NUREG-0750
Vol. 36, No. 1
Pages 1-45

NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1992

U.S. NUCLEAR REGULATORY COMMISSION

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Post Office Box 37082
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A year's subscription consists of 12 softbound issues,
4 indexes, and 2-4 hardbound editions for this publication.

Single copies of this publication
are available from National Technical
Information Service, Springfield, VA 22161

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

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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1992

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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COMMISSION

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. 50-498
50-499

HOUSTON LIGHTING & POWER
COMPANY, *et al.*
(South Texas Project, Units 1
and 2)

July 2, 1992

The Commission denies the motion of Houston Lighting & Power Company to modify or quash ten (10) Office of Investigations' (OI) subpoenas issued to certain South Texas Project employees and management officials in an investigation concerning Thomas J. Saporito, Jr. OI issued the subpoenas after those individuals attempted to condition their voluntary testimony. The Commission finds that OI's refusal to guarantee as a precondition to a compelled interview that a witness will unequivocally receive a copy of his transcript does not violate the Administrative Procedure Act.

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c)
(INVESTIGATION TRANSCRIPTS)

Transcript rights granted under section 555(c) of the Administrative Procedure Act do not extend to testimony voluntarily given. *United States v. Murray*, 297 F.2d 812, 821 (2d Cir. 1962); *Att'y General's Manual on the Administrative Procedure Act*, 67 (1947).

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

Section 555(c) of the Administrative Procedure Act requires that when testimony is compelled from a party or a witness, that person is entitled, upon payment of costs, to obtain a copy of his transcribed testimony. However, a "compelled" witness' right to obtain a transcript of his testimony may be limited in nonpublic investigatory proceedings to inspection of the transcript, upon a showing of "good cause" by the agency.

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

The invocation of the good-cause exception contained in section 555(c) of the Administrative Procedure Act is within the agency's discretion and applies to situations where evidence is taken in a case in which prosecutions may be brought later and it would be detrimental to the due execution of the laws to permit copies of the transcript to be circulated. *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966).

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

An agency is not required to make a good-cause determination prior to receiving testimony from a witness. *SEC v. Sprecher*, 594 F.2d 317, 319 (2d Cir. 1979).

MEMORANDUM AND ORDER

This matter is before the Commission on a motion by Houston Lighting & Power Company, *et al.* (South Texas Project, Units 1 and 2) to modify or quash ten (10) subpoenas issued by the Director of the Office of Investigations ("OI"). For the reasons explained below, we deny this motion.

I. BACKGROUND

On March 3, 1992, Robert D. Martin, Regional Administrator RIV, requested the Office of Investigations to conduct an investigation to determine the facts surrounding the denial of access of Thomas J. Saporito, Jr., a contract Instrument and Control Technician, to South Texas Project ("STP"). Mr. Saporito contends

that his unescorted access was denied solely on the basis of his having identified to the NRC potential regulatory violations by STP. STP contends that Mr. Saporito's access was denied for having provided false information on his employment application.

As part of this investigation, the OI investigator assigned to the case determined that testimony from STP employees and management officials was required. The investigator attempted to conduct these interviews on a noncompelled basis, transcribing management interviews as is OI's regular practice. As communicated through counsel, these witnesses indicated that they would agree to noncompelled interviews only if OI would either guarantee that transcripts of these interviews be given to the witnesses no later than 2 weeks after the date of each interview or comply with one of several other alternatives outlined in counsel's April 24, 1992 letter to the OI investigator. (Attachment 2 to Motion to Modify or Quash Subpoenas). Each of these demands was rejected by OI as being contrary to its policy not to release voluntary interview transcripts until the end of the investigation.[1] This impasse necessitated the issuance of the OI subpoenas at issue in the present motion.

II. THE MOTION TO MODIFY OR QUASH

We note at the outset that this challenge is to compelled interviews and is therefore governed by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"). Section 555(c) of the APA affords certain "procedural protections to a person subject to agency investigation . . . an assurance of lawfulness in the investigation, and the right to retain, procure, or at least inspect the data or evidence [the witness] has been compelled to submit." *Guardian Federal Savings and Loan Ass'n v. FSLIC*, 589 F.2d 658, 663 (D.C. Cir. 1978). Specifically, section 555(c) of the APA requires that when testimony is compelled from a party or a witness, that person is entitled, upon payment of costs, to obtain a copy of his transcribed testimony. This right, however, may be limited in nonpublic investigatory proceedings, upon a showing of "good cause," to inspection of the transcript. The invocation of the good-cause exception contained in section 555(c) is within the agency's discretion and applies to situations where evidence is taken in a case in which prosecutions may be brought later and it would be detrimental to the due execution of the laws to permit copies of the transcript to be circulated. *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966). Moreover, the agency is not required to

[1] This policy is consistent with the Administrative Procedure Act. Transcript rights granted under section 555(c) of the Act do not extend to testimony voluntarily given. *United States v. Murray*, 297 F.2d 812, 821 (2d Cir. 1962); *Att'y General's Manual on the Administrative Procedure Act* 67 (1947).

make a good-cause determination prior to receiving testimony from the witness. *SEC v. Sprecher*, 594 F.2d 317, 319 (2d Cir. 1979). To require otherwise would force OI to determine the impact on its investigations of releasing transcripts that do not yet exist. The APA does not require such an impractical procedure. *See id.*

With this understanding of the APA, we find premature Petitioners' argument that OI has violated the APA by refusing to guarantee, as a precondition to compelled interviews, that the witnesses will receive a copy of their transcribed testimony. There can be no procedural violation of section 555(c) of the APA until OI conducts interviews, produces transcripts, and takes some action pertaining to the transcripts. At the appropriate time, OI, of course, must allow the witnesses to obtain a copy of their interview transcripts unless, for good cause, the witnesses are limited to inspection of the transcripts.[2]

III. CONCLUSION

For the foregoing reasons, we deny the motion to modify or quash the subpoenas in this case.

It is so ORDERED.

For the Commission[3]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of July 1992.

---

[2] Petitioners also argue that they "have an unqualified right to obtain interview transcripts because they will almost certainly involve information germane to an administrative proceeding currently being conducted by the Department of Labor." Petitioner's Motion at 8. Petitioners construe language taken from both the House and Senate committee reports on section 555(c) stating that "[t]hey [witnesses] should also have such copies whenever needed in legal or administrative proceedings" as establishing this right. S. Rep. No. 752, 79th Cong., 1st Sess. 206 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 265 (1946). We disagree. Even assuming Petitioners' interpretation of the legislative history to be correct, legislative history does not create substantive rights not contained in the statute itself. 2A N. Singer, *Sutherland Statutory Construction* § 48.06 (4th ed. 1984) at 308. Section 555(c) does not provide that witnesses should have such copies whenever needed in legal or administrative proceedings. Rather, section 555(c) explicitly provides that witnesses are entitled to obtain copies of their transcribed testimony except that, upon a showing of good cause by the agency, witnesses may be limited to inspection of the transcripts. We therefore decline to enlarge rights granted under the APA beyond what Congress enacted.

[3] Chairman Selin was unavailable to participate in this matter.

Atomic Safety and Licensing Boards Issuances

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Frederick J. Shon,* *Deputy Chief Administrative Judge (Technical)*

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Richard F. Cole
Frederick J. Shon

In the Matter of

Docket No. 70-3070-ML
(ASLBP No. 91-641-02-ML)
(Special Nuclear
Materials License)

LOUISIANA ENERGY SERVICES, L.P.
(Claiborne Enrichment Center)

July 8, 1992

RULES OF PRACTICE: DISCOVERY

Security plans are to be withheld from public disclosure, irrespective of whether discovery of the documents is sought from the Nuclear Regulatory Commission or the applicant.

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

An applicant has no obligation to establish that the security plan is privileged or confidential. Section 2.790(d) of 10 C.F.R. deems it to be.

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

An applicant has no obligation under 10 C.F.R. § 2.790(b)(1) to submit an affidavit for having the security plan withheld from public disclosure. Section 2.790(b)(1) requires such an affidavit when a person "proposes" that the document be withheld because it contains confidential commercial or financial

information. In the case of a security plan, it has already been deemed to be such information under section 2.790(d).

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

Where an applicant has made a *prima facie* case that the security plan should be withheld from public disclosure and that an *in camera* proceeding is required in order to fashion an appropriate protective order under which portions of the security plan could be made available to the intervenor, the refusal of the intervenor to participate in the *in camera* proceeding is an effective waiver of its right to further consideration of its discovery request of the matter. The applicant should not respond to the discovery request, and the motion to compel shall be denied.

MEMORANDUM AND ORDER

(Ruling on Discovery Disputes Pertaining to Contentions L and M)

The matters for decision before the Board are discovery disputes between Applicant, Louisiana Energy Services, L.P. (LES), and Intervenor, Citizens Against Nuclear Trash (CANT), pertaining to Contentions L and M. The contentions involve the adequacy of Applicant's safeguards for protecting against the unauthorized production or diversion of highly enriched uranium.

On April 28, 1992, CANT filed interrogatories and a request for the production of documents from LES. Applicant responded on May 18, 1992. It claimed that, in many cases, to answer would disclose proprietary or classified information and therefore only referenced relevant portions of the documents, the Physical Security Plan (PSP) and the Fundamental Nuclear Material Control Plan (FNMC), where such information is contained. LES objected to producing the documents without appropriate controls. Applicant also objected to the manner in which LES was defined in the discovery request, which it believed would result in all of the partners having to answer each inquiry.

Attached to the response to the discovery request was Applicant's motion for a protective order protecting Applicant's partners from discovery and Applicant from disclosing portions of the PSP and FNMC without appropriate safeguards.

In turn, CANT on June 2, 1992, filed a motion to compel LES to respond to discovery and objected to Applicant's motion for a protective order. It argued that Applicant's objections and protective motion were without merit and that Intervenor was entitled to complete answers to its interrogatories and to inspect and copy the requested documents. Applicant filed a response on June 16, 1992, objecting to CANT's motion to compel.

In this Memorandum and Order, the Board rules on the cross-motions.

A. Dispute as to Who Is to Respond to Discovery

Applicant was concerned that under the definition CANT used to describe LES in the discovery request it was meant to require each partner to answer each interrogatory, to which Applicant objects. The same issue has previously been disposed of by the Board in this proceeding in Memorandum and Order (Ruling on Discovery Disputes Pertaining to Contentions, B, H, I, J, and K) (June 18, 1992), at 2-4 (unpublished).

The Board found that the issue had been rendered moot by disputants' understanding that LES has the responsibility for responding to discovery, and where it does not have the information directly it will obtain it from the partners if they possess it. We reach the same decision here. The Board similarly denies that part of each motion dealing with the dispute as to who the proper parties are in responding to discovery.

B. Dispute as to the Production of Requested Documents

1. Applicant's Position

Applicant, in response to Interrogatories 4, 5, 17, 18, 19, 20, and 22-26, referenced its answers to the PSP and the FNMC. It then refused to produce the documents in response to Intervenor's two requests for the production of documents on the ground that both documents are proprietary in their entirety and additional parts are classified as Confidential National Security Information (CNSI). The FNMC describes Applicant's material control and accounting (MC&A) information.

LES was willing to disclose those portions of the PSP or FNMC that were not CNSI, under the terms of an appropriate protective order. It would not permit the disclosure of CNSI to Intervenor because it is not aware that CANT has appropriate authorization to obtain the information.

Under the NRC regulations governing the Availability of Official Records (10 C.F.R. § 2.790), an applicant's physical protection and MC&A program for special nuclear material, not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data, are deemed to be commercial or financial information within the meaning of 10 C.F.R. § 9.17(a)(4). 10 C.F.R. § 2.790(d)(1).

Section 9.17(a)(4) exempts agency records from public disclosure that contain trade secrets and commercial or financial information obtained from a person and privileged or confidential. Section 2.744 provides procedures for obtaining NRC documents that are not available pursuant to section 2.790. One avenue is

through the Executive Director for Operations, the other through the Presiding Officer.

LES argues that like the NRC, which is exempt under 10 C.F.R. § 2.741(e) from the general discovery provisions governing the production of NRC records and documents, it too can limit access to the security plan documents Intervenor seeks, when the documents held by the Applicant are the same as possessed by the NRC.

LES relies on *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1402 (1977), in which the Appeal Board stated:

> The security plan for the Diablo Canyon nuclear power facility is (or will be) in the possession of both the applicant and the Commission.[11] Whether discovery of the documents comprising that plan be from one source or the other, essentially the same standards apply.[12]

---

[11] *See* 10 CFR §§ 50.34(c), 50.39 and 2.790(a).

[12] *See* 10 CFR § 2.740(b)(1) ("[p]arties may obtain discovery regarding any matter not privileged . . .") and (c) (protective orders). For a general discussion of these provisions see *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413-18 (1976).

The Appeal Board, as to security plans, further stated:

> Under 10 CFR § 2.790, they are clearly not to be made available to the public at large. And while they must be released to interested parties under appropriate conditions, that does not mean in all cases they need be released in their entirety or to anyone selected by the intervenors or without protective safeguards.

Id. at 1404.

Applicant asserted in its response to Intervenor's motion to compel that *Diablo Canyon* is consistent with the regulations governing the disclosure of Safeguards Information.

Safeguards Information is defined in 10 C.F.R. § 73.2 as:

> [I]nformation not otherwise classified as National Security Information or Restricted Data which specifically identifies a licensee's or applicant's detailed (1) security measures for the physical protection of special nuclear material, or (2) security measures for the physical protection and location of certain plant equipment vital to the safety of production or utilization facilities.

Applicant asserts that PSP and FNMC information is covered by the Safeguards Information prohibitions against disclosures. FNMC information is included because it contains MC&A information. LES cites the Commission's discussion of proposed 10 C.F.R. § 74.33, where it stated:

> MC&A is only one part of the safeguards program required for uranium enrichment applicants and licensees. Failure to properly carry out certain safeguards activities at enrichment facilities could adversely affect the national common defense and security. Safeguards consists of physical protection, MC&A, and information security.

55 Fed. Reg. 5126 (1990).

LES notes that the following regulations do not differentiate as to whether the NRC or a private party possesses the information.

Section 73.21 which governs the disclosure of Safeguards Information provides:

> (a) [e]ach licensee who . . . acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure.
>
> . . . .
>
> (c)(1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is:
>
> . . . .
>
> (vi) An individual to whom disclosure is ordered pursuant to § 2.744(e) of this chapter.
>
> (2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any other person except as set forth in paragraph (c)(1) of this section.

It also cited section 147 of the Atomic Energy Act (42 U.S.C. 2167) which prohibits the unauthorized disclosure, by whomever possessed, of safeguards information including security measures and material accounting procedures and control.

As to the portions of the documents that are CNSI, Applicant points out that 10 C.F.R. § 95.35 prohibits their disclosure to any individual that does not have the appropriate security clearance. Applicant is unaware that Intervenor has the required security clearance. It states that during the course of the proceeding Intervenor has maintained that it will not seek a security clearance.

2. *Intervenor's Position*

Intervenor premises its motion to compel on the general discovery rule which allows the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 C.F.R. § 2.740(b)(1). It notes that the law of evidence contains no exception for privileged or confidential commercial information.

CANT argues the inapplicability of sections 2.741(e) and 2.790 because they only apply to the production of NRC-held records and documents and not to those privately possessed.

CANT disagrees with Applicant's position that *Diablo Canyon* authorizes LES to treat its security plan in the same manner that the NRC can. CANT

asserts that the footnotes to the Appeal Board's statement that "the same standards apply" whether the security plan is in the hands of the applicant or the NRC, only relate to discovery in general and not to NRC records, and therefore, only the general rules of discovery are applicable.

Intervenor claims that even if section 2.790 were applicable, it is Applicant's burden to establish that the "[t]rade secrets and commercial or financial information" are "privileged or confidential," which it has not done. It asserts that section 2.790(d) does not convey an automatic exemption for the PSP or FNMC.

CANT also raises as an allegation that LES has not complied with 10 C.F.R. § 2.790(b)(1). It requires that:

> (1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains . . . confidential commercial or financial information shall submit an application for withholding accompanied by an affidavit . . . .
>
> (ii) . . . The application and affidavit shall be submitted at the time of filing the information sought to be withheld.

Intervenor states that Applicant's failure to comply with the regulation results in its not being able to claim that the documents are privileged or confidential commercial or financial information.

Applicant acknowledges that it has not complied with the requirements of section 2.790(b)(1). It states that its reason for not doing so is that under section 2.790(d) the documents are deemed to be commercial or financial information and are "exempt from public disclosure" subject to the provisions of section 9.19. That provision instructs the NRC on the segregation of exempt information and the deletion of the identifying details.

Intervenor contends that Applicant has not shown that any of the requested information is CNSI. It asserts that LES offers no proof that the documents have been classified, or where, when, or by whom, and that no description is given of which sections of the documents are classified.

Furthermore, CANT asserts that Applicant has essentially admitted that its documents are not CNSI. Applicant has claimed that its PSP and FNMC fall under section 2.790(d)(1) which describes "information or records concerning a licensee's or applicant's physical protection or material control and accounting program . . . not otherwise designated as Safeguards Information or classified as National Security information . . . ." CANT states that the Applicant, by claiming that this information fits into section 2.790(d)(1), admits that the PSP and FNMC are "not . . . classified as National Security Information."

Applicant, as part of its June 16, 1992 response to CANT's motion to compel, submitted an affidavit from the Licensing Manager of the Claiborne Enrichment Center. In it, he states that he is a derivative classifier authorized by the NRC to classify Restricted Data and National Security Information in the hands of LES,

that PSP and FNMC contain information required by Executive Order 12356 to be protected as CNSI, and that various sections of the PSP and Chapter 9 of the FNMC are classified as CNSI.

LES, in its response, satisfied Intervenor's criticism that Applicant may not have fulfilled the request for production by not stating whether any other documents other than the PSP and FNMC were consulted in preparing the answer. It advised that it listed the documents it consulted, i.e., PSP and FNMC.

3. Board Discussion

The Board finds that Applicant was correct in its refusal to produce the PSP and FNMC in response to CANT's discovery request in the absence of an appropriate protective order.

Diablo Canyon made clear that under 10 C.F.R. § 2.790 security plans are not to be made available to the public at large because of their sensitive nature. The Appeal Board further declared that security plans, if and to the extent released, should in most circumstances be subject to a protective order consistent with section 2.740(c). 5 NRC at 1403, 1404.

Intervenor's argument that, where identical security plans are in the hands of an applicant and the NRC, the NRC plans are protected from public disclosure and those in the hands of the private party are not, is not meritorious.

Diablo Canyon unequivocally states that "the same standards apply" irrespective of the source of the document. The fact that the footnoted material to the statement may only relate to general discovery rules does not establish that it was solely the general discovery rules that the Appeal Board was speaking about.

The Appeal Board's continuing discussion of the law applicable to security plan disclosure, in which the general discovery rules and those pertaining to the Availability of Official Records (section 2.790) were considered, makes it apparent that the security plan is to be withheld from public disclosure, whomever the source of the documents. *Id.* at 1402-04.

The very purpose of limiting disclosure is to keep security information out of the wrong hands in order to protect the public health and safety or the common defense or security. It would be illogical to have a regulatory scheme that would limit the plan's availability when the NRC held it, but not when it was held by a private party. To do otherwise would be comparable to barring the windows and leaving the front door unlocked in attempting to guard security plans.

Applicant had no independent obligation to establish that the security plans are privileged or confidential. Section 2.790(d) deems them to be. Neither did LES have an obligation under section 2.790(b)(1) to submit an affidavit for having the security plan withheld from public disclosure. Section 2.790(b)(1) requires such an affidavit when a person "proposes" that the document be

withheld because it contains confidential commercial or financial information. In the case of a security plan, it has already been deemed to be such information under section 2.790(d). There was no need to propose that it be done.

From the information furnished by the Applicant, the security plan appears to meet the definition of Safeguards Information contained in 10 C.F.R. § 73.2. If treated as Safeguards Information, it too would be subject to limited disclosure, irrespective of whoever holds it.

Section 147 of the Atomic Energy Act prohibits its disclosure by "whomever possessed." Under the implementing regulation, section 73.21(c)(1) and (2), no person may have access other than on a "need to know basis" and disclosure to an individual must be ordered pursuant to section 2.744(e).

Section 2.744(e) provides:

> When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

Additional protection must be afforded to the PSP and FNMC where they contain CNSI. In response to Intervenor's claim that LES has not shown that any of the requested information contains CNSI, Applicant has done so with the affidavit of its derivative classifier. The affidavit states that Chapter 9 of the FNMC is CNSI. It does not identify any specific portion of the PSP as containing CNSI but states that it is in various sections. Section 95.35(a) limits access to persons with security clearance on a need-to-know basis. Section 2.905 describes as to how access may be obtained. Applicant was correct in refusing to produce the documents containing the CNSI in the absence of a security clearance on the part of CANT.

Applicant has made a *prima facie* case that the documents should be withheld from public disclosure, whether they are considered to contain proprietary information, Safeguards Information, or CNSI. However, a number of matters would require resolution if CANT would continue to pursue access.

Those parts of PSP that consist of CNSI should be identified. It should be resolved whether contents of the documents be considered proprietary information or Safeguards Information. The furnishing of access to Safeguards Information is on a "need-to-know basis" and breach of a protective order is subject to criminal penalties. 10 C.F.R. §§ 2.744(e) and 73.21(c)(2). These conditions do not apply to privileged or confidential information disclosures. The extent and terms on which disclosure would be made to Intervenor would have to be decided and be made part of a protective order.

The foregoing would require a detailed examination of the documents. It would require that the examination be conducted *in camera*. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214 (1985).

Intervenor has already made known that it will not participate in closed proceedings. CANT has consistently maintained throughout this proceeding that it would not participate in *in camera* proceedings involving classified information because of its principle of bringing issues to public light. Tr. 113, 160, and 186. There is no basis to believe that Intervenor's attempt, by letter of February 26, 1992, to get the diameters of the piping at potential online enrichment measuring points declassified, even if successful, will eliminate all of the issues that need to be considered in the *in camera* proceeding.

The public interest does require the conducting of an *in camera* proceeding, which is an approved process under the circumstances of the case. Intervenor, in being unwilling to participate in the process that could result in the disclosure of the information it seeks, has effectively waived its right to further consideration of its discovery request on these matters. It cannot claim prejudice. *Id.* Applicant's request for a protective order on this issue will be granted and Intervenor's motion to compel will be denied.

C. Dispute as to the Completeness of the Response to Interrogatories

1. Intervenor contends that Applicant cannot avoid answering relevant interrogatories by stating that the answers are available in documents and then claim that Intervenor cannot obtain the documents. In support, Intervenor argues that section 2.740b, which governs interrogatories, and section 2.740, which has the general provisions for discovery, do not contain an exemption for proprietary information as does section 2.790.

The Board finds that Applicant responded to the interrogatories to the fullest extent allowable. Intervenor cannot obtain indirectly what it cannot obtain directly. The documents are not to be produced because of the sensitive information they contain. The information is not to be produced irrespective of what form the request takes, whether for the production of the documents themselves, or through questions about it. Applicant's motion for a protective order on this issue is granted and the motion to compel is denied.

2. Intervenor asserts that Applicant has not answered Interrogatory 18 fully. It asked whether Applicant takes into account "all" conceivable and credible scenarios for unauthorized production of uranium, and Applicant answered that conceivable and credible scenarios have been taken into account, without mentioning "all." CANT calls this answer evasive.

In its answer to the motion to compel, Applicant responded that it has considered all conceivable and credible scenarios as suggested by NUREG/CR-

5734. With the answering of the question, Applicant has rendered the issue moot. The motions on that issue are denied.

ORDER

Based upon all of the foregoing, it is hereby Ordered that:

(a) Applicant's motion for a protective order of May 18, 1992, is granted insofar as it seeks protection from disclosing the contents of the PSP and FNMC. LES shall not disclose the contents of the PSP and FNMC whether in response to a request for the production of the documents, in response to interrogatories, or otherwise, unless specifically ordered. The motion is otherwise denied, and

(b) CANT's motion to compel of May 19, 1992, is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW
JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 8, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 030-29626-OM&OM-2
(ASLBP Nos. 92-653-02-OM
92-662-06-OM-2)
(Byproduct Material License
No. 24-24826-01)
(EA 91-136, 92-054)
(License Revocation,
License Suspension)

PIPING SPECIALISTS, INC., and
FORREST L. ROUDEBUSH
d.b.a. PSI INSPECTION, and
d.b.a. PIPING SPECIALISTS, INC.
(Kansas City, Missouri)

July 10, 1992

After an evidentiary hearing had been conducted and proposed findings were pending in this enforcement action, the Licensing Board discovered language in the license making the Radiation Safety Officer "completely responsible" for compliance with safety regulations. Consequently, the Board issued a proposed resolution of the case under which the license would be revoked without any further determination of the degree of responsibility of the sole proprietor of Licensee. The Board scheduled oral argument on this proposition, which had not been addressed by the parties.

RULES OF PRACTICE: PROPOSED RESOLUTION

When a Licensing Board discovered grounds for decision that had not been argued by the parties, it decided to announce a proposed decision and to invite oral argument by the parties.

MEMORANDUM AND ORDER
(Proposed Resolution of the Case)

Licensee,[1] which is a small firm licensed to utilize a radiographic camera for industrial purposes, contests the validity of the license suspension and license revocation orders issued to it by the Staff of the Nuclear Regulatory Commission on October 17, 1991, and April 22, 1992.

We have been reviewing the record[2] carefully, analyzing it from the standpoint of the specific knowledge and responsibility of Mr. Forrest Roudebush, who is Licensee's sole proprietor. During our review, however, we made a significant discovery about language in the license, and we reached some tentative conclusions, as shown in Table 1.

TABLE 1. Tentative Conclusions

1. Item 7 of the contested license reads:

> INDIVIDUAL RESPONSIBLE FOR THE RADIATION SAFETY PROGRAM
>
> Radiation Safety Officer: Mr. Ken Keeton
>
> Mr. Ken Keeton will have *complete responsibility and authority to direct all aspects* of the radiation safety program of the company. In addition, Mr. Keeton is *the* manager of the company's radiography program. [Emphasis added.]
>
> Specifically, Mr. Keeton's responsibilities shall include: [fifteen listed responsibilities, seven of which begin with the term "administer."] *Source*: OI Report of Investigation, Case No. 3-91-011, Exhibit 1, page 121 of 187.

2. Item 7 of the contested license, as just set forth, has been amended by Amendment No. 02. This amendment makes James A. Hosack Radiation Safety Officer, but condition 17 continues the rest of Item 7 in effect. *Source*: OI Report of Investigation, Case No. 3-91-011, Exhibit 1, page 15 of 187.

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[1] The name of the Licensee is Piping Specialists, Inc. However, the orders also have been made applicable to Mr. Forrest Roudebush since there is no legal entity by the name of Piping Specialists, Inc.

[2] An evidentiary hearing was held in Kansas City, Missouri, April 28, 1992, to May 1, 1992.

TABLE 1. Tentative Conclusions (*Continued*)

3. Mr. James A. Hosack has complete responsibility and authority to direct all aspects of PSI's radiation safety program and also to manage that program. Hence, Mr. Forrest Roudebush's knowledge or alleged culpability are irrelevant to the company's compliance with its license.

4. It is appropriate to revoke this license because the person completely responsible, Mr. James A. Hosack, has committed numerous, egregious violations — including the intentional falsification of records. Licensee has admitted these errors.

5. It is outside the jurisdiction of this Licensing Board to determine the effect of this decision on a future license application by Mr. Roudebush.

In light of these tentative conclusions, we have decided to schedule an on-the-record telephone conference, for the purpose of oral argument, on July 20, 1992. Each side will have 20 minutes to present its argument concerning the appropriate treatment of the findings tentatively presented in Table 1. The Staff may go first and may reserve up to 5 minutes for rebuttal. Licensee may also reserve 5 minutes for surrebuttal.

We urge that prior to the scheduled telephone conference the parties should seek to reach a voluntary settlement. The date of the conference may be deferred upon agreement of the parties.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
AND PRESIDING OFFICER

Before Administrative Judges:

Thomas S. Moore, Chairman and Presiding Officer
Frederick J. Shon
James H. Carpenter

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2
(ASLBP Nos. 92-659-01-ML
92-664-02-ML-2)

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

July 17, 1992

MEMORANDUM

The Commission on July 2, 1992, issued an order granting review of the NRC Staff's June 26, 1992 petition for review of the June 11, 1992 consolidation order of the Presiding Officer and the Licensing Board in this proceeding. The order granting review directed the parties to address three questions concerning the proceeding. Additionally, the review order invited us to provide the Commission with "[our] views in this matter" as well as "[our] views on the positions of the parties in response to the questions posed."[1]

We must respectfully decline the Commission's offer. As administrative trial judges charged with safeguarding the public health and safety in a quasi-judicial

[1] Commission Order, July 2, 1992, at 5.

adjudicatory system, we must maintain absolute neutrality in disputes between the parties in agency proceedings. Our position as impartial decisionmakers precludes us from advocating any position before a superior appellate tribunal as if we were another party to the proceeding. Disregarding this long and well-founded judicial tradition of neutrality could only compromise our institutional responsibility to ensure that neither the parties before us nor the general public have any occasion, real or imagined, to question our impartiality or fairness in conducting the proceeding. Any party in a contested adjudicatory proceeding that believes its interests would be served by challenging any of our rulings before the Commission has the right to do so. Similarly, if it is in the interests of another party to defend a particular ruling, it is that party's responsibility to do so. For trial judges to assume the mantle of another appellate advocate to defend their own rulings serves no one's interests. Accordingly, we must decline the Commission's invitation to express our views in this matter.

Having said that, we nonetheless believe it is appropriate to detail our reasons for consolidating the proceeding involving the Staff's February 7, 1992 denial of the license renewal applications and the proceeding involving the Staff's February 7, 1992 decommissioning order because those reasons do not appear on the record.[2]

By way of background, there currently are three *Safety Light* proceedings: the OM proceeding involving an immediately effective Staff order of March 16, 1989; the OM-2 proceeding involving an immediately effective Staff order of August 21, 1989; and the consolidated ML, ML-2 proceeding involving the license renewal denials and the decommissioning order. All three of these proceedings are being conducted pursuant to the Commission's Rules of Practice in 10 C.F.R. Part 2, Subpart G, governing formal, on-the-record, adjudicatory proceedings. Underlying all of the proceedings is the need for the substantial and costly cleanup of the Licensees' Bloomsburg, Pennsylvania site and the possibility that the Licensees' assets may be insufficient to decontaminate the site to an acceptable level of risk.

Initially, a single Licensing Board (the ML Board) was established to preside over a proceeding involving both the Licensees' hearing requests on the Staff's February 7, 1992 denial of the license renewal applications and the Staff's February 7, 1992 decommissioning order.[3] Thereafter, the Licensing Boards

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[2] The June 11, 1992 order did not contain a recitation of reasons for consolidating the proceedings because at that time the question of the authority of the Licensing Board and the Presiding Officer to consolidate the proceedings was conceded by the Staff (Tr. 59-61), allaying any need to freight an otherwise routine procedural order with an exposition of that authority or the advantages of consolidation. Subsequently on June 18, 1992, Staff counsel retracted his concession claiming, *inter alia*, that "[he] inadvertently allowed [him]self to be misunderstood" and orally moved for reconsideration of the June 11 order. Tr. 152. Rather than further delaying the proceeding so that the Staff could do what it should have done initially, i.e., file a written reconsideration motion, we orally denied that motion. Tr. 161.

[3] 57 Fed. Reg. 10,932 (Mar. 31, 1992).

presiding over the distinct OM and OM-2 proceedings were reconstituted so that all three proceedings, as they then existed, were before identically constituted Boards.[4]

The original ML Board determined that the proceeding involving the license renewal denials and the decommissioning order should be adjudicated first before either of the pending OM or OM-2 proceedings. This determination was based upon the likelihood that the OM and OM-2 proceedings would become moot in the event the Board upheld the Staff's denial of the license renewal applications and the Board sustained the Staff's decommissioning order. Thus, the ML Board decided that efficient and cost-effective case management counseled holding one trial in an effort to avoid holding three, thereby minimizing the expenditure of the Licensees' limited assets on legal fees and litigation expenses when those assets are needed for the costly cleanup of the Bloomsburg site.

In response to a Staff request, on June 9, 1992, the portion of the ML proceeding involving the Staff's February 7, 1992 license renewal denials was severed from the proceeding by the Chief Administrative Judge. He appointed a single Presiding Officer to hear that part of the case (the ML-2 proceeding) under the Commission's Rules of Practice in 10 C.F.R. Part 2, Subpart L, governing informal adjudicatory proceedings.[5] Thereafter on June 11, 1992, the ML Board and the ML-2 Presiding Officer consolidated the two proceedings under Subpart G pursuant to 10 C.F.R. § 2.716.[6] We consolidated these proceedings because

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[4] 57 Fed. Reg. 11,343 (Apr. 2, 1992).

[5] Chief Administrative Judge's Memorandum (Designating Presiding Officer), June 9, 1992.

[6] The plain language of 10 C.F.R. § 2.716, a Subpart G provision of the Commission's "Rules of General Applicability," specifically authorizes presiding officers, like the Commission itself, to consolidate non-like-kind proceedings (i.e., proceedings with differing procedures) and directs that the consolidated proceeding be conducted in accordance with Subpart G procedures. Hence, whatever authority the Commission has pursuant to section 2.716 to consolidate a Subpart L and a Subpart G proceeding, or any other proceedings employing different procedures, presiding officers also have that authority. *See* 43 Fed. Reg. 17,798, 17,800 (1979).

With that in mind, it is apparent that the subsequent promulgation of the special Subpart L rules for some materials license proceedings did not supplant the authority of the Commission or presiding officers to consolidate proceedings, including Subpart L proceedings, pursuant to section 2.716. This follows from the operation of traditional rules of statutory interpretation which are fully applicable in construing the Commission's regulations. Those rules require that the Commission's regulations be read as a whole, including later-enacted amendments. Effect is to be given to each part of the regulations and *all* provisions are to be interpreted so they do not conflict. Only if the terms of general rules cannot be harmonized with specific rules, including later-enacted specific rules, do the new provisions prevail. Stated otherwise, only where there is an inescapable conflict between general and specific provisions of the regulations do the specific rules apply. *See* 1A N. Singer, *Sutherland Statutory Construction* §§ 22.34-.35 (4th ed. 1985); 2A N. Singer, *Sutherland Statutory Construction* § 46.05 (4th ed. 1984). Essentially, these are the statutory interpretation rules codified in 10 C.F.R. §§ 2.2, 2.3.

Here, the regulatory language of section 2.716 does not inherently conflict with the terms of 10 C.F.R. § 2.1201, the provision that establishes the application of Subpart L to Commission adjudicatory proceedings. Section 2.1201(a) does not use conventional statutory language of mandatory direction and exclusivity such as "shall" and "notwithstanding any other provision," that would cut off the application of section 2.716. In these circumstances, there is no sound basis for finding a conflict between the general rule of section 2.716 and the special rule of section 2.1201(a), and the later section does nothing to constrict the authority of the Commission or presiding officers to consolidate proceedings pursuant to the former.

both cases shared common, unresolved, issues of first impression involving the agency's personal jurisdiction over the corporate subsidiaries of licensee USR Industries, Inc., that likely involve disputed issues of fact.[7] Similarly, because of the common factual setting of both matters relative to the substantive issue of whether the Staff's actions are sustainable, there likely are other material factual disputes common to both proceedings.[8] Further, without consolidation as a Subpart G proceeding, the doctrine of collateral estoppel may well be inapplicable because that doctrine has generally been recognized to require a mutuality in the quality and extensiveness of procedures that arguably is lacking between proceedings conducted pursuant to Subpart L, on the one hand, and Subpart G on the other.[9] Thus, we joined the two proceedings pursuant to section 2.716 to avoid the necessity of trying the same issues twice in two separate proceedings under different procedural requirements, with the attendant risk of inconsistent factual findings by the Presiding Officer and the Licensing Board emanating from the marked differences in procedures between a Subpart L proceeding and a Subpart G proceeding.[10] Additionally, we sought to avoid the unnecessary expense of duplicative hearings that seemingly would squander what by all accounts are the Licensees' limited resources so those assets could be preserved for the decontamination of the Bloomsburg site. Accordingly, we found in our June 11, 1992 order, as required by section 2.716, that "the consolidation of these two proceedings for all purposes will be in the best

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[7] These same contested, unresolved, jurisdictional issues are also present in both the OM and OM-1 proceedings.

[8] Of course, the actual determination of how many factual disputes exist can only be made after we resolve the party's summary disposition motions.

[9] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979). See generally 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Proced* ·· § 4423 (1981); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.441[3.- 3] (2d ed. 1··8).

[10] Further, consolidation had the added benefit of avoiding future litigative risk over the propriety of applying Subpart L procedures to the denial of extremely long-pending license renewal applications when, in substance (in contrast to form), the Staff's February 7, 1992 action arguably was a conditioned license revocation or some other type of 10 C.F.R. Part 2, Subpart B, enforcement action that would have entitled the Licensees to a Subpart G hearing.

interests of justice are those most conducive to the effective and efficient resolution of the issues and the proceedings."[11]

THE ATOMIC SAFETY AND
LICENSING BOARDS

Thomas S. Moore, Chairman and
Presiding Officer
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 17, 1992

[11] Order, June 11, 1992, at 2.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-336-OLA
(ASLBP No. 92-665-02-OLA)
(FOL No. DPR-65)
(Spent Fuel Pool Design)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 2)

July 29, 1992

MEMORANDUM AND ORDER
(Establishing Pleading Schedule)

SYNOPSIS

This proceeding involves a license amendment for the recently redesigned spent fuel pool at Millstone Unit 2. The Board is considering several petitions for leave to intervene and requests for hearing in response to the *Federal Register* notice of the amendment application (57 Fed. Reg. 17,934 (Apr. 28, 1992)).[1]

[1] Initially petitions were filed by Mary Ellen Marucci (undated), Earthvision, Inc. (dated May 27, 1992), and Michael J. Pray (dated May 29, 1992). In addition, Ms. Marucci and others filed on behalf of Cooperative Citizens' Monitoring Network (CCMN) on June 23, 1992. Rosemary Griffiths, on June 29, 1992, and Joseph M. Sullivan, on July 6, 1992, filed nearly identical form petitions which seek intervention individually and which authorize *(Continued)*

The NRC Staff and the Licensee opposed early petitions on the grounds that they do not demonstrate standing to intervene and on other grounds. They have not yet answered later-filed petitions.[2]

Because the NRC Rules of Practice provide very broad opportunities to amend and to supplement intervention petitions, the Board has decided to defer rulings on intervention status until the final round of pleadings has been filed.

In this order, we set a schedule for the filing of amended and supplemental petitions to intervene and answers to such petitions. In addition, to aid the Board in ruling on petitions, we request the Petitioners, the NRC Staff, and the Licensee to address specified questions concerning standing to intervene.

BACKGROUND

In Licensee Event Report 92-003-00, dated March 13, 1992, Northeast Nuclear Energy Company (Licensee) reported that criticality analysis calculation errors with respect to the Millstone Unit No. 2 spent fuel pool had been discovered. The Licensee reported that:

> The safety consequence of this event is a potential uncontrolled criticality event in the spent fuel pool. Upon consideration of the following, a significant margin to a critical condition was always maintained and, therefore, the safety consequences of this event were minimal [factors omitted].

Id. at 3.

Consequently, on April 26, 1992, the Licensee requested an amendment to its Millstone Unit 2 operating license incorporating proposed changes to spent fuel pool technical specifications. Licensee reported that the calculational errors were due primarily to an incorrect treatment of Boraflex panels in the calculations and proposed several corrective modifications to the spent fuel pool design, procedures, and terminology.

The NRC Staff, on behalf of the Commission, found that the proposed changes are acceptable and determined that the proposed amendment involves a "no significant hazards consideration" as provided by 10 C.F.R. § 50.92. Accordingly, on June 4, 1992, the Staff issued Amendment No. 158 to the Millstone Unit 2 facility operating license with supporting Safety Evaluation by the Office of Nuclear Reactor Regulation.

CCMN to represent their respective interests in the proceeding. On July 2, 1992, Mr. Pray augmented his petition to respond to questions of timeliness. Mr. Pray also authorizes CCMN to represent his interests. We discuss the status of the later-filed intervention pleadings on p. 28, *infra*.

[2] In our orders of June 30, and July 15, 1992, we requested the NRC Staff and the Licensee to defer answering later-filed intervention pleadings until further order of the Board. We also extended the time for answering.

As noted at the outset, the notice of the opportunity for hearing on the proposed amendment had been published earlier — on April 28, 1992. Nevertheless, pursuant to the provisions of 10 C.F.R. § 50.91(a)(4), the amendment was issued before any hearing could be convened, even though adverse comments and requests for hearing had been received.

QUESTIONS CONCERNING STANDING TO INTERVENE

Although the Petitioners have not yet availed themselves of their right to state their final positions on standing to intervene, they have expressed concerns about a fuel pool accident in general (Pray and Marucci petitions) and a criticality accident in particular (Sullivan and Griffiths petitions). Their concern is that, because of the proximity of residences, schools, and other physical features, they would be injured by such an accident at Millstone. These concerns are very similar to the traditional "injury-in-fact" ingredient of standing to intervene in NRC proceedings.

Similarly, the Licensee and the NRC Staff have yet to address the final positions of the earlier Petitioners, and they have not yet answered the later-filed petitions. Even so, their answers to the initial petitions have raised possibly novel questions which should be answered before any final ruling on standing to intervene.

As a part of their opposition to the initial Marrucci, Earthvision, and Pray petitions, both the Staff and Licensee state in various terms that: (1) any injury-in-fact to Petitioners must derive from the design change authorized by the amendment itself and not from a general concern about a criticality accident in the spent fuel pool; and (2) since the amendment reduces rather than expands the fuel pool's storage capacity, the amendment does not increase the risk to nearby residents from the operation of Millstone even if a related accident scenario existed prior to the amendment; therefore, (3) no injury-in-fact from the amendment can be inferred from proximity to Millstone.[3]

Taking their argument to its logical conclusion, the Licensee and Staff seem to argue that, if the amendment reduces risks from the pre-amendment condition, there can be no injury within the scope of the notice of opportunity for a hearing. Living or functioning in close proximity to the plant would be irrelevant to the issue of standing to intervene.

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[3] E.g., Staff Response to Earthvision at 7; Staff Response to Marucci at 7; Licensee's Response to Marucci at 9-10.

ASSUMPTIONS

Solely for the purpose of discussing the standing-to-intervene issue, we assume (as Licensee states) that the amendment "simply imposes additional restrictions on the use of the Unit 2 fuel pool" and therefore would not increase risks from the pre-amendment condition. Licensee's Reply at 10. Indeed, for purposes of analysis we assume that the amendment actually decreases the risk of offsite releases from a spent fuel pool accident at Unit 2. We assume further that the pre-amendment accident under consideration is causally related to the event reported in LER 92-003-00.[4] With these assumptions the Board invites the Petitioners, the Licensee, and especially the NRC Staff, to address the following questions in the forthcoming round of intervention pleadings.

QUESTION NO. 1

Assuming as above stated, could an allegation that the technical specifications, as amended, do not bring the spent fuel pool up to the licensing basis and do not satisfy NRC criticality requirements, establish injury-in-fact? In simpler terms, can nearby Petitioners suffer injury-in-fact from postulated offsite releases if the amendment increases safety, but not enough?

QUESTION NO. 2

If Question No. 1 is answered in the negative, what relief from relevant post-amendment risks are available to nearby residents?

QUESTION NO. 3

In discussing the final "no significant hazards consideration" procedures, the Commission provided examples of amendments that are considered likely, and examples that are considered unlikely to involve significant hazards considerations.[5] Among the examples in the "likely" category was:

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[4] Any well-founded, properly pleaded allegation that standing is based upon an increased risk caused by the amendment is not foreclosed by the Board's purely hypothetical assumptions. As the Licensee notes, the Staff's determination that the amendment is a "no significant hazards determination" is not binding on Petitioners. Licensee's Reply to Pray petition at 13. Further, the Commission stated in the final procedures on "no significant hazards considerations," that such a determination is procedural only, without substantive safety significance. *See* Final Procedures and Standards on No Significant Hazards Consideration, 51 Fed. Reg. 7744, 7746 (Mar. 6, 1986).

[5] *Id.*, 51 Fed. Reg. at 7750-51.

(vii) A change in plant operation designed to improve safety but which, due to other factors, in fact allows plant operation with safety factors significantly reduced from those believed to have been present when the license was issued.

51 Fed. Reg. at 7751.

Does not the cited example, notwithstanding its category, indicate that the Commission does not intend to foreclose a hearing to persons whose interests may be affected by an amendment that does not in itself threaten injury, but where injury results directly from the amendment's failure to achieve adequate safety margins?

AMENDED AND SUPPLEMENTAL PETITIONS

The intervention rule provides that any person who has filed a petition for leave to intervene pursuant to the rule may amend his or her petition without prior approval of the presiding officer (i.e., Licensing Board) at any time up to 15 days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(3).

In addition, section 2.714(b)(1) provides that, not later than fifteen (15) days prior to the holding of the first prehearing conference, the Petitioner shall file a supplement to his or her petition to intervene which must include a list of the contentions that Petitioner seeks to have litigated in the hearing.

The NRC intervention rule tends to be forgiving in the sense that Petitioners have a chance to conform their petitions after seeing any objections to the initial petitions by the Licensee or the NRC Staff. In this case, Petitioners would be well served by examining carefully those objections. The questions we posed above should not be regarded as a road map to intervention. Standing with "injury-in-fact," as discussed in the cases cited by the Licensee and NRC Staff, is an absolute intervention requirement. Standing must be clearly and specifically established before intervention can be granted.

The *Federal Register* notice explained in detail the requirements for filing contentions in NRC proceedings. The Board recommends that the Petitioners study the contention requirements of the rule carefully since the rule provides that a Petitioner who fails to satisfy the requirements will not be admitted as a party. 10 C.F.R. § 2.714(b)(1), (2).[6]

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[6] In particular, section 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(Continued)

The Commission is not lenient in overlooking substantive shortcomings in intervention pleadings. It has stated that "the current section 2.714(b) provides rather clear and explicit notice as to the pleading requirements for contentions." Licensing boards may not ignore those requirements when evaluating intervention petitions. *Arizona Public Service Co.* (Palo Verde Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 n.1 (1991).

LATER-FILED PETITIONS

The *Federal Register* notice set May 28, 1992, as the date by which petitions for leave to intervene may be filed in this proceeding and explained that nontimely filings will not be entertained absent a balancing of the factors specified in 10 C.F.R. § 2.714(a)(i)-(v).[7] The petitions of Mr. Pray, Mr. Sullivan, and Ms. Griffiths were filed after May 28.[8] Complicating this situation is the fact that all three of the later-filing Petitioners, arguably with standing to intervene, are members of CCMN and authorize that organization to represent them. Ms. Marucci filed a timely petition as an individual, but may lack standing to intervene as an individual. She also alluded to her role as the coordinator of CCMN. That organization later ratified Ms. Marucci's initial timely filing.

The Board will consider amendments to petitions addressing the five factors to be balanced for nontimely petitions. We shall also consider any arguments that the CCMN petitions as a group are timely. Licensee and the NRC Staff may, of course, answer these arguments.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

[7] The five factors to be balanced are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

[8] Mr. Pray filed a letter supplement dated July 2, 1992, to his petition, in which he argues that his petition was not untimely. The Licensee and NRC Staff have not had an opportunity to answer Mr. Pray's July 2 filing.

SCHEDULE FOR FURTHER INTERVENTION PLEADINGS

The sequence and timing of the filing of amended and supplemental petitions under the rule can be changed by order of the Board to provide for the efficient and rational management of the proceeding. 10 C.F.R. §§ 2.711, 2.718(m). There is normally no need for a prehearing conference until it has been established by the filing of at least one facially acceptable contention by a Petitioner with standing to intervene that a hearing might be required.[9] Therefore, the Board suspends the provisions of the rule that permits filing up to 15 days before the prehearing conference and sets another schedule below.

ORDER

Pleadings shall be filed in accordance with the following schedule:

Each Petitioner may file no later than August 14, 1992, an amended petition and a supplement to his or her petition which includes a list of contentions that Petitioner seeks to have litigated in a hearing.[10]

Licensees may file answers to amended petitions and supplements to petitions within 10 days after service of the amended petitions or supplements.

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[9] Also, if the Petitioners wait until 15 days before the first prehearing conference to file amended and supplemental petitions, the answers to those petitions would not be in the hands of the Board and parties until the very day of the prehearing conference at the earliest, and possibly several days later. In short, the Board and parties would not be prepared to attend to the very business for which the prehearing conference is convened if the schedule set out in the rule is followed.

[10] Parties to NRC proceedings are responsible for serving their papers directly upon other parties and members of the Board in compliance with the provisions of 10 C.F.R. § 2.701. So far the Petitioners have not been complying with the service requirements. The Clerk to the Licensing Board will provide to the Petitioners a current service list for this proceeding. Petitioners must carefully follow the provisions of 10 C.F.R. Part 2 (Rules of Practice) in future filings. Intuitive intervention in NRC proceedings has a high probability of failing.

A copy of the pertinent regulations, 10 C.F.R. Parts 0 to 50, is available from the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328 or may be examined at the local public document room as stated in the *Federal Register* notice of this proceeding.

The NRC Staff shall file answers to amended petitions and supplements within 15 days following their service.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles N. Kelber
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 29, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of Docket No. PRM 50-54

DANIEL BORSON on Behalf of
PUBLIC CITIZEN July 27, 1992

The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM 50-54) from Daniel Borson on behalf of the Public Citizen. The Petitioner requested that the NRC amend its regulations regarding the licensing of independent power producers to construct or operate commercial nuclear power reactors. The petition is being denied on the basis that current NRC regulations provide authority for the licensing of an Independent Power Producer (IPP) should such an application be submitted and for a review of the applicant's financial qualifications to construct and operate a commercial power reactor.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50)

The existing regulations in 10 C.F.R. Part 50 provide authority to request the necessary information from non-utility applicants to perform a financial qualifications review, as well as require the applicants to set aside funds for decommissioning of the reactor.

REGULATIONS: INTERPRETATION (10 C.F.R. Part 140)

Each licensee, utility or non-utility, is required by 10 C.F.R. § 140.21 to maintain adequate monies, through several approved methods indicated in that section, to guarantee payment of deferred premiums to satisfy its responsibility under the Price-Anderson Act.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated November 22, 1989, Mr. Daniel Borson, on behalf of the Public Citizen, filed a petition for rulemaking with the NRC. The petition, which consisted of two parts, requested that: (1) NRC promulgate rules concerning the licensing of Independent Power Producers (IPPs) in general; and (2) these rules include specific criteria for financial qualifications for an IPP seeking a construction permit or an operating license for a commercial nuclear power reactor.

II. BASIS FOR PETITIONER'S REQUEST

Since all licensees of commercial nuclear power plants are presently regulated utilities, NRC regulations for financial qualification of licensees for the construction and operation of these facilities assume that local, state, or federal regulatory bodies will ensure that nuclear licensees have sufficient funds to safely operate their facilities. Regulated utilities have defined fixed markets for their electricity and usually are assured a set return on the amount of investment in plants which is included in the rate base. However, IPPs, on the other hand, must compete openly in the wholesale marketplace and may not have a steady supply of customers for their power. Consequently, while their rates are usually set by the Federal Energy Regulatory Commission (FERC), if IPPs fail to sell all the electricity they produce, or if their plants fail to produce enough electricity, they may not make a profit. Therefore, the long-term financial stability of an IPP is less certain than that of a regulated utility. This potentially precarious financial position may adversely affect the accrual of decommissioning funds, the promptness of necessary maintenance and repairs, the payment of waste fees, and the ability to pay funds in the event of an accident at any commercial nuclear plant as specified under the Price-Anderson Act. Currently, there are no regulations specifically addressing the licensing of IPPs or the transfer of licenses to IPPs.

In light of the above, Public Citizen petitioned NRC to require an affirmative showing of financial qualification by an IPP seeking a construction permit, an operating license, or a transfer of licenses. Additionally, Public Citizen requested that the specific financial qualifications be made part of the IPP's application for a license. The financial questions should include but not be limited to requiring the IPP to:

Establish a procedure to ensure that sufficient funds will be available for payment to the Nuclear Waste Fund established by the Nuclear Waste Policy Act.

Establish a mechanism to ensure that the money that the Price-Anderson Act requires licensees to pay in the event of an accident at any commercial nuclear plant would be available when needed.

Prepay into an external fund the cost of decommissioning the reactor, or demonstrate the absolute assurance by a financial institution that sufficient funds will be available for decommissioning.

III. PUBLIC COMMENTS ON THE PETITION

A notice of receipt of the petition for rulemaking was published in the *Federal Register* on March 12, 1990 (55 Fed. Reg. 9137). Interested persons were invited to submit written comments or suggestions concerning the petition by May 11, 1990. The NRC received 17 comments in response to the notice: 9 from public utilities/industry representatives, 2 from public corporations, 2 from state agencies, 2 from citizens' groups, 1 from a private citizen, and 1 from the Department of Energy (DOE). The majority of the commenters (13) opposed granting the petition. The main reasons cited by the commenters who were opposed to the petition were:

The DOE, the New York Power Authority, and others, stated that they believed that current NRC regulations are sufficient to recognize an entity other than an electrical utility as a licensee for a nuclear power plant. Further, they stated that Part 50 contains language that allows the Commission to obtain information on the financial integrity of an IPP to assure itself that the IPP is qualified to build, operate, and provide for other financial obligations in connection with the plant for the life of the license.

The Nuclear Management and Resources Council (NUMARC) as well as several utilities pointed out that the Petitioner failed to indicate any specific areas of the regulations that required change or to provide any arguments to justify the need for additional regulations at this time.

Financial qualifications for licensees are addressed in the current regulations (10 C.F.R. Parts 50 and 140) and apply to all applicants.

A private citizen pointed out that the promulgation of additional rules is not required to ensure the protection of the health and safety of the public.

Several commenters pointed out that any lender or investor supporting an application from an IPP would clearly insist on adequate financial arrangements to address all significant contingencies.

The Palisades Generating Company pointed out that the IPP concept has not yet been applied to nuclear plants; even in the nonnuclear segment of the electric industry, the concept is still evolving.

The remaining four commenters were in favor of granting the petition. The reasons provided for supporting the petition are as follows:

The State of Illinois stated that specific financial qualifications should be made a part of the application for an operating license. Satisfactory monetary provisions for plant decommissioning, Price-Anderson insurance, and disposal of radioactive waste must be assured. IPPs should have no less culpability than a regulated utility.

The Ohio Citizens for Responsible Energy stated that NRC has developed no substantive rules or a body of case law to address a situation such as the completion and operation of a nuclear reactor such as Perry 2 by an IPP. Stringent financial qualifications review and standards are essential to ensure that the IPPs have sufficient funds to cover appropriate expenses.

The Alabama Public Service Commission stated that the assumption should not be made that current regulations would encompass new entrants such as IPPs. Further, IPPs need to know what will be required by the NRC to determine whether to construct or operate a nuclear reactor and be reasonably sure of making a profit.

Public Citizen sent in a letter to NRC and reiterated essentially what had been stated in their petition.

IV. REASONS FOR DENIAL

Upon receipt of the petition from Public Citizen, the Staff examined the petition in detail to determine which specific regulations the Petitioner believed should be amended to address the licensing of an IPP, or which regulations were inadequate to determine the financial qualifications of an IPP. However, the Petitioner provided no specific reference to the regulations in 10 C.F.R. Chapter I that should be amended.

The Staff then examined each of the seventeen comments submitted by the public on the petition. None of the four commenters who favored granting the petition provided any reference to the specific regulations that should be amended by rulemaking. One of the commenters stated that specific financial qualifications should be made a part of the application for an operating license and that satisfactory monetary provisions for plant decommissioning, Price-Anderson insurance, and disposal of radioactive waste should be ensured. The Staff agrees that this type of information is important to any license application and such information will be reviewed in detail during any license review of an

IPP. Another commenter stated that IPPs should have no less culpability than a regulated utility. The Staff also agrees with this statement. Another commenter stated that NRC has not developed a "body of case law" to address IPPs. NRC has not developed a "body of case law" because an IPP has yet to submit an application for a construction permit or operating license, and the Staff believes that the current regulations provide authority to review an application by an IPP should one be submitted.

In its petition, Public Citizen has not presented any tangible evidence as to why or how the NRC regulations are inadequate. Nor does the Public Citizen demonstrate or state how the NRC would fail to apply existing regulations on a case-by-case basis to the circumstances of an IPP before making the necessary public health and safety findings prior to the issuance of any permit or license. The Staff agrees with the comments of the DOE, NUMARC, and others that the current regulations in 10 C.F.R. Part 50 can be appropriately applied to IPPs.

The Staff believes that the existing regulations in 10 C.F.R. §§ 50.33 and 50.75 provide the authority to request the necessary information from non-utility applicants to perform a financial qualifications review, as well as require the applicants to set aside funds for decommissioning of the reactor. The regulations in 10 C.F.R. § 50.75(d) specifically address "non-electric utility applicants" and require these applicants to submit a decommissioning report to the Commission describing the cost estimate for decommissioning the facility and the manner (which must be acceptable to the Commission) in which the funds will be set aside. Moreover, 10 C.F.R. 50.75(e)(2) specifically defines the acceptable financial assurance mechanisms for a licensee other than an electric utility. Public Citizen has not indicated in its petition where the Commission's regulations are inadequate for accommodating a non-utility applicant.

Non-utility applicants for operating licensees must demonstrate financial qualifications pursuant to 10 C.F.R. § 50.57, and 10 C.F.R. § 50.80 allows the Commission to request information on the financial qualifications of any applicant for license transfer.

Each licensee, utility or non-utility, is required by 10 C.F.R. § 140.21 to maintain adequate monies, through several approved methods indicated in that section, to guarantee payment of deferred premiums to satisfy its responsibility under the Price-Anderson Act. Moreover, if the suggested methods of guarantee are for any reason inadequate or inapplicable for a particular licensee, 10 C.F.R. § 140.21(f) provides for "such other types of guarantee as may be approved by the Commission."

Pursuant to Public Citizen's concern that non-utility applicants will not have sufficient monies available to fund their requisite payment to the Nuclear Waste Fund, the Staff believes that DOE, the agency that administers the Fund, is the best judge of whether a licensee has sufficient funds set aside to meet the costs of disposal of radioactive waste.

For the reasons cited above, the NRC denies the petition.

For the Nuclear Regulatory
Commission

James M. Taylor
Executive Director for Operations

Dated at Rockville, Maryland,
this 27th day of July 1992.

Denials of Petitions for Rulemaking

DENIALS OF PETITIONS FOR RULEMAKING

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of Docket No. PRM 20-19

GENERAL ELECTRIC STOCKHOLDERS' ALLIANCE, *et al.* July 27, 1992

The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM 20-19) from Betty Schroeder on behalf of the General Electric Stockholders' Alliance, *et al.* The Petitioner requested that the NRC issue a regulation to require that a detectable odor be injected into the emissions of nuclear power plants and other nuclear processes over which the NRC has jurisdiction. The petition is being denied on the basis that the proposed action is not necessary because: (1) current monitoring and emergency response procedures provide an adequate level of safety; (2) it would not result in any increased protection of the public health and safety and as a result would not meet the Commission's "Backfit Rule," 10 C.F.R. § 50.109; (3) the proposed action is not technically feasible; and (4) the injection of odors in detectable concentrations over the Emergency Planning Zone for a nuclear power plant or suitable area for other nuclear facility would likely be detrimental to the environment.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Emergency Plans; Environmental Effects of Odorants; Health Effects; Low-Level Radiation Releases; Radioactive Plumes; Radiological Monitoring.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated October 8, 1988, Ms. Betty Schroeder, Secretary of the GE Stockholders' Alliance, filed a petition for rulemaking with the NRC on behalf of herself, the Alliance, and "all the people in the country [USA] and all future generations." The Petitioner requested that the NRC issue a regulation to require that a detectable odor be injected into the emissions of nuclear power plants and other nuclear processes over which the NRC has jurisdiction. The petition specified that the injected odor be similar to, but recognizably different from, the mercaptans used in natural gas.

II. BASIS FOR REQUEST

As a basis for the requested action, the Petitioner stated that compliance with this requirement would immeasurably improve health and safety of the public by providing for early detection of radiation leaks, giving the public notice of the need to take protective measures. The Petitioner recognized that nuclear facilities are required to maintain monitoring stations, but alleges that the accident at Three Mile Island demonstrates deficiencies in the capability to alert the public of dangerous releases. In addition, the Petitioner claims that radiation plumes are erratic and unpredictable in their dispersion upon release because of varying weather and geophysical characteristics of the terrain. Furthermore, the Petitioner asserts that scientific studies prove that even the smallest amounts of ionizing radiation cause harmful health effects, stating that there is ample evidence that radiation causes increased infant mortality, genetic abnormalities, cancer and leukemia, and makes the body more prone to disease by "lowering" the immune system.

By example, the Petitioner asserts that the natural gas industry requires inexpensive, nontoxic mercaptans (recognizable odors) to be injected into gas to help people detect gas leaks and to provide confidence that the use of gas is safe.

III. PUBLIC COMMENTS ON THE PETITION

On February 1, 1989 (54 Fed. Reg. 5089), the NRC published a notice of receipt of the petition for rulemaking in the *Federal Register*. Interested persons were invited to submit written comments or suggestions concerning the petition by April 3, 1989. The NRC received 52 letters of comment in response to the

notice: 28 letters from individuals with 3 opposed, 24 in favor, and 1 urging a feasibility analysis; 10 letters from industry and industrial organizations argued against the petition; 13 public interest groups responded with 1 opposed, 10 in favor, and 2 requesting that NRC examine the technical feasibility of such a requirement; and 1 local governmental entity in favor.

Many of the commenters in favor of the petition gave no reasons for their support. Some only provided statements, without giving the basis for their statements, that this requirement would provide assistance in detecting leaks and/or normal releases, that it would provide the public an advanced warning of leaks, or that it would enhance the public's ability to take protective actions or save lives. A number of commenters stated or implied that it would improve public health or safeguard the future. Two commenters suggested property loss and damage would also be avoided. One commenter stated that it would improve NRC awareness of public exposure. Several of the commenters who favored the petition felt it was important to assuage worries of the public, increase public awareness, or aid public acceptance concerning nuclear power and radioactive emissions. One commenter, however, suggested that if an odorant were added to all emissions that it could mean the end of nuclear power. One commenter wanted to be able to detect leaks because she does not trust the government. One commenter also stated that if the NRC was unwilling to require the odorant, the NRC would be demonstrating to the public that it was hiding the danger from emissions. One commenter, who was apparently in favor of the petition, simply submitted an article which addressed lasting problems resulting from the accident at Three Mile Island. A few commenters seemed to be in favor of the odorant only for leaks or abnormal releases, a few clearly believed that information on all releases should be provided to the public in this way. One of these commenters contended that there was no proof that allowable levels of releases were not harmful. Two commenters stated that the public had a right and a need to know about all exposures. Although a few commenters gave an opinion that it would be technically feasible, none gave any information to support that statement other than noting the benefits of the use of mercaptans in natural gas.

None of the commenters presented any information that was convincing concerning the need for or the feasibility of the proposed requirement.

Although the Petitioner's proposal, if it were feasible, would provide one method of warning the public, the means currently in place are more effective. As discussed further below, the comparison with mercaptans in natural gas breaks down when one goes beyond the simplest of factors. As for this method providing more information to the NRC on public exposures, current systems for measuring releases, estimating doses to the public, and reporting to the NRC are more accurate than the use of an odorant in emissions would be. As to the public's right and need to know what their exposures are, existing

information, though not direct, is available to the public. For example, the NRC publishes an annual report entitled "Radioactive Materials Released from Nuclear Power Plants" compiled by Brookhaven National Laboratory for U.S. Nuclear Regulatory Commission, NUREG/CR-2907.[1] Various volumes cover different report years (each also summarizes previous data). Whether or not such a requirement in the long run would improve or diminish the public's faith in nuclear power would be difficult to predict; however, the question becomes irrelevant given the many arguments against the use of an odorant.

Three of the commenters that supported adding an odorant to emissions also suggested the addition of a safe, nontoxic colorant.

This suggestion is outside the scope of the original petition. However, the Commission notes that although a colorant might have some small advantage in terms of the timing of any warning, most of the considerations applicable to the use of an odorant would also be relevant to a similar use of a colorant.

The commenters that opposed the petition presented significant reasons for their opposition. Many commenters stated that there would be no significant increase in the protection of public health and safety. A few commenters concluded that the requirement would have a negative impact on public health and safety and the environment. Some concluded this because of the difficulty of choosing an odorant that would not be toxic when using the large quantities that would be necessary. Others were concerned that the safety of plants would be reduced. Some of the reasons expressed for this second concern were that: an odorant would make it difficult for workers to respond in an emergency, problems of odorants at the plant would make a nuclear incident more probable, an odorant might be explosive in the containment or corrosive, an odorant might be detrimental to the functioning of emergency equipment, and modification to systems might be necessary.

A number of the commenters stated that existing effluent monitors and notification procedures are more feasible, more sensitive, and more orderly and that present regulations require the integration of instrumentation and public notification procedures that would allow an adequate time for protective actions. Some concluded that the use of an odorant would be unreliable and inaccurate.

Many of the commenters indicated that use of an odorant is not feasible and discussed the technical difficulties. The main points were that: (1) the quantity of odorant required for even a threshold detection in an Emergency Planning Zone (radius of about 10 miles) for a nuclear power plant is greater than is feasible, (2) odors could not be related to the amount of radiation

[1] Copies of NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and/or copying at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

because of different half-lives or different concentrations, and (3) it is technically unfeasible to label fission products with an odor. Some commenters discussed the differences between radioactive emissions and the use of mercaptans in natural gas. They pointed out that: (1) natural gas is piped directly to and used in homes and buildings where there are no other warning devices and where a leak can create an immediate hazard to life and health; (2) mercaptans in natural gas are intended for the detection of very localized leaks, thus very small concentrations are used; and (3) mercaptans are gases that dissolve into the natural gas. These commenters stated that the situation with radioactive emissions is drastically different with the objective of detecting releases to the unbounded outdoors for miles around.

Some commenters indicated the importance of a unique odor and discussed problems with the choice of an odorant. A number of commenters including one in favor of the requirement pointed out problems with mercaptans or similar compounds. One commenter submitted extensive information concerning the toxicity of various mercaptan compounds. One commenter suggested peppermint or a specific perfume. Another commenter pointed out that even a usually pleasant odorant could be an allergen to some people.

Other problems pointed out by the commenters were: (1) the odorant would be overwhelming on site and possibly toxic to workers, (2) there would be a likelihood of false alarms as a result of similar odors or because of system malfunctions, (3) the length of time for the odor to reach the public would be unacceptably long, (4) the cost of the system would be an unnecessary financial burden to licensees, and (5) the public would have to be trained to recognize the odor. Some problems pertaining particularly to the use of an odorant in routine emissions were noted: (1) a problem of aesthetics for nearby residents, (2) olfactory fatigue, and (3) the possibility that the odor would become too familiar and not be responded to when appropriate.

Generally, the NRC agrees with those commenters who were opposed to the petition. Although there may have been a few minor overstatements or misstatements, the NRC agrees that all of the basic reasons given by the commenters for opposing the petition are valid.

In addition, two responders submitted that in accordance with 10 C.F.R. § 2.803, the NRC should not have instituted this proceeding on the basis that the petition was without merit and a waste of NRC, industry, and public resources and presumably not worth public comment.

The NRC's regulations require that a petition that meets the threshold requirements in 10 C.F.R. § 2.802(c) be docketed as a petition for rulemaking. Although publication for comment in the *Federal Register* is discretionary, it is not a burdensome procedure and affords members of the public an opportunity to participate in the agency's deliberative processes that would not otherwise be available. Public comment is frequently of value in considering the merits

of a petition, particularly where the petition raises an issue for the first time. Generally, the NRC prefers to err on the side of openness rather than invite public distrust.

IV. REASONS FOR DENIAL

The NRC has considered the petition, the public comments received, and other related information and has concluded that the issues raised by the petition are without merit. The following is a discussion of the details of that conclusion.

The primary concern of the Petitioner is a perceived need to improve the health and safety of the public by improving the detection of radiation leaks and providing the public with notification to take protective measures. In fact, for the case of nuclear power reactors, systems for the detection of radioactive leaks and the ability to quickly notify the public to take protective measures are in place as required by NRC regulations. A number of these measures were instituted based on lessons learned from the TMI accident.

Sensitive and redundant radiation monitors are located throughout nuclear power plants to provide detection and alarm capability at the point of release. These monitors measure, numerically and directly, the amount of radiation. In contrast, if detection of radiation were dependent upon identification of an odor by a person offsite rather than an instrument, the detection would be delayed by at least the time it would take to reach the first person off site trained to recognize the odor. At best, the use of an odorant in conjunction with radioactive emissions would be an indirect and not a quantitative indication of the presence of radioactivity.

The Petitioner contends that the accident at Three Mile Island demonstrated deficiencies in the ability to alert the population of dangerous releases.[2] After the accident, the NRC did conclude that the requirements for emergency preparedness needed to be significantly upgraded. Consequently, regulations elaborating the scope and contents of emergency plans for nuclear power plants were instituted. Included in these requirements are capabilities to promptly and accurately detect releases of radioactivity, as well as the potential for a release, and to notify the public within 15 minutes of the declaration of an emergency. Before a nuclear power plant is licensed to operate, the NRC must verify that the licensee's emergency plans and procedures are adequate to protect the public health and safety in the event of an accident. Further, the emergency planning for these licensees must be coordinated with local and state authorities. Also,

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[2]The Petitioner should note that careful analysis of the actual radioactive release during the accident at Three Mile Island showed that the resultant dose to the public was comparable to that which would result from one or two trans-Atlantic commercial airline trips, and therefore, would not be considered dangerous.

emergency plans must be maintained and updated annually and exercises must be conducted annually (with state and local participation biannually). In addition, the NRC inspects licensees annually to ensure compliance with the regulatory requirements.

In summary, for the case of nuclear power plants, a system is already in place, which the NRC has previously determined provides adequate protection of the public health and safety. It is unlikely that the addition of an odorant to emissions could add any margin of safety to that provided by existing systems. Therefore, the addition of an odorant to the radioactive emissions from power reactors would not meet the Commission's Backfit Rule, 10 C.F.R. § 50.109.

In the case of NRC licenses other than those for power reactors, emergency preparedness is commensurate with the hazard. The potential radioactive hazards from most of these licensees are not sufficient to affect the general public. However, for those licensees with sufficient materials to meet the criteria for requiring an emergency plan, the appropriate surveys and monitoring for radioactive releases are required, as well as timely reporting of radioactive releases to the proper authorities. As in the case of power reactors, the existing required systems have been judged adequate and are superior to the indirect indication that would be provided by an associated odorant.

The Petitioner specifically asserts that radiation plumes are erratic and unpredictable in their dispersion upon release because of varying weather and geophysical characteristics of the terrain.

Plumes of radioactive substances behave in accordance with their physical and chemical characteristics. In this respect, they are no different from plumes of stable elements with the same physical and chemical characteristics, such as temperature, velocity, density, particle size, etc. The NRC, other federal agencies, and licensees routinely predict the dispersion of radioactive plumes based on dispersion models (that are often computerized) that include factors such as weather and terrain. As with all modeling there are associated uncertainties. These models are used to predict the path of plumes and to enable public officials to recommend protective actions before the plume arrives at downwind, populated areas.

In contrast, the use of odorants would require the arrival of the plume in populated areas to initiate any protective actions. Precautionary evacuation, with virtually no radiation dose to the public, would not be an option with the use of an odorant. An additional problem is that a gaseous odorant may not have the same physical characteristics as the radioactive releases and thus may not follow the same path as the radioactive emissions. If this were the case, the detectability of the odorant may not be a good indicator of the presence or the concentration of radioactivity.

As discussed extensively by some of the commenters, the use of an odorant for the purpose of warning people of radioactive releases is not feasible. Most

sources of potential releases are not in a form such that an odorant could be dissolved into or otherwise associated with the radioactive material in a way that they would be automatically released together. It would be necessary to rely on a system of detecting radioactivity, such as existing measuring devices, which would then trigger the addition of odorants to stack effluents or venting systems. It would not be possible to account for all sources of releases, although main stacks or vents would be the primary sources of releases. In part because of the complexity of implementing such a requirement, reliance on licensee compliance and government enforcement would still be necessary. Thus, the problem of lack of trust of a segment of the public in the licensees and the government could not be eliminated.

A further concern is that the concentrations of odorants used would have to be very high at the point of release in order to be detectable at any significant distance. Concentrations reaching people would vary considerably, depending on the distance from the source and other factors, such that odors would likely be overwhelming on site and in some locations off site and quite possibly toxic while being undetectable at other locations. As noted above, it would also be impossible for the chemical and physical characteristics of the odorant to match those of all the releases that are both gaseous and particulate. Thus, the concentrations of odorants would not remain proportional with the concentrations of contaminants. The concentrations of odorants would also not match the relative hazard of contaminants, because the radiotoxicity of various nuclides varies greatly.

The prospect of injecting an odorant into emissions of radioactivity also raises an environmental issue. If the odorant were used in connection with normal permitted releases as specifically suggested by some of the commenters, it would cause the institution of an objectionable and continual insult to the air quality in and downwind from licensed facilities. For example, it is highly likely that the addition of a mercaptan-like odorant to radionuclides used in the nuclear medicine sections of hospitals would be intolerable. Similarly, residents downwind from nuclear power plants would be subjected to a decreased quality of air. It would be difficult, if not impossible, to select an odorant that would not be toxic in the concentrations required. As discussed above, the addition of an odorant would provide little, if any, benefit to the protection of the public health and safety. Therefore, the detrimental effects on the environment outweigh the benefits, if any, of injecting an odorant into radioactive emissions from NRC licensed facilities.

The petition erroneously states that scientific studies prove that even the smallest amounts of ionizing radiation cause harmful health effects. On the contrary, there is a controversy in science on the health effects, if any, of very small doses of ionizing radiation. Nonetheless, the NRC regulates on the basis of the linear nonthreshold hypothesis which assumes that there is no threshold

of dose below which there is no harm, i.e., that even the smallest doses are potentially harmful.[3]

Taking all the considerations above into account with respect to the early detection goal of the proposed requirement, the Petitioner fails to recognize that more timely and sensitive methods of detection of radioactive emissions are already in place. Similarly, with respect to the ability to notify the public to take protective actions in a timely manner, the Petitioner does not recognize that an effective method for notifying the public is already in place.

Therefore, there would be little, if any, increased benefit to the public health and safety as a result of the proposed requirement.

In conclusion, the NRC finds the petition without merit, and denies the petition.

For the Nuclear Regulatory Commission

James M. Taylor
Executive Director for Operations

Dated at Rockville, Maryland,
this 27th day of July 1992.

[3]The Petitioner also erroneously states that the natural gas industry requires the injection of odors into gas for commercial and domestic use. In fact, it is the federal government that requires the use of odorants in natural gas as stated in the regulations (49 C.F.R. § 192.626).