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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1996



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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1996

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 Decisions on 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 20555-0001
(301/415-6844)

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

CONTENTS

Issuances of the Atomic Safety and Licensing Boards

EMERICK S. MCDANIEL

(Denial of Application for Reactor Operator License)

Docket 55-21849-OT (ASLBP No. 96-716-01-OT)

(Re: License Amendment) (Transfer to Southern Nuclear)

MEMORANDUM AND ORDER, LBP-96-13, July 12, 1996 1

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

Docket 50-029-DCOM (ASLBP No. 96-718-01-R)

MEMORANDUM AND ORDER, LBP-96-14, July 12, 1996 3

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

Docket 50-029-DCOM (ASLBP No. 96-718-01-R)

MEMORANDUM AND ORDER, LBP-96-15, July 31, 1996 8

Issuances of Directors' Decisions

CHEMETRON CORPORATION, INC.

(Cleveland, Ohio)

Docket 040-08724

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

DD-96-9, July 3, 1996 47

TENNESSEE VALLEY AUTHORITY

(Watts Bar Nuclear Plant)

Docket 50-390

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

DD-96-10, July 9, 1996 54

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Peter B. Bloch, Presiding Officer
Dr. Peter Morris, Special Assistant

In the Matter of

Docket No. 55-21849-OT
(ASLBP No. 96-716-01-OT)
(Re: License Amendment)
(Transfer to Southern
Nuclear)

EMERICK S. MCDANIEL
(Denial of Application for
Reactor Operator License)

July 12, 1996

MEMORANDUM AND ORDER
(Scheduling)

Subject to change on the request of a party, Friday, July 19, 1996, at 9 a.m., there will be a telephone prehearing conference. Parties shall inform me by 4 p.m. on July 17 of their telephone address for this conference.

The purpose of the conference is to narrow the issues for hearing. The Presiding Officer proposes, subject to change in response to comments by the parties, that the conference be limited to whether or not Mr. McDaniel's written examination score should be increased because: (1) some of the questions should be struck as misleading, or (2) some of Mr. McDaniel's answers were incorrectly marked wrong. Other explanations for incorrect answers, including incorrect or misleading training for the examination, will not be considered. The NRC protects the public interest in health and safety by licensing reactor operators only if they have successfully demonstrated their knowledge of nuclear

power plant operation.¹ See *Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-10, 27 NRC 417 (1988), and LBP-88-16, 27 NRC 583 (1988); *Roger W. Ellingwood* (Senior Operator License for Catawba Nuclear Station), LBP-89-21, 30 NRC 68 (1989).

If Mr. McDaniel has concerns about the adequacy of the training he received, he may raise those concerns with his employer, Georgia Power Company, and with the Staff of the Nuclear Regulatory Commission. An adequate training program contributes to an operator's ability to safely operate a nuclear power plant. However, an inadequate training program does not excuse incorrect examination answers and is not a basis for issuing an operator's license.

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

¹ We note that Mr. McDaniel appears to be eligible to apply for a reexamination and that, upon request by him or facility management, the reexamination will be scheduled "shortly." Letter from Bruce A. Boger, NRC, to Mr. Emerick McDaniel, April 4, 1996. Hearing File Item #42. Parties may address the meaning and effect of this letter at the prehearing conference. If Mr. McDaniel can be denied reexamination, there may be a further issue in the case concerning the adequacy of his training.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Thomas S. Elleman

In the Matter of

Docket No. 50-029-DCOM
(ASLBP No. 96-718-01-R)

YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

July 12, 1996

The Licensing Board grants a participant request to videotape a prehearing conference, finding that, although language in a 1978 policy statement appears to restrict television and still camera coverage of Board proceedings to accredited news media, it is apparent under current agency practice there is no such limitation.

**RULES OF PRACTICE: TELEVISION AND STILL CAMERA
COVERAGE OF PROCEEDINGS**

The Commission's general statement of policy on camera coverage of Licensing Board hearings sets conditions for the use of television and still cameras "by accredited news media." 43 Fed. Reg. 4294 (1978). However, under current agency practice, any individual or organization may videotape a Commission-conducted open meeting so long as their activities do not disrupt the proceeding. See U.S. Nuclear Regulatory Commission, "A Guide to Open Meetings," NUREG/BR-0128, Rev. 2 (4th ed.) ("*Conduct in the Meeting Room . . .* e. You may . . . film, photograph or video tape meetings using cameras in designated fixed positions without additional lighting." (emphasis in original)).

As a consequence, the general policy statement on cameras at Board hearings, which was adopted in 1978 on a "trial basis," no longer appears to reflect agency practice to the degree it would preclude anyone other than the news media from videotaping Board proceedings.

RULES OF PRACTICE: TELEVISION AND STILL CAMERA COVERAGE OF PROCEEDINGS

Videotaping of a Board proceeding must be done in a manner that does not present an unacceptable distraction to the participants or otherwise disrupt the proceeding.

To this end, anyone videotaping a proceeding held in the Atomic Safety and Licensing Board Panel Hearing Room must abide by the following conditions:

1. Cameras must remain stationary in the designated camera area of the Licensing Board Panel Hearing Room.
2. No additional lighting is permitted.
3. No additional microphones will be permitted outside of the designated camera area. A connection is available in the designated camera area that provides a direct feed from the hearing room audio system.

RULES OF PRACTICE: TELEVISION AND STILL CAMERA COVERAGE OF PROCEEDINGS

As was noted in the 1978 policy statement, 43 Fed. Reg. at 4294, in instances when a Licensing Board is using other facilities, such as a state or federal courtroom, the Board generally will follow the camera policy governing that facility, even if it is stricter than the agency's camera policy. Nonetheless, the Board reserves the right to impose restrictions beyond those generally used at the facility to prevent disruption of the proceeding and maintain an appropriate judicial atmosphere.

RULES OF PRACTICE: TELEVISION AND STILL CAMERA COVERAGE OF PROCEEDINGS

The Board may terminate videotaping at any time it concludes a videotape-related activity is being carried out in a manner that interferes with the good order of the proceeding.

MEMORANDUM AND ORDER
(Granting Motion to Videotape Prehearing Conference)

Petitioners Citizens Awareness Network, Inc. (CAN), and the New England Coalition on Nuclear Pollution (NECNP) have filed a request for permission to videotape the scheduled July 16, 1996 prehearing conference in this proceeding. The proceeding will be held in the Licensing Board Panel Hearing Room at the agency's Rockville, Maryland headquarters complex.

In their July 10 motion and July 12 supplemental response, the Petitioners assert that because of the public interest in this decommissioning proceeding in the locality of the Yankee Nuclear Power Station, an experienced videographer wants to tape the proceeding for possible use on local public access television channels. The Petitioners also represent that the Commonwealth of Massachusetts supports their request, while the NRC Staff takes no position on their motion. Licensee Yankee Atomic Electric Company (YAEC) has opposed the request in a July 10 response and July 10 and 12 supplemental responses, asserting that to ensure the proceeding is not disrupted, any videotaping should be done by NRC personnel under the direction of the Board.

As the Board noted in its July 10 order, the existing Commission general statement of policy on camera coverage of Licensing Board hearings sets conditions for the use of television and still cameras "by accredited news media." 43 Fed. Reg. 4294 (1978). By its terms, the policy statement appears to permit videotaping of Board hearings only by news organizations or individuals acting on their behalf. Whether the individual who apparently will be taping the prehearing conference or the organizations for which he is acting fall within the policy statement's terms is not altogether clear.

As the Board suggested in its July 11, 1996 memorandum and order, however, another factor arguably is relevant in this instance as well. Under current agency practice, any individual or organization may videotape a Commission-conducted open meeting so long as their activities do not disrupt the proceeding. *See* U.S. Nuclear Regulatory Commission, "A Guide to Open Meetings," NUREG/BR-0128, Rev. 2 (4th ed.) ("*Conduct in the Meeting Room . . . e. You may . . . film, photograph or video tape meetings using cameras in designated fixed positions without additional lighting.*" (emphasis in original)). As the Board understands this practice, there is no requirement that the taping be done by or on behalf of a news organization.

As a consequence, the general policy statement on cameras at Board hearings, which was adopted in 1978 on a "trial basis," no longer appears to reflect agency practice to the degree it would preclude anyone other than the news media from videotaping Board proceedings in the Licensing Board Panel Hearing Room. The Board thus does not consider the policy statement a bar to the Petitioners'

request, so long as any videotaping is done in a manner that does not present an unacceptable distraction to the participants or otherwise disrupt the proceeding.¹

To this end, anyone videotaping the prehearing conference (or any other Board proceeding held in the Panel Hearing Room²) must abide by the following conditions:

1. Cameras must remain stationary in the designated camera area of the Licensing Board Panel Hearing Room.
2. No additional lighting is permitted.
3. No additional microphones will be permitted outside of the designated camera area. A connection is available in the designated camera area that provides a direct feed from the hearing room audio system.

Based on the representations in the Petitioners' July 12, 1996 reply, it appears that the proposed videographer is aware of and will comply with these standards.

The Board and other Licensing Board Panel personnel will monitor the activities of anyone videotaping this prehearing conference to ensure the proceeding is not disrupted.³ Likewise, any participant promptly should bring to the Board's attention any videotape-related activity it believes is distracting or otherwise disruptive. The Board may terminate videotaping at any time it concludes a videotape-related activity is being carried out in a manner that interferes with the good order of the proceeding.

¹ Licensee suggests that the Commission's camera policy might be limited to Sunshine Act "open" meetings, which "does not extend to adjudicatory hearings." Further Supplemental Opposition of [YAEC] to "Motion for Leave to Videotape Pre-Hearing Conference" (July 12, 1996) at 1 (citing 5 U.S.C. § 552b(c)(10)). Although the Sunshine Act does permit the agency to close meetings involving the disposition of adjudicatory matters, thereby precluding either the public or the press from attending, neither the Act nor the Commission statement on open meetings suggests there are any additional limitations on the use of cameras for those adjudicatory proceedings that otherwise are open.

² As was noted in the policy statement, in instances when a Licensing Board is using other facilities, such as a state or federal courtroom, the Board generally will follow the camera policy governing that facility even if it is stricter than the agency's camera policy. Nonetheless, the Board reserves the right to impose restrictions beyond those generally used at the facility to prevent disruption of the proceeding and maintain an appropriate judicial atmosphere.

³ The Board anticipates that the prehearing conference will begin promptly at 9:30 a.m. Those videotaping the proceeding should arrive in time to ensure that all equipment is set up and tested by this starting time. Licensing Board Panel employee James "Mac" Cutchin (301-415-7397) is the contact for any questions regarding videotaping in the Panel Hearing Room.

The Petitioners' July 10, 1996 motion to videotape the July 16, 1996 prehearing conference is *granted*, subject to the conditions set forth above.
It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 12, 1996

⁴ Copies of this Memorandum and Order have been sent this date to counsel for YAEC, CAN, NECNP, and the Commonwealth of Massachusetts by facsimile transmission and to Staff counsel by E-mail transmission through the agency's wide area network.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Thomas S. Elleman

In the Matter of

Docket No. 50-029-DCOM
(ASLBP No. 96-718-01-R)

YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

July 31, 1996

In this proceeding concerning citizen group challenges to the decommissioning plan for the Yankee Nuclear Power Station, acting pursuant to the Commission's directive in CLI-96-7, 43 NRC 235 (1996), to consider whether information filed with the Commission after the Licensing Board dismissed the proceeding for want of any litigable contentions will now provide for an admissible contention, the Board concludes that (1) a balancing of the five "late-filing" factors in 10 C.F.R. § 2.714(a)(1) establishes the Petitioners' new information should not be stricken, and (2) a portion of the Petitioners' new information provides a sufficient basis to admit a contention.

RULES OF PRACTICE: CONTENTIONS

Contentions play a vital role in agency licensing adjudications by framing the issues for consideration. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

A lack of precision about what is a contention and what are its bases serves to obfuscate the general principle that contentions, not bases, are litigated in NRC adjudications.

RULES OF PRACTICE: CONTENTIONS (AUTHORITY OF PRESIDING OFFICER TO SIMPLIFY AND CLARIFY)

Exercising his or her general authority to simplify and clarify the issues, *see* 10 C.F.R. § 2.714(f), a presiding officer can recast what a petitioner sets out as two contentions into one.

RULES OF PRACTICE: CONTENTIONS (NEW INFORMATION; UNTIMELY FILING)

A Commission direction to the presiding officer to consider the admissibility of a particular late-filed matter does not preclude the presiding officer from giving the same consideration to other late-filed information submitted by a petitioner relevant to that matter. *Cf. Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979) (in remand proceeding on management capability issue, additional petitioners' attempt to seek late intervention to participate on that issue must be assessed under late-intervention criteria).

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

Although a presiding officer must assess all five factors in determining whether to admit a late-filed issue, all the factors need not be given equal weight. In this connection, considerable importance generally has been attributed to factor one — "good cause" for late filing — in that a failure to meet this factor enhances considerably the burden of justifying the other factors. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1367 (1982); *see also Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977) (when good cause is demonstrated, other factors are given less weight).

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (ASSISTANCE IN DEVELOPMENT OF SOUND
RECORD; BROADENING ISSUES/DELAY IN THE PROCEEDING)**

Among the other four "late-filing" factors, factors three and five — contribution to a sound record and broadening issues/delay in the proceeding — generally have been considered as having the most significance in proceedings in which there are no other parties or ongoing related proceedings. *See Shoreham*, ALAB-743, 18 NRC at 399, 402; *see also South Texas*, LBP-82-91, 16 NRC at 1368.

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

Generally a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In some instances, however, the answer to the "good cause" factor may involve more than looking at the dates on the various documents submitted by the petitioners. Instead, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the new information "puzzle" were sufficiently in place to make the particular concerns espoused reasonably apparent.

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

The technical nature of the issues involved in a proceeding cuts against an assertion that the legal acumen of counsel in NRC proceedings should be given weight under the "late-filing" factor regarding assistance in developing a sound record. And, notwithstanding the fact an intervenor is entitled to make its case through cross-examination, that factor cannot be weighed favorably when the presiding officer has no reason to anticipate that cross-examination by counsel will be the sole means, or even the central method, for establishing the petitioner's case. *See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1)*, ALAB-868, 25 NRC 912, 926 (1987).

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

In assessing the "late-filing" factor of assistance in developing a sound record, the need to conduct discovery no doubt may excuse a lack of specificity

about potential witnesses' testimony in those nontechnical cases where any testimonial evidence likely will come from licensee employees or contractors. See *Comanche Peak*, ALAB-868, 25 NRC at 925-26.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BROADENING ISSUES/DELAY IN THE PROCEEDING)

An assertion that the "late-filing" factor regarding broadening the issues and delaying the proceeding takes on added significance because of the impact of delay on the applicant's ability to conduct activities for which it needs authorization does not comport with the established rule that "a licensing board [is] to determine whether the proceeding — not license issuance or plant operation — will be delayed." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986) (footnote omitted).

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

Because a petitioner who otherwise has standing can put forth any contention that would entitle that petitioner to the relief it seeks, see CLI-96-1, 43 NRC 1, 6 (1996), in deciding whether to admit a late-filed contention the petitioner otherwise would be entitled to litigate, the fact the petitioner's contentions focus primarily on matters that will protect the interests of others does not mean the petitioner's "interest" should be afforded short shrift in assessing the late-filing factors of whether other means or other parties will protect the petitioner's interests.

RULES OF PRACTICE: SUMMARY DISPOSITION (PREMATURE FILING)

A presiding officer cannot consider a motion for summary disposition, with supporting affidavits, in connection with a determination about the admissibility of a contention.

RULES OF PRACTICE: DISCOVERY (SUMMARY DISPOSITION); SUMMARY DISPOSITION (DISCOVERY)

One possible answer to a motion for summary disposition is the assertion that discovery is needed to respond fully to the motion. See *Public Service Co.*

of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992). Such a request generally should be made in a pleading supported by an affidavit. *See id.* The functional equivalent of such a filing may be the statements of counsel during a prehearing conference outlining the discovery needed to support the party's case.

MEMORANDUM AND ORDER

(Admitting Contention and Establishing Litigation Schedule Regarding "New Dose Argument")

In CLI-96-7, 43 NRC 235 (1996), the Commission referred to the Licensing Board for its consideration the so-called "new dose argument" made by Petitioners Citizens Awareness Network, Inc. (CAN), and the New England Coalition on Nuclear Pollution (NECNP). The Commission has directed that we determine whether that argument, made initially in a March 7, 1996 filing before the Commission, merits a finding the Petitioners have presented a litigable contention in their adjudicatory challenge to Licensee Yankee Atomic Electric Company's (YAEC) choice of a decommissioning option for its Yankee Nuclear Power Station (Yankee Rowe).

For the reasons set forth below, we conclude the Petitioners' "new dose argument" does satisfy the "late-filing" standards of 10 C.F.R. § 2.714(a)(1) and provides a sufficient basis for admitting a challenge to the YAEC decommissioning option choice based on concerns about maintaining public and occupational radiation doses as low as reasonably achievable (ALARA) and agency compliance with the National Environmental Policy Act of 1969 (NEPA). As a consequence, we (1) grant the Petitioners' intervention request and admit a revised version of their previously separate ALARA and NEPA contentions that incorporates both aspects of the Petitioners' concern about YAEC's decommissioning option choice, and (2) establish an expedited schedule for litigating the merits of that contention.

I. BACKGROUND

Previous Commission and Licensing Board decisions provide a detailed history of the judicial and administrative underpinnings of this proceeding. *See* CLI-96-7, 43 NRC at 241-46; LBP-96-2, 43 NRC 61, 65-68 (1996). Suffice it to say that this matter is before the Board again pursuant to a June 18, 1996 Commission memorandum and order directing us to consider the viability of what has been labeled the "new dose argument." As described in that issuance, this argument is rooted in information presented in a March 7, 1996 petitioner

filing before the Commission supplementing a January 26, 1996 motion for reconsideration or partial rescission of a January 16, 1996 Commission issuance, CLI-96-1, 43 NRC 1 (1996). See CLI-96-7, 43 NRC at 254-55, 271-72.

In CLI-96-1, the Commission referred the Petitioners' November 30, 1995 intervention petition to the Board to conduct an adjudicatory proceeding. In that directive, the Commission also provided the Board with guidance regarding, among other things, certain of the Petitioners' five contentions. Addressing the Petitioners' Contention A — an ALARA-based challenge to YAEC's decision to use a modified version of the DECON decommissioning alternative rather than the longer-term SAFSTOR alternative¹ — the Commission declared it was willing to assume an adequately based ALARA challenge would lie against a licensee's decommissioning alternative choice. The Commission also indicated, however, that it would not sanction an intervenor adjudicatory challenge to the DECON-SAFSTOR choice resting solely on estimated collective occupational doses "on the order of magnitude" of the generic 900 person-rem estimated difference between those options as set forth in the 1988 final generic environmental impact statement (GEIS) supporting the agency's 1988 decommissioning rule.² Noting that the Petitioners' ALARA contention estimates seemingly fell within that range, the Commission suggested that their challenge had no ALARA significance, absent "some extraordinary aspect to the case not apparent to us from the pleadings that the Licensing Board may uncover on its own review." CLI-96-1, 43 NRC at 9.

While the matter was pending with the Board, the Petitioners filed a motion with the Commission that, among other things, requested reconsideration of the Commission's guidance regarding their Contention A. In that motion, the Petitioners declared that the Commission's guidance regarding the relative doses for DECON and SAFSTOR constituted an improper prejudgment of contested facts. To support that assertion, the Petitioners repeated a statement from a portion of their November 1995 hearing petition relating to Contention E — their NEPA

¹ As both we and the Commission have explained, see CLI-96-7, 43 NRC at 243 n.2; LBP-96-2, 43 NRC at 66 n.2, the DECON alternative is decontamination of the reactor site to a level that permits the site to be released for unrestricted use shortly after facility operation concludes. In contrast, the SAFSTOR option involves maintaining the facility in a condition that allows for safe storage for an extended time period (e.g., 30 years) and subsequent decontamination to levels permitting release for unrestricted use. The Licensee's modified DECON alternative under consideration in this proceeding provides for dismantling the plant (except for required spent fuel pool safe maintenance systems); dismantling the spent fuel pool when fuel and high-level radioactive waste storage and/or removal options become available; shipping other appropriate radioactive materials to a low-level radioactive waste (LLRW) facility; and then decontaminating the site for release for unrestricted use. See CLI-96-7, 43 NRC at 243.

² This 900 person-rem figure reflects the approximate difference between the GEIS estimated total reference pressurized water reactor (PWR) DECON decommissioning occupational dose of 1.215 person-rem and the GEIS estimated SAFSTOR occupational dose of 333 person-rem that would be accrued using a 30-year storage period at the reference PWR. See Office of Nuclear Regulatory Research, USNRC, NUREG-0586, "Final Environmental Impact Statement on Decommissioning of Nuclear Facilities" (Aug. 1988) at 4-8 (Table 4.3-2). The GEIS was prepared in support of the 1988 rule that is the basis of pertinent NRC decommissioning requirements. See 53 Fed. Reg. 24,018 (1988).

contention challenging the Staff's determination not to prepare a full-blown environmental impact statement (EIS) regarding Yankee Rowe decommissioning — in which they declared that “based on 1993 dose estimates by YAEC [of 350-400 person-rem for its early component removal project (CRP)³], ‘it appears that total occupational doses [for Yankee Rowe decommissioning] will be significantly greater than 744 or 755 person-rem, and perhaps greater than 900 rem.’” [CAN/NECNP] Motion for Reconsideration and Partial Rescission of CLI-96-01, Request for an Order to Show Cause Why the NRC Staff Should Not Be Dismissed from This Proceeding, and Request for Recusal of Commissioners (Jan. 26, 1996) at 10 (quoting [CAN/NECNP] Petition to Intervene and Supplemental Petition to Intervene (Nov. 30, 1996) at 32 [hereinafter Intervention Petition]).

On March 1, 1996, while the Petitioners' reconsideration motion was still pending with the Commission, the Licensing Board issued a decision concluding that while the Petitioners had standing, their petition to intervene nonetheless had to be dismissed for failure to present a litigable contention. In LBP-96-2, the Board noted that the three “extraordinary circumstances” detailed by the Petitioners relative to their Contention A, including their concerns about the Commission's conclusion regarding the difference in occupational doses likely to occur from using the DECON and SAFSTOR options, were identical to bases put forth in support of their then-pending reconsideration motion challenging the validity of CLI-96-1. We therefore declined to consider them. *See* LBP-96-2, 43 NRC at 72-73. In addition, we addressed the Petitioners' Contention E argument that YAEC's 1993 CRP estimate of 350-400 person-rem, when compared to a later revised figure of 160 person-rem, suggested a significant discrepancy in its overall decommissioning dose estimate that mandated preparation of a supplemental EIS. We found that by not presenting anything suggesting that the more recent figure was incorrect, as opposed to simply different from the earlier figure, the Petitioners had failed to establish the requisite disputed material factual issue warranting further inquiry.⁴ *See id.* at 86-87.

The Petitioners' January 26, 1996 reconsideration motion ultimately was denied by the Commission in a March 7, 1996 memorandum and order. Concluding that it had not engaged in any factual prejudgment in CLI-96-1, the Commission also indicated it would defer consideration of those portions of the Petitioners' argument that appeared to challenge the merits of its CLI-96-1

³ As also has been described in detail elsewhere, the CRP was an agency-sanctioned program under which YAEC, prior to approval of its decommissioning plan, was permitted to dismantle and remove various reactor components and either ship those items to the LLRW disposal facility at Barnwell, South Carolina, for permanent disposal or store them in the Yankee Rowe spent fuel pool. *See Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 288-90 (1st Cir. 1995).

⁴ The Board also ruled that the Petitioners' Contentions B, C, and D were not litigable. *See* LBP-96-2, 43 NRC at 73-85. The Commission affirmed these rulings in its June 18, 1996 memorandum and order, *see* CLI-96-7, 43 NRC at 256-69, and those contentions are not before us in connection with the Petitioners' “new dose argument.”

guidance, including their assertions about the size of occupational dose totals for Yankee Rowe decommissioning, until its anticipated review of the Licensing Board's decision in LBP-96-2. See CLI-96-5, 43 NRC 53, 59 n.6 (1996).

The "new dose argument" that now is at the core of this proceeding comes from a supplement to the Petitioners' January 26 reconsideration motion that was filed the same day as the Commission's determination denying that reconsideration motion.⁵ In their March 7 supplement, the Petitioners posited "new dose information" they asserted undermined the Commission's assumptions in CLI-96-1 about the doses attendant to YAEC's decommissioning activities. This new information was alleged to come from a February 28, 1996 letter from Russell A. Mellor, YAEC, to Morton B. Fairtile of the NRC Staff responding to a Staff request for justification for eleven "minor" decommissioning activities that YAEC had started or planned to start in accordance with the agency decommissioning regulations allowing such actions prior to approval of a decommissioning plan.⁶ According to the Petitioners, the total projected occupational dose incurred over several months from the eleven activities as described in the YAEC letter

is fully half the dose purportedly caused by the CRP, a program that went on for two and a half years and was intended to remove 90% of the radioactivity from the plant. The dose from these few supposedly minor activities is also more than 10% of the total remaining radiation dose projected for the rest of YAEC's decommissioning activities . . .

[CAN/NECNP] Supplement to Motion for Reconsideration and Partial Rescission of CLI-96-01 (Mar. 7, 1996) at 5 (emphasis in original) [hereinafter Reconsideration Supplement].

The Petitioners maintained that the disproportionate relationship between the doses from these eleven activities and the Licensee's dose projections for the CRP and the entire decommissioning project raised serious questions regarding "the general accuracy and reliability of YAEC's dose projections for the CRP." *Id.* Additionally, they asserted that these questions of accuracy and reliability were compounded by a number of other Licensee dose estimate discrepancies, including:

1. The disparity between YAEC's 1993 estimate of 350-450 person-rem for the CRP and its 1995 estimate of 160 person-rem in Table 507.1 of YAEC's 1995 Final Safety Analysis Report (FSAR).

⁵ Although the Petitioners' March 7 filing indicates it is supplementing a February 9, 1996 filing, it is apparent on its face that it is a supplement to the January 26, 1996 reconsideration filing. See [CAN/NECNP] Supplement to Motion for Reconsideration and Partial Rescission of CLI-96-01 (Mar. 7, 1996) at 1.

⁶ The Commission has defined such "minor" activities as those that do not "materially and demonstrably" affect decommissioning options or "substantially increase" decommissioning costs. See CLI-96-6, 43 NRC 123, 129 (1996).

2. The licensee's FSAR 160 person-rem CRP dose estimate, which does not comport with other staff CRP dose estimate, and staff CRP dose estimates that are inconsistent with each other, as illustrated by:
 - a. A May 10, 1994 letter from Seymour H. Weiss, NRC, to CAN representing that during the CRP's first year, YAEC incurred 147 person-rem of occupational doses, meaning that during the first year of the two and one-half year CRP, ninety percent of the total occupational dose estimated in the FSAR was incurred.
 - b. An October 17, 1994 staff inspection report (No. 50-29/94-09) that (i) put the dose estimate for the CRP's second phase at 40 person-rem, with 16.7 person-rem being expended by mid-September 1994, but (ii) stated that because of higher than expected total accumulated dose for reactor vessel internal components segmentation work and shield tank cavity decontamination, the licensee was revising its 1994 total worker exposure estimate from 138 to 197 person-rem, meaning that 1994 CRP occupational doses exceeded the total FSAR CRP estimated dose.
 - c. A December 5, 1995 staff inspection report (No. 50-29/95-05) that described a licensee calendar year 1995 total effective dose assignment of 57 person-rem and a reactor pressure vessel removal preparation occupational dose of 21 person-rem as of October 11, 1995, meaning that in 1995, workers received at least 21 person-rem and as much as 57 person-rem.
 - d. An April 19, 1995 memorandum from Russell A. Mellor, YAEC, to the Yankee Rowe Distribution List enclosing an April 19, 1996 memorandum from G.M. Babineau to N. St. Laurent and Russell A. Mellor regarding "higher than normal 1994 accident/injury statistics" and "extreme radiological conditions present during much of the 1994 work evolutions," which suggest that the total radiation dose is higher than indicated in the staff inspection reports.

See id. at 6-3 & n.4. Based on this information, particularly the 1994 and 1995 Staff inspection reports, the Petitioners asserted that the total occupational CRP radiation dose is hundreds of rems higher than the Licensee's 160 person-rem estimate, raising significant questions whether YAEC's overall decommissioning dose projections are skewed because of gross underreporting of CRP exposures.

In their March 7 supplement, the Petitioners also declared that the high projected doses for the eleven "minor" activities identified in the February 28, 1996 letter were inconsistent with the Licensee's representations regarding relative radioactivity levels involved in current and future decommissioning activities, thereby raising further questions about whether YAEC generally has underestimated all decommissioning activity radiation doses. Relying on a January 29, 1996 letter from Andrew C. Kadak, YAEC, to William T. Russell, NRC, the Petitioners asserted that if YAEC is correct in its representation there that 99% of the Yankee Rowe facility's remaining nonfuel and non-greater than Class C (GTCC) waste radioactivity is in the reactor vessel and lower neutron

shield that cannot be removed until approval of YAEC's decommissioning plan, then the radioactivity in all the components involved in the eleven activities amounts to less than 1% of the radioactivity left in the plant. Moreover, assuming there is some proportionality between the radioactivity level in those components and the decommissioning radiation dose to workers, as the Petitioners state YAEC has done before the Commission in an October 24, 1993 letter from Andrew C. Kadak, YAEC, to John C. Hoyle, NRC, the Petitioners maintain that a reasonable inference is that the 59.1 person-rem assigned to these eleven activities is only a small fraction of the as-yet-to-be-received occupational dose from decommissioning activities. The result, they declare, is that the total DECON dose is far beyond the 1215 person-rem calculated in the GEIS, making the dose differential between DECON and SAFSTOR for Yankee Rowe larger than the 900 person-rem difference relied upon by the Commission in CLI-96-1. *See id.* at 8-10.

In CLI-96-7, the Commission considered both the Petitioners' appeal of LBP-96-2 and their March 7 reconsideration supplement. The Commission rejected the Petitioners' appellate challenges to the substance of the Board's conclusion that the Petitioners' five contentions were not litigable, as well as their attacks on its CLI-96-1 guidance. Relative to their ALARA-related Contention A, however, referring to the February 28, 1996 letter, the NRC Staff 1994 and 1995 inspection reports, and the "proportionality" argument made in the Petitioners' March 7 pleading, the Commission found "[t]his recently proffered information and new argument, if substantiated, may constitute 'extraordinary circumstances' justifying further litigation on whether the YAEC's DECON approach meets the ALARA standard." CLI-96-7, 43 NRC at 255. The Commission also rejected YAEC and Staff assertions that the Petitioners' argument should be summarily rejected as untimely, noting that the Petitioners' claim rested significantly on a late-February document that promptly was brought to the Commission's attention. *See id.* In addition, the Commission concluded that the Petitioners' argument might provide the basis for a NEPA-related challenge as well. *See id.* at 272. As a consequence, the Commission referred the matter back to the Licensing Board for consideration of whether the Petitioners' "new dose argument" satisfies the "late-filing" standards in 10 C.F.R. § 2.714(a)(1) and, if so, whether it provides a sufficient basis for an ALARA or NEPA challenge to YAEC's decommissioning alternative choice. *See id.* at 277.

In response to the Commission's referral, we established a schedule for party briefs on the questions of whether the Petitioners' "new dose argument" meets the "late-filing" standards and whether it provides an adequate basis for an ALARA or NEPA-based challenge. *See* Board Order (Briefing Schedule Regarding "New Dose Argument") (June 19, 1996) (unpublished) [hereinafter Board Briefing Order]. In addition, we requested the Petitioners set forth, in full, the language of the contention (or contentions) and the supporting basis (or

bases) they asserted are before the Board in ruling on the Commission-referred questions. See Board Order (Requesting Additional Information Regarding "New Dose Argument") (June 21, 1996) (unpublished) [hereinafter Board Information Order].

On June 28, 1996, the Petitioners filed their responsive pleading. In it, they set forth the language of what they maintain are supplemental bases for their Contentions A and E, and assert that those supplemental bases should be accepted under the "late-filing" standards and be found to provide sufficient support to admit both contentions. See [CAN/NECNP] Response to Licensing Board Order of June 19, 1996 (June 28, 1996) [hereinafter Petitioners Response].

As set forth in the Petitioners' original intervention request, Contentions A and E provide:

Contention A: YAEC's proposed decommissioning plan violates 10 C.F.R. § 20.1011 in that it fails to maintain occupational and public radiation doses as low as reasonably achievable.

Contention E: The NRC Staff violated the National Environmental Policy Act by failing to prepare a supplemental Environmental Impact Statement for the decommissioning of the Yankee Rowe Nuclear Power Station.

Intervention Petition at 7, 30 (emphasis in original). The Petitioners submit that their "new dose argument" provides an additional basis, with subbases, in support of these contentions, which can be summarized as follows:

For Yankee Rowe facility decommissioning, YAEC and the NRC Staff have incorrectly assumed that the dose differential between the DECON and SAFSTOR alternatives is less than the 900 person-rem differential deemed acceptable in the 1988 GEIS. In fact, the dose differential would be significantly higher than 900 person-rem. Therefore, the ALARA and NEPA cost-benefit balances must be re-evaluated, taking into account the significant radiological dose savings afforded by the SAFSTOR alternative.

(A) *Dose Calculation/Estimation Uncertainties.* Because the dose calculations and projections for YAEC decommissioning activities are so inconsistent, disparately represented, and unclear, there is no basis for concluding that the dose differential is less than, or even on the order of, 900 person-rem. Dose calculation/estimation discrepancies and confusion are reflected in various licensing documents, inspection reports, and YAEC/Staff correspondence. These include:

(1) The 1995 FSAR accompanying YAEC's decommissioning application, in which YAEC provided calculations indicating:

- (a) Occupational doses during 1993 and 1994 for the CRP were 160 person-rem.
- (b) Occupational doses during dismantlement and transportation would involve another 543 person-rem, for a total of 744 person-rem.

(2) The Staff's 1994 Environmental Assessment, which contains a total DECON dose estimate of 755 person-rem.

(3) A June 17, 1993 letter from Jay K. Thayer, YAEC, to Morton B. Fairtile, NRC, containing an estimate of 350-400 person-rem for total CRP exposures, the correctness of which has been recently demonstrated by:

(a) Based on a June 20, 1996 telephone conversation between YAEC and CAN/NECNP counsel, YAEC's current radiation dose calculations putting:

(i) pre-CRP and CRP Phase I and II doses at 304 person-rem, of which 227 person-rem is CRP Phase I,

(ii) doses for 1994 activities under the NRC-approved decommissioning plan at 48 person-rem,

(iii) doses from "minor" activities between October 1995 and the present at 106 person-rem, and

(iv) total decommissioning dose from 1993 to the present at 433 person-rem.

(b) Staff Inspection Report 50-29/96-02 (May 31, 1996), which reports total occupational dose from dismantlement and decommissioning work from 1993 through March 1996 at approximately 416 person-rem, including doses of approximately 60.5 person-rem between January 1 and April 23, 1996.

(c) A February 28, 1996 letter from Russell A. Mellor, YAEC, to Morton B. Fairtile, NRC, setting forth dose projections for eleven "minor" decommissioning activities, putting expected occupational doses in a range of 0.4 person-rem to 40.2 person-rem, for a total of 59.1 person-rem, which is

(i) more than one-third of the 160 person-rem expected from the CRP program that was to remove 90% of plant radioactivity in two and one-half years, and

(ii) over 10% of the total remaining dose of 543 person-rem projected under the FSAR for decommissioning activities after CRP completion.

(d) A May 15, 1996 letter from Russell A. Mellor, YAEC, to Morton B. Fairtile, NRC, putting person-rem exposures during the eleven "minor" activities described in the February 28, 1996 letter and ten other "minor" activities (some of which were uncompleted or not started) at 93.8 person-rem, which is 17% of the YAEC FSAR's projection for the remaining decommissioning activities.

(4) The dose estimates and calculations provided by YAEC and the Staff, including:

(a) The CRP dose discrepancy illustrated by comparing the items in paragraphs (A)(1)(a) and (A)(3)(a) above,

(b) The different expressions of dose calculations by YAEC and the Staff, as illustrated by a table set forth on pages thirteen and fourteen of CAN/NECNP's pleading, which includes references to the documents described in paragraph A(1)-(3) above, the December 1993 YAEC Environmental Report, and the Staff documents described in paragraph 2(a)-(c) of our synopsis of their March 7, 1996 reconsideration supplement, *see supra* p. 16, and

(c) An April 19, 1995 memorandum from Russell A. Mellor, YAEC, to the Distribution List enclosing an April 19, 1996 memorandum from G.M. Babineau to N. St. Laurent and Russell A. Mellor regarding "higher than normal 1994 accident/injury statistics" and "extreme radiological conditions present during much of the 1994 work evolutions," which suggest that the total radiation dose is higher than indicated in the Staff inspection reports.

(B) *Proportionality*. High projected doses from recent "minor" activities are inconsistent with YAEC representations about the relative levels of radioactivity involved in current and future decommissioning activities, which raises significant questions about the accuracy of YAEC's representations regarding past exposures and the reliability of its estimates of future exposures. This is illustrated by a January 29, 1996 letter from Andrew C. Kadak, YAEC, to William T. Russell, NRC, indicating 99% of the facility's remaining nonfuel and non-GTCC radioactivity is in the reactor vessel and lower neutron shield, and an October 24, 1993 letter from Andrew C. Kadak, YAEC, to John C. Hoyle, NRC, indicating there is proportionality between the level of radioactivity in such components and the radiation dose to workers decommissioning these components. When these are considered in the context of the projected 93.8 person-rem dose for the "minor" activities described in paragraph (A)(3)(d) above, they suggest that the total DECON dose for Yankee Rowe is far above the 1,215 person-rem dose postulated in the GEIS.

(C) *Reference Reactor Comparison*. The likelihood that Yankee Rowe DECON decommissioning doses will exceed the GEIS 900 person-rem differential also is illustrated by the benchmark projections provided in NUREG/CR-5884 (1995), setting forth the estimated occupational doses for each decommissioning process step for a generic reference light water reactor (LWR) (i.e., Trojan Nuclear Plant). When compared to the decommissioning steps undertaken to date at Yankee Rowe, they indicate that Yankee Rowe should have accumulated about 33% of the total anticipated decommissioning process dose, which, in turn, suggests that based on the YAEC calculated 433 person-rem dose thus far accrued, Yankee Rowe decommissioning will result in a total occupational dose in excess of 1,300 person-rem.

See Petitioners Response at 5-18; Letter From Diane Curran, Counsel for CAN/NECNP, to the Licensing Board (July 9, 1996).

On July 10, 1996, both YAEC and the Staff filed responses to the Petitioners' brief, declaring that the Petitioners' "new dose argument" fails to meet the standards for admitting late-filed contentions and does not provide a litigable contention. See Memorandum of [YAEC] in Opposition to Late-Filed "New Dose Information" and in Support of Conditional Motion for Summary Disposition (July 10, 1996) [hereinafter YAEC Reply]; NRC Staff's Reply to Petitioners' Response to Licensing Board Order of June 19, 1996 (July 10, 1996) [hereinafter Staff Reply]. Subsequently, on July 16, 1996, the Board conducted a prehearing conference in which it entertained arguments from the Petitioners,

YAEC, and the Staff regarding the admissibility of the Petitioners' "new dose argument."⁷ See Tr. at 235-412.

II. DISCUSSION

A. Contention and Bases at Issue Under the Petitioners' "New Dose Argument"

As we noted above, the Petitioners' "new dose argument" comes from a March 7, 1996 pleading intended to supplement a then-pending motion for reconsideration of a Commission decision. As such, the relationship between that argument and the contentions and bases initially set forth by the Petitioners in support of their intervention request is not as well defined as it might otherwise be. This is troubling, because contentions play a vital role in agency licensing adjudications by framing the issues for consideration. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981). Accordingly, before determining whether their "new dose argument" will provide the Petitioners with an admissible contention, we think it important to give at least some consideration to the content of the "new dose argument" in relation to the Commission's procedures regarding contentions and their bases.

Because of our concern about what, if any, existing contentions and bases were implicated by the "new dose argument," we asked the Petitioners to set forth in detail the language of the contention or contentions and the supporting bases that are at issue relative to that argument. See Board Information Order at 1-2. We also invited the other participants to address the question of the status of the "new dose argument" as it relates to the contentions already proposed by the Petitioners. See Board Briefing Order at 2 n.1. Apparently relying on a Commission reference to "the standards for consideration of late-filed bases and information submitted in support of an unadmitted contention prior to termination of the proceeding," CLI-96-7, 43 NRC at 255 n.15, the Petitioners have asserted that their "new dose argument" as set forth in their June 28, 1996 filing provides new bases for their existing Contentions A and E. See Petitioners Response at 5. The Staff apparently agrees with this analysis. See Staff Reply at 26.

For its part, YAEC suggests that what the Petitioners have done is submit a new contention. The Licensee asserts that what was at issue in ALARA-related

⁷ The Commonwealth of Massachusetts, which is participating in this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c), filed a pleading in support of the "mission of the Petitioners' "new dose argument." See Response of Commonwealth of Massachusetts to [C] (ECNP) Response to Licensing Board Order of June 19, 1996 (July 10, 1996) [hereinafter Massachusetts P]. The Commonwealth of Massachusetts decided not to participate in the July 16, 1996 prehearing conference. See Tr. at 242.

Contention A as originally proposed was the question of whether, consistent with ALARA principles, SAFSTOR had to be selected as the Yankee Rowe decommissioning alternative because it involved less occupational exposure. What is now at issue under the "new dose argument," according to YAEC, is whether the total dose estimates for Yankee Rowe decommissioning, when compared to SAFSTOR doses, fall outside the 900 person-rem envelope established in the GEIS. According to YAEC, although both contentions share a common reference to ALARA, under Contention A the Yankee Rowe dose estimates could be accepted, while under the "new dose argument" they must be rejected. *See* YAEC Reply at 17.

YAEC further declares that the analysis for NEPA-related Contention E is somewhat the same in that each "basis" for Contention E was, in fact, a separate contention, none of which encompassed the entirely new assertion now being made in the "new dose argument." *See id.* Yet, suggesting that the difference between a "contention" and a "basis" is "as elusive as the distinction between a table and the legs that hold it up," YAEC concludes that for present purposes the distinction is not material because the Commission has determined that the "new dose argument" must be analyzed using the standards applicable to late-filed contentions. *Id.* at 17-18.

Notwithstanding the apparent lack of distinction that now exists between contentions and bases in applying the "late-filing" standards of 10 C.F.R. § 2.714(a)(1), as we noted during the July 16 prehearing conference, the Board remains concerned that for contentions such as those set forth by the Petitioners as Contentions A and E, the section 2.714(b)(2) requirement of "specificity" may be met only if the stated contention is considered to incorporate the bases. *See Tr.* at 244. Moreover, this lack of precision about what is a contention and what are its bases serves to obfuscate the general principle that contentions, not bases, are litigated in NRC adjudications.

Because we agree with the Licensee that the crux of Petitioners' "new dose argument" appears to be a new contention, exercising our general authority to simplify and clarify the issues, *see* 10 C.F.R. § 2.714(f), we recast what the Petitioners set out as two contentions into one. That contention, the precise terms of which we take from our earlier synopsis of the description of the "new dose argument" in the Petitioners' June 28, 1996 filing, *see supra* p. 18, is as follows:

For Yankee Rowe facility decommissioning, YAEC and the NRC Staff have incorrectly assumed that the dose differential between the DECON and SAFSTOR alternatives is less than the 900 person-rem differential deemed acceptable in the 1988 GEIS. In fact, the dose differential would be significantly higher than 900 person-rem. Therefore, the ALARA and NEPA cost-benefit balances must be re-evaluated, taking into account the significant radiological dose savings afforded by the SAFSTOR alternative.

As is apparent from the language of this contention, its central focus is the question whether, taken together, the doses already incurred and the doses to be incurred under YAEC's modified DECON decommissioning option fall outside the bounds of the approximately 900 person-rem differential that the Commission has highlighted as being at the heart of the GEIS comparison of the DECON and SAFSTOR options.⁸ Further, we consider the concerns that we have summarized in the paragraphs headed "Dose Calculation/Estimation Uncertainties," "Proportionality," and "Reference Reactor Comparison" as the bases for this contention. *See supra* pp. 18-20.

B. Application of the "Late-Filing" Standards to the Petitioners' "New Dose Argument" Contention

1. Scope of the Commission's Remand

Having outlined the scope and content of the Petitioners' "new dose argument" contention, we next must consider whether that issue fulfills the "late-filing" standards set forth in 10 C.F.R. § 2.714(a)(1). In doing so, however, we first address a preliminary matter raised by the Licensee and the Staff regarding the scope of our authority to consider the various matters set forth in support of that issue in the Petitioners' June 28, 1996 filing.

In setting forth the matters it was referring for Board consideration, the Commission described the content of the Petitioners' March 7, 1996 supplement that was to be considered under the five "late-filing" standards in 10 C.F.R. § 2.714(a)(1) to determine whether it provided a litigable issue. *See* CLI-96-7, 43 NRC at 255 n.15. As we indicated above, in their June 28, 1996 filing setting forth the extent of their "new dose argument," the Petitioners have proffered additional information they assert also should be considered in determining whether they have established a litigable contention. Both the Licensee and the Staff, however, contend we should not consider this added information. They assert the scope of this proceeding is to be construed narrowly so that only the information/argument explicitly discussed in the Commission's June 18, 1996 directive is to be assessed by the Board under the "late-filing" standards. *See*

⁸The Licensee has suggested the actual measure of the differential at issue here is whether the remaining exposure from DECON activities would exceed the sum of the 900 person-rem difference from the GEIS plus the occupational dose required to shift now to SAFSTOR and implement that for 40 years, plus some qualitative margin to account for the "on the order of magnitude" standard of CLI-96-1. *See* YAEC Reply at 2 n.4.

To the degree this equation seeks to reflect the issue of "sunk costs" relative to decommissioning activities already completed, this appears to be a matter more appropriate to the issue of the cost-benefit balance that must be reanalyzed if we determine the GEIS 900 person-rem envelope has been breached.

Tr. at 302-03; NRC Staff's Response to Atomic Safety and Licensing Board Order Dated July 17, 1996 (July 18, 1996).⁹

We do not agree. Nothing in the Commission's June 18, 1996 memorandum and order suggests that its direction to the Board to consider the admissibility of a particular late-filed matter precludes the Board from giving the same consideration to other late-filed information submitted by the Petitioners relevant to that matter. Indeed, construing the Commission's decision as YAEC and the Staff suggest would eviscerate its holding that even when a Board dismisses a proceeding for want of any litigable contentions, until the proceeding is finally terminated before the agency, information that may provide the basis for a previously dismissed contention should be assessed under the "late-filing" standards to determine whether it provides a litigable contention. *Cf. Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979) (in remand proceeding on management capability issue, additional Petitioners' attempt to seek late intervention to participate on that issue must be assessed under late-intervention criteria). Accordingly, we will apply the "late-filing" standards to the relevant information submitted in the Petitioners' March 7, 1996 filing, as supplemented by their June 28, 1996 pleading.

2. Application of the "Late-Filing" Standards

In determining whether to admit a late-filed contention (or basis), a Board must analyze and balance the following five factors set forth in 10 C.F.R. § 2.714(a)(1):

- (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.

Although a Board must assess all five factors in determining whether to admit a late-filed issue, all the factors need not be given equal weight. In this connection, considerable importance generally has been attributed to factor one — "good cause" for late filing — in that a failure to meet this factor enhances considerably the burden of justifying the other factors. *See Long Island Lighting*

⁹ Although the Petitioners have asserted that this filing should be stricken, *see* [CAN/NECN] Reply to YAEC's and NRC Staff's Responses to Licensing Board Order of July 17, 1996 (July 19, 1996) at 3, the pleading was properly filed. *See* Board Order (Confirming Schedule for Additional Filings) (July 17, 1996) at 2 (unpublished).

Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1367 (1982); *see also Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977) (when good cause is demonstrated, other factors are given less weight). Moreover, as among the other four factors, factors three and five — contribution to a sound record and broadening issues/delay in the proceeding — generally have been considered as having the most significance in proceedings such as this in which there are no other parties or ongoing related proceedings. *See Shoreham*, ALAE-743, 18 NRC at 399, 402; *see also South Texas*, LBP-82-91, 16 NRC at 1368.

a. Factor One — Good Cause for Failure to File Timely

The CAN/NECNP contentions and supporting bases were due on November 30, 1995. *See* Commission Order (Nov. 21, 1995) at 2 (unpublished). It was not until March 7, 1996, one week after we dismissed this proceeding because the Petitioners had failed to present a litigable contention, that they filed their reconsideration supplement before the Commission in which they presented the nub of their "new dose argument." Subsequently, in their June 28, 1996 remand filing, they provided other information they assert affords a basis for admitting a contention relative to their "new dose argument." The lateness of all the material cited in the Petitioners' "new dose argument" thus is manifest.

The Petitioners put forth two arguments to establish "good cause" for this lateness. First, they assert they previously raised a timely dose discrepancy argument in this proceeding, pointing to their assertions regarding the difference between the CRP estimates in YAEC 1993 correspondence (350-400 person-rem) and the 1995 FSAR (160 person-rem) in their original petition. Additionally, they maintain that, notwithstanding their previous efforts to highlight this dose discrepancy, the February 28, 1996 letter outlining the eleven "minor" work activity doses indicated a disproportionality with the CRP and anticipated future doses that, in its own right, was new information providing a basis for their ALARA and NEPA challenges to YAEC's decommissioning choice. In this regard, they liken the February 28, 1996 letter to a key piece in a puzzle that revealed for the first time a strong possibility that the previous YAEC dose estimates were understated. *See* Tr. at 259-62, 273-75. And for those documents cited for the first time in their June 28 filing before the Board, they declare those documents now have become pertinent in light of the February 28 letter. *See* Petitioners Response at 20-21; Tr. at 259-77.

In response, both YAEC and the Staff declare that the only document for which "good cause" can even be claimed is the February 28, 1996 letter cited in the Commission's order. They also assert that nothing in the February 28 letter demonstrates a "new" dose discrepancy that would constitute "new" information

so as to provide good cause for late-filing. See YAEC Reply at 3-5; Staff Reply at 4-5; Tr. at 294-95.

The Petitioners' argument regarding their previous assertion of a discrepancy between the YAEC CRP estimates is nothing more than an attempt to reargue a point already decided on appeal. As we noted in our March 1996 determination, the Petitioners then presented nothing to suggest that the subsequent 1995 FSAR figure was incorrect, as opposed simply to different from the earlier 1993 figure. See LBP-96-2, 43 NRC at 86-87, *aff'd*, CLI-96-7, 43 NRC at 271-72. The same is not true, however, for their argument based on the "new information" submitted with their March 7, 1996 reconsideration request, as supplemented on June 28.

Generally a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In this instance, however, the answer to the "good cause" factor involves more than looking at the dates on the various documents submitted by the Petitioners. Instead, as the Petitioners suggest, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the decontamination information "puzzle" were sufficiently in place to make the particular concerns they now espouse reasonably apparent.¹⁰

Based on the record now before us, we conclude that, notwithstanding their reliance on information going back to 1993, the February 28, 1996 YAEC memorandum constituted a sufficiently important constituent of the dose calculation/estimate uncertainty and proportionality portions of their "new dose argument" that it provided the appropriate "trigger" for a filing detailing these concerns. The dose calculation for the activities involved in the February 28 letter — approximately 59.1 person-rem — certainly is not de minimis. And while the Staff and YAEC disparage the substance of the Petitioners' claims about the size of the doses involved in this letter, they have presented nothing suggesting that there were any earlier dose calculations that provided the requisite "puzzle piece" so as to warrant an earlier filing by the Petitioners on these matters.¹¹

¹⁰ In contesting the "good cause" for the Petitioners' late-filing, the Licensee relies on the Appeal Board's holding in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), stating that a contention "cannot be rejected as untimely if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination." See YAEC Reply at 5 n.12. Nothing in our "good cause" finding in this case is inimical to that holding. The Appeal Board's analysis clearly is not a declaration that a contention based on more than one document lacks good cause for late-filing if any of those documents previously were on the public record for any period of time.

In this regard, we are unable to find the 1993 and 1995 information the Petitioners previously asserted showed a CRP dose estimate discrepancy was a sufficient "trigger" for their present discrepancy and proportionality arguments so as to require a blanket finding there was no "good cause" relative to all pre-February 28, 1996 information. As we have already declared, on its face that information is insufficient to show anything other than a change in estimates. See *supra* p. 14.

Accordingly, the Petitioners have provided good cause for the late-filing of their dose calculation/estimate uncertainty and proportionality arguments based on the February 28 letter and the earlier supporting materials. Further, in these circumstances the May and June 1996 materials cited in the Petitioners' June 28, 1996 pleading as supporting these arguments have been introduced promptly enough after they became available so that the first factor weighs in favor of permitting their consideration as well.

For the Petitioners' reference reactor comparison, which was first submitted to us as part of their June 28, 1996 filing, we must look to a different factor. From the reference source information provided by the Petitioners, it appears that prior to March 7, 1996, when the Petitioners first submitted their "new dose argument" to the Commission, they had information about completed Yankee Rowe activities that would have permitted a comparison with projected occupational doses for reference reactor activities accounting for some 60% of the projected reference reactor DECON dose of 308.09 person-rem they ultimately relied upon as a comparative measure in their June 28 filing. *See* Letter from Diane Curran, Counsel for CAN/NECNP, to the Licensing Board (July 17, 1996), attach. at 2 (references 1-9, 13) [hereinafter Curran Letter]. However, what they did not have, and what they apparently were able to discern only at the end of May and in mid-June from information in a May 31, 1996 NRC inspection report (No. 50-29/96-02) and a June 20 telephone conference with YAEC counsel, was a YAEC total DECON dose figure that was necessary to make the reference reactor comparison. *See* Petitioners Response at 14. In this light, we find that the Petitioners have provided good cause for their late-filed reference reactor comparison too.

b. Factor Three — Contributing to the Record

Having found the central "good cause" factor supports consideration of the information in their March 7 and June 28 filings, we look next to factor three regarding the Petitioners' ability to assist in creating a sound record. As we noted earlier, this is one of the "non-good cause" elements that generally is given considerable weight in determining whether a late-filed issue should be considered for admission.

In their June 28 response, the Petitioners declare that the experience of their counsel in NRC matters and the expertise of their consultants, Dr. Marvin Resnikoff and the Tellus Institute, in the field of decommissioning will ensure that the Petitioners' participation will assist in developing a sound record. *See* Petitioners Response at 21-22. During the July 16 prehearing conference, in further support of this assertion the Petitioners explained that up to this point Dr. Resnikoff has reviewed and provided an analysis of all the publicly available information relevant to their assertion that YAEC's DECON activities

will significantly exceed the GEIS 900 person-rem differential, and is prepared to testify in this case in support of that analysis. The Petitioners maintained, however, they could not provide any further details regarding the substance of his testimony until they had access to YAEC internal documents through discovery. They nonetheless did indicate that with that information he would be able to go through all the decommissioning steps, provide a person-rem total for each step, and make an estimate of the occupational exposure risk. The Tellus Institute, on the other hand, will provide expertise regarding any reevaluation of the ALARA or NEPA cost-benefit analysis when that becomes necessary. The Petitioners also contended they intend to make a substantial contribution to the record through their experienced counsel's cross-examination of YAEC and Staff witnesses. See Tr. at 280-82, 287-89.

In response, both Licensee and the Staff declare the Petitioners have failed to show that this factor weighs in their favor. YAEC asserts the Petitioners have not provided the requisite "bill of particulars," including proposed witness testimony. See YAEC Reply at 6-7. The Staff apparently has the same view, declaring the Petitioners have failed to demonstrate any reasonable question regarding the validity of reported radiation projections or actual exposures. See Staff Reply at 5-6.

The Petitioners' showing on this factor is a decidedly mixed bag. The technical nature of the issues relative to their "new dose argument," which involves the occupational and public doses arising from decommissioning activities and the ALARA/NEPA cost-benefit analysis involved in decommissioning option choices, cuts against their assertion that the legal acumen of their counsel in NRC proceedings should be given weight under this factor. And, notwithstanding the fact an intervenor is entitled to make its case through cross-examination, we have no reason to anticipate in this instance that cross-examination by counsel will be their sole means, or even their central method, for establishing their case in support of the "new dose argument." See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926 (1987). Accordingly, we are unable to find that the expertise and experience of their counsel favors late-filed admission under factor three.

As to the need for a "bill of particulars" on their expert witnesses, the Petitioners clearly have identified their prospective witnesses. Moreover, at this juncture we have no cause to quarrel with the Petitioners' assertion that Dr. Resnikoff and the Tellus Institute have relevant expertise regarding the matters implicated by their "new dose argument." The Petitioners, however, have provided us little in the way of specifics to show how that expertise will be wielded, declaring that to do so without discovery would be too speculative. See Tr. at 287-88.

The need to conduct discovery no doubt may excuse a lack of specificity about witness testimony in those nontechnical cases where any testimonial evidence

likely will come from Licensee employees or contractors. *See Comanche Peak*, ALAB-868, 25 NRC at 925-26. This likely is not the case here. Although the confusion over decommissioning dose details that we discuss under section II.C.2 below mitigates somewhat their failure to provide detail on the nature and scope of the testimony of the Petitioners' expert witnesses, it cannot excuse that shortcoming totally. We would have liked the Petitioners to describe in greater detail what the substance of their experts' testimony would be. Thus, for the Petitioners this factor is, at best, inconclusive and, at worst, weighs against them to a minor degree.

c. Factor Five — Broadening Issues/Delay in the Proceeding

As we also noted above, the factor five question of whether admitting a late-filed contention will broaden the issues or delay the proceeding is an important element among the four "non-good cause" factors.

The Petitioners contend that because (1) their Contentions A and E raise significant safety issues, and (2) there are fundamental considerations of fairness, this factor must be weighed in their favor. As proof of the latter assertion, the Petitioners again offer their earlier challenge to the 1993 and 1995 CRP estimates, which they declare the Licensee only addressed after the Commission remanded this matter to the Board. *See* Petitioners Response at 22.

Besides asserting that delay and issue broadening are inevitable because this proceeding was closed, YAEC maintains this factor must be weighed against the Petitioners because admitting the contention will delay Yankee Rowe decommissioning approval. According to YAEC, this delay will result in cost and occupational exposure increases when the current experienced, highly trained crew is laid off and then must be reassembled, retrained, and reoriented. Such high costs are a relevant consideration under this factor, YAEC maintains. *See* YAEC Reply at 8. The Staff merely declares that the Board should be cautious in triggering nonmandatory hearings based on late-filed contentions.¹² *See* Staff Reply at 6.

In this instance, as with any other proceeding in which contentions have not been admitted, the admission of any new issue will inevitably broaden the issues. It likewise is true, as generally is the case whenever a contention is admitted in a proceeding, that to permit litigation of this issue will extend this proceeding in some measure. On the other hand, the Licensee's assertion that this factor takes on added significance because of its impact on decommissioning

¹²In support of this proposition, the Staff cites *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979), an authority of dubious applicability given the Appeal Board there was referring to the institution of hearings for those asserting "discretionary" standing. The Petitioners clearly have established their standing as of right in this proceeding.

activities does not comport with the established rule that "a licensing board [is] to determine whether the proceeding — not license issuance or plant operation — will be delayed." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986) (footnote omitted). Under the circumstances, we consider this factor as being a negative element, albeit a minor one, in the balance.

d. Factors Two and Four — Availability of Other Means for Interest Protection and Extent Existing Parties Will Represent the Petitioners' Interest

Concerning the remaining two factors, the Petitioners argue that there are neither other parties nor other forums available to protect their interest in obtaining a reevaluation of the costs and benefits of the YAEC-chosen DECON alternative. See Petitioners Response at 21, 22. The Staff concedes this is correct. See Staff Reply at 5 n.5. The Licensee, however, suggests these factors are entitled to less weight than usual, or no weight at all, because the Petitioners' interest, as implicated in their "new dose argument," is really an interest of Yankee Rowe workers, whom they do not represent. See YAEC Reply at 5 & n.13.

We find these two factors weigh fully in favor of the Petitioners here. We will not discount them based on the fact that the contention involved has as its focus occupational doses. As the Commission already noted in this proceeding, once the Petitioners have established their standing, they are entitled to put forth any contentions that would entitle them to the relief they seek. See CLI-96-1, 43 NRC at 6. They have established their standing, and with that the right to put forth contentions challenging the YAEC DECON choice based both on public and occupational doses. See CLI-96-7, 43 NRC at 246-48. We thus find no basis now for affording their "interest" short shrift in assessing whether to admit a late-filed contention that they otherwise would be entitled to litigate consistent with the Commission's previous guidance regarding standing and contentions.

e. The Final Balance

For the reasons discussed above, factors one, two, and four weigh in favor of the Petitioners' "new dose argument." On the other hand, factors three and five do not favor the admission of this issue, albeit only slightly. In reaching a final balance, given the significance of factor one, and the fact that factors three and five, to the extent they weigh against the "new dose argument" do not do so in any significant manner, we conclude the balance under the late-filing standard

in 10 C.F.R. § 2.714(a)(1) weighs against striking the Petitioners' "new dose argument" contention as untimely.

C. Admissibility of "New Dose Argument" Contention

Having concluded that the Petitioners' "new dose argument," as expressed in their June 28, 1996 submission, is not subject to dismissal as late-filed, we consider next the question of whether that argument, in whole or in part, provides the basis for a litigable contention for this proceeding. In its June 18 memorandum and order, the Commission set forth in detail the standard that now governs contention admission:

Although [10 C.F.R. § 2.714] imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. Nor does section 2.714 require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in "formal affidavit or evidentiary form," sufficient "to withstand a summary disposition motion." On the other hand, a petitioner "must present sufficient information to show a genuine dispute" and reasonably "indicating that a further inquiry is appropriate."

CLI-96-7, 43 NRC at 249 (quoting *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995)) (citations and footnote omitted).

For the reasons set forth below, we find that although the Petitioners' dose calculation/estimation uncertainty and reference reactor comparison concerns set forth in their "new dose argument" are not adequate to support a litigable contention, the proportionality aspect of their "new dose argument" does provide a sufficient basis for admitting a contention.

1. Reference Reactor Comparison Basis

As we have described previously, *see supra* p. 20, this basis constitutes an attempt by the Petitioners to compare projected occupational exposures from decommissioning activities for a reference LWR (Trojan Nuclear Station) with the doses accrued from those decommissioning activities the Petitioners contend have been completed at Yankee Rowe. The reference reactor information comes from tables in a November 1995 NRC contractor report (NUREG/CR-5884), while the information relating to completed work at Yankee Rowe comes from the Petitioners' analysis of various pieces of YAEC and NRC correspondence and Staff inspection reports. *See* Petitioners Response at 16-17; Curran Letter, attach. at 2. Although this particular concern is the latest to be put forth by the Petitioners, having surfaced initially in their June 28, 1996 pleading, we

deal with it first because it clearly is inadequate to provide a basis for their contention.

According to the Petitioners, the comparison table they have produced indicates that the total decommissioning dose for Yankee Rowe will exceed the 900 person-rem GEIS benchmark by at least 100 person-rem. *See* Petitioners Response at 18. Both the Licensee and the Staff have attacked this particular basis on a number of grounds, the most significant being the differences between the two plants (Trojan and Yankee Rowe) in terms of systems, components, and geometries. Both contend that the impact these differences have on radiation exposures and projections renders the Petitioners' analysis wholly inapposite. *See* Staff Reply at 24; Tr. at 370-74.

One example suffices to demonstrate the validity of this Staff and Licensee objection. The comparison table provided by the Petitioners has a line item indicating that the single activity of decontaminating stainless steel piping in the Trojan reference reactor is projected to accrue 459.03 person-rem, or almost one-half the total 932.56 person-rem decontamination dose for that facility. The Yankee Rowe Licensee, however, is given no credit for having done any stainless steel piping work as part of its current decommissioning work. *See* Petitioners Response at 17. As was pointed out during the July 16, 1996 oral argument, the materials supplied by YAEC that describe dose data do not account for stainless steel pipe decommissioning doses in this way. In fact, the dose relating to stainless steel piping is assessed as part of the activity for the plant system of which it is a part. *See* Tr. at 372-73, 376-77 (citing 2 Yankee Atomic Electric Company, Final Safety Analysis Report, Yankee Nuclear Power Station, Rowe, Massachusetts at 507-15 (rev. June 1995) (Table 507.1) [hereinafter FSAR]). This is apparent as well from the more detailed description of the various planned decommissioning activities provided in the FSAR. *See, e.g.*, 1 FSAR at 211-1 (waste disposal system includes "associated valves, piping, fittings, and instrumentation").

The Petitioners' failure to establish that the Trojan reference reactor study, as configured, provides a reasonable benchmark for comparison with Yankee Rowe constitutes a significant deficiency in their claim that causes us to conclude their comparative analysis does not raise a disputed material issue of fact that indicates further inquiry is warranted.

2. Dose Calculation/Estimation Uncertainty Basis

As we have summarized above, *see supra* pp. 18-20, in their June 28 submission the Petitioners have described a variety of purported deficiencies with the Licensee and agency documentation regarding dose estimates and calculations relating to different aspects of the Yankee Rowe decommissioning process that they assert establish a basis for inquiring further into whether the

900 person-rem GEIS envelope will be breached under YAEC's DECON option. See Petitioners Response at 6-15. Licensee and the Staff have responded by attempting to show that these examples are not discrepancies. See YAEC Reply at 10-13; Staff Reply at 11-22.

After reviewing the arguments and information submitted by the parties regarding the purported deficiencies cited by the Petitioners,¹³ we have reached two conclusions. The first is that the existing public record does create some level of uncertainty about the magnitude of the total person-rem occupational dose, both actual and projected, for Yankee Rowe facility decommissioning. Even for the reasonably well-informed member of the public, at best it is hard to discern what doses were projected, what doses actually have been accrued, and what doses are still to be encountered. For example, notwithstanding the explanations now provided by YAEC and the Staff, as is illustrated by the items set forth on pages 13 and 14 of the Petitioners' June 28 response, it is difficult to ascertain whether dose values provided by YAEC and the Staff represent projected or accrued dose values; how accrued annual doses compare with projected or accrued doses for individual projects or activities; and whether reported doses represent "operational" or decommissioning doses. In addition, the record suggests there is uncertainty over such matters as the significance of (1) 93.8 person-rem accrued during twenty-one agency-approved decommissioning activities as it might alter the ultimate accrued decommissioning dose, and (2) the dose from planned activities outlined in the February 28, 1996 letter given that some items do not appear to have been included in a later May 15, 1996 letter regarding those activities. Compare Letter from Diane Curran, Counsel for CAN/NECNP, to the Licensing Board (July 19, 1996), attach. 9 (Letter from Russell A. Mellor, YAEC, to Morton B. Fairtile, NRC (May 15, 1996)) with Reconsideration Supplement, attach. 1 (Letter from Russell A. Mellor to Morton B. Fairtile (Feb. 28, 1996), attach. A).

Despite these uncertainties, however, we are unable to discern based on the present record that these purported deficiencies rise to a level that would merit additional inquiry relative to whether there is a reasonable possibility of

¹³ Although YAEC has asserted that the Commission's June 18, 1996 memorandum and order can be read to preclude this basis in toto, see YAEC Reply at 13, as we understand the Commission's opinion, what has been addressed is the Petitioners' argument that the 1993 CRP estimate of 350-400 person-rem and 1995 FSAR estimate of 160 person-rem, on their face, establish an actionable discrepancy. As we already have indicated, we do not accept that assertion by the Petitioners. See *supra* note 11.

Also with regard to our review of this and other parts of the Petitioners' arguments, we note that besides its response to the Petitioners' June 28, 1996 pleading that sets forth the Petitioners' arguments supporting the admissibility of the "new dose argument," YAEC also submitted a "conditional" motion for summary disposition with a supporting affidavit. See Conditional Motion for Summary Disposition ("New Dose Argument") (July 10, 1996); YAEC Reply at 18-19. As we discuss in Section III below, that motion is relevant to the schedule we establish for litigating the "merits" of the Petitioners' contention; however, we could not and did not consider that motion in connection with our determination about the admissibility of the "new dose argument" because any summary disposition motion cannot be considered until a contention is admitted. See Tr. at 320-21.

exceeding the 900 person-rem GEIS envelope.¹⁴ Whether taken individually or collectively, the alleged discrepancies are not by themselves of a magnitude that suggests there is any serious threat that this generic upper boundary is in danger of being breached. As such, we do not find this concern, standing alone, to be a sufficient basis for admission of the Petitioners' "new dose argument" contention.

3. *Dose Proportionality Basis*

The third and final basis set forth in the Petitioners' June 28, 1996 pleading is their dose proportionality assertion. According to the Petitioners, based on (1) a May 15, 1996 letter from YAEC to the Staff regarding high projected dose (93.8 person-rem) for an expanded list of twenty-one decommissioning activities the Licensee has labeled "minor" in that they need not await decommissioning plan approval, (2) a January 29, 1996 letter from YAEC to the Staff indicating 99% of facility's remaining nonfuel and non-GTCC waste radioactivity is in the still-to-be decommissioned reactor vessel and lower neutron shield, and (3) the Licensee's own admission in an October 1993 letter to the Commission that there is "some proportionality" between the level of radioactivity involved and the occupational dose to decommissioning workers, one can reasonably conclude that the total Yankee Rowe DECON decommission dose will substantially exceed the 1215 person-rem dose postulated for DECON activities in the GEIS, thereby bringing the YAEC decommissioning choice outside the GEIS 900 person-rem differential between DECON and SAFSTOR.¹⁵ See Petitioners Response at 15-16.

Declaring the Petitioners' dose proportionality argument is based on either a "major vs. minor dose correlation" theory or a "radioactivity vs. dose rate

¹⁴ In acknowledging this uncertainty, we are not suggesting it is the result of any regulatory violations relating to agency reporting or information requirements. We have no basis to believe that there is any communication problem between the Licensee and the Staff relative to those matters that are under regulatory review. Having said this, we think it also is apparent that the uncertainty in this instance may be explained, at least in part, by the absence of any tables, data, and discussion detailing such items as (1) actual person-rem doses for the various phases of the CRP and Staff-approved "minor" projects; (2) annual reported absorbed doses apportioned between "operational" exposures and decommissioning exposures; (3) total absorbed dose for all decommissioning activities to date; and (4) periodic reappraisals of the 1995 FSAR dose values to reflect the projected doses for yet-to-be-completed activities.

¹⁵ Although, as far as we are aware, none of the parties has provided the letter for our consideration, see Tr. at 369, the relevant portion of the October 1993 letter, as set forth in the Petitioners' June 28, 1996 pleading, declares:

"Among the considerations cited by the Commission in deciding to allow Trojan to complete its pre-Plan component removal activities is that the Trojan component removal project involves just 1% of the non-fuel residual radioactivity at the Trojan plant, and therefore, was not a 'major' segment of decommissioning. Such a consideration suggests that there is some radiologically related threshold for which an activity, regardless of physical size of components involved, does not represent 'major.'"

Petitioners Response at 15 n.6 (quoting Letter from Andrew C. Kadak, YAEC, to John C. Hoyle, NRC Office of the Secretary (Oct. 24, 1993) at 3).

correlation" theory, YAEC asserts that on both scores it is inadequate to support a contention. YAEC argues the former theory is deficient because (1) the Petitioners have failed to provide any support for their premise that "major" decommissioning activities that must await decommissioning plan approval involve higher occupational doses than "minor" pre-plan approval activities; (2) their reliance on the October 1993 letter evinces a lack of understanding of the difference between radioactivity (measured in curies) and absorbed dose (measured in person-rem); and (3) an attachment to the May 1996 letter showing that for the nine completed activities, the actual dose was within 2% of the estimated dose, indicates the accuracy of YAEC's projected dose estimates. *See* YAEC Reply at 14-15. The latter theory is no more successful, according to YAEC, because (1) as a matter of physics, there is no correlation between the radioactivity of a given component and the decommissioning dose that will be incurred to dismantle it; and (2) as a matter of history, any assumed correlation disproves the Petitioners' assumption. With regard to the second point, YAEC declares that because more than one million curies of nonfuel radioactivity have been stored or removed from the facility with only 400 person-rem of occupational and operational exposure, to apply a corresponding proportionality to the remaining 5000 curies would result in an occupational dose of 1.9 person-rem. *See id.* at 15-16.

In challenging the Petitioners' proportionality argument, the Staff likewise relies on the Petitioners' asserted confusion of radioactivity and radioactive exposure. According to the Staff, because radiation dose estimation for any decommissioning activity depends on many factors, including field radiation levels (which are dependent on shield material type and thickness) and exposure time, the Petitioners' assumption about the relationship between the "minor" activities person-rem and the occupational dose for the remaining decommissioning activities is without foundation. The Staff also asserts that the Petitioners' reliance on the October 1993 letter is misplaced in that supposedly critical language was nothing more than the Licensee's attempt to interpret how the Commission considered the radioactivity of components in connection with the issue of what pre-plan approval activities would be permitted. *See* Staff Reply at 22-23 & n.17.

That there is, as the Petitioners assert, some relationship between the level of radioactivity that exists for a contaminated system or component and occupational absorbed dose to workers involved in decommissioning activities regarding that system or component seems self-evident. One reasonably can anticipate that workers would receive more person-rem from activities that involved decommissioning a facility system that had a radioactivity level of 1000 curies than from a system with a level of 1 curie, even taking into account differences in shielding and time of exposure. Indeed, the October 1993 YAEC statement cited by the Petitioners that there is "some radiologically related threshold" at

which an activity is considered "major" rather than "minor" reflects this idea, albeit in another context.

The Petitioners' assertion of a relationship between absorbed dose and radioactivity thus cannot be rejected out of hand, although questions remain about the extent of that relationship and the impact of that relationship on the Petitioners' asserted concern that the GEIS 900 person-rem DECON-SAFSTOR differential envelope will be exceeded. As we described above, YAEC provides information that at Yankee Rowe it previously has removed or stored some one million curies of nonfuel radioactivity with only 400 person-rem of occupational dose. This suggests that any relationship between radioactivity and absorbed dose is substantially less than one-to-one. When viewed in light of the YAEC assertion that there are some 5000 curies of radioactive contamination that must still be removed, *see* YAEC Reply at 16, the likelihood of exceeding the 900 person-rem envelope would seem exceedingly small.

On the other hand, the information on the decommissioning activities in the February 28 and May 15 letters relied upon by the Petitioners indicates that recent decommissioning activities, whether labeled major or minor, have entailed absorbed doses that, when compared to YAEC's own figures on total occupational doses, cannot be considered *de minimis* relative to its completed decommissioning activities.¹⁶ Added to this is the fact that, whether assessed by a comparison to the recent "minor" activities doses (as the Petitioners suggest) or by looking to the total curies extant (as YAEC suggests), the remaining facility radioactivity level is not insignificant. This suggests that if the Petitioners are able to establish that the recent dose information is reflective of the dose that must yet be absorbed,¹⁷ there is a reasonable likelihood they can establish a total DECON dose figure that falls outside the GEIS envelope.

The record now before us contains conflicting factual information from the Petitioners and YAEC and the Staff regarding the Petitioners' proportionality basis. Further, the Petitioners have at least suggested some reasonable grounds to believe that, based on their proportionality analysis, the GEIS 900 person-rem envelope may be exceeded by more than a minor degree. Thus, as to this

¹⁶ The February 28, 1996 letter relied upon by the Petitioners also indicates that for the eleven decommissioning activities involved, to accomplish the removal of 34.6 curies, YAEC estimated that workers would have an occupational absorbed dose of 59.1 person-rem. *See* Reconsideration Supplement, attach. 1, at A-1 to -5 & Table A. This suggests a relationship of somewhat more than one-to-one for these recent activities, which, when applied to future decommissioning activities, would substantially increase the possibility that removing the last 5000 curies from Yankee Rowe could involve doses that would exceed the GEIS 900 person-rem envelope.

¹⁷ It may well be, as the line item for reactor pressure vessel decontamination on the Petitioners' LWR reference reactor comparison table suggests, the absorbed dose for the remaining Yankee Rowe decommissioning activities will fall well below the level needed to cause a concern about breaching the GEIS 900 person-rem envelope. *See* Petitioners Response at 17 (17 person-rem to decommission reference reactor pressure vessel). At present, however, we do not have any information regarding the particular decommissioning activities to be completed at Yankee Rowe that would confirm whether, in fact, that is the case. Indeed, the same concern about compatibility with Yankee Rowe activities that causes us to reject that table as an adequate basis for the Petitioners' contention renders that table inadequate as a foundation for rejecting the Petitioners' proportionality basis.

basis, we have disputed issues of material fact for which further inquiry seems appropriate.

4. Conclusion on Admissibility of "New Dose Argument" Contention

Although the Petitioners' reference reactor comparison and dose calculation/estimation uncertainty bases fall short of the section 2.714(b)(2) standard for admissibility, their dose proportionality basis is sufficient to support the admission of their "new dose argument" contention. Moreover, as already has been established, the Petitioners have standing as of right to intervene in this proceeding. We, therefore, grant their intervention petition and will proceed to litigate the "merits" of their "new dose argument" contention.

III. LITIGATION SCHEDULE

As part of its January 16, 1996 memorandum and order initially referring this matter to the Board, the Commission directed that this proceeding be "expedited" and provided a proposed schedule. See CLI-96-1, 43 NRC at 9-11. With our decision to admit the Petitioners' "new dose argument" contention, we now must establish a schedule for litigating that matter.

We have set forth an expedited schedule as an appendix to this opinion. That schedule, however, deviates somewhat from the Commission's suggested schedule to accommodate the particular circumstances involved with the Petitioners' contention as well as our discussions with counsel regarding scheduling during the July 16, 1996 prehearing conference. See Tr. at 399-412. Below is a further explanation of our scheduling determinations and directives.

A. Bifurcation of Issues

The Commission's schedule seemingly contemplated that all aspects of the Petitioners' contentions would be litigated at once. In this instance, it is apparent that the Petitioners' "new dose argument" contention has two facets, which we will refer to as the "envelope" phase and the "relief" phase. The "envelope" phase involves a determination of whether the YAEC DECON decommissioning process will result in occupational doses that will exceed the 900 person-rem GEIS "envelope" such that additional ALARA and/or NEPA analysis is necessary. If we should decide that, in fact, the GEIS parameters have been exceeded to a degree that warrants further ALARA and/or NEPA analysis, only then do we need to consider the question of "relief" regarding the appropriate manner for providing that analysis and litigating its sufficiency.

Given the considerable differences that are likely to exist regarding the discovery and proof applicable to these two phases, the most efficient way to conduct this proceeding is to deal first with the question of whether the GEIS envelope has been exceeded and then, if necessary, move to the question of relief. Accordingly, the schedule we set forth in this memorandum and order relates only to the envelope phase of this litigation on the Petitioners' contention.

B. Sequenced Discovery for the Petitioners and Summary Disposition

In its proposed schedule, the Commission provided for a period of discovery, followed by the filing of summary disposition motions and prefiled testimony. As was noted earlier, however, we now have pending before us the Licensee's "conditional" summary disposition motion. *See supra* note 13. In its motion, YAEC asks that if we admit a contention for litigation, we move immediately to grant summary disposition in its favor on what is essentially the envelope phase described above.

The usual method of dealing with a summary disposition motion is to provide an opportunity for the other parties to respond to the motion. Among other things, the Petitioners could answer the Licensee's motion by asserting that they need discovery to respond fully to YAEC's motion. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992). Such a request generally should be made in a pleading supported by an affidavit. *See id.* The Petitioners have not formally filed such a response. We do, however, have the functional equivalent of such a filing in the statements of the Petitioners' counsel during the July 16 prehearing conference. There, counsel outlined the discovery the Petitioners assert they will need to support their case. *See Tr.* at 350-53.

After reviewing the Licensee's motion and the statements of the Petitioners' counsel, the Board finds the Petitioners' have presented sufficient information to justify permitting them discovery prior to filing a response to the Licensee's summary disposition motion. Accordingly, we will hold the Licensee's motion in abeyance and permit the Petitioners to obtain discovery from the Licensee and the Staff relative to the envelope phase of their contention.¹⁸

Discovery will be in two segments, an informal phase and a formal phase. In the informal phase, the Licensee and the Staff are to meet with the Petitioners to discuss and respond to the Petitioners' information requests as they are relevant

¹⁸ In a previous filing, the Commonwealth of Massachusetts declared that it supported the admission of the Petitioners' contention. *See* Massachusetts Reply at 3. Unless the Commonwealth advises the Board by close of business on Friday, August 2, 1996, that it has some other intention, we will consider the Commonwealth to be supporting the Petitioners relative to the merits of their contention. In this event, the Commonwealth will be subject to the same schedule as the Petitioners relative to any filings relating to litigation matters such as summary disposition or the evidentiary hearing.

to the envelope phase of this proceeding.¹⁹ Bearing in mind the Board's prior admonition that discovery requests should be as specific as possible, *see* Tr. at 407-08, the Petitioners should be prepared to provide the Licensee and the Staff with an enumeration of the particular types of information they seek relative to the envelope phase of this proceeding. In turn, the Licensee and the Staff should be prepared to make that information available to the *maximum* degree possible, by affording the Petitioners access to the pertinent documents and to knowledgeable individuals, particularly those persons the Licensee and the Staff anticipate may provide testimony on their behalf during any evidentiary hearing.²⁰

Following this period of informal discovery, the Petitioners will have a brief period for formal discovery, if needed.²¹ The Petitioners will have the opportunity to file interrogatories/document production requests and deposition notices. Without prior leave of the Board or written stipulation, the Petitioners may serve upon the Licensee and the Staff (1) not more than fifteen interrogatories per party, including all discrete subparts, and (2) deposition notices not to exceed a total of three per party.²² The schedule also provides for protective order motions, motions to compel, and motion responses.

Thereafter, the Licensee will be afforded an opportunity to supplement its pending summary disposition motion. The Staff also may seek summary disposition at this point. The other parties will have a period to respond to any Licensee or Staff filing or to file a cross-motion for summary disposition. The Licensee (and the Staff if it files a summary disposition motion) then will have a short period to reply to any responsive filings or cross-motions. If the Board finds that an oral argument regarding the Licensee's motion would be helpful, that argument will be held shortly after the Licensee's reply is filed.

C. Post-Summary Disposition Discovery Options for the Licensee and the Staff

If the Board concludes that summary disposition cannot be granted in favor of the Licensee (or the Staff) or the Petitioners on a cross-motion, the Board will

¹⁹ In this regard, we note that our discussion in Section II.C.2 above concerning the uncertainty that exists about the magnitude of the total person-rem dose for the Yankee Rowe facility likely has implications for resolving the envelope phase of this litigation in that whether, and to what extent, occupational doses from any future work will exceed the 900 person-rem GEIS envelope may depend on how much absorbed dose already has been accrued.

²⁰ So that the Board can assess the progress of informal discovery, we ask that by close of business on *Tuesday, August 6, 1996*, the parties provide us with a joint status report on that discovery. This can be done in writing or through a telephone conference call to the Board Chairman.

²¹ The parties are, of course, free to continue informal discovery in lieu of, or in tandem with, formal discovery.

²² Board preapproval to exceed these discovery limitations must be sought in accordance with the procedures specified in Section III.E.2. Any request for additional interrogatories or depositions must specify the questions to be asked or the person to be deposed and provide a detailed justification for the additional discovery.

afford the Staff and the Licensee an opportunity for formal discovery along the same lines as were provided for the Petitioners (i.e., absent prior Board approval, a limit of fifteen interrogatories and three depositions for each). Thereafter, the parties will be afforded an opportunity to submit prefiled testimony and exhibits and motions in limine and responses regarding that prefiled material. The Board will then begin an evidentiary hearing of up to 2 weeks on the "envelope" phase of this litigation.

If, however, the Licensee and the Staff wish to expedite the start of the evidentiary hearing further, they can, in lieu of formal discovery, opt for an alternative "discovery" procedure. Under this alternative, the Petitioners would submit their prefiled direct testimony and exhibits first. The Staff and YAEC then would have an opportunity to consider that information in preparing and submitting their own prefiled direct testimony and exhibits.

If the Licensee and the Staff choose to utilize this alternate discovery vehicle, the schedule for which we have described in the appendix, we would anticipate starting the evidentiary hearing approximately 2 weeks earlier. To provide the Board with sufficient time to try to arrange for appropriate hearing facilities in the vicinity of the Yankee Rowe facility, on or before *Monday, August 12, 1996*, the Licensee and the Staff should provide the Board with a joint filing indicating which discovery option they wish to use.

D. Evidentiary Hearing and Initial Decision on "Envelope" Phase

As the Board has noted previously, to the extent possible under this expedited schedule we will hold evidentiary hearing sessions in the vicinity of the Yankee Rowe facility. See Board Memorandum and Order (Denying Motion to Change Prehearing Conference Location) (July 3, 1996) at 5 (unpublished). The Board also anticipates that it will conduct one or more limited appearance sessions in conjunction with any evidentiary hearing held at the Yankee Rowe facility. During this period, the Board may wish to conduct a site visit at the Yankee Rowe facility as well.

At the end of the hearing, the parties will be afforded an opportunity to file proposed findings of fact and conclusions of law. As with the Commission's proposed schedule, we provide for simultaneous filings by the Petitioners and the Licensee, with the Staff afforded an opportunity to file shortly thereafter. The Board will then issue its initial decision on the envelope phase of the proceeding.

E. General Provisions Governing Party Filings

In addition to the specific scheduling provisions set forth above, the following general directives shall apply to each filing in this proceeding:

1. Same-Day Courtesy Service of All Pleadings

In addition to serving a conforming paper copy of all pleadings on all parties, the Board members, and the Office of the Secretary, a copy of each filing shall be sent to all other parties, the Board members, and the Office of the Secretary by facsimile transmission, E-mail transmission, or other means that will ensure receipt by 4:30 p.m. Eastern Time on the date of filing.

2. Limitations on Pleading Length and Reply Filings

Absent preapproval by the Board, all motions and responses thereto (other than the summary disposition filings described in Section III.B above) are to be no more than ten pages in length, including the pleading's signature page. Replies (other than the summary disposition filing described in Section III.B above) are not permitted without preapproval of the Board. Board preapproval regarding pleading length and leave to reply must be sought in writing at least 24 hours before filing the motion or pleading. The preapproval request must indicate whether the other parties to the proceeding oppose or support the request. In addition, a party seeking preapproval to exceed the page limitation should provide a good faith estimate of the number of additional pages it intends to file.

3. Discovery Motion Presubmission Conference of Counsel

As part of a motion for protective order/motion to compel with regard to a discovery request, counsel for the moving party shall provide a certification that he or she previously has (1) provided counsel for the party to whom the motion is directed a clear and concise written statement of the asserted deficiencies or objections and the requested action relative to the discovery request, and (2) has, after providing this statement, consulted with counsel in an attempt to resolve all the disputed matters without Board action. If counsel are able to resolve a potential objection on the basis of the presubmission conference, that resolution should be reduced to writing with copies provided to each counsel involved.

IV. CONCLUSION

In response to the Commission's June 18, 1996 referral of the Petitioners' "new dose argument," we find that a balancing of the five factors used in assessing late-filed contentions establishes that the information supplied in the Petitioners' March 7, 1996, and June 28, 1996 pleadings should not be stricken for being late-filed. Further, we have determined that one of the three bases put

forth in support of the Petitioners' "new dose argument" contention — the dose proportionality basis — does present a material factual dispute that warrants further inquiry. As such, we admit that contention and establish an expedited schedule for further litigation on its merits.

For the foregoing reasons, it is, this 31st day of July 1996, ORDERED that:

1. The November 30, 1995 petition to intervene of CAN/NECNP is *granted* with respect to the contention specified in Section II.A of this Memorandum and Order.

2. Litigation on this issue shall commence immediately in conformance with Section III and the schedule specified in the appendix to this Memorandum and Order.

3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules on an intervention petition, this Memorandum and Order may be appealed to the Commission within ten days after it is served.²³

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 31, 1996

²³ Copies of this Memorandum and Order have been sent this date to counsel for YAEC and CAN/NECNP by Internet E-mail transmission, to counsel for the Commonwealth of Massachusetts by facsimile transmission, and to Staff counsel by E-mail transmission through the agency's wide area network.

APPENDIX

Expedited Schedule for *Yankee Rowe* "Envelope" Phase Litigation

A. CAN/NECNP Discovery and YAEC/Staff Summary Disposition

Date (1996)	Action	Day
Thurs., Aug. 1	CAN/NECNP Informal Discovery Begins	1
Fri., Aug. 9	CAN/NECNP Informal Discovery Ends	9
Wed., Aug. 14	CAN/NECNP Formal Discovery Requests Served	14
Wed., Aug. 21	YAEC/Staff Discovery Responses/ Protective Order Motions Due	21
Mon., Aug. 26	CAN/NECNP Response to Protective Order Motions/Motion to Compel Due	26
Wed., Aug. 28	YAEC/Staff Responses to Motions to Compel Due	28
Fri., Aug. 30	CAN/NECNP Discovery Closes (all depositions must be completed by this date)	30
Tues., Sept. 3	YAEC Supplement to Motion for Summary Disposition/Staff Summary Disposition Motion Due	34
Tues., Sept. 10	Summary Disposition Motion Responses/Cross-Motions Due	41
Fri., Sept. 13	YAEC/Staff Reply to Summary Disposition Motion Responses/Response to Cross-Motions Due	44
Fri., Sept. 27	Board Ruling on Summary Disposition Filings (time period may include oral argument)	58

B. Hearing Alternative 1 — YAEC/Staff Formal Discovery

Date (1996)	Action	Day
Mon., Sept. 30	YAEC/Staff Formal Discovery Requests Served	61

Mon., Oct. 7	CAN/NECNP Discovery Responses/ Protective Order Motions Due	68
Thurs., Oct. 10	YAEC/Staff Response to Protective Order Motions/Motions to Compel Due	71
Tues., Oct. 15	CAN/NECNP Responses to Motions to Compel Due	76
Fri., Oct. 18	YAEC/Staff Discovery Closes (all depositions must be completed by this date)	79
Fri., Oct. 25	Prefiled Direct Testimony/Exhibits 86 Due	
Tue., Oct. 29	Motions in Limine re Prefiled Direct Testimony/Exhibits Due	90
Thurs., Oct. 31	Responses to Motions in Limine re Prefiled Direct Testimony/Exhibits Due	92
Mon., Nov. 4	Evidentiary Hearing Begins	96
Fri., Nov. 15	Evidentiary Hearing Completed	107
Wed., Nov. 27	YAEC/CAN/NECNP Proposed Findings of Fact and Conclusions of Law Due	119
Thurs., Dec. 5	Staff Proposed Findings of Fact of Fact and Conclusions of Law Due	127
Tues., Dec. 31	Board Initial Decision on "Envelope" Phase	153

C. Hearing Alternative 2 — No YAEC/Staff Formal Discovery

Date (1996)	Action	Day
Fri., Oct. 4	CAN/NECNP Prefiled Direct Testimony/Exhibits Due	65
Fri., Oct. 11	YAEC/Staff Prefiled Direct Testimony/Exhibits Due	72
Tue., Oct. 15	Motions in Limine re Prefiled Direct Testimony/Exhibits Due	76
Thurs., Oct. 17	Responses to Motions in Limine re Prefiled Direct Testimony/Exhibits Due	78
Mon., Oct. 21	Evidentiary Hearing Begins	82

Fri., Nov. 1	Evidentiary Hearing Completed	93
Wed., Nov. 13	YAEC/CAN/NECNP Proposed Findings of Fact and Conclusions of Law Due	105
Wed., Nov. 20	Staff Proposed Findings of Fact of Fact and Conclusions of Law Due	112
Mon., Dec. 16	Board Initial Decision on "Envelope" Phase	138

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of

Docket No. 040-08724

CHEMETRON CORPORATION, INC.
(Cleveland, Ohio)

July 3, 1996

The Director of the Office of Nuclear Material Safety and Safeguards grants, in part, Petitioner's request under 10 C.F.R. § 2.206 that NRC compel Chemetron to commence action to decontaminate the Harvard Avenue site to the extent this is required by the License Amendments of May 25, 1993, and June 7, 1996, and the Orders dated May 5, 1992, and October 26, 1993; to the extent these actions were not taken in the time originally specified by Petitioner, this request is denied. In addition, the Director denies Petitioner's second request that NRC impose sanctions against Chemetron for failing to comply with its November 14, 1988 Confirmation of Commitment to decontaminate the Harvard Avenue site. On March 22, 1989, the Director formally acknowledged receipt of the petition and denied the Petitioner's request for immediate relief because NRC considered that Chemetron's actions demonstrated minimally sufficient progress toward decontamination.

**CIVIL PENALTIES: VIOLATION OF SCHEDULE FOR
DECOMMISSIONING**

For violations of NRC requirements relating to sites on the Site Decommissioning Management Plan, the NRC will consider civil penalties where (1) the licensee or responsible party fails to comply with an order compelling payment into an escrow account; or (2) the licensee or responsible party fails to comply with a requirement or an order compelling cleanup when there is already sufficient decommissioning funding. "Action Plan to Ensure Timely Cleanup of Site Decommissioning Management Plan Sites" (April 10, 1992).

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

I. INTRODUCTION

By letter dated January 6, 1989, Dr. Klaus R. Romer, on behalf of McGean-Rohco, Inc. (Petitioner or McGean), requested that the U.S. Nuclear Regulatory Commission (NRC) take action pursuant to 10 C.F.R. § 2.206 with respect to Chemetron Corporation (Chemetron), an NRC licensee. McGean requested that NRC exercise its enforcement powers to compel Chemetron, at the time a subsidiary of Allegheny International, Inc. (Allegheny), to immediately commence decontamination of its facilities at 2910 Harvard Avenue, Cuyahoga Heights, Ohio (the Harvard Avenue site), under the terms agreed to by Allegheny in its Confirmation of Commitment dated November 14, 1988. The Petitioner also requested the NRC to impose sanctions upon Chemetron for its failure to carry out the decontamination of the Harvard Avenue site. McGean alleged the following bases for its requests:

- 1) On November 14, 1988, Chemetron committed to begin decontamination of the Harvard Avenue site immediately and complete the job by March 17, 1989;
- 2) The NRC had stated that the March completion deadline would be relaxed only if Chemetron made a compelling showing of diligent efforts to clean up the site and good cause;
- 3) Chemetron's letter to the NRC of December 12, 1988, which requests an extension of the deadline for good cause, fails to make a compelling showing of good cause; and
- 4) Chemetron has not made a good faith effort to decontaminate the site.

On March 22, 1989, the Director of the Office of Nuclear Material Safety and Safeguards, formally acknowledged receipt of the petition and informed Petitioner that its request was being treated pursuant to section 2.206 of the NRC's regulations. A notice of the receipt of the petition was published in the *Federal Register* notice on March 28, 1989 (54 Fed. Reg. 12,698). In the March 22, 1989 letter, the Director denied the Petitioner's request for immediate relief because NRC considered that Chemetron's actions demonstrated minimally sufficient progress toward decontamination. However, the Director deferred a decision on the remainder of the petition.

II. BACKGROUND

In 1965, pursuant to 10 C.F.R. Part 40, the Atomic Energy Commission issued Source Material License No. SUB-852 to Chemetron, which through its McGean Unit of the Inorganic Chemical Division, manufactured catalysts

containing depleted uranium. These operations were carried out between 1965 and 1972 in facilities located at the Harvard Avenue site. By February 1972, manufacture of the catalysts had been terminated, and in December 1973, the license was amended to authorize storage only for the remaining depleted uranium. No activities involving source material, other than decontamination, have been conducted at the site since the termination of the catalyst production by Chemetron in 1972.

In 1975, the McGean Chemical Company, Inc., the predecessor to McGean-Rohco, Inc., purchased the Harvard Avenue site. The Chemetron Corporation, however, retained the license and responsibility for the depleted uranium remaining at the facility. In late 1977, the Licensee was acquired by Allegheny-Ludlum Industries. In 1979, the Licensee obtained a new NRC license, No. SUB-1357, to authorize the possession of depleted uranium contamination at the Harvard Avenue site and its remediation. License SUB-1357 superseded SUB-852. The license was last renewed, pursuant to 10 C.F.R. § 40.42(a), on January 10, 1990, and is continuing in effect.

Remediation activities at the Harvard Avenue site under License SUB-1357 began in 1979, with the expectation that the project would be completed in about 6 months. However, those activities were not completed within the term of the license. The NRC renewed the license five times between 1979 and 1984. As renewed on July 18, 1984, the Licensee included a condition requiring, within 1 year, the completion of decontamination, a final radiological survey, and a request for license termination. But again, these activities were not completed within the required time frame.

From 1985 through 1989, the NRC continued to take actions intended to lead to decontamination of the Harvard Avenue site. These actions included (1) amending the license on October 1, 1987, to require completion of decontamination by October 1, 1988; (2) issuing a Demand for Information on June 13, 1988; and (3) requesting a Confirmation of Commitment to complete the Harvard Avenue decontamination by March 17, 1989. While Chemetron performed some survey and decontamination work during this time, Chemetron did not then complete decontamination of the Harvard Avenue site. Chemetron's parent, Allegheny International, entered bankruptcy on February 20, 1988, and Chemetron then stopped spending money for decontamination until the Bankruptcy Court authorized such expenditures on March 9, 1989. This was one of several factors Chemetron claimed prevented completion of decontamination according to the required schedules. Some of Chemetron's claimed reasons for failing to meet the schedules had merit, but some did not.

Shortly after the Bankruptcy Court's authorization, Chemetron resumed decontamination activities at the Harvard Avenue site. Chemetron soon discovered, however, that it had significantly underestimated the amount of contamination at the site due to an inadequate characterization of that contamination. From 1989

to 1992, including Allegheny's emergence from bankruptcy in 1990 (Allegheny was reorganized as Sunbeam/Oster Company, Inc. (Sunbeam)), the NRC sought Chemetron's commitment to characterize and remediate the Harvard Avenue site. To that end, concurrent with the NRC's approval of a transfer of control over the license to Sunbeam through the reorganization, the NRC sought Chemetron's commitment to complete a revised remediation plan for the Harvard Avenue site, based on adequate site characterization. On August 31, 1990, Chemetron proposed to complete a revised remediation plan by March 1, 1991, and the NRC approved this schedule and the transfer of control of the license on September 11, 1990.

Chemetron, however, again failed to meet its schedule, and failed to meet subsequent revised schedules showing completion of site characterization by March 1, 1991, and completion of a revised remediation plan by August 16, 1991. While some characterization data had been obtained, the site characterization report submitted on July 28, 1991, was inadequate, and, consequently, Chemetron's August 16, 1991, remediation plan was also inadequate. Accordingly, the NRC sought to compel Chemetron to characterize the site. As a result, on May 5, 1992, the NRC and Chemetron entered into a Consent Order that established June 15, 1992, as the submittal date for the Final Site Characterization Report for the Harvard Avenue site. Chemetron met this date, and on January 8, 1993, the NRC approved the Final Site Characterization Report as an acceptable basis for developing a remediation plan.

After NRC acceptance of the Final Site Characterization Report, Chemetron, by license condition, established October 1, 1993, as the submittal date for the remediation plan. Chemetron submitted a remediation plan on this date that was incomplete. Accordingly, the NRC issued a Confirmatory Order to Chemetron on October 26, 1993, which required, *inter alia*, that all required portions of the remediation plan be submitted by November 15, 1993. Chemetron complied with this order.

On February 28, 1995, Chemetron submitted Revision 1 to its site remediation plan, which incorporated modifications as requested by the NRC. On June 7, 1996, the NRC approved Chemetron's revised remediation plan for the Harvard Avenue site and amended the license to authorize remediation of the site in accordance with the plan.

III. DISCUSSION

Since the petition was submitted to NRC, NRC Staff and inspectors have made numerous site visits to and inspections of the Harvard Avenue site. The inspections included routine safety inspections, which involved observing the status of site physical security provisions, verifying compliance with 10

C.F.R. Part 20 radiation protection requirements, and observing the condition of tarpaulins securing soil piles. In April 1992, NRC inspectors installed air sampling devices and thermoluminescent detectors to measure radioactivity levels at the Harvard Avenue site and verify Chemetron measurements. These monitoring efforts were discontinued in 1993 because the results indicated radioactivity was at background levels consistent with the continuing Chemetron monitoring results. The NRC inspections, site visits, and monitoring have ensured that public health and safety have been adequately protected.

As set forth above, Chemetron made progress (except for some time while in bankruptcy) toward remediating the Harvard Avenue site, but this progress was very slow. One major impediment to remediating the site was the lack of an adequate site characterization. The NRC's frustration with the slow progress toward adequate characterization of the site resulted in the NRC's entering into the Consent Order of May 5, 1992, which compelled Chemetron to submit an adequate Final Site Characterization Report on June 15, 1992. The characterization report was acceptable because it provided information on: (1) depleted uranium concentration levels not only on the surface, but also at depth; (2) depleted uranium concentration levels in soil piles; and (3) groundwater monitoring results. The NRC then required Chemetron, through a license condition, to submit a remediation plan for the Harvard Avenue site by October 1, 1993.

As described above, Chemetron did not meet its schedule for submitting an adequate remediation plan for the Harvard Avenue site, which resulted in the NRC issuing the Confirmatory Order of October 26, 1993. The Confirmatory Order led to the NRC's June 7, 1996 approval of Chemetron's site remediation plan. The NRC Staff concluded that this remediation plan, unlike the previous ones submitted by Chemetron, is adequate because (1) it is based on a comprehensive site characterization; (2) adequately describes the decommissioning activities; (3) provides acceptable radiological controls to protect workers and the public; (4) provides an adequate plan for conducting a final survey; and (5) provides an acceptable decommissioning cost estimate. By authorizing Chemetron to proceed, NRC Staff is confident that Chemetron can safely and successfully complete the remediation within the 1-year schedule proposed. In the NRC review of the Harvard Avenue remediation plan, NRC Staff considered the radiological controls that Chemetron would use during the remediation and the health and safety impacts of the proposed onsite disposal cell. Accordingly, NRC has now received adequate assurance from the Licensee that it has produced a final remediation plan that will lead to the ultimate decontamination of the Harvard Avenue site by the end of 1997.

In accordance with Commission policy, the Petitioner's request to impose sanctions was not granted as requested. On April 10, 1992, the Commission approved the "Action Plan to Ensure Timely Cleanup of Site Decommissioning

Management Plan Sites." The Action Plan discussed the imposition of civil penalties for sites listed in NRC's Site Decommissioning Management Plan (SDMP). (Chemetron's Harvard Avenue site is one of the SDMP listed sites.) The Action Plan provides that civil penalties should be limited to two situations. Specifically, the Action Plan provides that "the NRC will consider civil penalties where (1) the licensee or responsible party fails to comply with an order compelling payment into an escrow account; or (2) the licensee or responsible party fails to comply with a requirement or an order compelling cleanup when there is already sufficient decommissioning funding."

The clear intent of the Action Plan is to take into account the financial impact of a civil penalty on achieving decommissioning. In the Staff's view, for schedular violations, the test should be the reasonableness of the Licensee's efforts to achieve decommissioning in a timely manner. It is not the intent of NRC Staff to impose civil penalties where such penalties adversely affect the financial ability of the Licensee to properly complete decommissioning.

On May 11, 1994, NRC Staff issued a Notice of Violation and Proposed Civil Penalty of \$10,000 to Chemetron for submitting an incomplete remediation plan on the date established for the plan submittal set under a license condition (i.e., October 1, 1993). The base civil penalty of \$5000 was escalated because NRC identified the violation and because of the Licensee's limited corrective action. The civil penalty reflected the poor progress that had been made at that time by the Licensee in the decommissioning. The NRC deferred imposition of the civil penalty until a final waste disposal option for both the Harvard Avenue site and Chemetron's Bert Avenue site is approved, to ensure that sufficient funds have been set aside to carry out the decommissioning.

As set forth above, based on the Commission's guidance in the Action Plan, NRC has not imposed sanctions as requested by the Petitioner. However, NRC Staff has taken appropriate enforcement actions where the Licensee did not achieve decommissioning milestones set out in the license.

Based on the above, the NRC Staff has taken appropriate actions to ensure the decontamination of the Harvard Avenue site. The most significant actions include the issuance of a license amendment (dated May 25, 1993) and two orders (dated May 5, 1992, and October 26, 1993) to establish schedules for the submittal of documents key to the Harvard Avenue site remediation and the issuance of a license amendment on June 7, 1996, authorizing Chemetron to proceed with the remediation. Further, based on a review of the Licensee's actions regarding this decontamination effort, the NRC Staff has concluded that the Licensee has made adequate progress toward this end. Therefore, for all practical purposes, the Petitioner's request to compel the remediation of the Harvard Avenue site has been granted to the extent that this is required by the License Amendments of May 25, 1993, and June 7, 1996, and the Orders of May 5, 1992, and October 26, 1993. However, NRC Staff does not consider that the

imposition of sanctions, beyond those proposed on May 11, 1994, is needed to compel completion of the Harvard Avenue site remediation. Therefore, we are denying the Petitioner's request to impose further sanctions. Finally, the Staff has concluded that no additional NRC actions are warranted concerning these requests. Should Chemetron fail to meet its 1-year schedule for decontamination of the Harvard Avenue site, NRC Staff will take appropriate action at that time.

IV. CONCLUSION

For the reasons discussed above, Petitioner's request that NRC compel Chemetron to commence action to decontaminate the Harvard Avenue site has been granted to the extent this is required by the License Amendments of May 25, 1993, and June 7, 1996, and the Orders dated May 5, 1992, and October 26, 1993. However, to the extent these actions were not taken in the time originally specified by Petitioner, the request is denied. Petitioner's second request that NRC impose sanctions against Chemetron for failing to comply with its November 14, 1988 Confirmation of Commitment to decontaminate the Harvard Avenue site, as requested by the Petitioner, has been denied. Further, no substantial public health and safety concerns currently exist that warrant additional NRC action concerning these requests.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become a final action of the Commission twenty-five (25) days after issuance unless the Commission on its own motion institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 3d day of July 1996.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-390

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant)

July 9, 1996

The Director of the Office of Nuclear Reactor Regulation denied Petitioner's request under 10 C.F.R. § 2.206 that the NRC rescind the operating license of the Watts Bar Nuclear Plant (WBNP) due to what Petitioner claimed was a previously unreviewed problem related to radioactive sediments in the "Watts Bar Lake" (Lower Watts Bar Reservoir (LWBR)). The Director found that sediment from the LWBR could not be drawn into WBNP's cooling water as the LWBR is downstream from the plant. The Director also noted, with regard to Petitioner's claim that no action is being considered to remove radioactive material from the LWBR or restrict use of that body of water, that a DOE report on the reservoir describes selected remedial action to be taken with regard to the LWBR. Finally, the Director noted controls in place at WBNP to prevent radioactive material from being discharged into the environment and that the facility meets applicable NRC requirements sufficient to allow it to operate.

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

I. INTRODUCTION

On February 14, 1996, Ms. Faith Young (Petitioner) of Dixon Springs, Tennessee, submitted a letter requesting that the U.S. Nuclear Regulatory Commission (NRC), among other things, rescind the operating license of Watts

Bar Nuclear Plant (WBNP). The Petitioner's concern, as stated in her February 14 letter, is as follows:

Watts Bar lake water which cools Watts Bar nuclear plant's radioactive core holds sediment contaminated by radioactive material. Over a lifetime of Watts Bar nuclear plant operation uncontrolled access to this lake will disturb its sediment, in turn contaminating water drawn into the nuclear cooling system. This heightened radioactive contamination of nuclear plant emission has not been previously addressed. No action is being considered to restrict lake use or to remove radioactive material. This "record of decision" by Department of Energy, Environmental Protection Agency, U.S. Army Corps of Engineers, state of Tennessee and Tennessee Valley Authority appears in an interagency document dated September, 1995.

Since the document referred to by Ms. Young ("Record of Decision for the Lower Watts Bar Reservoir," DOE/OR/02-1373&D3, dated September 1995, hereinafter, the "Department of Energy (DOE) Report") clearly addresses Lower Watts Bar Reservoir (LWBR), the Staff has assumed, for purposes of this Decision, that the "Watts Bar lake" in Ms. Young's letter refers to the Lower Watts Bar Reservoir. On March 27, 1996, the Staff formally notified Ms. Young that her petition was being evaluated pursuant to section 2.206.

II. DISCUSSION

The DOE Report presents the selected remedial action being used to address the contamination of the LWBR "Operable Unit (OU)." The report attributes LWBR contamination to past activities at the DOE's Oak Ridge Reservation (ORR) and other non-DOE sources. The boundaries of the LWBR, as defined in the DOE Report, extend from the Watts Bar Dam at Tennessee River Mile (TRM) 529.9 on the Tennessee River, upstream to TRM 567.5 at the confluence of the Clinch and Tennessee Rivers. The DOE Report, at p. 2-2, discusses the selection of the Watts Bar Dam as the downstream boundary as follows:

The downstream boundary of the ORR was placed at Watts Bar Dam because earlier studies had shown that the vast majority of sediment-associated contaminants released from ORR had collected in lower Watts Bar Reservoir. Consequently, concentrations of sediment-associated contaminants released from ORR are much lower in reservoirs downstream of Watts Bar Dam. The level of Oak Ridge-derived contaminants detected in past studies in the Tennessee River system below the Watts Bar Dam were well below the concentrations determined to be of human health concerns by the baseline risk assessment within the Watts Bar Reservoir.

WBNP is located approximately 1.9 river miles downstream from the Watts Bar Dam on the west bank of the Chickamauga Lake. Chickamauga Lake is the next lake downstream from the LWBR and is bounded by the Chickamauga Dam approximately 57 miles downstream from WBNP. The intake and discharge for

cooling water to WBNP are located 1.9 or more river miles downstream from the Watts Bar Dam. Accordingly, it must be noted that WBNP is located outside and below the boundary of the area considered by the DOE Report. Therefore, since WBNP does not draw cooling water from within the boundary of the LWBR and does not discharge cooling water into the boundary of the LWBR, the operation of WBNP will have no effect on the sediment in the LWBR and, accordingly, will not cause contaminated sediment to be drawn into WBNP.

The Petitioner's understanding that the LWBR holds sediment contaminated by radioactive material is consistent with the DOE Report (*see* p. 2-2) and with information in the NRC Staff's "Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Units 1 and 2," (FES) NUREG-0498, Supplement 1, § 2.5 (April 1995). The NRC Staff stated therein that "Operations at the Oak Ridge Reservation have historically resulted in the release of radionuclides to the aquatic environment. . . . Most of the releases occurred during the 1950s and have declined since." The NRC Staff concluded in the FES, Supplement 1, that there are no significant changes in environmental impacts as a result of changes in plant design, procedures or proposed methods of plant operation, or changes in the environment.

By contrast, the Petitioner's claim that "no action is being considered to restrict lake use or to remove radioactive material" is not consistent with the DOE Report. The DOE Report's "Statement of Basis and Purpose" (at p. 2-2) states that the Report "presents the selected remedial action for the LWBR OU." The "Description of Selected Remedy" (at p. 2-2) and "The Selected Remedy" (at p. 2-10) describe the selected remedy as the "continuance of existing controls and advisories regarding LWBR activities" and the "Monitoring Plan." The DOE Report (at p. 2-9) also notes that "[t]he state of Tennessee and other federal agencies are already implementing the main components of the preferred alternative." With respect to the removal of radioactive sediments, the DOE Report (at p. 2-9) states that "The cost of the preferred alternative is much lower and a more effective use of funds when compared to active remediation of sediments." In other words, a remedy has been developed for the contamination in the LWBR and the purpose of the DOE Report is to present that remedy.

Notwithstanding the conclusion that operation of WBNP will not disturb the sediment in the upstream LWBR, the WBNP Technical Specifications (TS) and the associated Offsite Dose Calculation Manual require programs and controls for the control of radioactive effluents from the plant itself. Such controls include limitations on the concentrations of radioactive material released in liquid effluents from the plant. The Staff evaluated control of radioactive effluents by WBNP in section 11 of NUREG-0847, "Safety Evaluation Report Related to the Operation of Watts Bar Nuclear Plant, Units 1 and 2." The Staff concluded therein that WBNP meets applicable regulations (10 C.F.R. § 20.1302;

10 C.F.R. Part 50, Appendix A, General Design Criteria 60, 63, and 64) and other guidance documents and is therefore acceptable for operation.

The NRC Staff's review did not substantiate the Petitioner's assertions. The Petitioner did not offer information that indicated any need to revisit the Staff's previous evaluations.

III. CONCLUSION

For the reasons given above, Petitioner's request to rescind the operating license of the WBNP is denied. As explained above, the NRC Staff concludes that the Petitioner has not raised any substantial health and safety issues as the Staff believes that there is no appreciable threat to the public health and safety presented by WBNP's effluent water. Accordingly, the Petitioner's request for action pursuant to section 2.206, as specifically stated in the letter of February 14, 1996, is denied.

A copy of this Final Director's Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). This Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 9th day of July 1996.