient showing on the identity of the standing issues in the two proceedings for collateral estoppel to apply, and we decline to bar ECO's standing claims on that basis.

A. Injury in Fact

In determining whether injury in fact has been adequately set forth, we are limited to assertions actually pleaded by the petitioner. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114 (1992). The petition itself must "set forth with particularity" the elements of standing. 10 C.F.R. § 2.714(a)(2). We are thus not permitted to assume or presume the existence of facts not actually pleaded. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

ECO's claims for having standing are set forth in both its April 20, 1992 petition and its June 29, 1992 supplement. The latter document additionally sets forth contentions, to which we will refer to the extent relevant to the standing claims.

Although not a model of clarity, ECO has put forward several discrete bases for its standing. Specifically, it sets forth (1) claimed injuries to itself as an

organization, and (2) claimed injuries of certain specified members whom it represents.[12] We turn to each of these claims:

1. ECO first asserts that it (as well as its members) will be adversely affected if an environmental impact statement (EIS) for the proposed decommissioning is not prepared. With respect to its organizational interests, ECO initially stated that

> ECO strongly supports the use of nuclear plants to provide the safe and domestically secure electricity needed in this country. This mission necessarily includes intervening in the present matter where the destruction of a state-of-the-art nuclear reactor is sought in order to inform decisionmakers and the public of the consummate folly of decommissioning Rancho Seco.[13]

ECO goes on to state that the NRC Staff's failure to indicate that it will prepare an EIS on the decommissioning deprives ECO of its ability to comment directly on the environmental report prepared by SMUD and on a draft EIS prepared by the Staff, to advise its members of the environmental risks involved with each alternative and to report the findings and recommendations of the environmental evaluations to the public.[14]

ECO's supplemental petition adds little with respect to organizational standing, except to indicate that the contentions contained therein are examples of the injury suffered by ECO. (An affidavit by the President of ECO is also provided, formalizing in essence ECO's general claims and providing ECO's articles of incorporation, setting forth the organization's purposes.) Looking at the contentions, the only one bearing on ECO's organizational standing claims is the purported lack of an EIS (including alleged inadequacies in the Licensee's Environmental Report).

It is clear from the precedents cited above that ECO has failed to present an adequate basis for organizational standing. The lack of an EIS would at most affect ECO's informational interests, but nowhere is there asserted any environmental harm that would affect the organization, other than informationally. That being so, ECO has not satisfied the informational harm criteria sanctioned by recent court decisions and set forth by the Commission — with respect to ECO itself — in the POL proceeding. CLI-92-2, *supra*, 35 NRC at 57-61. It thus has not established standing on that basis.

2. ECO also seeks standing as the representative of certain of its members. In its initial petition, ECO listed the names of two members who purportedly live within 50 miles of the facility. No affidavits authorizing representation by ECO were included.

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[12] April 20, 1992 Petition at 4; June 29, 1992 Supplement at 2-10.
[13] April 20, 1992 Petition at 19.
[14] *Id.* at 19-20.

The only description of how these individuals might be affected by the proposed decommissioning action was that they "have an interest in whether the proposed order provides reasonable assurance of their radiological health and safety . . . and whether the decision . . . is made in accordance with and is consistent with the goals of NEPA."[15] ECO goes on to claim that certain of its members (not explicitly the two listed) depend on SMUD to meet their electric energy needs and that ECO has a vital interest in ensuring that an adequate and reliable supply of electricity will be available. Nowhere does ECO provide any factual basis for its thesis that radiological health and safety of the two listed members would be compromised or that their future supply of electricity would become unreliable. Nor does it show how, as it claims, the absence of Rancho Seco would lead to the substitution of fossil fuel plants that would contribute not only to acid rain, the greenhouse effect, and other effects adverse to the environment but also to the endangerment of national energy security.[16]

In its Supplement, ECO refers only to one of the aforementioned members, identifying him as living 43 miles from the facility and providing an affidavit authorizing ECO to represent his interests. It relies on the so-called "presumption of standing which attaches to residency within a 50 mile radius of the plant."[17] It also cites portions of the decommissioning plan and the environmental report which analyze certain effects of the plan extending as much as 50 miles from the facility.[18]

As the Commission has explicitly held, the 50-mile presumption of standing applies only in proceedings involving reactor construction permits, operating licenses, or significant amendments thereto — cases "with clear implications for the offsite environment, or . . . a clear potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). In other situations, a petitioner must allege "some specific 'injury in fact' that will result from the action taken . . . ." *Id.* at 330.

As we have seen, ECO has relied primarily upon the so-called presumption. It asserts that decommissioning involves at least as much radioactivity as a construction permit and, thus, that the same presumption should apply. This reasoning, however, ignores the foundation for the 50-mile presumption — the fact that significant offsite consequences can result from the operation of a facility for which a construction permit is sought. ECO does not even allege

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[15] April 20, 1992 Petition at 18.

[16] ECO makes other claims — likewise unspecific — concerning the members' interest in electricity at reasonable rates, the likely rise in those rates as a result of decommissioning, and the contribution of decommissioning to the national trade deficit. As set forth later in this Opinion, at pp. 130-31, *infra*, none of the claims of that sort fall within the zones of interest arguably sought to be protected by the Atomic Energy Act or NEPA.

[17] Supplement at 8. *See also* Oral Argument, Tr. 6-8.

[18] Supplement at 10.

that similar offsite radiological or environmental consequences eventuate from decommissioning. As for its second claim, ECO has made no attempt to show how any of the effects cited in the decommissioning plan or environmental report as extending as much as 50 miles from the facility affect the particular individual.

At the prehearing conference, ECO asserted that the individual whom it represents would also be affected by the radiological effects of transportation attendant to the decommissioning proposal — "the transportation of spent fuel . . . and high level transuranic and low level waste off site and through the area surrounding the plant where [the individual represented by ECO] lives."[19] ECO had not mentioned transportation either in its pleadings or in the affidavit of the affected individual. And it has not spelled out what the radiological impact, if any, would be on the affected individual. Because of this lack of particularity, as well as ECO's failure to mention transportation prior to the prehearing conference, we are not accepting any of ECO's transportation assertions in our consideration of its standing.[20]

In sum, ECO's unsupported general references to radiological consequences are insufficient to establish a basis for injury. Similarly, as the Commission has made clear in an earlier ruling in another case, the social-type environmental consequences that ECO alleges will come not from decommissioning but from the prior, unreviewable action of SMUD to discontinue operation of the facility. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-08 (1990), *reconsideration denied*, CLI-91-2, 33 NRC 61 (1991). That being so, ECO has not adequately alleged "injury in fact" to its member to support its claim of representational standing.

B. Zone of Interests

Not only must a petitioner allege "injury in fact," but the injury alleged must be within the zone of interests allegedly sought to be protected by the Atomic Energy Act or NEPA (the only two statutes that govern in the current situation). We need not devote extended discussion to this matter, given our determination that no valid "injury in fact" has been pleaded. However, because of our authority in certain circumstances to permit discretionary standing, we will at least touch briefly on the zone-of-interests question.

It has long been held that protection of financial interests such as excessive electric rates or higher fuel costs is not within the zone of interests sought

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[19] Tr. 8.

[20] In addition, transportation impacts are not at issue in this proceeding. We express no view, however, on whether transportation impacts arising from a decommissioning proposal could serve as a basis for standing, irrespective of their litigability in this proceeding.

to be protected either by the Atomic Energy Act or NEPA. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806, *aff'd*, CLI-76-27, 4 NRC 610, 614 (1976); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-21 (1977). Just recently, the Commission reiterated the same point in its ruling on ECO's attempt to enter the POL proceeding. CLI-92-2, *supra*, 35 NRC at 56. Specifically with respect to NEPA, the Commission observed that, although NEPA does protect some economic interests, it only protects against those injuries resulting from environmental damage. We reiterate again that no such injury is here alleged.

ECO's very general claims with respect to radiological health and safety may not run afoul of the zone-of-interests test. But, as set forth earlier, they are so generalized, so lacking in specific detail as to injury in fact, that they cannot serve as a basis for standing.

C. Conclusions as to Standing of Right

For the reasons set forth above, ECO has failed to present a valid claim of "injury in fact," either organizationally or as a representative of its listed member. Most of its claims also fail to fall within the zone of interests arguably protected by the Atomic Energy Act or NEPA. That being so, we hold that ECO has failed to establish standing of right.

D. Discretionary Standing

ECO next claims that, should we determine that it lacks standing of right, we nevertheless grant it discretionary standing, as authorized by the Commission in *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614-17. There, the Commission set forth criteria to evaluate whether discretionary intervention should be granted — the most important of which is "[t]he extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record." *Id.* at 616.

The Licensee and Staff each claim that discretionary intervention is not permissible in a situation where, as here, no other petitioner has sought a hearing. In *Watts Bar*, ALAB-413, *supra*, 5 NRC at 1422, the Appeal Board suggested otherwise, commenting that intervention as a matter of discretion could trigger a hearing when there was "cause to believe that some discernible public interest will be served by the hearing." A licensing board recently adopted that viewpoint, although not permitting intervention in the particular situation. *Envirocare of Utah, Inc.*, LBP-92-8, 35 NRC 167, 182-83 (1992).

Here, although we tend to favor the *Watts Bar* and *Envirocare* approach, we need not reach the question. For, in view of the contentions sought to be litigated by ECO, none of which are acceptable (see discussion *infra*), we have determined that ECO would not reasonably be expected to assist in building a sound record on which the Commission may base its decision in this proceeding. We thus are declining to grant discretionary standing.

III. CONTENTIONS

To be admitted as a party, ECO must not only establish its standing but also proffer at least one valid contention. Although we would not routinely consider the validity of contentions where standing has not been found, we are doing so here in light of ECO's request for us to grant discretionary standing.

ECO's proposed contentions are not clearly labelled as such. At the prehearing conference, ECO attempted to include as contentions material from its initial petition (not there designated as contentions) as well as material from its June 29, 1992 supplement.[21] Because of our direction that contentions be filed in the supplement, we ruled that only information appearing in the supplement would be considered as contentions.[22] We therefore turn to Parts III and IV of ECO's supplement, which contain, respectively, ECO's environmental and safety-based contentions.

A. General Criteria for Contentions

Before dealing with specific contentions, we here review the standards for admissibility of contentions. The applicable rules, 10 C.F.R. § 2.714(b) and (d), were amended in 1989 "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (1989).

In short, they now require, *inter alia*, that there be a specific statement of law or fact to be raised or controverted, a brief explanation of the bases of the contention, a concise statement of the "facts or expert opinion" that support the contention, together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists with the applicant (or licensee) on a material issue. On NEPA issues, the contentions are to be based on the applicant's or licensee's environmental report. Further, the contention must be of consequence in the proceeding and, if proved, entitle the petitioner to relief of some sort.

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[21] Tr. 109.
[22] Tr. 112.

B. Environmental Contention

In Part III of its Supplement, ECO presents what it describes as a single environmental contention, which is divided into several subparts.[23] Its general thrust is that "SMUD's environmental report is inadequate."[24] At least two reasons are assigned — first, that the NRC's Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586) (hereinafter, GEIS) provides inadequate consideration of decommissioning of Rancho Seco under NEPA; and second, that SMUD's October 21, 1991 Supplement to its Environmental Report is "totally inadequate."

As background to this contention, ECO lists what it characterizes as the various "mandatory" requirements for environmental reports, as set forth in 10 C.F.R. § 51.45. It then goes on to particularize what it describes as additional requirements for an environmental re for decommissioning. ECO then asserts that NEPA requires the conside..ion of "cumulative impacts," which it goes on to define as including "past" actions, regardless of what person undertakes such action. It next sets forth what it deems NEPA to require by way of defining "Major Federal action" and "significantly affecting the quality of the human environment." Finally, it describes requirements for the consideration of alternatives, including the "no action" alternative.

As its first specific claim, ECO asserts that NUREG-0586 provides "inadequate consideration" of the decommissioning of Rancho Seco. It lists several reasons: i.e., that its purpose was to assist NRC in developing policies and amended regulations dealing with decommissioning, that it was never intended to deal with decommissioning of a facility that had not reached the end of its useful life by age or accident, and that it provides inadequate treatment of radiological impacts and virtually no treatment of nonradiological impacts.

ECO then goes on specifically to describe several alleged omissions from the Environmental Report. Most specifically, ECO scores the report for omitting any meaningful discussion of alternatives, either the "no action" alternative or the alternative of resumed operation, and for failing to include a cost-benefit balance. ECO explicitly states that

> the availability of the option of selling SMUD [*sic*; should be Rancho Seco] to a responsible entity for operation rather than decommissioning is a significant distinction between this case and the Shoreham situation where there was an agreement to decommission.[25]

Finally, ECO faults the environmental report on the basis of the Staff's March 12, 1992 questions. It attempts to incorporate those questions by reference,

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[23] Supplement at 16-28; Tr. 114.
[24] Supplement at 16.
[25] *Id.* at 27.

contending without further explanation that "each one" represents a deficiency in the report.

The Licensee and Staff assert that this environmental contention involves matters previously designated by the Commission as unnecessary for the environmental review of decommissioning, such as need for power or the environmental effects of replacement power. Moreover, they declare that the numerous vague and unsupported allegations in the environmental contention fail to meet the rather stringent pleading requirements that the Commission adopted in 1989, because they include no facts that would establish a material issue of fact or law.

With respect to issues of law, the Licensee and Staff assert that the major thrust of ECO's environmental claims — that the effects of ceasing operations are cumulative effects that must be analyzed in an EIS — has been rejected by the Commission with respect to decommissioning. Further, they contend that ECO's challenge to the use made by the Licensee of the GEIS fails to acknowledge the Commission's directions with respect to the GEIS.[26]

In reviewing ECO's environmental assertions, it is clear that ECO misperceives the character of the environmental review established by the Commission for a decommissioning case such as this. The Commission views the environmental review as a supplement to that which already occurred during the operating license phase of the proceeding. Thus, a licensee's environmental report for decommissioning need only "reflect any new information or significant environmental change associated with the [licensee's] proposed decommissioning activities or with the [licensee's] proposed activities with respect to the planned storage of spent fuel." 10 C.F.R. § 51.53(b).

Beyond that, the Commission has concluded that, in the usual case, the environmental impact of decommissioning can be delineated in generic terms through reference to the GEIS. To the extent that the impacts from decommissioning a particular plant are significantly different from the generic impacts, those impacts may be covered in a supplemental EIS. Thus, in promulgating decommissioning regulations in 1988, the Commission stated with respect to the GEIS:

> The Commission's primary reason for eliminating a mandatory EIS for decommissioning is that the impacts have been considered generically in a GEIS. The Commission determined that examination of these impacts and their cumulative effect on the environment and their integration into the waste disposal process could best be examined generically. A final, updated GEIS has been issued . . . . The GEIS shows that the difference in impacts among the basic alternatives for decommissioning is small, whatever alternative is chosen, in comparison with the impact accepted from 40 years of licensed operation. The relative impacts are expected to be similar from plant to plant, so that a site-specific EIS would result

[26] *See* pp. 134-35, *infra*.

> in the same conclusions as the GEIS with regard to methods of decommissioning. Although some commenters correctly point out that an EA is much less detailed in its assessment of impacts than an EIS, if the impacts for a particular plant are significantly different from those studied generically because of site-specific considerations, the environmental assessment would discover those and lay the foundation for the preparation of an EIS. If the impacts for a particular plant are not significantly different, a Finding of No Significant Impact would be prepared.[27]

With this in mind, it is not difficult to perceive why a separate EIS for decommissioning a particular facility is rarely, if ever, necessary. *See Shoreham*, CLI-91-2, *supra*, 33 NRC at 74; *id.*, CLI-90-8, *supra*, 32 NRC at 209.

To repeat, no NRC approval is required for a licensee to cease operation. *Shoreham*, CLI-90-8, *supra*, 32 NRC at 207. That decision is SMUD's to make and does not represent federal action of any kind. Therefore, no EIS need be prepared for that action. Moreover, the impacts that ECO now seeks to have discussed relate only to the cessation of operations — they are not impacts of decommissioning. *Shoreham*, CLI-91-2, *supra*, 33 NRC at 71. That being so, they are not pertinent to the environmental effects of decommissioning — with which ECO has not taken issue or raised any environmental question.

Resumed operation would be an alternative only to the cessation of operation, not to decommissioning (as to which the Commission has stated that only alternative forms of decommissioning, together with "no action," are all that need be discussed.) *Shoreham*, CLI-90-8, *supra*, 32 NRC at 208. As pointed out by the Licensee,[28] this is consistent with cases holding that, under NEPA, an agency need consider only alternatives that lead to the objective of a proposal. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1020-22 (9th Cir. 1986) (per curiam), *cert. denied*, 484 U.S. 870 (1987); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 116 L. Ed. 2d 638, 112 S. Ct. 616 (1991). Resumed operations thus need not be considered in conjunction with the proposed decommissioning action that is before us.

Failure to prepare an EIS may be an issue raised in certain proceedings. But where, as here, the action is allegedly deficient for failing to include matters that the Commission has already ruled are outside the scope of consideration of a proceeding such as this, we decline to consider a contention to that effect. Further, where the Licensee has filed an Environmental Report that on its face attempts to supplement the GEIS with site-specific information sufficient to provide the Commission with information to determine whether a supplemental EIS may be necessary, we will not entertain an unsupported generalized claim that the Commission is placing undue reliance on the GEIS in its assessment of the impacts of decommissioning the particular facility.

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[27] 53 Fed. Reg. 24,018, 24,039 (1988).

[28] Licensee's July 8, 1992 Answer at 10.

Finally, ECO's attempt to incorporate by reference the questions asked by the Staff concerning the environmental report fails to comply with the Commission's pleading requirements. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346, 357-58 (1991). ECO does not describe the significance of the matters to which the questions are addressed or why, indeed, they might constitute a defect in the environmental report. Even under the Commission's earlier rules, they would not have been pleaded sufficiently. *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976); *see also Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768-78 (1977).

ECO's environmental contention is accordingly rejected.

C. Safety Contentions

ECO includes six safety-related contentions in part IV of its Supplement (designated Contentions IV.A–IV.F). The Licensee and Staff deem each of them to be legally or factually incorrect and to be inadequately pleaded under the Commission's contention requirements.

Contention IV.A asserts that the decommissioning plan is premised upon, *inter alia*, the availability of Hardened-SAFSTOR to be implemented after the fuel has been moved to dry storage in an Independent Spent Fuel Storage Installation (ISFSI). ECO claims, however, that "SMUD has terminated its application for the ISFSI thereby invalidating a large part of the decommissioning plan."

ECO provided no basis for this claim, thereby invalidating the contention on pleading grounds. But when asked for its source at oral argument, ECO identified a letter from SMUD to the Staff, dated March 20, 1992, which requests the Staff to "terminate" certain aspects of its review pending selection by SMUD of an appropriate storage cask. (The Licensee previously provided the Board and ECO with a copy of that letter, appended to its July 8, 1992 filing.)

At oral argument, the Licensee conceded that the wording of the letter might have been more felicitous, using "suspend" rather than "terminate," but it claimed that the "application" had not been abandoned. Only the safety review had been suspended, pending selection of a cask; the environmental review is continuing. The Staff agreed that this was the case and the ISFSI application remains active.[29] That being so, Contention IV.A must be rejected.

Contention IV.B claims that SMUD lacks an adequate funding plan for the decommissioning. Such a plan is required by 10 C.F.R. § 50.75. The reason alleged by ECO for the deficiency is the Staff's revocation of an exemption

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[29] Tr. 96-97.

it had previously granted SMUD, permitting funding over the course of the original operating license (i.e., until 2008) rather than at time of shutdown.

The Staff granted the exemption without receiving public comments. Because the Staff had earlier promised ECO that it would be permitted to comment, the Staff then revoked the exemption and has received comments from ECO (which it has not yet finished evaluating).

Even though ECO may be technically correct about the current funding plan, we fail to see how this establishes a material factual or legal dispute. If the Staff should grant the exemption, it will remedy the defect. (The granting of such an exemption would be consistent with a newly revised version of 10 C.F.R. § 50.75.) If the Staff should deny the exemption, it will have to take steps to ensure that SMUD provides adequate funding for the decommissioning. Indeed, the crux of ECO's concern, that its views on the exemption be taken into account, has been fulfilled.[30] We thus decline to entertain ECO's contention on this subject.

Contention IV.C challenges the adequacy of the *Federal Register* notice for this proceeding, claiming that it failed to identify any relevant documents other than the decommissioning plan and the environmental report. ECO contends that adequate notice demands identification of all supplements and amendments to that application.

There is no such requirement. Potential intervenors reasonably are expected to research these documents in the Commission's Public Document Rooms, where supplements and amendments would be available. In any event, at the time of the Notice, there were no supplements or amendments. This contention is thus rejected.

Contention IV.D asserts that the decommissioning order may not be issued prior to the completion of an adjudicatory hearing. ECO cites the introductory phrase of section 191a of the Atomic Energy Act, 42 U.S.C. § 2241(a). That phrase, however, only authorizes the Commission to use a three-member licensing board, such as this one, to conduct a formal on-the-record adjudication, in lieu of a single Administrative Law Judge as required by the Administrative Procedure Act.

ECO has, in fact, been afforded the *opportunity* for a public adjudicatory proceeding. As the Licensee observes, whether a hearing on a licensing action will be a pre-effectiveness hearing is not within the province of this Board but, rather, the Commission itself. 10 C.F.R. §§ 50.58(b)(6), 50.91, 50.92. Moreover, there does not appear to be any requirement in the Atomic Energy Act that would mandate a pre-effectiveness hearing for decommissioning. *See*

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[30] 57 Fed. Reg. 20,718 (May 14, 1992); Tr. 139-43, 162.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 77 (1992).

For these reasons, Contention IV.D is rejected.

Contention IV.E is a procedural claim that, since filing its intervention petition, ECO was entitled to be served with all documents filed by SMUD and its attorneys. ECO cites 10 C.F.R. § 2.712.

That section deals only with the technical aspects of service of adjudicatory documents and, in any event, requires service only on "parties," which ECO is not.[31] The scope of document service is covered by 10 C.F.R. § 2.701(b), which also only applies to "parties." Adjudicatory documents filed by parties responsive to or bearing upon intervention petitions must, of course, be served upon the petitioner — as was the situation here.

At oral argument, ECO supplemented its request by referencing the Board's general authority as a basis for requiring service upon ECO. If ECO were to become a party, that remedy would not be necessary. Where, as here, ECO is not being admitted as a party, that remedy would be inappropriate, if not beyond our authority. In any event, ECO was unable to identify any document with which it had not been served. It mentioned the Licensee's response to Staff questions, a nonadjudicatory document dated April 15, 1992, but that document was filed prior to ECO's submission of its April 20, 1992 petition for intervention.[32] We are thus denying this contention.

Somewhat related is ECO's recently filed Motion for an Order to Compel Service, together with portions of its even more recent Motion to Strike. We have examined those motions and, for similar reasons, are denying them.

Contention IV.F is an attempt to incorporate by reference questions raised by the Staff in its March 12, 1992 series of questions to the Licensee. No explanation is provided concerning the significance of any question. ECO merely portrays the questions as a *per se* reflection of defects in the decommissioning plan. ECO does not bother to reference the Licensee's extensive April 15, 1992 responses to the questions asked. (Those responses were available before ECO filed its intervention petition and over 2 months before ECO filed its incorporation-by-reference contentions.)

For the same reasons that we rejected a similarly worded environmental contention, we also reject this attempt to rely on incorporation by reference as a foundation for a contention.

One isolated sentence in the affidavit of the individual whom ECO represents might also be deemed a safety contention. That sentence reads:

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[31] ECO, in its Motion to Strike filed on August 14, 1992, n.1, incorrectly cites 10 C.F.R. § 2.714a as denominating petitioners as parties, presumably for all purposes. All that provision does is provide a right of appeal to petitioners who are denied intervention or requested hearings. ECO here is given that right.

[32] That document is a nonadjudicatory document that, unless it related directly to a previously accepted contention, would not have been required to be served upon a party.

> However, if the plant cannot be preserved for its intended purpose then it is my opinion that the DECON method of decommissioning is the preferred alternative both because it would best protect the public health and safety by removing the radiological hazard most promptly and it would offer better assurance that the economic costs of decommissioning would be minimized and borne by those persons who received the benefits of Rancho Seco.[33]

No data or witnesses (expert or otherwise) are identified to support this claim. Although the subject matter could be considered in a proceeding of this type, the claim satisfies none of the pleading requirements necessary to support a contention. For that reason, we decline to consider it.

D. Conclusion on Contentions

Based on the foregoing, there are no contentions that are admissible. Some concern subject matter that is outside the scope, as properly defined, of the decommissioning matter before us. The Commission itself has previously ruled directly on a number of these items. Nor are any of the contentions in conformity with the Commission's pleading requirements. That being so, we are rejecting all the contentions both as contentions and as potential support for discretionary standing, based on ECO's ability to assist in developing a sound record.

IV. OTHER MATTERS

As we pointed out earlier, ECO filed four motions following the prehearing conference. We considered and denied the first, dealing with service of documents, in conjunction with our consideration of Contention IV.E. *See* p. 138, *supra*.

Because of this action, the Licensee's cross-motion for us to strike certain portions of ECO's motion (supported by the Staff) becomes moot, and we are dismissing it for that reason. (This dismissal also makes moot the portion of ECO's August 14, 1992 Motion to Strike directed to this cross-motion of the Licensee, which we also dismiss.)

The second motion is denominated as a "Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing." Anticipating that we might reach the very conclusions we have described in this Order, ECO asks us to forbear and instead issue an order permitting it to amend its contentions or file new contentions within a reasonable time after SMUD files revisions to its environmental report and the Staff issues an environmental assessment.

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[33] June 29, 1992 Supplement, Crespo Affidavit at 4.

ECO provides several reasons for the relief it seeks, most notably the prospect (not disputed by anyone) that in the future SMUD will supplement its environmental report. ECO also cites its "vested right" to amend its contentions — a right that ECO already exercised in filing its June 29, 1992 supplement.

The so-called "vested right" to amend, to the extent it may properly be so described, extends only until 15 days prior to the first prehearing conference. 10 C.F.R. § 2.714(a)(3). Beyond that, it may be exercised only with leave of the Licensing Board, based on prescribed factors. In this case, granting this motion would run counter to the Commission's long-standing requirement that contentions be submitted prior to the first prehearing conference and that contentions or amended contentions submitted thereafter be considered "late-filed" and judged under the criteria applicable to such contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

We are accordingly denying ECO's motion. In view of the position we have taken on ECO's various contentions, we consider the Licensee's cross-motion to strike certain portions of ECO's motion (supported by the Staff) as moot and, accordingly, are dismissing it on that basis. Similarly, in view of this dismissal, we also consider the portions of ECO's Motion to Strike relating to the Licensee's and Staff's responses to ECO's Contingent Motion to Withhold Decision to be moot and are dismissing it on that basis.

ECO's third motion, denominated as a Motion to Strike, dated August 14, 1992, seeks to have us strike certain portions of the Staff's and Licensee's responses to ECO's previous motions. (Its fourth motion seeks leave to file the foregoing Motion to Strike.) We are permitting ECO to file the Motion to Strike, even though it consists mainly of a reply to certain of the points raised by the Licensee and Staff in response to ECO's earlier motions. As noted earlier, we have denied or dismissed as moot several aspects of this Motion to Strike. Although we have declined to strike the materials specified, we have taken ECO's reply into account in ruling on those earlier motions.

V. ORDER

Based on the foregoing, and the entire record of this proceeding, it is, this 20th day of August 1992, ORDERED:

1. The Petition for Leave to Intervene and Request for Prior Hearing of the Environmental and Resources Conservation Organization (ECO), dated April 20, 1992, is hereby *denied*.

2. ECO's July 17, 1992 Motion for an Order to Compel Service and its July 17, 1992 Contingent Motion to Withhold any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing are each

hereby *denied*. The Licensee's cross-motions to strike certain material from the foregoing motions are each *dismissed* as moot.

3. ECO's Anticipatory Motion for Leave to File ECO Pleading, dated August 14, 1992, is hereby *granted*. ECO's Motion to Strike, dated August 14, 1992, is hereby *denied* or *dismissed* as moot, as set forth earlier in this Opinion.

4. This proceeding is hereby *terminated*.

5. This Order is subject to appeal to the Commission pursuant to the terms of 10 C.F.R. § 2.714a. Any such appeal must be filed within ten (10) days after service of this Order and must include a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 20, 1992

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-528
50-529
50-530

ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

August 12, 1992

The Director of the Office of Nuclear Reactor Regulation denies the remainder of a Petition submitted by Mrs. Linda E. Mitchell (Petitioner) requesting action with regard to the Palo Verde Nuclear Generating Station of Arizona Public Service Company, *et al.* (Licensee).

In her Petition, Petitioner alleged that serious violations existed at the Palo Verde facility in the systems for emergency lighting and fire protection. In a Partial Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), this aspect of Petitioner's request for action pursuant to 10 C.F.R. § 2.206 was denied.

Petitioner had also alleged improprieties by Licensee personnel regarding NRC inspection activities, specifically that Licensee personnel acted improperly to "water down" inspection findings, suppress serious violations, and discredit an NRC inspector. Based on an investigation by the NRC's Office of the Inspector General, these allegations were found to be without merit. Accordingly, the Director denied this aspect of the Petitioner's request for action pursuant to section 2.206.

FINAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On May 22, 1990, David K. Colapinto, Esq., submitted a Petition on behalf of Mrs. Linda E. Mitchell (Petitioner) requesting that the U.S. Nuclear Regulatory Commission (NRC) take actions pursuant to 10 C.F.R. § 2.206 regarding the Palo Verde Nuclear Generating Station (Palo Verde) of the Arizona Public Service Company, *et al.* (APS or Licensee). The Petitioner stated that she is employed by the Licensee as an associate electrical engineer at Palo Verde. She alleges that serious violations exist at Palo Verde in the systems for emergency lighting and fire protection which were uncovered by the NRC during routine inspections, and that Licensee personnel acted improperly to "water down" the inspection findings, suppress other serious violations, and discredit an NRC inspector. Petitioner also alleges that NRC Region V management retaliated against the NRC inspector in question and agreed to "water down" inspection report findings as a result of the efforts made by the Licensee.

Petitioner claims that these actions will chill efforts by NRC inspectors and employees of NRC-licensed facilities to raise safety concerns.

Petitioner sought a variety of relief, including (1) instituting a proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke the licenses issued by the NRC for Palo Verde; (2) issuing citations to the Licensee for violations improperly and illegally deleted from an NRC inspection report; (3) issuing fines to certain employees of the Licensee for allegedly tampering, obstructing, and impeding an ongoing NRC inspection; (4) taking disciplinary actions against any and all NRC employees allegedly involved in retaliating against an NRC inspector; and (5) granting such other and further relief as the NRC may deem appropriate.

In a letter to Mr. Colapinto of June 21, 1990, I acknowledged receiving the Petition and informed him that the Petition would be treated under 10 C.F.R. § 2.206 of the Commission's regulations. I also informed Mr. Colapinto that allegations in the Petition concerning improprieties by NRC personnel had been referred to the Office of the Inspector General and that any inquiries regarding those allegations should be directed to that office. I will not further address the relief sought for these matters because these matters are outside the scope of section 2.206.

The allegations in the Petition fall into three categories. First, Petitioner alleges improprieties by NRC personnel regarding NRC inspection activities. As noted above, this matter was referred to the Office of the Inspector General. Second, the Petitioner alleges that, during routine NRC inspection activities, an

inspector uncovered serious safety violations at Palo Verde in the systems for emergency lighting and fire protection.

I addressed this aspect of the Petition in a Partial Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), in which I found no justification for instituting a proceeding pursuant to section 2.202 to modify, suspend, or revoke the NRC licenses held by APS. I made this decision after reviewing the corrective actions that APS took to resolve the concerns found by the NRC Staff while inspecting emergency lighting and fire protection at Palo Verde. I found reasonable assurance that Palo Verde can be operated with adequate protection of the public health and safety until the Licensee completed its ongoing corrective actions. Therefore, I denied this aspect of the Petitioner's request for action pursuant to section 2.206.

The third category of allegations set forth by the Petitioner allege improprieties by APS personnel regarding NRC inspection activities. As was noted in the Partial Director's Decision of October 31, 1990, these allegations of wrongdoing were referred for investigation. I further noted in that Partial Decision that I would issue a Final Director's Decision dealing with these allegations upon receipt of the investigative findings. These matters were investigated by the NRC's Office of the Inspector General (OIG) which has completed its work on these matters. My decision with regard to these allegations of wrongdoing follows.

II. DISCUSSION

Petitioner alleges that Licensee personnel acted improperly to "water down" emergency lighting and fire protection inspection findings, suppress other serious violations, and discredit an NRC inspector. Petitioner also claims that these actions will severely chill the rights of employees at NRC-licensed facilities to speak freely and raise concerns with NRC inspectors and the rights of employees to raise safety concerns without fear of retaliation in general.

On April 24, 1990, the NRC Staff issued Inspection Report (IR) 90-02. In the letter transmitting IR 90-02, the NRC Staff stated that it found several concerns regarding the status of the 10 C.F.R. Part 50, Appendix R, emergency lighting at Palo Verde. In IR 90-02, the NRC Staff listed as unresolved items numerous apparent deficiencies in the emergency lighting system which were described in detail in the report. Unresolved items are items for which the NRC Staff needs additional information to decide whether the matter is a violation of NRC requirements. Petitioner alleges that APS officials improperly influenced the NRC Staff to "water down" IR 90-02 to cover up additional concerns raised by Petitioner and verified by an NRC inspector identified by Petitioner as "John Doe." Petitioner further alleges that, upon learning of these potential violations,

APS management began a concerted effort to harass and discredit "John Doe" through his superiors at NRC Region V, and that APS intended to cover up and suppress additional serious violations, many of which Petitioner's supervisors at APS recognized were legitimate concerns. Petitioner further alleges that APS employees stated that they were going to contact NRC management to get "John Doe" to revise his findings and have him transferred to another NRC region because he was causing too much trouble. Finally, Petitioner alleges that senior APS officials contacted NRC Region V officials by telephone and accused "John Doe" of misconduct to impede and interfere with an ongoing inspection.

As stated above, OIG has completed its investigation of the wrongdoing aspects of the Petition. OIG issued its report on September 30, 1991 (OIG Investigative Report, Case No. 90-45H). The following is a synopsis of this report.

The Petitioner told OIG that she had no first-hand knowledge of the alleged telephone calls by Palo Verde managers to NRC Region V officials. The Petitioner learned of the telephone calls from Inspector "John Doe." "John Doe" told OIG that it was his understanding based on discussions with Region V officials that Palo Verde officials had called the Region and expressed concern with the manner in which he presented his inspection findings on emergency lighting at an exit meeting on March 23, 1990. Specifically, Palo Verde officials were surprised at the exit meeting with new findings that "John Doe" had not previously discussed during the inspection. Therefore, they were not prepared to respond.

All of the Palo Verde and NRC officials allegedly involved in the communications regarding "John Doe" and the NRC inspection findings denied or had no recollection of ever discussing "John Doe's" performance during the March 23, 1990 exit meeting. However, Palo Verde and NRC Region V managers had discussed emergency lighting during telephone discussions following a February 9, 1990 exit meeting. According to the NRC Region V officials, "John Doe" was not mentioned during these telephone discussions, and Palo Verde did not contest the emergency lighting findings. NRC Region V held these telephone conversations with representatives of Palo Verde to inform them of the gravity of the emergency lighting issues.

With regard to IR 90-02, "John Doe" told OIG that he did not agree with the manner in which his inspection findings were presented. He believed his findings should have been reported as violations rather than as unresolved items.

In Inspection Report 90-02 the NRC Staff included as unresolved items all of the emergency lighting findings listed by "John Doe" in his draft inspection report. In other words, none of "John Doe's" findings were deleted from the report. The NRC Staff both at headquarters and Region V continued to research these issues for several months. Following additional inspections, Region V issued Inspection Reports 90-25 and 90-35 and assessed Palo Verde a civil

penalty of $125,000 for emergency lighting violations. The OIG investigators did not substantiate the existence of a conspiracy between Palo Verde and NRC Region V officials to water down inspection findings, as alleged. This concludes the synopsis of the OIG Report.

The Petitioner also claimed that the Licensee actions alleged in the Petition would chill efforts by NRC inspectors and Licensee employees to raise safety concerns. As discussed above, the specific allegations of Licensee misconduct, which were the bases for the chilling effects claims, were not substantiated.[1]

III. CONCLUSION

The OIG conducted an investigation and could not substantiate the existence of a conspiracy between Palo Verde management and NRC Region V officials to delete items or alter inspection findings, and other related aspects of alleged wrongdoing as detailed above. Therefore, I have decided to deny the Petitioner's requests for action: (1) that NRC institute a proceeding against APS pursuant to section 2.202; (2) that APS be cited for violations deleted from NRC Inspection Report 90-02; (3) that NRC issue fines to APS and certain named employees for tampering, obstructing, and impeding an NRC inspection; and (4) that NRC employees involved in retaliation against the NRC inspector be disciplined.

Finally, Petitioner requests that NRC grant such other and further relief as the NRC may deem appropriate. Based on the foregoing, there is no further action deemed appropriate with respect to this Petition. However, the NRC will continue to review DOL cases of discrimination and any OI investigations involving retaliation as they are completed for appropriate action, as is normal NRC practice.

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[1] On March 16, 1992, I issued a Director's Decision regarding Palo Verde (DD-92-1, 35 NRC 133) in response to a Petition filed by Messrs. David K. Colapinto and Stephen M. Kohn. In footnote 1 of that Decision, I indicated that the issues of widespread harassment, intimidation, and retaliation raised by Messrs. Colapinto and Kohn would be the subject of a separate Director's Decision. These issues have not been finally resolved and are still under consideration by the NRC. The NRC will keep Messrs. Colapinto and Kohn advised of the resolution of these issues.

As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for its review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 12th day of August 1992.