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NUCLEAR REGULATORY COMMISSION ISSUANCES

November 1985

U.S. NUCLEAR REGULATORY COMMISSION

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

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the Division of Technical Information and Document Control,
Office of Administration, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555
(301/492-8925)

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Prepared by the Division of Technical Information and Document Control,
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Alan S. Rosenthal, Chairman
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

In the Matter of **Docket Nos. 50-338-OLA-1**
50-339-OLA-1

VIRGINIA ELECTRIC AND POWER COMPANY
(North Anna Power Station, Units 1 and 2)

November 1, 1985

After conducting its *sua sponte* review, the Appeal Board affirms the Licensing Board's initial decision (LBP-85-34, 22 NRC 481 (1985)) authorizing the Director of Nuclear Reactor Regulation to issue a license amendment for the North Anna nuclear facility, Units 1 and 2, to permit the receipt and storage of 500 spent fuel assemblies from the Surry Power Station.

MEMORANDUM AND ORDER

On September 3, 1985, the Licensing Board issued its initial decision authorizing the Director of Nuclear Reactor Regulation to issue a license amendment for the North Anna nuclear facility, Units 1 and 2, to permit the receipt and storage of 500 spent fuel assemblies from the Surry Power Station. LBP-85-34, 22 NRC 481. No appeals from the

Board's decision have been filed. We have therefore conducted our customary *sua sponte* examination of the initial decision and relevant portions of the underlying record. That examination has disclosed no error warranting corrective action with regard to the Board's ultimate determination in the applicant's favor. For this reason, we *affirm* the Board's decision.[1]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[1] *See generally Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

In the Matter of **Docket Nos. 50-352-OL**
50-353-OL

PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station,
Units 1 and 2) **November 19, 1985**

The Appeal Board, finding that it does not have jurisdiction over intervenors' motion to reopen the record, refers the motion to the Commission for its consideration.

RULES OF PRACTICE: JURISDICTION

Jurisdiction to rule on a motion to reopen on certain issues, filed after exceptions have been taken to a Licensing Board decision on those issues, rests with the appeal board rather than the licensing board. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324 (1982).

RULES OF PRACTICE: JURISDICTION

Jurisdiction to rule on a motion to reopen on certain issues, filed after petitions for review of an Appeal Board decision on those issues have been filed with the Commission, no longer rests with the appeal board.

APPEARANCE

Robert L. Anthony, Moylan, Pennsylvania, intervenor pro se and for intervenor Friends of the Earth.

MEMORANDUM AND ORDER

On October 22, 1985, we issued ALAB-819, 22 NRC 681, completing our appellate review of numerous issues raised in connection with the Licensing Board's second partial initial decision in this proceeding. *See* LBP-84-31, 20 NRC 446 (1984). Among the issues we addressed was the Board's disposition of contentions V-3a and V-3b, raised by intervenors Robert L. Anthony and Friends of the Earth (Anthony/FOE). Those contentions concerned the possible effects of a gas or petroleum pipeline explosion on structures at the Limerick nuclear plant. We considered the many arguments raised on appeal by Anthony/FOE and found none to have merit. We thus affirmed the Licensing Board's determination that the Limerick structures are adequate to withstand the postulated explosion scenarios. *See* ALAB-819, 22 NRC at 730-41.

Anthony/FOE, in a motion filed November 12, 1985, now ask us to reopen the record on contentions V-3a and V-3b and to stay the operation of Limerick Unit 1. The basis of their motion is an October 31 letter from applicant Philadelphia Electric Company (PECo), enclosing a recent Licensee Event Report (LER). That report (No. 85-080) notes a potential condition not previously covered by the plant's operating or emergency procedures — a postulated cooling tower basin break with resultant entry of water into the lower elevations of the plant control structure due to the present status of Unit 2 construction and grading. Such an event could affect the Control Structure Chilled Water Systems (used to remove heat from areas such as the main control room through the heating, ventilation, and air conditioning system), but assertedly would not prevent the safe shutdown of the plant. According to Anthony/FOE, this new information undermines the Licensing Board's conclusions regarding the ability of safety-related structures to withstand such flooding. *See* LBP-84-31, 20 NRC at 490-92. Because ALAB-819 affirms the Board's partial initial decision, Anthony/FOE seek our reconsideration of ALAB-819 in light of the information contained in LER No. 85-080. We no longer have jurisdiction over matters relating to contentions V-3a and V-3b, however, and therefore refer Anthony/FOE's motion to the Commission for its consideration.

As we have noted on several past occasions, the Commission's Rules of Practice provide no ready answer to questions concerning the division of authority and jurisdiction among the various decisionmaking entities within the NRC. Similarly, we could locate no case precedent directly applicable to the situation presented by Anthony/FOE's motion. Our decision in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324 (1982), however, addresses a closely related issue. In that case, an intervenor filed a motion with the Licensing Board, seeking reopening of certain issues that Board had decided previously in one of several partial initial decisions. Because intervenor's motion was submitted after the filing of exceptions to that Licensing Board decision — thereby initiating Appeal Board review — we concluded (in agreement with the Licensing Board) that jurisdiction over the motion to reopen rested with us rather than the Licensing Board.

That reasoning provides a fair and workable solution to the problem here. Two petitions for review of ALAB-819 have already been filed with the Commission (one by PECo on November 5, and the other by intervenor Limerick Ecology Action on November 8), thereby triggering the Commission's consideration of that decision, including our rulings in connection with Anthony/FOE's contentions V-3a and V-3b. Therefore, the Commission is logically the proper entity within the adjudicatory chain that should consider Anthony/FOE's motion to reopen on these same contentions.

Anthony/FOE's November 12, 1985, motion to reopen is therefore *referred* to the Commission.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

Cite as 22 NRC 776 (1985) ALAB-824

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

In the Matter of **Docket No. 50-322-OL**

LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)

November 21, 1985

The Appeal Board affirms the Licensing Board's partial initial decision (LBP-85-18, 21 NRC 1637 (1985)) which determined that, for the first fuel cycle, the three Transamerica Delaval, Inc. emergency diesel generators installed at the Shoreham nuclear facility will satisfy the requirements of General Design Criterion 17, 10 C.F.R. Part 50, Appendix A.

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

The General Design Criteria for Nuclear Power Plants "establish minimum requirements for the principal design criteria for water-cooled nuclear power plants similar in design and location to plants for which construction permits have been issued by the Commission." 10 C.F.R. Part 50, Appendix A.

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

Both pressurized water and boiling water reactors are equally subject to the requirements of General Design Criterion 17, and fulfill those requirements in the same fashion.

ATOMIC ENERGY ACT: HEARING RIGHT

The hearing right granted by section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), carries with it no license to encumber the record with evidence of little, if any, intrinsic worth on the theory that the examination and cross-examination of other witnesses might establish the proposition for which that evidence had been offered. *See Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 968 (7th Cir. 1983). *See also* 10 C.F.R. § 2.743(c).

APPEARANCES

Fabian G. Palomino, Albany, New York, for the intervenors State of New York and Suffolk County (**Lawrence Coe Lanpher, Alan Roy Dynner,** and **Douglas J. Scheidt,** Washington, D.C., were on the brief for Suffolk County).

T.S. Ellis, III, Richmond, Virginia (with whom **W. Taylor Reveley, III,** Richmond, Virginia, **Odes L. Stroupe, Jr.,** Raleigh, North Carolina, and **Lucinda E. Minton,** Washington, D.C., were on the brief), for the applicant Long Island Lighting Company.

Richard J. Goddard (with whom **Edwin J. Reis** was on the brief) for the Nuclear Regulatory Commission staff.

DECISION

Before us is the joint appeal of intervenors Suffolk County and the State of New York from the Licensing Board's June 14, 1985 partial initial decision in this operating license proceeding involving the Shoreham

nuclear facility.[1] In its decision, the Board determined that, for the first fuel cycle, the three Transamerica Delaval, Inc. (TDI) emergency diesel generators installed at the facility will satisfy the requirements of General Design Criterion (GDC) 17.[2] Insofar as here relevant, that criterion provides:

> *Electric power systems.* An onsite electric power system and an offsite electric power system shall be provided to permit functioning of structures, systems, and components important to safety. The safety function for each system (assuming the other system is not functioning) shall be to provide sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents.
>
> The onsite electric power supplies, including the batteries, and the onsite electric distribution system, shall have sufficient independence, redundancy, and testability to perform their safety functions assuming a single failure.
>
> * * * * *

Although a large number of subsidiary findings and conclusions undergird the Licensing Board's ultimate determination on the short-term acceptability of the TDI generators, the appeal presents a single, and relatively narrow, issue. That issue concerns the exclusion by the Board of certain evidence offered by the intervenors that purportedly reflects the NRC staff's interpretation of the requirements imposed by GDC 17. For the reasons that follow, we conclude that the evidence in question could not serve its intended purpose and, therefore, was properly excluded. In addition, we have conducted our customary *sua sponte* review of the ultimate determination of the Licensing Board on the acceptability of the TDI generators. Finding no error requiring corrective action, we affirm the partial initial decision.

A. In the case of a loss of offsite power accompanied by a loss-of-coolant accident (regarded as the "worst case" event for analytic purposes),[3] the Shoreham emergency generators must be capable of furnishing sufficient AC power to enable various systems to bring the reactor to a safe shutdown condition. In order to ascertain whether the TDI generators satisfy this requirement, one of them was subjected to an endurance test. It was successfully operated for a period of 740 hours at power

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[1] LBP-85-18, 21 NRC 1637.

[2] The General Design Criteria for Nuclear Power Plants are found in Appendix A to 10 C.F.R. Part 50. As the Introduction to the Appendix states, they "establish minimum requirements for the principal design criteria for water-cooled nuclear power plants similar in design and location to plants for which construction permits have been issued by the Commission."

[3] Dawe, *et al.*, fol. Tr. 27,153, at 8, 29.

levels that, for the most part, met or exceeded 3300 kilowatts (kW).[4] Each of the generators was therefore deemed capable of supplying power in that amount over a protracted period.[5] On this basis, the staff found the generators "qualified" to fulfill their assigned function; i.e., should the worst case event occur, they would provide an adequate amount of electricity to the required systems.[6]

For their part, the intervenors did not contend that the continuous emergency power need imposed on any one generator might exceed 3300 kW.[7] They nonetheless claimed that the generators should not have been deemed acceptable unless it had been demonstrated that each was capable of delivering more than that amount of power. To the extent pertinent to their appeal, this claim rested on the proposition that, as interpreted and applied by the staff, GDC 17 requires that emergency generators be equipped not merely to provide the electricity necessary to take care of the expected maximum loads during the postulated worst case event but, as well, to accommodate unexpected and unnecessary additional loads stemming from possible untoward operator actions.

In an endeavor to buttress this proposition, the intervenors offered the written testimony of two officials of a "technical consulting firm on nuclear power plant safety and licensing matters."[8] These witnesses maintained that "[i]t has been the standard practice in the licensing of all boiling water reactors" to require the "maximum rated load" of the emergency generators to exceed by a "significant margin" the amount of power required to shut down the reactor safely.[9] The essential foundation for this assertion was a table referring to 27 operating boiling water reactors located in 18 nuclear power facilities.[10] That table, which was ap-

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[4] *See* LBP-85-18, 21 NRC at 1681, 1697.

[5] As a general matter, the staff relies upon the power ratings assigned by the manufacturer. Tr. 27,759-60, 27,968-69. *See* Regulatory Guide 1.9, Revision 2, "Selection, Design, and Qualification of Diesel-Generator Units Used as Standby (Onsite) Electric Power Systems at Nuclear Power Plants" (December 1979) (Long Island Lighting Company (LILCO) Exhibit C-3). Because of problems encountered by TDI generators, the staff suggested that the capacity of those generators (whether installed at Shoreham or at another nuclear facility) be determined through an extensive empirical test. Tr. 27,981-84. *See also* Dawe, *et al.*, fol. Tr. 27,153, at 9-10.

[6] Knox, fol. Tr. 27,735, at 12; Tr. 27,787, 27,945-46.

[7] *See* LBP-85-18, 21 NRC at 1689, 1691. Although the intervenors did argue before the Licensing Board that there might be intermittent power demands that would produce a total load on a single generator in excess of 3300 kW, that thesis is not renewed in connection with their appeal. In any event, we see no reason for concern on this score. *See* p. 783, *infra*.

[8] Bridenbaugh and Minor, fol. Tr. 27,500, at 1.

[9] *Id.* at 15. By "maximum rated load," the witnesses apparently had reference both to (1) in the case of TDI generators, the capacity of the generator as determined empirically (in the words of the staff "qualified load"), and (2) in the case of other generators, the capacity of the generator as represented by the manufacturer (i.e., "power rating" or "nameplate rating").

[10] Many such facilities have, of course, more than one reactor (i.e., unit).

pended to their proposed testimony, had been prepared by the witnesses following an asserted survey made of Final Safety Analysis Reports and other documents. According to it, the emergency generators associated with the 27 reactors had capacities that exceeded the loads that they might have to satisfy by margins ranging from approximately three to 100 percent.

With the support of the staff, the applicant moved to strike the proposed testimony and accompanying table on the ground that the capacity/power demand margins at other facilities were irrelevant on the question of the acceptability of the Shoreham TDI generators.[11] The motion was granted for a somewhat different, albeit allied, reason. According to the Licensing Board, admission of the testimony and table would lead to the litigation of issues "at least so remotely collateral to the material issues before us as to be digressive without any redeeming usefulness."[12]

As earlier noted, the intervenors' appeal from the June 14 partial initial decision is confined to this Board ruling. According to the intervenors, the testimony and table did provide support for their claim that the staff has consistently interpreted and applied GDC 17 to require that the rated capacity of emergency generators exceed by a substantial margin the anticipated maximum loads associated with a worst case event. This being so, the intervenors maintain, the exclusion of this evidence was improper.

The applicant and the staff urge affirmance of the ruling (and thus the June 14 decision). They insist that the evidence was properly excluded because it both did not demonstrate past agency practice and was "excessively collateral." In addition, we are told that, had it been admitted, the evidence would not have affected the outcome of the proceeding.

B. Contrary to the intervenors' position, we are entirely satisfied that the testimony and table in question were correctly excluded by the Licensing Board. As we have seen, that evidence was proffered for a single purpose: to establish that the staff has uniformly interpreted and applied GDC 17 in a manner consistent with intervenors' own thinking on the subject. It is manifest, however, that neither the testimony nor the table establishes any such thing. More specifically, they do nothing to contradict the staff's insistence on the appeal that "GDC 17 has not

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[11] *See* LILCO's Motion to Strike Testimony of Dale G. Bridenbaugh and Gregory C. Minor Regarding Suffolk County's Emergency Diesel Generator Load Contention (February 1, 1985), at 3; NRC Staff Response to LILCO's Motions to Strike Suffolk County's Testimony on Emergency Diesel Generator Load Contention and Cylinder Blocks (February 8, 1985), at 2.

[12] February 11, 1985 Memorandum and Order Ruling on Motions to Strike Portions of Suffolk County and LILCO Testimony (unpublished), at 3.

been construed as requiring a substantial margin, or a margin to accommodate operator error, between a diesel generator's rating or qualified load and the maximum emergency service load."[13]

In the final analysis, all that the table demonstrates is that there are 27 boiling water reactors licensed by this agency that possess emergency generators with widely varying capacity/power demand margins. While each of those margins exceeds to some extent the margin at Shoreham, by no means can all of them be characterized as substantial. As previously noted, the table reflects that one of the margins (that at Millstone 1) was in the neighborhood of three percent. Moreover, several others also were relatively small (i.e., less than ten percent). Still further, the table did not embrace all licensed boiling water reactors and made no mention of any pressurized water reactors.[14] This is a matter of some significance, given the fact that the TDI emergency generators for Unit 1 of the Catawba facility (a pressurized water reactor) have *staff-accepted* capacity/power demand margins that are *less* than those possessed by the Shoreham generators.[15]

If anything, then, both the table and the Catawba data bear out the staff's representation to us that it has not construed GDC 17 to have the effect attributed to it by the intervenors. But even had the table reflected that the emergency generators associated with all of the listed reactors possessed large capacity/power demand margins, there still scarcely would have been room to infer that such margins were provided in obedience to a staff mandate, rooted in GDC 17. For utilities and their contractors do many things in the construction and operation of nuclear power reactors that are not in direct response to a staff-imposed requirement.

The short of the matter is that the table, and accordingly the testimony of the witnesses founded thereon, were of so little probative value on the question of the staff's interpretation and application of GDC 17 that the Licensing Board was fully justified in excluding them from the record. In this connection, if interested in obtaining an authoritative

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[13] NRC Staff Response to Suffolk County and State of New York Brief in Support of Appeal of June 14, 1985 ASLB Decision on Emergency Diesel Generators (August 26, 1985), at 12-13 (footnote omitted). The term "maximum emergency service load" (or "MESL") was employed in this proceeding to refer to the load that the generators would have to bear in response to the worst case event for more than a short time period. LBP-85-18, 21 NRC at 1691-92.

[14] Although Shoreham is a boiling water reactor, there is no reasonable, technical basis for distinguishing between it and pressurized water reactors for present purposes. Both types of reactors are equally subject to the requirements of GDC 17 — and fulfill those requirements in the same fashion.

[15] *See* Supplement No. 4 to the Safety Evaluation Report for Catawba Nuclear Station, Units 1 and 2 (NUREG-0954, December 1984) Appendix G, at 9. At Catawba, the staff-accepted rated capacity for each of its two emergency generators is 5750 kW and the power demand for its worst case event is 5714 kW. The equivalent figures for Shoreham are 3300 and 3253.3, respectively. *See* LBP-85-18, 21 NRC at 1691-92. Thus, the Catawba margin is 0.6 percent and the Shoreham margin is 1.4 percent.

answer to the interpretation question, the intervenors might well have sought through the discovery process to obtain that answer from members of the staff responsible for the enforcement of GDC 17. It is unclear to us why such a direct approach was eschewed, in favor of an endeavor to have the Licensing Board indulge in assumptions that the proffered indirect evidence simply would not allow.[16]

It need be added only that there is no substance to the intervenors' claim at oral argument that the exclusion of this evidence deprived them of hearing rights guaranteed by the Atomic Energy Act of 1954, as amended.[17] The intervenors were accorded a full hearing on the subject of the acceptability of the TDI generators. They had ample opportunity to adduce any evidence of true probative value and to test on cross-examination the evidence presented by other parties. That was the extent of their entitlement. More specifically, their counsel's apparent differing view notwithstanding, the statutory hearing right enjoyed by the intervenors carried with it no license to encumber the record with evidence of little, if any, intrinsic worth on the theory that the examination and cross-examination of other witnesses might establish the proposition for which that evidence had been offered.[18]

C. We have reviewed *sua sponte* the evidence on the adequacy of the Shoreham emergency generators and concluded, in common with the Licensing Board, that the generators will suffice at least for the first fuel cycle. Although there is no need to explore this matter in great detail, a few brief observations are appropriate.

To begin with, there is no basis for the belief expressed below by the intervenors that a substantial capacity/power demand margin is required to avoid the consequences of operator error. To be sure, such error might occur and might lead to the loss of the availability of one of the three generators.[19] But GDC 17 requires the emergency power supply to be able to provide sufficient power to perform its safety functions even in the event of such a "single failure."[20] Accordingly, the three generators each must and do possess sufficient capacity to enable any two of

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[16] The intervenors cited in their brief and at oral argument a portion of the prepared testimony of staff witness John L. Knox, introduced into the record following Tr. 27,735. Mr. Knox did not state directly, however, that the staff interpreted GDC 17 to require substantial capacity/power demand margins. With respect to the intervenors' reliance on Mr. Knox's testimony regarding operator error loads, we discuss the ability of the emergency power supply to accommodate such loads at pp. 782-83, *infra*.

[17] *See* section 189a., 42 U.S.C. 2239(a).

[18] *See Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 968 (7th Cir. 1983). *See also* 10 C.F.R. 2.743(c).

[19] The applicant has ensured that a single operator error cannot cause the loss of more than one emergency generator. Dawe, *et al.*, fol. Tr. 27,153, at 37.

[20] *See* p. 778, *supra*.

them to meet the power demand should the worst case event be accompanied or followed by a loss of the third generator (either because of operator error or otherwise).[21]

Nor is there merit to the other reasons advanced by the intervenors before the Licensing Board in support of their claim that the capacity/power demand margins are insufficient.[22] With regard to the power requirements of equipment that might operate intermittently, the record indicates both that (1) such operation would be for no more than a few minutes; and (2) in the unlikely event of the simultaneous occurrence of all of the intermittent loads, the total additional power demand for that relatively short period would be 78.1 kW.[23] Yet the tested generator successfully completed a 220-hour segment at power levels at or above 3500 kW – i.e., 200 kW greater than the 3300 kW capacity accepted as more than sufficient to accommodate the maximum continuous load.[24] This consideration also provides an adequate response to the intervenors' concern that the instrument used by the operators to determine the power output of the generators might be crucially inaccurate.[25] Although the design accuracy of the instrument is plus or minus 140 kW, the calibrations performed before and after the endurance test showed that it was accurate within 70 kW.[26]

Apart from the issue regarding the power capacity of the TDI generators, the Licensing Board considered in detail the adequacy of the cylinder blocks and crankshafts of the TDI diesel generators at Shoreham. On our review, we have found that the TDI diesel generators have been subjected to extensive analyses, testing and inspections. In addition, stringent license conditions have been imposed with respect to operating limits, surveillance testing and inspections of the generators.[27] As previously noted, the Licensing Board approved the use of the TDI generators for only the first fuel cycle, after which newly purchased diesel generators from a different manufacturer presumably will be available

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[21] Dawe, *et al.*, fol. Tr. 27,153, at 37. The loss of only one emergency generator must be postulated because GDC 17 does not require that the emergency power supply be capable of enduring more than a "single failure."

[22] *See* LBP-85-18, 21 NRC at 1689, 1691.

[23] *Id.* at 1693, 1694; Dawe, *et al.*, fol. Tr. 27,153, at 11-19.

[24] LBP-85-18, 21 NRC at 1697.

[25] *See id.* at 1691. The intervenors also claimed below that an allowed operating band of 100 kW rendered the capacity/power demand margin insufficient. *Ibid.* This operating band is allowed, however, only during surveillance testing and will not result in the generators being operated at increased power levels during an emergency. Dawe, *et al.*, fol. Tr. 27,153, at 27.

[26] *Id.* at 28-29. The extensive testing of one of the emergency generators for 220 hours at or above 3500 kW also satisfies the intervenors' concern that the endurance test did not demonstrate that the generators can provide 3300 kW. *See* LBP-85-18, 21 NRC at 1691.

[27] *See id.* at 1677-79, 1687, 1689-90.

for service.[28] Along this line, the Board agreed "with LILCO and the staff that the record supports the approval of continued operation of the Shoreham TDI [diesel generators] for multiple fuel cycles — with appropriate inspections — but consider[ed] it prudent for the NRC to defer a decision on operation past the first fuel cycle until industry experience with TDI diesels up to that time can be reviewed."[29] In our view, there is no reason to disturb any condition or limitation placed on the operation, testing or inspection of the TDI diesel generators by the Licensing Board.

The Licensing Board's June 14, 1985 partial initial decision is *affirmed*. It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[28] *Id.* at 1677-78. For its part, the applicant has not raised an objection on appeal to any of the license conditions or limitations established by the Licensing Board.
[29] *Id.* at 1654.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

In the Matter of **Docket Nos. 50-413-OL**
50-414-OL

DUKE POWER COMPANY, *et al.*
(Catawba Nuclear Station,
Units 1 and 2) **November 21, 1985**

Following up on ALAB-813, 22 NRC 59 (1985), the Appeal Board affirms the remainder of the Licensing Board's authorization of a full power operating license for the Catawba facility — the receipt and storage at Catawba of spent fuel generated at the applicants' Oconee and McGuire facilities.

LICENSING BOARDS: JURISDICTION

Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).

LICENSING BOARDS: JURISDICTION

Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act, 42 U.S.C. §§ 2132, 2133, and use licensing boards "to conduct such hearings as the Commission may direct." 42 U.S.C. § 2241. The boards,

therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them. *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 25 (1980); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980, 987 (1974).

LICENSING BOARDS: DELEGATED AUTHORITY

Hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the licensing boards the authority to conduct proceedings. *See* 10 C.F.R. § 2.700; *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976).

LICENSING BOARDS: JURISDICTION

Licensing boards "can neither enlarge nor contract the jurisdiction conferred by the Commission." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

LICENSING BOARDS: JURISDICTION

A licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

OPERATING LICENSES: DISPOSAL OF SPENT FUEL

Proposals to store spent fuel generated at one facility in the fuel pool of another facility that does not qualify as an independent storage installation under 10 C.F.R. Part 72 should be licensed pursuant to 10 C.F.R. Part 50. 45 Fed. Reg. 74,693, 74,698 (1980).

RULES OF PRACTICE: BRIEFS

Under the Commission's Rules of Practice, an appellant is obligated to clearly identify the errors of fact or law that are the subject of the appeal and, for each issue appealed, must identify the precise portion of the record relied upon in support of the assertion of error. 10 C.F.R. § 2.762(d)(1). *See Wisconsin Electric Power Co.* (Point Beach Nuclear

Plant, Unit 1), ALAB-719, 17 NRC 387, 395 (1983); *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 954-56 (1982); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975).

RULEMAKING: EFFECT ON ADJUDICATION

Appeal boards are required to apply the regulations in effect at the time of the appeal to matters before them. ALAB-813, 22 NRC 59, 86 (1985).

APPEARANCES

Robert Guild, Columbia, South Carolina, for the intervenors Palmetto Alliance and Carolina Environmental Study Group.

J. Michael McGarry, III, Washington, D.C. (with whom **Anne W. Cottingham** and **Mark S. Calvert,** Washington, D.C., and **Albert V. Carr, Jr.,** Charlotte, North Carolina, were on the brief), for the applicants Duke Power Company, *et al.*

George E. Johnson for the Nuclear Regulatory Commission staff.

DECISION

In ALAB-813,[1] we decided the consolidated appeals of intervenors Palmetto Alliance and Carolina Environmental Study Group from a series of Licensing Board decisions, the last of which authorized full power operating licenses for the two-unit Catawba Nuclear Station owned by Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation and Saluda River Electric Cooperative. Although we affirmed the major portion of the Licensing Board's license authorization, we deferred all questions pertaining to a small part of the authorization permitting the applicants to receive and store at Catawba spent fuel generated at Duke Power Company's Oconee and McGuire nuclear power facilities.[2] We

[1] 22 NRC 59 (1985).
[2] *Id.* at 64, 86-87.

now address those questions and affirm the remainder of the Licensing Board's full power license authorization.

I.

This proceeding was instituted with the publication of the customary notice of opportunity for hearing indicating that the Commission had received an operating license application pursuant to 10 C.F.R. Part 50 "to possess, use and operate" the Catawba Nuclear Station, Units 1 and 2.[3] In addition to the conventional information concerning the procedures for intervening in the proceeding, the notice closed with the usual statement that the license application on file in the agency's various public document rooms should be consulted "[f]or further details pertinent to the matters under consideration."[4] The Commission's published notice said nothing about the possible utilization of the Catawba facility as a repository for spent fuel generated at other nuclear power plants. The application referenced in the notice stated, however, that

> [t]he license hereby applied for is a class 103 operating license as defined by 10 CFR 50.22. It is requested for a period of forty (40) years. Applicants further request such additional source, special nuclear, and by-product material licenses as may be necessary or appropriate to the acquisition, construction, possession, and operation of the licensed facilities and for authority to store irradiated fuel from other Duke nuclear facilities. At present, Duke has no specific plans to utilize this storage alternative but, rather, considers it prudent planning to have this storage as one of the alternatives available.[5]

In response to the Commission's notice, both Palmetto Alliance and Carolina Environmental Study Group filed petitions to intervene and proffered contentions aimed at, inter alia, the fuel storage proposal contained in the license application.[6] The Licensing Board admitted both intervenors as parties to the operating license proceeding, but, in initially considering the admissibility of the intervenors' contentions concerning the fuel storage proposal, the Board questioned whether it had jurisdiction over that subject matter. Asserting that its jurisdiction "is normally

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[3] 42 Fed. Reg. 32,974 (1981).

[4] *Id.* at 32,975.

[5] Duke Power Company, Catawba Nuclear Station License Application (Mar. 31, 1981), Volume 1 at 11-12.

[6] After the intervenors' petitions to intervene were filed, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (acting pursuant to the standing delegation of authority contained in the Commission's Rules of Practice, 10 C.F.R. § 2.714) established a Licensing Board to rule on the petitions and preside over any operating license proceeding. *See* 46 Fed. Reg. 39,710 (1981). Other than naming the members of the Licensing Board, this notice only referred to the Commission's previous notice of opportunity for hearing.

established by the notice of opportunity for hearing" and that here the notice did not mention the fuel storage proposal, the Licensing Board sought the parties' views on the issue.[7] After receiving them, the Board concluded, without elaboration, that it "must consider the environmental impacts associated with [spent fuel] transport to, and storage at Catawba."[8] As pertinent to the issues now before us, the Licensing Board then rejected for various reasons most of the intervenors' contentions regarding the applicants' spent fuel proposal.

On appeal, the intervenors purport to challenge the Licensing Board's rejection of certain of their contentions concerning the applicants' spent fuel proposal. Because they sought to contest the applicants' plan, the intervenors understandably did not dispute the Licensing Board's assertion of jurisdiction over the portion of the license application containing the spent fuel proposal. We, on the other hand, raised the issue of the power of the Licensing Board to consider the intervenors' spent fuel contentions at oral argument of the intervenors' appeal. Because the issue of subject matter jurisdiction may be raised at any time, we questioned (for much the same reason originally asserted by the Board below) that Board's naked conclusion that it had authority over the spent fuel portion of the license application. Accordingly, we invited the parties to brief the jurisdictional issue.

In response, the applicants and the NRC staff assert that the Licensing Board properly exercised jurisdiction over the spent fuel proposal. They also argue that the Board properly rejected the intervenors' related contentions. The intervenors, in effect, now argue alternatively that the applicants' spent fuel plan was beyond the jurisdiction of the Licensing Board, but that, in any event, the Board erred in rejecting their contentions.

II.

Although it failed to articulate the rationale for its conclusions, the Licensing Board was correct in asserting jurisdiction over the spent fuel proposal contained in the operating license application. This being the case, the Board properly could, as it did, determine whether the intervenors' spent fuel proposal contentions were admissible.

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[7] LBP-82-16, 15 NRC 566, 580 (1982).
[8] LBP-82-51, 16 NRC 167, 171 (1982).

Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings.[9] Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act[10] and use licensing boards "to conduct such hearings as the Commission may direct."[11] The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them.[12] The various hearing notices[13] are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings.[14]

Our decisions make clear that licensing boards generally "can neither enlarge nor contract the jurisdiction conferred by the Commission."[15] For example, in *Marble Hill*,[16] we faced the question whether a notice of opportunity for hearing on a construction permit application gave the Licensing Board jurisdiction to consider an intervention petition seeking to raise antitrust issues where the Commission previously had issued a notice of hearing on the antitrust aspects of the application. In affirming the Licensing Board's determination that it lacked jurisdiction, we held that the Board correctly turned to the Commission's hearing notices to ascertain its subject matter jurisdiction, and that the Board had no discretion to alter this delegated authority absent Commission approval.[17] Thereafter, in *Trojan*,[18] the issue of the Licensing Board's jurisdiction arose in a special proceeding involving the question of the interim operation of the facility where the notice initiating the hearing spelled out the issues to be heard. We agreed with the Licensing Board's conclusion that it lacked jurisdiction over certain issues proffered by the intervenors because the "issues manifestly [were] beyond the bounds of the issues

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[9] *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).

[10] 42 U.S.C. §§ 2132, 2133. The Atomic Energy Commission was abolished and its regulatory functions were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, 42 U.S.C. § 5841(f) & (g).

[11] 42 U.S.C. § 2241.

[12] *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 25 (1980); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980, 987 (1974).

[13] *See* 10 C.F.R. § 2.700.

[14] *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976).

[15] *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

[16] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

[17] *Id.* at 170-71.

[18] *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287 (1979).

identified in the notice of hearing which triggered this special proceeding."[19] In so holding, we relied upon *Marble Hill* as a precedent of general applicability and characterized that decision as "squarely hold[ing] that a licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding."[20] Finally, in *Zion*,[21] we had occasion in an operating license amendment proceeding concerning the modification of a spent fuel pool to state, in a somewhat different context, that the Licensing Board's "jurisdiction was limited by the Commission's notice of hearing" and that its "jurisdiction extended only to issues fairly raised by the application to modify the spent fuel pool, the sole matter which the Commission had placed before it."[22]

Unlike the hearing notice in the special *Trojan* proceeding that specified the issues for hearing, the notice of opportunity for hearing on the Catawba operating license application followed the Commission's customary practice for such notices and was very general. As pertinent here, the notice referenced only the application to possess, use and operate the two Catawba units and stated that the application should be consulted for furtner details. By employing a broad announcement without specifying any limitations, the Commission delegated to the Catawba Licensing Board authority over all portions of the license application in the event of an operating license proceeding; the application itself therefore set the bounds of the Licensing Board's jurisdiction. The fact that the hearing notice did not specifically identify the applicants' spent fuel proposal, or any other particular feature of the application, is irrelevant to the question of the Licensing Board's subject matter jurisdiction because the Commission's delegation of authority to the Licensing Board in the hearing notice necessarily covered the entire operating license application.[23] All matters properly included as part of an operating license

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[19] *Id.* at 289 n.6.

[20] *Id.*

[21] *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419 (1980).

[22] *Id.* at 426. *See also Point Beach*, 18 NRC at 339.

[23] Because the intervenors sought to challenge the applicants' spent fuel proposal in their proffered contentions (and on appeal did not raise any questions concerning the notice) and we raised only the question of the Licensing Board's jurisdiction to consider the spent fuel portion of the license application, we leave for another day any questions concerning the adequacy of the Commission's hearing notice under the Atomic Energy Act, 42 U.S.C. § 2239, the Administrative Procedure Act, 5 U.S.C. § 554, and the Commission's regulations, 10 C.F.R. § 2.105. For example, 10 C.F.R. § 2.105(b)(1) states, inter alia, that the notice of opportunity for hearing on an operating license application set forth the "nature of the action proposed." One substantial question is whether that section requires something more in a notice than a simple statement to consult the license application for further information when the noticed application, in addition to seeking authority "to possess, use and operate" a nuclear power plant, also seeks authority for a second activity that is clearly nonintegral and coincidental to the operation of the plant.

(Continued)

application pursuant to the Commission's regulations thus fell within the jurisdiction of the Licensing Board.

Moreover, the Commission's regulations, 10 C.F.R. Part 50, do not prohibit the type of spent fuel proposal contained in the applicants' application. Indeed, in the statement of basis and purpose accompanying the Commission's rule setting forth requirements for the storage of spent fuel in an independent spent fuel storage installation, 10 C.F.R. Part 72, the Commission indicated that proposals such as that contained in the Catawba application that do not qualify as independent storage installations should be licensed pursuant to 10 C.F.R. Part 50.[24] Consequently, the applicants' spent fuel proposal was properly included within their operating license application, and the Licensing Board's jurisdiction encompassed that proposal as well as the intervenors' contentions directly challenging the applicants' spent fuel plan.

III.

On appeal, the intervenors claim that the Licensing Board erred in rejecting their "environmental contentions which sought to require thorough environmental impact analys[e]s of the costs and benefits, as well as the consideration of more environmentally-sound alternatives" to the applicants' transshipment proposal.[25] They assert that the lower Board incorrectly relied upon the Commission's generic determination of insignificant environmental impacts contained in Table S-4, "Environmental Impact of Transportation of Fuel and Waste To and From One Light-Water-Cooled Nuclear Power Reactor," 10 C.F.R. § 51.20 (1984). They argue that the S-4 Table applies only to the shipment of irradiated fuel from a reactor to a reprocessing plant, not from one reactor to another.

But the intervenors have failed to identify which specific contention was wrongly rejected and which Licensing Board ruling was incorrect. Over the course of the operating license proceeding, they filed a number of similar contentions all aimed at the applicants' spent fuel proposal.[26]

(such as receiving and storing spent fuel generated at other facilities). Regardless of what 10 C.F.R. § 2.105(b)(1) requires, however, explicit mention in the notice of opportunity for hearing of such non-integral activities clearly would be advisable in the future so that the notice may fully serve its intended purpose.

[24] 45 Fed. Reg. 74,693, 74,698 (1980).

[25] Brief of Appellants Palmetto Alliance and Carolina Environmental Study Group (Jan. 9, 1985) at 69.

[26] *See* CESG's Contentions (Dec. 9, 1981); Palmetto Alliance Supplement to Petition to Intervene (Dec. 9, 1981); Palmetto Alliance and Carolina Environmental Study Group Supplement to Petitions to Intervene Regarding Draft Environmental Statement (Sept. 22, 1982).

Moreover, the Licensing Board dealt with all of them in a number of different rulings.[27] Consequently, like so many of the intervenors' arguments in ALAB-813 their argument here suffers from a lack of proper briefing.[28] Once again the intervenors have not fulfilled their obligation under the Rules of Practice "clearly [to] identify the errors of fact or law that are the subject of the appeal" and, "[f]or each issue appealed, [to identify] the precise portion of the record relied upon in support of the assertion of error."[29] For this reason their argument fails. Nevertheless, as best we can determine, it appears that the intervenors intend to challenge the Licensing Board's rejection of combined contention 19.[30] If that is the case, their protest is without substance.

One part of the intervenors' contention 19 questioned the environmental costs and benefits of the applicants' transshipment proposal and sought an examination of the alternatives to it. In rejecting the contention, the Licensing Board found that the intervenors' challenge was an impermissible attack on the Commission's regulations, specifically Table S-4.[31] That ruling and the Board's supporting reasoning is generally correct. We need only add that the intervenors' sole argument before us (i.e., Table S-4 is inapplicable to the transport of spent fuel from one reactor to another because 10 C.F.R. § 51.20(g)(1) (1984) speaks of the spent fuel being shipped to a reprocessing plant) is unavailing. As the Licensing Board indicated in rejecting another of the intervenors' contentions, the Commission's generic determination of transportation impacts in the regulation is equally applicable to the transshipment of spent fuel between reactors as well as to a hypothetical reprocessing facility because it is the same fuel regardless of destination.[32]

Even if the intervenors' literal reading of the regulation were accepted, however, the Licensing Board's result would not change. First, the intervenors have not challenged the Board's alternative determination that the contention lacked specificity.[33] More important, subsequent to the Licensing Board's decision, the Commission's regulation was amended to delete all reference to a reprocessing facility.[34] Hence, there no longer

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[27] *See* LBP-82-16, 15 NRC at 578-81; LBP-82-51, 16 NRC at 171-72; LBP-83-8B, 17 NRC 291 (1983).

[28] *See* ALAB-813, 22 NRC at 66 n.16, 71, 84 n.128.

[29] 10 C.F.R. § 2.762(d)(1). *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 395 (1983); *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 954-56 (1982); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975).

[30] *See* LBP-83-8B, 17 NRC 291 (1983).

[31] *Id.* at 294.

[32] LBP-82-16, 15 NRC at 579.

[33] *See* LBP-83-8B, 17 NRC at 295.

[34] *See* 49 Fed. Reg. 9352, 9389-90 (1984). The substance of 10 C.F.R. § 51.20(g)(1) is now codified in 10 C.F.R. § 50.52 (1985).

can be any basis for arguing that Table S-4 does not apply to the transshipment of spent fuel from one reactor to another. Because we are required to apply the regulations in effect at the time of the appeal,[35] the amended regulation is controlling and the intervenors' semantic argument is now moot.

For the foregoing reasons, therefore, we affirm the remaining part of the Licensing Board's operating license authorization that permits the applicants to receive and store at Catawba spent fuel generated at Duke Power Company's Oconee and McGuire nuclear power facilities.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[35] ALAB-813, 22 NRC at 86.

Atomic Safety and Licensing Boards Issuances

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Cite as 22 NRC 795 (1985) LBP-85-42

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

In the Matter of

Docket Nos. STN 50-498-OL
STN 50-499-OL
(ASLBP No. 79-421-07-OL)

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

November 5, 1985

The Licensing Board explains its earlier summary ruling which granted in part and denied in part an intervenor's motion to reopen the record. The Board permitted incorporation into the record of a document which inadvertently had not been supplied to the intervenor through discovery but declined to reopen the record to include another document which the Board determined was not material to the issues under consideration.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

Where a record is closed and at least some proposed findings have been filed, but where a decision has not yet been rendered on a question, a motion to reopen the record must satisfy three criteria: (a) the motion must be timely filed; (b) it must address a significant safety (or environmental) issue; and (c) the additional information must potentially be susceptible of altering the result which would be reached in its absence.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

Where a party seeks to reopen a record to include a new contention, it must demonstrate not only that the criteria for reopening a record are satisfied but also that the factors for late-filed contentions in 10 C.F.R. § 2.714(a) have been satisfied.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

In evaluating the significance of newly proffered information for purposes of reopening a closed record, a Licensing Board may consider whether the information is new factual information. Differing analyses of experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Where a motion to reopen the record to consider a late-filed contention fails to discuss the factors bearing upon such contentions set forth in 10 C.F.R. § 2.714(a), the motion could be dismissed on that basis alone.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

The *McGuire* doctrine requires advice to a Licensing Board of matters "relevant and material" to issues pending before that Board. LBP-85-6, 21 NRC 447, 461 (1985), and cases cited.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

The stringent standards for reopening a record need not be applied with full force in a situation where (1) the proponent of reopening the record to include a newly discovered document was prevented from offering the document earlier, and (2) the new evidence can be received with little or no burden upon the parties.

MEMORANDUM AND ORDER
(Explanation of Rulings on CCANP Motion of 9/30/85)

On September 30, 1985, Citizens Concerned About Nuclear Power, Inc. (CCANP), an intervenor in this operating license proceeding, filed a "Motion for Board Ordered Production of Documents, to Reopen the Record, for New Contention, for Discovery, and for Extensions of Time" ("Motion"). By our Order (Rulings on CCANP 9/30/85 Motion), dated October 16, 1985 (unpublished), we announced summary rulings on the Motion, stating that we would provide our reasons in a forthcoming Memorandum and Order. We are doing so here.

1. Background

The Motion in effect seeks to reopen the Phase II evidentiary record to incorporate therein two documents: (a) a report prepared by S. Levy, Inc., on Brown & Root Engineering on the South Texas Project, dated October 1, 1984 ("SLI Report"); and (b) a handwritten chronology of events from June 26, 1981, to December 16, 1981, prepared by Mr. Don D. Jordan, Chairman of the Board of Directors of Houston Lighting & Power Co. (HL&P), the lead Applicant ("Jordan Chronology"). The Motion also seeks related relief: (a) that we order the Applicants to provide the Board and parties with copies of the SLI Report; (b) that we admit a new contention premised upon the SLI Report; (c) that we permit discovery on two matters – the Applicants' handling of the SLI Report, and the origin, supporting documentation and handling of the Jordan Chronology; and (4) that we grant CCANP a 2-week extension of time within which it might file its proposed findings of fact and conclusions of law for the recently completed Phase II hearings.

By our Memorandum and Order dated October 4, 1985 (unpublished), we granted CCANP's request for an extension of time. Furthermore, in their response to the Motion, the Applicants provided the Board and parties with copies of the SLI Report, making moot CCANP's request for Board-ordered production of that document.

With respect to the remainder of CCANP's Motion, the Applicants, on October 10, 1985, filed a response which offered no objection to the incorporation of the Jordan Chronology into the record but opposed reopening the record for the SLI Report. The Applicants also opposed the new contention and the discovery requested by CCANP (although, as noted above, they provided the Board and parties with copies of the SLI Report). By its response dated October 15, 1985, the NRC Staff opposed reopening the record for either document, as well as the other

relief requested by CCANP (excluding that on which we had already ruled or which had become moot by virtue of the Applicants' response).

In our summary October 16, 1985 Order, we ruled that we would admit into the Phase II record the Jordan Chronology[1] but would deny admission of the SLI Report. (We issued the Order at an early date to accommodate the date we had established for CCANP to file its Phase II proposed findings, which now could reference the Jordan Chronology.) We also denied CCANP's proposed new contention, and the additional discovery which CCANP had requested.

2. *Standards*

The Commission's standards for reopening the record of a proceeding are well recognized. As we have recently pointed out, a proponent of a motion to reopen a record bears a heavy burden. Under normal circumstances, such a motion must satisfy three criteria:

(a) The motion must be timely filed;

(b) It must address a significant safety (or environmental) issue; and

(c) It must demonstrate that the information sought to be added to the record might alter a result previously reached.

LBP-85-19, 21 NRC 1707, 1720 (1985) and cases cited; *see also* our Phase I Partial Initial Decision, LBP-84-13, 19 NRC 659, 716 (1984), *aff'd*, ALAB-799, 21 NRC 360, 381 (1985). Furthermore, when a party seeks to reopen a record to consider a new contention, it must also demonstrate that the factors in 10 C.F.R. § 2.714(a) relating to late-filed contentions have been satisfied. *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985).[2]

CCANP raises no question as to the first two of the reopening-the-record criteria but claims the third not to be applicable where, as here, no decision has yet been rendered. The Applicants and Staff disagree as to the third criterion, finding it applicable with respect to the current motion.

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[1] We denominated the Jordan Chronology as CCANP Exhibit 148 and requested the Applicants to provide copies to the NRC's Docketing and Services Branch. By their letter dated October 17, 1985, they promptly complied with our request.

[2] These factors are

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

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

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

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

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

CCANP is technically correct in its claim that, before a decision on a question has been reached, a motion to reopen the record need not — indeed, cannot — demonstrate that a different result would have been reached. That is so since no result has in fact yet been reached. *See Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-83-50, 18 NRC 242, 248 (1983). Nonetheless, as we observed in LBP-84-13, *supra*, 19 NRC at 716 n.43, with the record closed on the portion of the proceeding with respect to which new information is being proffered, it is appropriate for us to consider (in the context of the materiality or significance of the information in question) whether the additional information might potentially alter the result we would reach in its absence.[3] We have done so here.

In evaluating the significance of newly proffered information, we may consider whether the information is new factual information. Differing analyses of experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. *Id.* at 718-19; *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

We turn now to the application of these standards to the two documents for which CCANP seeks to reopen the record.

3. SLI Report

By letter dated October 9, 1984, the Licensing Board and parties were advised of the SLI Report, dated October 1, 1984. That report had been prepared by a technical consultant of the Applicants in conjunction with the Applicants' lawsuit in Matagorda County, Texas, against Brown & Root, Inc. (B&R), the former architect-engineer, construction manager and constructor of the South Texas Project (STP). The SLI Report was subject to a protective order of the Texas court, which was dissolved on May 30, 1985.

The SLI Report is a two-volume, 541-page[4] evaluation of B&R's engineering activities on the STP. In that respect, it is similar to the Quadrex

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[3] In LBP-84-13, the motion to reopen the record was filed prior to our ruling on the issue in question but subsequent to the submission of proposed findings by all parties. To the same effect, *see Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), *vacated in part on other grounds*, CLI-80-8, 11 NRC 433 (1980). Here, the motion was filed subsequent to (but on the same day as) the filing of the Applicants' proposed findings and prior to the filing of proposed findings by other parties. In this context, we find no compelling reason for not considering the effect of the information on the result we would otherwise reach.

[4] Our page count differs from the "650-page" description included in CCANP's Motion and the Staff's response.

Report which was the subject of Phase II litigation. In addition, the SLI Report was an overview of the review of Quadrex Report findings previously performed by Bechtel Corp. (Applicants' Exhibit 63) together with a review of some of Bechtel's redesign activities. As set forth in the SLI Report (at ii):

> The specific findings in this report on Brown & Root's engineering work reflect an historical review of certain areas of B&R engineering and its management, SLI's evaluation of data in the Bechtel work packages, and a review of some Bechtel redesign work.

According to the Applicants, the SLI Report represents an expert consultant's analysis of information obtained though lawsuit discovery from 1982-84.

None of the issues admitted for litigation in Phase II questions the adequacy of B&R's engineering, or the adequacy of engineering at STP following the replacement of B&R by Bechtel. As we understand it, the issue as to which CCANP seeks to reopen the record to include the SLI Report is CCANP Contention 9, which questions the adequacy of HL&P's reporting of the Quadrex Report to NRC pursuant to 10 C.F.R. § 50.55(e).

CCANP asserts that the SLI Report is relevant to the reportability of the Quadrex Report and of particular Quadrex findings. It asserts that this issue is significant — a point with which no party disagrees. But it fails to explain the significance of the information in the SLI Report to Contention 9, either in terms of its effect on the result to be reached or in the manner in which the SLI Report would bear on information already in the record (*see* Motion at 17-19). All that CCANP does in this regard is to set forth certain SLI Report excerpts bearing upon Quadrex Report findings which Contention 9 claimed to be reportable. CCANP also references certain SLI Report excerpts which, it claims, support its position that the Quadrex Report as a whole should have been reported to NRC as a QA breakdown pursuant to 10 C.F.R. § 50.55(e).

Applying the reopening criteria, we agree that the issue to which the SLI Report is said by CCANP to relate is significant. We decline to rule on questions of the timeliness of CCANP's Motion, although we believe the Applicants and Staff have raised valid questions as to why CCANP could not have obtained the SLI Report and filed its motion earlier. (In particular, we understand that CCANP never sought this report from the Applicants.)

Dispositive of CCANP's Motion insofar as it seeks to reopen the record to include the SLI Report, however, is the lack of materiality of this report to CCANP Contention 9. In our view, the SLI Report appears

to be no more than a further expert opinion on facts already in the record. This is not the type of information for which reopening a record is generally warranted. *Diablo Canyon*, ALAB-644, *supra*. In this case, it is the information available to HL&P in 1981 that determines the reportability of the Quadrex Report, not a subsequent evaluation of that information in the light of later-acquired information. Indeed, earlier in this proceeding, at the behest of CCANP, we declined to admit into evidence a 1982 Bechtel review of Quadrex findings offered by the Applicants (Work Package EN-619, Applicants' proposed Exhibit 64) to demonstrate (in part) that some of the Quadrex findings were not as serious as they appeared to be when the Quadrex Report was issued and hence did not represent reportable "deficiencies" (*see* Tr. 13,464-70). For reasons similar to those causing our rejection of Applicants' Exhibit 64, we here decline to accept into evidence the SLI Report. Accordingly, we decline to reopen the record for that purpose.

4. SLI Report (New Contention)

CCANP also seeks to introduce a new contention which asserts that the Applicants violated their obligations under the *McGuire* doctrine by not providing copies of the SLI Report to the Board and parties during the Phase II hearings. This proposed contention is by definition late-filed, since it was not (indeed, could not have been) submitted in 1978, during the period when contentions were initially required to be filed. For that reason this contention is subject to a balancing of the five factors bearing upon late-filed contentions set forth in 10 C.F.R. § 2.714(a).

CCANP fails to address these factors. Its proposed new contention could be dismissed on that basis alone. *Cf. Waterford*, ALAB-812, *supra*, 22 NRC at 16. But its motion for a new contention must be denied for a more fundamental reason: it fails to meet the materiality standards for reopening the record.

The *McGuire* doctrine requires advice to a Licensing Board of matters "relevant and material" to issues pending before that Board. LBP-85-6, 21 NRC 447, 461 (1985), and cases cited. As we have explained, the SLI Report is not material to CCANP Contention 9, the only contention as to which CCANP claims any relevance. CCANP has made no real effort to demonstrate the materiality of the SLI Report to any issue accepted for litigation in Phase II. Absent such a connection to a Phase II issue, the Applicants would not have been obligated by the *McGuire* doctrine to supply copies of the report to us and the parties.

Furthermore, the Applicants kept us informed in a timely fashion about the existence of the report. Their October 9, 1984 letter advising

of the report was sent little more than a week following the issuance of the report on October 1, 1984. The report's nature was discussed in the letter and briefly at the October 16, 1984 prehearing conference (Tr. 10,859-62), where we concluded that it probably was not relevant to Phase II issues. We discussed the report again at the outset of the Phase II hearings, when we were advised that the protective order imposed by the Matagorda County Court had been lifted. We advised CCANP that it could bring to our attention anything in the report it believed to be "specifically relevant" to Phase II issues (Tr. 11,268-70). Prior to its current Motion, CCANP made no attempt to do so.

Our present examination of the SLI Report convinces us that it is not material to the Phase II issues before us. We stress again that, at the time the SLI Report was released from the protective order of the Matagorda County Court, the issues open for litigation in Phase II (insofar as they might be affected by the SLI Report) concerned only the reportability of the Quadrex Report and not the adequacy of B&R's engineering efforts. That being so, there was no *McGuire* violation in the Applicants' failure to provide the SLI Report to us. For that reason, CCANP has not satisfied the standards for reopening the record to include its proposed new *McGuire* contention.[5]

5. *Jordan Chronology*

The second document as to which CCANP seeks to reopen the record is a handwritten diary or chronology of events prepared by Don D. Jordan, Chairman of the Board of Directors of HL&P, covering the period June 26, 1981, through December 15, 1981. Mr. Jordan testified during the Phase II hearings, and certain of the entries in the chronology are clearly relevant to that testimony. CCANP claims, and the other parties acknowledge, that the Jordan Chronology should have been provided to the Board and parties by virtue of the direction included in LBP-85-19, *supra*, 21 NRC at 1730-31. The Applicants explained, and apologized for, their failure to supply it (along with other documents which they provided on July 2, 1985), as an inadvertent error by counsel.

The Applicants and Staff claim that the matters set forth in the Jordan Chronology, to the extent relevant to Phase II issues, are cumulative of matters already in the record. The Staff would accordingly deny reopening the record to include this document. The Applicants also assert that

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[5] Given this ruling, we need not undertake a balancing of the five factors of 10 C.F.R. § 2.714(a) governing late-filed contentions.

the document does not satisfy the standards for reopening the record; but, inasmuch as their error prevented CCANP from introducing it earlier, they do not object to its admission into evidence.

In our view, the Jordan Chronology clearly would have been admissible if CCANP had offered it during the hearings. We also believe that the stringent standards for reopening a record need not always be applied with full force, particularly where, as here, the proponent of reopening the record was prevented by the inadvertent error of another party from offering the document earlier. *See also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 7 NRC 83, 85 (1978) (lower threshold of significance where new evidence can be received with little or no burden upon the parties). Finally, reopening the record to include the Jordan Chronology will not result in any delay in the proceeding; we specifically announced our ruling early to avoid any such delay.

In view of the above considerations, we have reopened the record to include the Jordan Chronology, which is to be designated as CCANP Exhibit 148.

6. *Discovery*

CCANP has asked for discovery concerning two matters: (a) the handling of the SLI Report as it relates to CCANP's proposed new contention, and (2) the origin, supporting documentation, and handling of the Jordan Chronology.

With respect to the first of these requests, discovery would not be appropriate since we have denied admission of the proposed contention (*see* § 4, *supra*). 10 C.F.R. § 2.740(b)(1) (discovery shall relate only to matters in controversy); LBP-85-19, *supra*, 21 NRC at 1729; *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 n.12 (1982).

As for the Jordan Chronology, the document is being offered by CCANP primarily on a collateral issue — the role of Applicants' lead counsel in the decision to replace B&R. While the answer to that question may have some bearing on the honesty and candor which we accord to the testimony of certain of Applicants' Phase II witnesses, we do not view that circumstance as sufficient, at this late date, for reopening discovery. Furthermore, one of the bases for our reopening the record to admit the Jordan Chronology (CCANP Exhibit 148) was the absence of significant burden on the parties by virtue of doing so. Discovery would

undermine that basis. For these reasons, we are denying the request for discovery on the Jordan Chronology.

For the reasons set forth above, and confirming our Order dated October 16, 1985, it is, this 5th day of November 1985,

ORDERED

1. That CCANP's Motion dated September 30, 1985, to reopen the record to admit the Jordan Chronology is *granted*; the Jordan Chronology is admitted into evidence as CCANP Exhibit 148;

2. That CCANP's Motion for Board-ordered production of the SLI Report is *dismissed* as moot;

3. That in all other respects (and except as ruled upon by our Memorandum and Order dated October 4, 1985, granting CCANP an extension of time within which to file its proposed findings of fact and conclusions of law) CCANP's September 30, 1985 Motion is *denied*.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Cite as 22 NRC 805 (1985) LBP-85-43

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. A. Dixon Callihan
Dr. Richard F. Cole

In the Matter of **Docket Nos. 50-456**
50-457

COMMONWEALTH EDISON COMPANY
(Braidwood Nuclear Power Station,
Units 1 and 2)

November 7, 1985

In this Memorandum and Order the Licensing Board rules that the National Environmental Policy Act (NEPA) does not entitle the intervenor to litigate the possible effects of a proposed transmission line to transport electricity from the Braidwood facility. The Board imposes an operating license condition requiring notice in the event Applicant decides to build and operate a 765-kV transmission line on rights-of-way to and from the Braidwood site.

NEPA: SEGMENTATION

There is no requirement to assess the effects of an overall transmission grid system long-range plan when considering a presently proposed part of the transmission system. *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); *see also Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973) (same reasoning applied in the analogous factual setting of an independently useful highway).

NEPA: SEGMENTATION

The three-prong test to determine whether an agency may confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought is: (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan, or forecloses alternatives to subsequent portions of the plan, and; (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is a high probability that the entire plan will be implemented in the near future. *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976) (en banc); *see also Duke Power Co.* (Amendment to SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981).

MEMORANDUM OF RATIONALE FOR SUMMARY DISPOSITION OF NEINER FARMS CONTENTION 1

MATERIAL FACTS

By unpublished order dated August 12, 1985, this Licensing Board granted Applicant Commonwealth Edison's motion, which had been supported by the NRC Staff, for summary disposition of Neiner Farms Contention 1. This memorandum gives the reasons for our ruling and determines that an operating license condition providing for notice in the future is appropriate to assure the integrity of the hearing process and Neiner Farms' rights to due process. We do not adopt more extensive license conditions sought by Neiner Farms.

Neiner Farms Contention 1 alleged that there would be specified adverse operational effects from a 765-kV transmission line which was being proposed to transport electricity from the two-unit Braidwood nuclear power plant.

Applicant's June 11, 1985 motion for summary disposition, as supported by affidavit of its System Planning Manager, Alfred H. Getty, establishes the following material facts as to which there is no genuine issue to be heard (*see* 10 C.F.R. § 2.749):

1. Applicant does not now plan to build a 765-kV transmission line to transmit power from Braidwood, Units 1 and 2. Getty Affidavit, at 1.

2. Applicant might in the future build and operate a 765-kV transmission line connected to the Braidwood Station or elsewhere on the existing rights-of-way running to and from Braidwood only if additional generating plants (beyond those now being constructed) were constructed and operated at Braidwood or at other nearby sites such as the LaSalle site (located west of Braidwood), or at other locations which could require a 765-kV line on the existing rights-of-way east of Braidwood. *Id.* at 1-2, 4. *See* Applicant's Environmental Report (ER) Fig. 3.9-1.
3. Based on present load projections, Applicant does not now foresee the need for such additional electrical generating capacity for at least 25 years. Therefore, Applicant does not now plan to install a 765-kV transmission line connected to Braidwood or elsewhere on the existing rights-of-way running to and from Braidwood for at least 25 years. Getty Affidavit at 4-5.

Material facts 1 and 2 are clear, unambiguous commitments by Applicant. These commitments are sufficient to establish that any future 765-kV transmission line which may be connected to Braidwood Units 1 and 2, or otherwise installed on the existing Braidwood rights-of-way, would be attributable to a future generating unit and not sufficiently attributable to the present subject of the application for operating licenses — Braidwood, Units 1 and 2 — to be considered under the National Environmental Policy Act (NEPA) as part of this operating license hearing. This lack of attribution, which we will discuss below, includes elements of lack of reasonable certainty of future plans, lack of foreclosure of future transmission line alternatives by the proposed action before us, and the substantial independent utility of Braidwood Units 1 and 2 and its associated transmission lines.

In light of material fact 2, material fact 3 is not truly material to our determination. Applicant has promised under oath that any 765-kV transmission lines associated with the Braidwood site or rights-of-way would be built only if future generating plants were built. Material fact 2. If Applicant had not made this commitment, then the long period of time before any such 765-kV lines might be built could have been sufficient by itself to find that such a future possibility should not now be considered under NEPA in this operating license hearing. However, given material fact 2, our decision to grant summary disposition does not depend directly or strongly on material fact 3. We view material fact 3 as a supporting "makeweight" fact which establishes that Applicant has no nefarious scheme, vaguely alluded to by Neiner Farms, of putting

a 765-kV line on the Braidwood rights-of-way in the near future for purposes of serving Braidwood Units 1 and 2, under the subterfuge of asserted need for such a transmission line by another generating unit which would be built in that near-future time frame.

Given our limited, contextual reliance on material fact 3, we place no importance on high accuracy for the prediction that it will be at least 25 years before any additional generating capacity might be needed at or sufficiently near the Braidwood site so as to require 765-kV transmission lines in the Braidwood region of the Applicant's transmission grid system. It is sufficient for our purposes to rely on the fact that it will be many years before such future generating capacity will be needed. Moreover, as set forth below, we establish a notice requirement for the Applicant which will protect Neiner Farms' opportunity to argue that it should be entitled to litigate its contention before the NRC if Applicant materially changes its commitments in material facts 1 and 2 as we have them set forth above, or in material fact 3 to the extent we have relied on it.

FACTUAL BACKGROUND

Neiner Farms is concerned with a transmission line right-of-way which runs through its property. This right-of-way extends from the Braidwood Station site, generally east for about 23 miles to the Davis Creek Transmission Substation, and then north for about 7½ miles to the Wilton Center Transmission Substation (apparently point "J" on ER Fig. 3.9-2), for a total distance of about 30½ miles. ER § 3.9.1 and Fig. 3.9-2.[1] The Neiner Farms' properties are located in Manteno, Illinois, which is in Kankakee County on the portion of the right-of-way in question between Davis Creek and Wilton.

Mr. Getty states that Applicant has never planned to build a 765-kV transmission line to transmit power from Braidwood Units 1 and 2. Getty Affidavit at 1. However, the Applicant deemed it prudent to plan for the ultimate development of the rights-of-way between LaSalle and Braidwood (running west from Braidwood) and those running to Wilton to include a future 765-kV line which would parallel the two-circuit,

[1] It is not a material difference, but Mr. Getty's affidavit, at page 1, reports that the distance from Braidwood to Wilton is about 38.3 miles. From Wilton, new rights-of-way were acquired to the east and then north to the Crete Substation, for transmission lines of 345 kV and lower voltage. Part of these rights-of-way involved the widening of an existing 765-kV transmission line right-of-way. ER § 3.9.1 and Fig. 3.9-2.

345-kV lines associated with Braidwood, Units 1 and 2. *Id.* at 1-2.[2] Applicant believed, at the time those long-range planning studies were performed in the early to mid-1970's, that a 765-kV line would be needed if additional generating units were added at the Braidwood site, or at other nearby sites, such as LaSalle. Given the estimated electrical load growth at the time of those planning studies, Applicant believed such additional generating capacity, and therefore a new 765-kV transmission line system in the vicinity of Braidwood, would be needed in six or seven years after the Braidwood 345-kV lines were needed. *Id.* at 2.

Therefore, at least along the Braidwood to Wilton route, Applicant sought to acquire a right-of-way wide enough for both the 345- and 765-kV sets of lines. All of the rights-of-way necessary for the 345-kV circuits needed for Braidwood Units 1 and 2 have been acquired. Applicant has also acquired adequate width for the possible future 765-kV circuit for more than 97% of the route to Wilton. *Id.* at 2-3.[3] The right-of-way easement through the Neiner Farms' property had to be obtained by eminent domain. Since only the 345-kV circuits were immediately required, this easement awarded by the Illinois Commerce Commission does not permit installation of a 765-kV line. Applicant would have to obtain a Certificate of Convenience and Necessity from the Illinois Commerce Commission before a 765-kV line could be built. *Id.* at 3.

As set forth above, the three material facts show that Applicant might build and operate 765-kV transmission lines on the route from Braidwood to Wilton, or on other rights-of-way running to and from Braidwood, only if additional generating plants were built and operated at Braidwood or other nearby sites. Moreover, it will be many years before such future generating capacity will be needed.[4]

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[2] Neither Mr. Getty's affidavit, nor the ER, discloses whether Applicant's long-range planning also included the possible addition of a 765-kV line on the Braidwood to East Frankfort Substation 345-kV line right-of-way, which runs in a general northeast direction from Braidwood. *See* ER Fig. 3.9-1.

[3] On the Davis to Wilton portion of the route, the 345-kV circuits require a right-of-way about 145 feet wide. A future 765-kV circuit would require additional width of about 170 feet, for a total of about 315 feet. Getty Affidavit at 3; ER Fig. 3.9-2. Other sections of the Braidwood to Wilton right-of-way acquired by Applicant range as wide as 330 to 405 feet. ER Fig. 3.9-2. Possibly because almost all of the transmission line route crosses nearly flat cleared farmland, no issue has been raised before us regarding clearing of the right-of-way to the width required for the possible future 765-kV line. ER § 3.9.1. *Cf. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-75-70, 2 NRC 879, 891 (1975), and LBP-76-1, 3 NRC 37 (1976). We do not know whether clearing is necessary to accommodate the wider rights-of-way for a possible 765-kV line. If it is, we do not know whether clearing has or will be done before the Applicant seeks and obtains the Certificate of Convenience and Necessity from the Illinois Commerce Commission which is prerequisite to building any future 765-kV line. Getty Affidavit at 3. Given the absence of any such issue raised before us, we do not pursue it. This is probably a matter also within the domain of the Illinois Commerce Commission.

[4] As discussed above, Applicant represents its present plan will not require additional capacity which would require 765-kV circuits on rights-of-way running to and from Braidwood for at least 25 years. This is supported by the Getty Affidavit (at 4-5). The Getty Affidavit (at 4) also states that there are tenta-

(Continued)

We have set forth the factual circumstances at some length, because when combined with the applicable law, there springs directly from the facts a clearly mandated result: Applicant's possible future construction and operation of 765-kV transmission lines are not part of the proper scope of a NEPA evaluation of the proposed action of operating Braidwood, Units 1 and 2.

APPLICATION OF THE LAW

Along with another Licensing Board's determination, we recognize that "[c]aution is necessary in dividing a project into segments for NEPA purposes in order to avoid arbitrary divisions which may hide significant total impacts." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1473 (1982). The test for whether an agency may confine its environmental analysis to the portion of the plan for which approval is being sought is: (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan; and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future. *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976) (en banc). *See, e.g., Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1297-98 (8th Cir. 1976); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974). *See also Duke Power Co.* (Amendment to SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981).

Clearly, the generation and delivery of electricity by the Braidwood Station, Units 1 and 2, over its 345-kV (and lower voltage) transmission circuits has substantial independent utility. This is decidedly not a situation like those of a highway segment with no logical termini unless and until an additional connecting segment is added (*cf. Swain, supra*, 542 F.2d at 370), or of an electric [illegible] plant without the transmission

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tive plans for new generating capac[illegible] in the affidavit would be consistent [illegible] mission lines on rights-of-way runn[illegible] ever, it does not matter. No one [illegible] be attributable to Braidwood Units [illegible] of "many years," which is inconsistent

plicant's Langham site. These statements ham would not require new 765-kV trans- We do not know if this is the case. How- ciated with a plant at Langham would not ; and (2) 12 years easily fits under a label r limited reliance on material fact 3.

lines necessary to make the plant useful by the delivery of its electricity. *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974). Cases which have found a lack of sufficient independent utility of a proposed project have found that the project was dependent on subsequent phases "such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken [footnote omitted]." *Trout Unlimited, supra*, 509 F.2d at 1285. This is not the case here.

Approval of the proposed project does not preordain that 765-kV transmission lines will be constructed in the future or otherwise foreclose future alternatives. Neiner Farms argues that because Applicant is maintaining the option of installing 765-kV lines on the rights-of-way to and from Braidwood within the lengthy period of time that Braidwood Units 1 and 2 would still be operating, the issue of effects of such possible future 765-kV lines is now ripe for litigation. Intervenor's Answer, July 10, 1985, at 2. We disagree. If and when approval to build such future 765-kV lines is actually sought, its impacts can then be evaluated by the governmental authority with jurisdiction (which could vary or overlap depending on the type of generating plant or plants with which the lines would be associated). For example, if operational effects of 765-kV lines are found unacceptable even with mitigation, the lines could be disapproved, and lower-voltage lines approved instead.

The particular routing was not in issue in Neiner Farms' contention although we imagine that Neiner Farms would prefer that any 765-kV lines which might be approved in the future not traverse its property. Sensibly, future routing decisions would take into account existing rights-of-way and the location of the new and existing generating plants on the Applicant's electrical transmission system. However, this does not foreclose alternatives to any future proposals. The fact that future projects may be correlated with past projects and the project pending before us does not bring such future projects within the scope of environmental review of the present proposal. *See Sierra Club v. Callaway*, 499 F.2d 982, 987 (5th Cir. 1974). Thus, there is no requirement to assess the impacts of an overall transmission grid system long-range plan when considering a presently proposed part of the transmission system. *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); *Columbia Basin Land Protection Ass'n v. Kleppe*, 417 F. Supp. 46, 52 (E.D. Wash. 1976), *aff'd in part, rev'd in part on other grounds, sub nom. Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). The same reasoning has been applied in the analogous factual setting of an independently useful highway, which may be built without the need for an environmental evaluation of:

> a network of highway routes comprising a statewide highway plan. . . . [S]uch plans must of necessity be projected over a relatively long span of time and be flexible in order to allow modifications to meet unforeseen and untoward developments[.] [W]e do not think the overall project is subject at the outset to the requirements of NEPA. Such plans usually are and should be visionary, subject to extensive modification and dependent to a large degree upon [future circumstances].
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> * * *
>
> [A]s a practical matter it is necessary to permit the division of a state highway plan into segments for the purpose of environmental considerations.

Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19 (8th Cir. 1973), *cited by Sierra Club v. Callaway, supra*, 499 F.2d at 987.

The third prong of the *Swain* test, *supra*, 542 F.2d at 369, is not explicitly set forth in the string of cases we have cited above after *Swain*, or by the Appeal Board in *Duke Power Co., supra*. It appears to us that the fact that a future larger plan is definite would not necessarily bar segmented consideration of a smaller portion of the plan if the first two prongs of the test, discussed above, are met. However, the facts pertinent to the future prospects of a larger plan could also be viewed as relevant indicia in applying the first two prongs of the test. In any event, our decision that a possible future 765-kV line on rights-of-way to and from Braidwood need not be evaluated as part of the decision regarding the operation of Braidwood Units 1 and 2 easily satisfies the third prong of *Swain*.

In the first place, it is arguable whether there even is a sufficiently formed larger "overall plan" in existence so as to come within the prerequisite conditional clause of the third prong — "*if* the proposed action is part of a larger plan" (emphasis added). *See Kleppe v. Sierra Club*, 427 U.S. 390, 400-06 (1976); *Sierra Club v. Hodel, supra*, 544 F.2d at 1040-41. Moreover, as is clear from the factual context discussed above and set forth in the material facts, Applicant is engaged in long-range planning for the future expansion of its electrical capacity and associated transmission system. It is not definite that 765-kV lines will be needed on rights-of-way running to and from Braidwood. It is definite that additional electrical units, which possibly might have 765-kV transmission lines associated with them, will not be needed for many years (perhaps about 12, perhaps about 25). Moreover, the routes and voltages of such future transmission lines will depend on the location of future generating plants, and probably on other future circumstances such as the location and distribution of electrical demand by customers on the Applicant's system.

For the first time, and with no explanation, Neiner Farms in its July 10, 1985 opposition to summary disposition of its contention, at page 2, states "there is a possible nexus between a 345 kV line and an already

existing 765-kV line." An existing 765-kV line runs east-west for about 17 miles between the Wilton Substation and a point in Washington Township. ER § 3.9.1 and Fig. 3.9-2. *See* note 1, above. The new 345-kV circuits running between Braidwood Units 1 and 2 and the Crete Substation parallel this existing 765-kV line along this 17-mile portion of the 55-mile route to Crete. Neiner Farms' contention, and its stated basis, focuses on 765-kV lines which would transport power from Braidwood Units 1 and 2 and which would be placed in the new rights-of-way acquisitions testified to before the Illinois Commerce Commission and discussed by us above. Indeed, the Neiner Farms' contention appears to be limited to the Braidwood to Wilton right-of-way given its stated basis in the second paragraph, although we have assumed in this Memorandum that it would be broad enough to include any new 765-kV lines transmitting power from Braidwood Units 1 and 2.[5]

An already operational 765-kV line transmitting other power over the grid would not be attributable to Braidwood Units 1 and 2. Although not referred to in Neiner Farms' July 10, 1985 answer, if the reference to the existing line meant to allege cumulative or synergistic operational impacts caused by adding the Braidwood Units 1 and 2, 345-kV lines parallel to the existing 765-kV line, Neiner Farms has never raised any such contention, let alone a timely one with reasonable specificity and basis.

CONDITION

To protect Neiner Farms' ability to pursue whatever legal action it deems appropriate before forums with jurisdiction, if and when Applicant does seek to build additional 765-kV transmission lines on rights-of-way to and from the Braidwood site, we direct that a notice condition be made part of any operating licenses which may be issued for Braidwood

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[5] The contention states:

> Intervenors contend that the 765kV transmission lines that will be used to transport the electrical output from the Braidwood Station create an unacceptable, hazardous and dangerous condition to persons living or working on a daily basis within 600 feet from the closest line, and that the 765kV transmission lines should not be placed closer than 600 feet from any structure or area in which people can be expected to be present six or more hours per day. The hazardous and dangerous conditions include: audible noise impairing hearing, increasing tension, interfering with sleep, interfering with speech, interference with the operation of cardiac pacemakers, biological effects on humans because of exposure to electric fields excluding the use of nearby areas for working, living or recreation, and the danger of shock to persons and animals.
>
> The basis for this contention is that Commonwealth Edison testified before the Illinois Commerce Commission that as of March 3, 1978, approximately 60% of all transmission right-of-way acquisitions included right-of-way for 345kV and 765kV transmissions lines. Opinion No. 78-13, involving Case No. 26529, issued by the Public Service Commission of New York discusses the hazards associated with 765kV lines.

Units 1 and 2. The notice condition could also serve to protect the integrity of the hearing process in the event future actions by Applicant provide the basis for arguing that material facts 1 and 2, and 3 to the extent relied upon by us, have changed materially. Therefore, we include the NRC Staff as a recipient of the notice required by the condition. Neiner Farms would in any event receive notice if Applicant were to seek an easement for a 765-kV line on Neiner Farms' property since, as noted above, the present easement does not include permission to erect 765-kV lines. However, the condition we impose is not limited to the particular right-of-way which passes through Neiner Farms' property, or for that matter, to existing rights-of-way. The condition is:

> Commonwealth Edison Company will give notice to Bob Neiner Farms, Inc. and the NRC Staff of any application to construct, or of other firm action in advance of construction if an application to construct is not required, 765-kV transmission lines on present or future rights-of-way routed to or from the site of the Braidwood Station.

APPEALABILITY

As discussed in our unpublished Order of August 14, 1985, today's memorandum completes our action dismissing Neiner Farms Contention 1. Dismissal of Contention 1 has the effect of terminating Neiner Farms' participation as a party in this case. Therefore, Neiner Farms may now appeal our summary disposition of its Contention 1. Neiner Farms may also appeal any earlier rulings against it in this case. The nature of our action does not neatly fit under the initial decision category of decisions for which appellate procedures and schedules are provided for in 10 C.F.R. § 2.762 of the Commission's Rules of Practice, or under the category of appeals of rulings on petitions to intervene and requests for hearing governed by 10 C.F.R. § 2.714a. In the circumstances that: (1) Neiner Farms can now appeal all prior rulings against it; (2) we desire to resolve doubt in favor of giving Neiner Farms and other parties the longer time period of § 2.762 if they so desire; and (3) the fact that we referenced § 2.762 in our August 14, 1985 Order, we presently advise, subject to change by the Atomic Safety and Licensing Appeal Board, that § 2.762 shall govern.

As before, we offer no opinion on whether any appeal of this Memorandum by the Applicant or NRC Staff would be ripe, since their participation in the case has not been terminated. It seems the better course that these parties should appeal now, if they desire to do so. The Appeal

Board could always hold their appeal in abeyance if it so desires. If a party desires to wait for the issuance of the next appealable initial decision by the Licensing Board before deciding whether to appeal, that party promptly should seek such permission from the Appeal Board. Finally, courtesy would suggest, in the peculiar circumstances at hand, that a party which does not wish to file an appeal should so inform the Appeal Board within the 10-day period of service of this Memorandum specified in § 2.762 for a Notice of Appeal.

Therefore, pursuant to 10 C.F.R. § 2.762, any party may take an appeal from this grant of summary disposition by filing a Notice of Appeal within ten (10) days after service of this Memorandum. Each appellant must file a brief supporting its position on appeal within thirty (30) days after filing its Notice of Appeal (forty (40) days if the Staff is the appellant). Within thirty (30) days after the period has expired for the filing and service of the briefs of all appellants (forty (40) days in the case of the Staff), a party who is not an appellant may file a brief in support of or in opposition to the appeal of any other party. A responding party shall file a single responsive brief, regardless of the number of appellants' briefs filed.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 7, 1985

Cite as 22 NRC 816 (1985) LBP-85-44

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Sheldon J. Wolfe, Chairman
Oscar H. Paris
Frederick J. Shon

In the Matter of

Docket No. 50-320-OLA
(ASLBP No. 80-442-04-LA)

METROPOLITAN EDISON COMPANY,
et al.
(Three Mile Island Nuclear Station,
Unit 2)

November 8, 1985

The Board's Order grants the parties' joint motion to approve a stipulation, dismisses the Intervenor and dismisses the proceeding involving proposed technical specifications for this plant.

RULES OF PRACTICE: STIPULATIONS

A stipulation is approved to further the principles of settlement and compromise of NRC litigation.

ORDER

(Granting Joint Motion to Approve Stipulation, Dismissing ECNP and Dismissing Proceeding)

On October 22, 1985, the Atomic Safety and Licensing Board was served with a Joint Motion, filed by all parties to the captioned proceeding, requesting Board approval of the "Joint Stipulation Regarding Settlement of ECNP Proposed Contentions," a copy of which was attached thereto. According to the Joint Stipulation, the subject Stipulation was entered into by the Environmental Coalition on Nuclear Power, the NRC Staff, and Licensee for the purpose of resolving the remaining proposed contentions advanced by ECNP in this proceeding.[1] The Stipulation memorializes Licensee's commitment to leave in place and to operate its real-time monitoring system until shipment from TMI has been completed of all TMI-2 core material the recovery of which is practicable (whether located in or external to the pressure vessel), as evidenced by a final accounting of the TMI-2 core which accounting has been received and accepted by the Nuclear Regulatory Commission. In addition, ECNP will continue to be sent all documents currently being sent (including formal correspondence to Licensee management, Weekly Status Reports, safety evaluations, exemptions, environmental review documents and changes to the Recovery Operations Plan) pertaining to TMI-2 for the duration of cleanup and recovery activities or until ECNP notifies Licensee and the NRC Staff to the contrary.

The Board regards the Joint Motion and subject Stipulation as furthering the principles of settlement and compromise of NRC litigation. Accordingly, the Joint Motion is hereby GRANTED and it is hereby ORDERED that:

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[1] ECNP is the only petitioner remaining in this proceeding.

1. The Stipulation is approved;
2. ECNP is dismissed from the proceeding; and
3. The proceeding is dismissed.

THE ATOMIC SAFETY AND
LICENSING BOARD

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Oscar H. Paris
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 8th day of November 1985.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

In the Matter of **Docket Nos. STN 50-498-OL**
STN 50-499-OL
(ASLBP No. 79-421-07-OL)

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

November 14, 1985

The Licensing Board grants (in part) a motion to reopen the record, and permits withdrawal of another such motion.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

A motion to reopen the record filed prior to decision but subsequent to the filing of certain parties' proposed findings must satisfy the following criteria: (1) the motion must be timely filed; (2) it must address a significant issue; and (3) it must demonstrate that the information sought to be added to the record might potentially alter the result which would be reached in its absence.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS

Even if untimely, a motion to reopen a closed record may present a matter of such gravity that the motion should be granted.

RULES OF PRACTICE: RESPONSIBILITIES OF COUNSEL

A party that attacks the integrity and professional responsibility of an opposing party's counsel has an obligation to assure that the charges have a basis and are accurately documented. Lack of resources is no excuse for baseless charges.

RULES OF PRACTICE: MOTION TO STRIKE

Licensing boards have authority to strike pleadings which do not live up to the high standards of practice expected before the Commission.

MEMORANDUM AND ORDER
(CCANP Motions II and III to Reopen Record)

On October 16, 1985, Citizens Concerned About Nuclear Power, Inc. (CCANP), an intervenor in this operating license proceeding, filed two motions (Motion II and Motion III) to reopen the record of Phase II of this proceeding.[1] Thereafter, CCANP moved to withdraw Motion III (Withdrawal Motion). For reasons set forth herein, we are granting (in part) Motion II, as well as the Withdrawal Motion.

A. Background

Hearings in Phase II of this proceeding were conducted during the Summer of 1985, and the record has been closed. Proposed findings of fact and conclusions of law have been submitted by the Applicants and CCANP, and are due in the near future from the NRC Staff. The issues included several which raise questions on a very sensitive subject — the openness and candor of the Applicants in their dealings with the NRC, including this Board, and the effect of the Applicants' performance in this area on their character to manage construction and operation of the South Texas Project (STP). In particular, CCANP Contention 10 claims that HL&P's failure to advise this Board in a timely fashion of, *inter alia*, the Quadrex Report pursuant to the so-called *McGuire* doctrine reflects

[1] CCANP earlier filed another motion to reopen the Phase II record (Motion I). We granted in part and denied in part that motion. *See* Memorandum and Order, LBP-85-42, 22 NRC 795 (1985).

adversely on the Applicants' character. *See* LBP-85-6, 21 NRC 447, 460-63 (1985).

Motions II and III each seek to introduce into the Phase II record documents which, according to CCANP, indicate that certain testimony presented by the Applicants was not wholly truthful. Although filed on the same date, the two motions were kept separate because of the differing circumstances surrounding CCANP's discovery of the particular documents. In particular, CCANP claimed in Motion III that the document for which it there sought to reopen the record should have been — but was not — provided to CCANP prior to the Phase II hearings. Shortly after filing Motion III, however, CCANP realized (through the advice of the Staff) that the document in question had in fact been provided to it prior to the hearings. CCANP thus advised the Board and parties by telephone of this circumstance; and on November 1, it filed its Withdrawal Motion.

By response dated October 31, 1985, the Applicants opposed Motion II. On November 4, 1985, the Applicants filed a response to the Withdrawal Motion which did not object to the withdrawal of Motion III but sought certain sanctions against CCANP because of language included both in Motion III and the Withdrawal Motion. The Staff's response, dated November 5, 1985, opposed reopening the record through Motion II but offered no objection to the withdrawal of Motion III.

We will treat each of these motions *seriatim*.

B. Motion II

1. Positions of Parties and Applicable Standards

Motion II seeks to have the record reopened for the purpose of admitting four documents. These documents (hereinafter referred to as Documents 1-4)[2] consist of the typed version of notes taken by Mr. Thrash, Secretary of the STP Management Committee, of four meetings of that Committee (or, in the case of Document 3, a meeting of that Committee with the Chief Executive Officers of the applicant utilities). The meetings were held on December 4, 1980 (Document 1), February 19, 1981 (Document 2), February 20, 1981 (meeting with CEOs, Document 3), and March 19, 1981 (Document 4). The official minutes of three of the meetings in question are in evidence as CCANP Exhibit 108 (meetings of February 19 and 20, 1981) and CCANP Exhibit 109 (meeting of

[2] The documents were designated by CCANP as Exhibits 1-4; but, to avoid confusion with exhibits offered or entered into evidence in the proceeding, we will refer to these documents as Documents 1-4.

March 19, 1981). The notes of the meetings recorded by Documents 1-3 refer in part to the reasons for HL&P's commissioning of the Quadrex Report and the relationship of the report to the then-forthcoming Phase I hearings. Document 4, in relevant part, includes only a hypothetical discussion of possible outcomes of the Quadrex review.

CCANP claims that these documents undercut the position taken by the Applicants that they did not regard the Quadrex Report as relevant and material to the Phase I issues and hence were not required to provide it to the Board shortly after its issuance, pursuant to *McGuire* obligations. *See* LBP-85-6, *supra*, 21 NRC at 461 and cases cited. CCANP claims that Documents 1, 2 and 3 show that HL&P had intended the Quadrex Report to assist it at the Phase I hearings, and that Document 4 demonstrates the potential significance of that report and its import to the "licenseability" of the STP. Further, CCANP asserts that these documents demonstrate "that there was a direct link *in the minds of HL&P senior management* between the commissioning of the Quadrex Report, the Phase I operating license hearings, and the ultimate licenseability of the plant" (Motion II at 5-6, emphasis in original). CCANP concludes that testimony of HL&P officials during Phase II was inconsistent with these documents, and that HL&P did not turn the Quadrex Report over to us early in Phase I because it would threaten the licenseability of STP.

In determining whether to reopen the record, we are bound by the well-known standards which we recently described in LBP-85-42, *supra*, 22 NRC at 798-99. See also our earlier ruling in LBP-85-19, 21 NRC 1707, 1720-21 (1985). Suffice it to say that, given the timing of Motion II, three criteria must be satisfied:

1. The motion must be timely filed;
2. It must address a significant issue; and
3. It must demonstrate that the information sought to be added to the record might potentially alter the result we would reach in its absence.

CCANP concedes that Motion II was not timely submitted, since CCANP could have obtained Documents 1-4 through discovery but failed to attempt to do so. CCANP relies (Motion II at 7) on one of our earlier rulings which cites authority to the effect that "a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier." LBP-85-19, *supra*, 21 NRC at 1720-21, *citing Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); to the same effect, *see Public Service Co. of Oklahoma* (Black

Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), *vacated in part on other grounds*, CLI-80-8, 11 NRC 433 (1980).

In opposing Motion II, the Applicants claim that CCANP's charges are totally without merit and are supported only by its own mischaracterization of the Phase II record and of Documents 1-4. They further claim that the information in Documents 1-4, to the extent relevant to Phase II issues, is at best cumulative and would not modify the result which we otherwise would reach. Finally, the Applicants point to the untimeliness of Motion II as another reason for dismissing or summarily denying it.

The Staff offers somewhat different reasons for denying Motion II. It stresses the untimeliness of the motion and the ambiguity in the statements in Documents 1-4 upon which CCANP relies. The Staff acknowledges the seriousness of the safety issue to which the documents pertain. But it asserts that the documents are susceptible to many interpretations, "none of which are entitled to conclusive (or indeed much, if any) weight"; and accordingly, that admission of the "documents standing alone" (as sought by CCANP) would provide no probative evidence which would be likely to affect our decision (Staff Response at 4). The Staff notes that CCANP's failure to have offered the documents in a timely fashion prevented the possibility of introducing them into the record at the hearing and "deprived the parties of the opportunity to adduce evidence concerning the meaning and import of the documents" (*id.* at 3).

2. *Ruling on Motion II*

No party questions the significance of the issue to which Motion II is directed. Nor do we. The real question before us is whether the information in Documents 1-4 would have a tendency to modify the result on Contention 10 which we would reach absent such information. As the Staff observes, there is some ambiguity as to the meaning of certain terms in Documents 1-4. But we nonetheless conclude that the new information could potentially alter the result we would otherwise reach on Contention 10. In particular, the documents appear to raise legitimate questions about the veracity or completeness of certain evidence now before us for decision and hence of the integrity of the Phase II record on Contention 10.

The crucial fact which these documents could establish is that one of the major reasons for HL&P's having commissioned the Quadrex review was to provide information for use in the Phase I hearings. If proved, such fact would undercut the Applicants' position on Contention

10. The Applicants assert that CCANP's claim is not supported by either the Phase II record or Documents 1-4. The first of these assertions is obvious — if CCANP's claim were clearly established by the Phase II record, CCANP would not have filed Motion II. Contrary to the Applicants' claim, however, the proffered documents do support a connection between the Quadrex Report and Phase I issues beyond that to which the Applicants' witnesses have testified and contrary to the position taken by the Applicants on Contention 10.

In our view, the following scenario could be created by adding Documents 1-3 to the record:

a. The second prehearing conference was held on November 19, 1980. At that conference, the issues for Phase I were approved. The most important question discussed at that conference was whether Phase I issues should include consideration of corrective actions adopted by the Applicants following the April 30, 1980 Order to Show Cause or (alternatively) whether Phase I should be limited to an exploration of the deficiencies leading up to the Show-Cause Order. *See* Second Prehearing Conference Order, dated December 2, 1980, at 3-5 (unpublished). We ruled in favor of considering corrective actions during Phase I.

b. The broader aspects of corrective actions involved consideration of whether the Applicants had abdicated (and were continuing to abdicate) responsibility for the project. Abdication of responsibility was one of the indicia of lack of character to which the Commission had referred in CLI-80-32, 12 NRC 281 (1980), the Order which gave rise to the broad Phase I issues.

c. The Phase I issues were discussed at the Management Committee meeting on December 4, 1980 (slightly more than two weeks following announcement of the Phase I issues at the November 19, 1980 prehearing conference). At that meeting, there was discussed a third-party review of engineering as a method for demonstrating at the OL hearing that HL&P was in charge of the entire operation, was competently discharging its responsibilities for overseeing design engineering, and accordingly had not improperly abdicated its responsibilities in this area (Document 1).

d. Accordingly, there was a direct relationship between the commissioning of the Quadrex Report and the Phase I issues (Documents 1, 2 and 3).

e. Further discussion at the February 1981 Management Committee meetings reflects a difference of opinion as to the relevance of the Quadrex review to the OL hearings. Mr. Goldberg determined it to be relevant, but Mr. Oprea found it not relevant (Document 2). The view of Mr. Oprea, the senior of these two officials, prevailed at the hearing, notwithstanding Mr. Oprea's acknowledgment (in a somewhat different context) that he had less experience to determine reportability than did Mr. Goldberg (Tr. 14,170, 14,390).

f. A likely reason for the Applicants' adoption of Mr. Oprea's view was the strong negative character of the Quadrex Report and the potential adverse effects on the abdication of responsibility issue to be litigated in Phase I.

To be sure, the Applicants offer explanations for statements in the various documents. They refer to testimony by Mr. Goldberg indicating only a peripheral and incidental use of the results of the Quadrex review at the hearings. Goldberg, ff. Tr. 11,491, at 4-5; Tr. 11,582-84 (Goldberg). They also assert that the discussion at the December 4, 1980 Management Committee meeting came up only "incidentally" (Applicants' Response at 5). They attribute the discussion to persons unfamiliar with the particular issues to be litigated in Phase I but familiar with the broad scope of NRC licensing proceedings — pointing specifically to the circumstance that the December 2, 1980 Order which "delineat[ed] Issues A-F" was issued only 2 days prior to the December 4 Management Committee meeting (*id.* at 6 n.10). That latter claim, however, is misleading: Issues A-F were approved at the prehearing conference on November 19, 1980 (Tr. 306-07) and the approved text (at the suggestion of the Applicants, Tr. 307) was bound into the transcript of that conference (ff. Tr. 307). Absent further information, we must presume that many attendees at the December 4, 1980 Management Committee meeting were familiar with the precise issues to be litigated in Phase I. Furthermore, the Applicants failed to explain the apparent inconsistency between Document 1 (which indicates Mr. Oprea's presence at the December 4, 1980 Management Committee meeting) and Mr. Oprea's testimony in which he indicated that his best recollection was that the Management Committee was first informed of the Quadrex review in March 1981 (later amended to February 1981) (Tr. 14,103-06).

Because Documents 1-3 can be construed as seriously undercutting the position adopted by the Applicants, and hence as adversely impacting our evaluation of their character, we do not believe that we could render a fair or meaningful decision on Contention 10 without reopening the record to include those documents. Given the potential differences in

how these documents may be construed, however, we would not adopt CCANP's proposal merely to incorporate the documents into the record. We believe that testimony of various individuals concerning the meetings in question is necessary to create an adequate record on Contention 10.

On the other hand, we agree with the Applicants that the portions of Document 4 (and to some extent, Document 2) on which CCANP relies, bearing on the seriousness of the Quadrex Report, are largely speculative, as well as cumulative of some testimony in the record. We do not believe that the record should be reopened to include Document 4. As for Document 2, it is significant not for the seriousness of the Quadrex Report but rather for the relationship of the Quadrex review to the forthcoming hearings, and the apparently differing views within HL&P on that question.

As for the timeliness criterion, we agree with all parties that Motion II should have been submitted earlier — indeed, the material should have been offered prior to the Phase II hearings. But the information in Documents 1-3 is so basic to the Applicants' position on Contention 10 that, as CCANP claims, the record should be reopened to include that information notwithstanding its untimely submittal. We are therefore reopening the Phase II record to include Documents 1-3 and testimony concerning the relationship of the Quadrex review to the Phase I hearings.

The Board envisages the reopening of the record which we find warranted to entail a relatively short evidentiary hearing. To enable us to complete the Phase II record and issue a decision in a timely fashion, we propose a hearing in the Houston, Texas area for December 5 and (if necessary) December 6, 1985. Appropriate witnesses would include Messrs. Goldberg, Oprea and Barker, but possibly would also include Messrs. Jordan and Thrash. We expect to discuss hearing arrangements in the conference call we previously scheduled (for other purposes) for November 15, 1985.

Motion II does not seek discovery. Although we envisage that discovery would possibly be useful, we are not authorizing discovery in view of the time constraints necessary for us to issue our Phase II decision in a timely fashion. We request the Applicants, however, to produce the following documents (to the extent that they may reflect *either* the reason(s) for HL&P's commissioning of the Quadrex review *or* a relationship of the Quadrex review to the Phase I hearings):

1. Notes of the meeting of the Management Committee with executive officers (if such meeting took place) on or about December 4-5, 1980.

2. Notes of the Management Committee meetings (including the meeting with executive officers) on January 22 and 23, 1981 (*see* CCANP Exh. 113, at 5 (p. 4603)).
3. Notes of the meeting of the Management Committee with executive officers on March 20, 1981 (the minutes of which are included in CCANP Exh. 109).

These documents should be provided to the Board and parties by Wednesday, November 27, 1985 (filing date) or Monday, December 2, 1985 (delivery date).

C. Withdrawal of Motion III

In seeking to withdraw Motion III, CCANP acknowledged that it had erred in accusing the Applicants' counsel of withholding important documents from it. CCANP also apologized for its accusations against counsel. Motion III additionally accused HL&P management officials of presenting perjured testimony during Phase II. The Withdrawal Motion does not retract those allegations but, instead, reiterates them.

The Applicants would permit CCANP to withdraw Motion III, but they ask us to impose sanctions against CCANP for its "baseless and scandalous charges." Specifically, the Applicants would have us strike both Motion III and the Withdrawal Motion "since they contain charges that defame HL&P management and Applicants' counsel." They also would have us admonish CCANP's representative that further unwarranted accusations regarding the integrity of Applicants' counsel or management officials will result in additional sanctions.

Absent objection, we are granting the motion to withdraw Motion III. Although we are not striking from the record either Motion III or the Withdrawal Motion, we wish to put parties on notice of our displeasure at the unfounded and reckless allegations which CCANP has made against Applicants' counsel. Since the allegations of perjury against HL&P management officials are in part closely related to the position taken by CCANP on substantive Phase II issues, we defer any ruling on such allegations pending issuance of our Phase II Partial Initial Decision on those issues. Finally, we note that one of the positions taken by the Applicants in connection with Motion II was based on an erroneous statement of facts, most likely through carelessness, and hence was misleading at best. That, too, warrants our disapproval.

The most serious — partly because of its lack of any basis — is CCANP's attack on the integrity and professional responsibility of Applicants' counsel. As the Applicants point out, this is at least the second instance in which CCANP has made baseless charges against Applicants'

counsel concerning the Applicants' response to Board-ordered discovery. (The other example appears at Tr. 12,660-63, 14,186-89.) CCANP explained its charges against counsel in Motion III on the basis of its own lack of organization of the material which it previously had received. Most significant, however, is the listing of the allegedly withheld document in the July 2, 1985 transmittal letter to the Board and parties on which CCANP relied in part in its Motion III; in its Withdrawal Motion, CCANP conceded that it had not actually looked at the transmittal letter it had cited (Withdrawal Motion at 4).

In its Withdrawal Motion, CCANP admitted it had been "careless" and it apologized for its carelessness. Similarly, CCANP had apologized for its earlier erroneous charges concerning the Applicants' response to discovery (Tr. 14,193-96). Nonetheless, CCANP failed to take appropriate steps to assure the validity of the serious charges it was making. As the Applicants point out, CCANP failed to inquire of Applicants' counsel (or Staff counsel) whether the document in question had been produced; failed to review the documents which were produced; and failed to consult the list of produced documents in the Applicants' July 2, 1985 transmittal. When charges as serious as those against Applicants' counsel are proffered, a party has an obligation to take greater care than did CCANP in asserting those charges.

We recognize, of course, the paucity of resources available to CCANP. Nonetheless, when charges as serious as those in Motion III are made, lack of resources is no excuse. If charges of this type cannot be accurately documented, they should not be made.

Although intrinsically less serious, the erroneous claims advanced by the Applicants in responding to Motion II (*see supra* p. 825) are also inexcusable — particularly in light of the far greater resources available to the Applicants. The Second Prehearing Conference Order, dated December 2, 1980, indicated that the issues set forth in the attachment to that Order had been accepted at the Prehearing Conference. A perusal of the transcript of the November 19, 1980 prehearing conference would have revealed that, at the suggestion of the Applicants themselves, the text of the accepted issues was bound into the transcript. That being so, it is inconceivable to us that the precise issues to be heard in Phase I were not known by at least some of those who attended the December 4, 1980 Management Committee meeting. One of the Applicants' primary responses to Motion II was, therefore, upset by the facts.

We have authority, of course, to strike pleadings which do not live up to the high standards of practice expected before the Commission. 10 C.F.R. §§ 2.708(c), 2.713(a), 2.718(e); *see also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), Docket

Nos. 50-445-OL-2 & 50-446-OL-2, Memorandum dated September 17, 1985 (unpublished). However, given the totality of circumstances, including the differing evaluations by CCANP and the Applicants of the completeness and accuracy of testimony of HL&P officials during Phase II (all of which bear on the substance of Phase II issues), we decline to strike Motion III or the Withdrawal Motion from the record. We warn all parties, however, that we expect more care in the preparation of pleadings than has been demonstrated by either CCANP or the Applicants in the instances described herein.

For the reasons stated, it is, this 14th day of November 1985,

ORDERED

1. That CCANP's Motion II is *granted in part*; the record of Phase II is *reopened* to the extent indicated in § B.2 of this Memorandum and Order;

2. That CCANP's Motion to Withdraw Motion III is *granted*;

3. That the Applicants' request to strike Motion III and the Withdrawal Motion is *denied*.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of

Docket No. 40-2061-ML
(ASLBP No. 83-495-01-ML)

KERR-McGEE CHEMICAL CORPORATION
(West Chicago Rare Earths Facility)

November 14, 1985

The Licensing Board rules on intervenor's motion to stay the proceeding.

RULES OF PRACTICE: INTERVENTION

When a party intervenes in an NRC proceeding, that party assumes all of the responsibilities attendant to intervention. The pressures of other professional responsibilities are not a basis for alleviating that burden. *See Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 n.33 (1982).

RULES OF PRACTICE: LICENSING BOARDS

The existence of State Court litigation between the same parties as those before the NRC does not prevent the Licensing Board from carry-

ing out its responsibilities under Federal law. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984).

MEMORANDUM AND ORDER
(Ruling on the People's Motion to Stay the Proceeding)

On September 11, 1985, a prehearing conference was held to discuss discovery disputes pending between Kerr-McGee and the People. Various scheduling matters were also addressed. In this connection, counsel for the People expressed the view that activity in this case should be held in abeyance until the related action pending in the Illinois Circuit Court for DuPage County[1] is completed. Tr. 403-04. Subsequent to the prehearing conference, we issued a Memorandum and Order ruling on the discovery disputes which, while noting the People's interest in deferring further proceedings,[2] required that further discovery responses required by the Order, and requests for admissions, be made within 30 days of service. Further, we required motions for summary disposition to be made within 60 days of service.[3]

On October 15, 1985, the People filed a Motion to Stay the *West Chicago* proceeding. Kerr-McGee and the Staff responded in opposition.[4] Kerr-McGee's response also included a motion urging the Board to impose sanctions on the People due to their noncompliance with the Board's order.[5]

The People's motion alleges that they are unable to comply with the discovery schedule because of the necessity to prepare for the upcoming State Court trial. The Staff response[6] points out that, as a procedural

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[1] *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, No. 80-CH-298 (Cir. Ct. DuPage County). In this litigation, the People seek, *inter alia*, an injunction requiring Kerr-McGee to move the mill tailings which are the subject of this proceeding elsewhere for disposal. The People rely on State water quality standards in support of their position. This litigation has implications for this proceeding in that here we are considering Kerr-McGee's application to dispose of those mill tailings on site.

[2] Memorandum and Order (Ruling on Discovery Disputes), dated September 26, 1985, LBP-85-38, 22 NRC 604, 631.

[3] *Id.*

[4] Kerr-McGee Chemical Corporation's Motion for Sanctions and Opposition to State's Motion to Stay Proceedings, dated October 28, 1985. NRC Staff Response to People of the State of Illinois' Motion to Stay the Proceedings dated November 6, 1985 ("Staff Response").

[5] The Board has considered the arguments propounded by Kerr-McGee in its motion for sanctions. We do not feel sanctions would be appropriately imposed at this time, and therefore we deny the motion. Our denial is without prejudice, however, and the motion may be renewed if the People are again derelict in upholding their responsibilities as an intervenor in this proceeding.

[6] Staff Response at 3-4.

matter, the People failed to comply with the deadline for filing objections to a Prehearing Conference Order prescribed under 10 C.F.R. § 2.752(c). While we agree with Staff that § 2.752(c) is applicable, we nonetheless address the merits of the motion.

In so doing, we note that this proceeding was instituted at the behest of the People.[7] While we recognize that this proceeding may impose a heavy burden, the People assumed all the responsibilities attendant to intervention in NRC hearings by initiating this proceeding. The pressures of other professional responsibilities are not a basis for alleviating that burden.[8] We cannot allow the People to abdicate responsibilities which are required of even pro se intervenors who lack many of the resources presumably available to the People. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978); *Northern States Power Co.* (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); *Offshore Power Systems* (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Discovery has been ongoing in this proceeding for many months. The existence of related litigation in the State Court furnishes no good reason why this discovery should not be completed now.

Furthermore, we reject the People's argument that we are restricted from requiring progress in this proceeding by the existence of the State Court litigation.[9] While in theory the People's success in the State proceeding could result in an injunction requiring Kerr-McGee to move the mill tailings in question, we question whether any such injunction would be upheld. *Brown v. Kerr-McGee*, 767 F.2d 1234 (7th Cir. 1985). More importantly, however, even absent the question of Federal preemption, the existence of the State litigation furnishes no basis on which to abdicate our responsibilities under Federal law. We will not permit the NRC proceeding to be held hostage to the State Court action. The People have raised serious issues with regard to the application of Federal law in this proceeding. It is our intent to give these issues full consideration. However, the People's neglect of their responsibilities creates difficulties in this regard. We call upon the People to fulfill these responsibilities.

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[7] One other request for a hearing was filed by the Chamber of Commerce of West Chicago, but was subsequently withdrawn.

[8] *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 n.33 (1982).

[9] As Staff noted in its Response at 7 n.7, in *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 843, 884-85 (1984) the Appeal Board took the position that an NRC adjudication is independent from that of other administrative or judicial entities "with differing concerns and responsibilities." For this proposition, the Appeal Board cites the NRC Commissioners' decision in the *West Chicago* proceeding and its subsequent affirmance in the 7th Circuit. 20 NRC at 885 n.164.

At the same time, the People must be aware that we will not hesitate to impose sanctions if their neglect continues.[10]

Thus, while we deny the People's Motion to Stay, we will provide a period of 3 weeks from service of this Order for the People to comply with our September 26 rulings on discovery. Further, we vacate the deadline for summary disposition motions provided in that order, as well as the deadline for filing requests for admissions.[11] As noted, Kerr-McGee has moved to impose sanctions for the People's neglect of their responsibilities. We deny this motion without prejudice to its resubmission if compliance with our Order is still not forthcoming.

Order

In consideration of the foregoing, it is hereby ORDERED:

1. The People's motion for a stay is denied. The People are to comply with our discovery orders contained in our September 26 Memorandum and Order no later than 3 weeks following the date of service of this Memorandum and Order.

2. Kerr-McGee's motion for sanctions is denied without prejudice to its resubmission if the People do not comply with ¶ 1, above.

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[10] The Statement on Conduct of a Licensing Proceeding Policy issued by the Commission in 1981 suggests various sanctions a board may impose when a participant in a licensing proceeding fails to meet its obligations. These include, in severe cases, the dismissal of a party from the proceeding. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, *supra*, 13 NRC at 454.

[11] Our decision not to proceed to hearing on the basis of the draft supplement to the FES alleviates the need for early consideration of any arguments that Staff's alternate site analysis is inadequate as a matter of law. This was the argument which, if it were to be raised, we wished raised early.

The schedule for admissions was set because counsel for the People had suggested at the prehearing conference that this might be appropriate, and no objections were voiced (Tr. 402). It now appears that all parties object to filing such requests prior to the completion of depositions. People's Motion to Stay Proceeding, dated October 15, 1985, at 2. Kerr-McGee Chemical Corp. Motion for Extension of Time to File Requests for Admissions, dated October 30, 1985, at 2 n.1. Staff Response at 5 n.4.

3. The deadlines for filing requests for admissions and motions for summary disposition contained in our September 26 Memorandum and Order are vacated.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. James H. Carpenter*
ADMINISTRATIVE JUDGE

Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

*Judge Carpenter concurs but was unavailable to review and sign this Memorandum and Order.

Cite as 22 NRC 835 (1985) LBP-85-47

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Kenneth A. McCollom
Dr. Walter H. Jordan

In the Matter of

Docket Nos. 50-445-OL
50-446-OL
(ASLBP No. 79-430-06-OL)

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

November 25, 1985

The Licensing Board denies Applicants' motion for reconsideration of an earlier Board order.

MEMORANDUM AND ORDER
(Reconsideration of Misrepresentation Memorandum)

Memorandum

The principal purpose of this Memorandum is to act on TEXAS UTILITIES ELECTRIC COMPANY, *et al.*'s (Applicants') "Motion for Reconsideration of Licensing Board's Memorandum (Reopening Discov-

ery; Misleading Statement)," January 7, 1985.[1] In response to the Applicants' motion we have decided to leave our initial order in effect but to clarify it somewhat.

We hold Applicants to a very high standard concerning the completeness and persuasiveness of proof. Litigation of technical issues can be difficult. Simplification is feasible if a party attains mastery of the technical issues and communicates them so clearly that the outcome becomes evident.

In licensing cases, applicants are expected to master the technical issues affecting their plant. Their mastery flows from:

- the availability of the sophisticated technical staff needed to build a sound nuclear plant and to defend it before the Nuclear Regulatory Commission (NRC), and
- the seriousness of their commitment to understand their plant in sufficient depth to be able to assure themselves, the public and their stockholders of the soundness and safety of their plant.

If an applicant masters technical issues, implements its knowledge during design and construction, and describes its knowledge in detail, the case can become simple. If mastery of technical issues is not attained or if the presentation is lacking in thoroughness or clarity, then the work of the Licensing Board becomes far more difficult and the outcome may be clouded by doubt.

Because Comanche Peak is built under a complex regulatory scheme, an applicant also must demonstrate the use of a reasoned approach to what is required by regulations, regulatory materials (Regulatory Guides, etc.), codes and commitments (FSAR). A full, logical description of the resolution of a safety problem must include a clear discussion of the relationship between the problem and the regulatory context.

With respect to the clear presentation of technical issues, it is instructive to consider the following argument in Applicants' motion for reconsideration, at page 16:

> The Board . . . should recognize the inherent impracticality in Applicants being held to a standard that requires it to anticipate the inquiries of others and to provide every shred of evidence that others may deem important, regardless of its significance, related to a particular subject.

Contrary to the thrust of this argument, we find that anticipating the inquiries of others is important. Although "providing every shred of evi-

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[1] Applicants completed their filing with a supplementary statement on this motion on November 12, 1985. *See* Tr. (January 9, 1985) at 3-5.

dence" is not required, effective communication requires anticipation of the inquiries of others. After all, the purpose of communication is to persuade someone of the truth of an assertion. Understanding the questions they may ask is essential to communicating in a way that persuades.

In addition, one must seek to understand the inferences others are likely to draw. Inferences that are intended to be evoked should be supportable. If a favorable inference is incorrectly evoked, then our integrity as communicators is placed squarely on the line and we have an obligation to revise our language so the incorrect inference will no longer be evoked.

In licensing cases, it is necessary to set forth technical findings persuasively. The filing should describe how the problem is resolved by the approach, including a description of the problem, the legal setting in which it arises, the reasoning applied to the problem and how the approach was implemented. The reader must be informed of how the problem was logically and fully resolved. If new problems were encountered during implementation or if the resolution is uncertain, the problems or uncertainties should be described. Disclosure of difficulties encountered during resolution of the problem can add to confidence that the problem was resolved in a thoughtful way and that the presentation to the licensing board is an honest description of a real-world process rather than just a presentation designed to persuade.

Within this general framework, there is substantial freedom. What is not permitted is a simplification of the process that creates an appearance or gives rise to honest inferences that are different from reality.

For example, it may be acceptable to determine — for certain purposes — what the torque on U-bolts was in Unit 1 by testing the torque on U-bolts in Unit 2. However, acceptance of the appropriateness of that procedure requires acceptance of a number of assumptions concerning why Unit 2 is "representative" of Unit 1. Furthermore, for certain limited purposes, it may be acceptable for a person to wander around in the field choosing U-bolts the person happens upon. Necessarily, this will exclude certain U-bolts from the sample (such as hard-to-reach U-bolts or ones that happen to be in a different part of the plant than where the person started selecting U-bolts).

Selecting a "sample" in the imprecise manner just discussed may be appropriate for some purposes. However, describing the sample thus obtained as a "representative sample" or as a "randomly selected representative sample"[2] without any discussion of the way the "sample" was in fact selected is to oversimplify and mislead.

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[2] Memorandum (Reopening Discovery; Misleading Statement), LBP-84-56, 20 NRC 1696, 1697 (1984).

It was appropriate for Applicants to file a motion for reconsideration, challenging the Board's conclusion. Then, before we acted on the motion, the Applicants stated that they were changing their legal team and examining anew their position in the case. We were hopeful that Applicants would revisit what they had written, what the Board had said and what the Applicants had replied. However, Applicants have not withdrawn their motion for reconsideration and their new affidavits fail to resolve the concerns that led us to issue our Misrepresentation order.

The problem with Applicants' brief on the Motion for Reconsideration is that Applicants argue that they do not need to use a random or representative sample. This may be true. Applicants have not been *required* to use a random or representative sample for what they did.

The problem with Applicants' brief was that they *said* they had used such a sample. They voluntarily stated, without compulsion, that they had done that. This suggested to us precisely what Applicants discuss on page 10 of their Motion for Reconsideration. We thought that when Applicants used the words "samples," "representative" and "random" that the words bore their natural reference to sampling theory, which governs how samples of voters, families, airplanes, etc., would be drawn. That Applicants also would refer to that kind of sample in their Motion for Reconsideration indicates to us that the misrepresentation that occurred may have grown from ignorance rather than intention. Otherwise, it would make little sense to make such a direct reference to samples that follow laws other than what Applicants followed.

Our knowledge of sampling theory is derived from basic principles that are broadly accepted and widely known. Randomness requires some method of assuring the operation of chance. Random samples are not drawn by someone voluntarily choosing from the universe based on personal choice. Sometimes random number tables are used. Sometimes structured samples may be appropriate, where a known decision rule is utilized to assure a structured, unbiased sample. What is never done is to permit a person to draw names (or U-bolts) from a telephone book (or a nuclear plant) by personal choice, for there is no assurance that some personal factor will not bias the sample.

We know nothing of the knowledge or bias of the people who chose the bolts for Applicants' sample. We know nothing of the psychological process governing how particular U-bolts or areas of the plant were selected for sampling. There might, for all we know, be some knowledge, belief, habit or superstition that caused certain areas or U-bolts to be excluded or included in such a sample. Without an objective method of choosing the sample, those biases could result in an unrepresentative sample.

So we continue to conclude that we were misled. Did it matter in this particular case? Probably not. Although Applicants' entire technique for qualifying U-bolts is still up in the air, the impact of this error on the technique that was used appears to be marginal.

Did the statement matter? Yes. Assuredly it did. The only way the Board can trust the Applicants is if their filings communicate clearly and are trustworthy.[3] That requires care. Otherwise, each word or phrase must be parsed and distrusted. We would be driven to examine closely how we might be misled if we accepted the obvious meaning of the words Applicants used. Unless Applicants' language is careful, precise and trustworthy, we would need to approach their filings with suspicion.

We expect Applicants to be forthright about what they do, the problems that remain, the regulatory context, the areas of uncertainty. By living up to that ideal, Applicants will facilitate timely Board action. If that ideal remains elusive, we will have to be suspicious, and action on our part will be delayed or will be unfavorable.

Licensing cases before the NRC are not ordinary litigations. They are not games of persuasion. Facile, simplified arguments do not show an awareness of the seriousness required for building and running a safe plant. Clear, careful arguments (and admissions of error when error is pointed out or detected) inspire trust and confidence. In this proceeding, where time means money and carefulness protects lives, we urge Applicants to consider the importance of assuring that we can place trust in their filings. Careful filings are the key to the efficient conduct of this hearing from this time on.

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[3] As to Mr. Reedy's testimony, we note that he stated that the ASME Code does not provide a formula for every situation but refers to good engineering practice or standard practice. Tr. 6915. He also said that "the whole industry . . . does it the same way" (Tr. 6917) and that a "consensus of the field of engineering in the United States helps establish good engineering practice" (Tr. 6920). The implication that Mr. Reedy was apparently seeking to convey was that Comanche Peak was complying, in its methods of analysis, with methods used elsewhere.

He was then challenged by Mr. Walsh, who stated that at a previous hearing Mr. Reedy said he had not seen anywhere else a particular pipe support configuration used at Comanche Peak. To that, Mr. Reedy responded that he had now seen the type of configuration (Tr. 6921) but that he had no knowledge of whether the particular kind of analysis suggested by Mr. Doyle would be done elsewhere in the industry. Tr. 6922. Until this point in the cross-examination, Mr. Reedy created the impression with the Board that it was not industry practice to do the kind of analysis suggested. After the question by Mr. Walsh, we concluded that Mr. Reedy's testimony rested on general philosophical analysis but that he had no specific basis for applying that analysis to the particular configuration used by NPSI at Comanche Peak.

The Board felt misled by Mr. Reedy's testimony. Upon rereading the pertinent transcript passages, however, it now appears that Mr. Reedy was not intentionally misleading the Board. On the other hand, the situation serves as an example of the Board's concern that testimony be adequate to specify the relationship between the arguments being made and the specific problems being addressed.

Applicants have not persuaded us to revise any of our other findings in the challenged Order.

I. APPLICANTS' SUPPLEMENTARY FILING

The Affidavits of Robert C. Iotti and John C. Finneran, Jr., filed on November 12, 1985, did not persuade us to reconsider our earlier order. Indeed, this new filing leaves us with some preliminary concerns that we will discuss for the purpose of informing the parties.

Although we are pleased at the candor involved in revising the earlier summary disposition motions, the imprecise use of language in the earlier filings is apparent from a careful examination of this new filing. Furthermore, the discussion of the U-bolt tests and analyses remains confusing. On page 2 of the U-bolt filing, the affidavit states:

> [A]pplicants' program of tests and analyses assured that results of *both* [emphasis added] the tests and finite element analyses . . . may be applied to supports in the field.

Then, on page 3, Applicants appear to use the following language to disclaim the direct applicability of the tests that were performed:

> It is important to understand that Applicants' approach in utilizing U-bolt tests was not a simple empirical one of performing selected tests and employing the test results directly for evaluating field conditions. Rather, the tests were utilized for the purpose of deriving, then confirming, a general theoretical model. . . .

This confusion relates to an important point. If Applicants conducted a test program, then they are required by 10 C.F.R. Part 50, Appendix B, to "include suitable qualifications testing of a prototype unit under the most adverse design conditions." Unless we accept Applicants' argument that the tests were utilized *solely* for the purpose of deriving, then confirming, a general theoretical model, then the tests were used for verifying the adequacy of a specific design feature and were covered by Appendix B requirements.

It is not entirely clear to what extent these tests were used to verify a design feature, but the tests were used at least in part for that purpose. In Applicants' Motion for Summary Disposition of CASE's Allegations Regarding Cinching Down of U-Bolts (June 29, 1984), page 44 states:

> [T]o unequivocally answer the Board's concern with pipe stresses and how they are influenced by cinching the U-bolt and related stresses, *a mix of information derived from test and analyses is required* [emphasis added]. . . . [T]here are concerns which can only be answered by test. Examples of these concerns are the relaxation characteristics of the assembly under long term vibration, thermal cycling, and preload. The thermal cycling, creep and accelerated vibration tests have provided answers to these concerns. No analytical tool could have done it.

To the extent that tests were used to verify a design feature, the tests had to cover the most adverse design conditions. However, they did not. Generally speaking, the test value for U-bolt parameters was near the middle of the range of variables for lever arm, pipe thickness, U-bolt diameter, cross-piece width and cross-piece thickness. There was no effort made to pick adverse design conditions.[4]

To the extent that the tests were used to confirm "a general theoretical model," the filings are confusing as to what that model is (the model itself does not seem to have been presented), the extent to which it has been confirmed, the range of values over which it may be valid, and its precision (standard error).[5] It is not clear whether the general model was applied, at the time of the initial filing, to the range of parameters present in the plant. Additionally, there is the legal question of where this "general theoretical model" is contemplated in the scheme of regulation and of the ASME Code.

In conclusion, we do not see any reason for the supplementary filing to influence our order concerning the scope of discovery.

II. DISCOVERY IMPLICATIONS OF THE MISREPRESENTATION ORDER

Applicants have sought to withdraw the filings by which they initially implemented their Plan to respond to our order of December 1983. The Board has expressed its interest in examining the extent to which those filings represent a failure on the part of management to understand the design problems confronting the plant. Under the circumstances, discovery about the validity of any of these motions and of Applicants' knowledge about the validity of these motions is in order. Applicants therefore should respond promptly to the outstanding interrogatories related to their first Plan and their filings under that Plan.

In addition, we are not persuaded to revise any portion of our Memorandum of December 18, 1984. Consequently, the Order issued that day remains in effect. The discovery period shall run for 50 days from the issuance of this Memorandum. Discovery may of course cover the supple-

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[4] Iotti-Finneran U-Bolt Affidavit at Attachment B (last page of filing).

[5] For example, there are other conclusions on page 14 of the June 29 Iotti-Finneran affidavit that might be affected by the parameters set forth in Appendix B of the November 12 memorandum, and there are other tests, such as the friction test discussed on page 15 of that affidavit, that could be affected by those same parameters. We note also that the finite element analyses reported by Westinghouse were analyses of the precise U-bolt assemblies that were sent to them and did not include variations in parameters present at the plant. "Comanche Peak Steam Electric Station U-Bolt Finite Element Analysis," Westinghouse Electric Corp. (June 12, 1984) at 10 (Attachment 3 to the June 29 Affidavit).

mentary filing. Applicants' answers may, where appropriate, reference appropriate sections of the supplementary filing.

Given the status of this issue, we deny CASE's motion to make BN 85-077's conclusions about "material false statement" a separate issue in this case at this time. We have already announced our conclusions concerning this particular false statement and see no point to further proceedings about it. We will consider the implications of our finding when it can be placed in the context of the larger picture of this vast project.

III. APPLICANTS' MOTION FOR CLARIFICATION OF AUGUST 28, 1985

This motion is now moot, in light of the Board's determination of Applicants' earlier motion for reconsideration.

Order

For all the foregoing reasons and based on consideration of the entire record in this matter, it is, this 25th day of November 1985,

ORDERED:

1. Texas Utilities Electric Company, *et al.*'s Motion for Reconsideration of Licensing Board's Memorandum (Reopening Discovery; Misleading Statement), January 7, 1985, is denied.
2. Applicants' Motion for Clarification of August 28, 1985, is moot.
3. The discovery period shall run for 50 days from the issuance of this Memorandum. Interrogatories previously served shall be responded to promptly.
4. We deny CASE's motion to make BN 85-077's conclusions an issue in this case.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

Cite as 22 NRC 843 (1985) LBP-85-48

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of **Docket No. 40-2061-SC**
(ASLBP No. 84-502-01-SC)

KERR-McGEE CHEMICAL CORPORATION
(Kress Creek Decontamination) **November 29, 1985**

In this Memorandum and Order the Board denies Kerr-McGee's request to postpone further proceedings until completion of related State Court litigation between it and the People of the State of Illinois (People). The Board also dismisses the People's Contentions 1 and 6 for failure to comply with Board-ordered discovery.

RULES OF PRACTICE: MOTION TO DEFER PROCEEDING

An inability to complete prehearing preparation because of demands of intensive discovery in related State Court litigation is not adequate justification for postponement of the proceeding. Counsel's failure to ascertain that the People's contentions did not add anything to the proceeding and that the People's discovery responses were not a precondition to proceeding under the established schedule created a delay, and the Board will not grant relief from the consequences of a delay caused by counsel's own factual error.

RULES OF PRACTICE: SANCTION FOR FAILURE TO COMPLY WITH DISCOVERY ORDER

Where the People failed to respond to a discovery order and failed to file an appropriate motion seeking relief from filing dates, the Board dismissed the People's contentions after considering "the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances." *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416-20 (1982), *quoting Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

MEMORANDUM AND ORDER

This proceeding has been pending for 18 months.[1] There has been ample time for the parties to complete discovery, prepare for, and complete a hearing which should last no more than 2 weeks.

Nonetheless, we are now confronted with a request from Kerr-McGee to postpone further proceedings until completion of related litigation between it and the People of the State of Illinois (People) in the Circuit Court for DuPage County, Illinois, and a failure of the People to comply with our discovery orders.

Our review of the history of this proceeding leads us to conclude that there is no good reason why the hearing in this proceeding should not take place in January 1986. Further, we conclude that sanctions are appropriate against the People for failure to comply with our discovery orders.

In our September 7, 1984 Memorandum and Order (unpublished), issued following the first prehearing conference held August 22, we adopted a schedule for this proceeding which the parties had proposed. The parties' schedule called for discovery to take place between November 12, 1984, and February 15, 1985. It anticipated that this proceeding would be ready for hearing in March 1985.

Our Memorandum and Order of February 7, 1985 (unpublished), issued following the second prehearing conference held January 25,

[1] *See* unpublished Commission Order of June 28, 1984.

noted that the parties contemplated completion of discovery on May 1. We required a status report on March 1.

Following receipt of that report, we approved a schedule agreed to by the parties which called for the filing of an agreed schedule for depositions on July 31. We also set a schedule for filing of motions to compel and suggested that a prehearing conference to consider discovery disputes be held on July 9, 10, or 11.[2] That schedule was subsequently amended in a telephone conference. The prehearing conference was put off until September 11 to accommodate the schedules of counsel.[3]

No discovery disputes arose between Kerr-McGee and Staff. However, the People raised five matters with respect to Kerr-McGee's discovery responses (we granted their motion with respect to one of these), and Kerr-McGee raised eleven matters with respect to the People's responses (we granted its motion with respect to nine of these and withheld a ruling on one other). *See* LBP-85-38, 22 NRC 604 (1985). Kerr-McGee has responded pursuant to our Order in LBP-85-38, but the People have not. As a result, on November 6 we issued an Order to the People to show cause why their Contentions 1 and 6 should not be dismissed. We deal with the People's response to that Order below.

In LBP-85-38, we required further discovery responses by November 4. In our unpublished Memorandum and Order denying Staff's motion to hold this proceeding in abeyance, we required that witness lists be exchanged on November 8, depositions taken between November 8 and 29, written testimony to be filed by December 13 and 20, and set the hearing to begin on January 6.

In our Order to Show Cause directed to the People referred to above, we noted that we were considering dismissing Contentions 1 and 6 because the People's failure to comply with LBP-85-38 requiring additional discovery responses threatened this schedule. This Order was prompted

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[2] *See* unpublished Memorandum and Order of May 1.

[3] One day prior to the September 11 conference, Staff filed a motion to hold this proceeding in abeyance pending a decision from EPA as to whether action should be taken under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) with respect to Kress Creek. Staff's reasons were that:

> First, action under Superfund could result in a more expeditious resolution of the Kress Creek situation; and
>
> Second, holding this proceeding in abeyance would conserve the parties' resources pending a decision by EPA.

Staff's motion indicated that it had initiated discussions with EPA on this subject. The People supported the motion and Kerr-McGee opposed. In an unpublished Memorandum and Order of September 26, 1985, we denied Staff's motion and set a schedule leading to hearing in January 1986. We took this step in order to provide for an early resolution of the question whether Kerr-McGee must prepare the cleanup plan which Staff seeks. Until the filing of Staff's motion, no indication had been given to us that Staff was concerned that resolution of the matters raised in its Order to Show Cause could not be expeditiously achieved before us.

by a motion filed by Kerr-McGee which requested that the schedule which we had established be deferred pending the People's compliance with LBP-85-38. We agreed with Kerr-McGee that it could not proceed with the identification of witnesses and the scheduling of depositions in the absence of the People's discovery responses.

Our Order to Show Cause was issued on November 6. On that day, Staff counsel requested a telephone conference because of the impending deadline (November 8) for the exchange of witness lists. We advised Staff counsel that, in light of the People's failure thus far to comply with LBP-85-38 and our issuance of the Order to Show Cause, witness lists need not be exchanged on November 8 and that we would address the schedule with the parties following receipt of the People's response due to be filed November 15.

To that end we held a telephone conference with the parties on November 19 at which time we set a deadline of November 27 for the parties to exchange witness lists on their affirmative cases together with a synopsis of each witness' testimony and defined the scope of the hearing for this initial phase. (*See* unpublished Memorandum and Order of November 20.)

During that telephone conference, Kerr-McGee's counsel reiterated the motion to defer the schedule. This time counsel did not base the motion on the People's failure to comply with LBP-85-38. Rather counsel cited the intensive discovery taking place in the related State Court litigation, a matter which counsel also raised in his written motion. Counsel asserted that it was not possible to complete prehearing preparations in this proceeding because of the demands of the State Court litigation. Counsel now sought to defer further proceedings until completion of the State Court litigation, rather than until compliance by the People with our discovery orders. Thus, if the motion were granted, no further proceedings would take place until next Spring.

During the telephone conference, counsel for the People and the Staff agreed, and counsel for Kerr-McGee did not contest, that Contention 1, which raises the possibility that chemical pollutants may exist in Kress Creek which would need to be considered in a cleanup plan, was not involved in the subject matter to be addressed in this hearing.[4] Similarly, counsel for the People and the Staff agreed that Contention 6 is duplicative of the Staff's Order to Show Cause and would not add anything new to the hearing. No other contentions have been admitted.

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[4] Presumably, this contention would come into play in connection with litigation of the content of any cleanup plan Kerr-McGee might be ordered to prepare.

Counsel for Kerr-McGee has vigorously opposed any suggestion from the People that the related *West Chicago* disposal proceeding be deferred because of intensive activity in the State Court litigation. Counsel lacks credibility when he asserts that that activity demands that this proceeding be deferred. We have been unwilling to entertain this argument from counsel for the People. We are no more inclined to entertain it from counsel for Kerr-McGee. In LBP-85-46, 22 NRC 830, we denied a similar motion filed by the People in *West Chicago*. Just as we refused to allow the *West Chicago* proceeding to be held hostage to the State Court litigation, we refuse to allow this proceeding to be held hostage to that litigation.

Of more concern is the fact that counsel's motion to defer this proceeding was based on an incorrect factual premise. Counsel could have readily ascertained this prior to filing the motion. Phone calls to counsel for the People and the Staff would have revealed that the People's contentions did not add anything to the hearing and that therefore the People's discovery responses were not a precondition to proceeding under the schedule which we had established. When making factual representations, counsel may not make errors. *Cf. Regents of the University of California* (UCLA Research Reactor), LBP-84-22 and attachment, 19 NRC 1383 (1984). By failing to verify the accuracy of his factual argument, counsel has created a delay. We will not grant him relief from the consequences of that delay.

It is clear from these circumstances that there has been ample time to complete prehearing discovery in this proceeding. Nonetheless, we will permit depositions by all parties to be taken until December 31. We take this step because Staff has advised that it needs to take the deposition of William A. Nixon, the current Staff Project Manager, who will retire prior to the hearing, and because Staff counsel has indicated that Staff needs depositions in order to discover the facts underlying Kerr-McGee's averments.

In his November 27 letter identifying witnesses, counsel for Kerr-McGee has elaborated Kerr-McGee's legal position with respect to the averments stated in the answer to the Order to Show Cause. A review of this letter and Staff counsel's letter of the same date also identifying witnesses indicates that the issue posed by averment 10 — no order may be issued to Kerr-McGee without a complete analysis of the health risks of such an order — will be addressed by both Staff and Kerr-McGee. This is in accord with our Memorandum and Order of March 22, 1985 (unpublished). However, we are unable to determine at this point whether testimony on the remaining averments is appropriate at this phase of the

hearing. Consequently, we will entertain a motion to exclude some or all of Kerr-McGee's testimony on the remaining averments.

We set January 6 as the deadline for filing written direct testimony on each party's affirmative case. Motions to exclude testimony are to be filed by January 13. Answers to such motions are to be delivered to the Board on January 20.

We will hear limited appearances the afternoon and early evening of January 20 at a location in or near West Chicago. The evidentiary hearing will commence on January 21 at a location in the Chicago area to be announced.

The People have addressed the Board's Order to Show Cause in a response filed November 18, 1985.[5] The People's motion focuses on their position that their failure to comply with the Board-ordered discovery has not prejudiced Kerr-McGee. The People base their argument that Kerr-McGee endured no prejudice on the People's claim that the responses sought would not have substantially added to Kerr-McGee's knowledge of factual matters at issue in the proceeding. The People correctly conclude that their conduct has not impinged upon the Company's ability to prepare its admission requests and witness lists necessary for the upcoming hearing.

Nonetheless, the People's arguments to rebut the Show Cause order are wholly inadequate. The Board issued the Show Cause order because the People did not comply with LBP-85-38. To avoid a default the People could easily have filed an appropriate motion seeking relief from the filing dates. This is especially important if there were early indications that it was not going to be possible to meet the Board's deadlines. The People instead chose to do nothing. We cannot permit our orders to be ignored. Were we to do so, we would fail to discharge our responsibility to properly manage this proceeding. Consequently, we now impose the sanction proposed in our Order to Show Cause.

There is no question that the Board is vested with the authority and the obligation to mete out a sanction commensurate with the misconduct in a particular situation.[6] Indeed, another Board has aptly stated that "a licensing board is not expected to sit idly by when parties refuse to comply with its orders." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982). However, the appeal board has directed licensing boards imposing sanctions to provide an explication of their reasons for doing so pursuant to the

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[5] People's Response to Board's Show Cause Order and Kerr-McGee's Motion to Extend Schedule, dated November 18, 1985.

[6] *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). Although this is not a licensing proceeding, we find the guidance contained in the Policy Statement applicable.

factors enunciated by the Commission in its 1981 Policy Statement. *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416-20 (1982). The pertinent portion of the policy statement is as follows:

> In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances.

CLI-81-8, *supra*, 13 NRC at 454. We take these seriatim.

As stated earlier, the Board's sanction arises from the People's failure to comply with our order compelling them to answer the disputed interrogatories. We were not whimsical when we required the People to respond. We acted after giving careful consideration to Kerr-McGee's assertions of the nature and importance of the interrogatories as well as the People's bases for not responding. The People have an obligation to properly flesh out their contentions and to respect the Board's orders. These obligations are to be taken seriously. No party may be selective in meeting them. Had the People simply provided responses to the interrogatories (which, because they do not require complicated answers, undoubtedly could have been answered with less effort than has been expended on the objections), discovery could have concluded and the hearing held several months ago. The schedule of the proceeding has been impacted by the People's resistance to providing answers. Moreover, while we are not convinced that the People's actions could properly be characterized as part of a pattern, the incident is the most egregious example of the People's reluctance to adhere to schedules and to comply with our Orders.

The People's failure to provide answers to these relatively simple interrogatories leads us to conclude that they do not have any substantial basis for Contention 1 and are engaged in a "fishing expedition." Thus we weigh the factor citing the importance of the safety and environmental concerns raised by Contention 1 in favor of imposing the sanction. Contention 6 is duplicative of the Staff's Show Cause Order which precipitated the Kress Creek proceeding initially. Thus the issues contained in Contention 6 will be addressed through the Staff's efforts at hearing.

In considering all the circumstances, we find the sanction of dismissal of the People's Contentions 1 and 6 to be justified. Although we are cognizant of the seriousness of imposing such a sanction, the factual situation before us warrants such action.

Order

In consideration of the foregoing, it is, this 29th day of November 1985, ORDERED:

1. Kerr-McGee's motion to hold this proceeding in abeyance is denied;
2. Depositions may be taken until December 31;
3. Prepared testimony on each party's affirmative case is to be filed by January 6, 1986;
4. Motions to exclude testimony are to be filed by January 13, and answers to such motions are to be delivered to the Board on January 20, 1986;
5. Limited appearances will be heard at a location to be announced in the vicinity of West Chicago the afternoon and early evening of January 20, 1986;
6. The hearing will commence at a location to be announced in the Chicago area on January 21, 1986, and conclude by January 31, 1986; and
7. The People's Contentions 1 and 6 are dismissed.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 29, 1985

Directors' Decisions Under 10 CFR 2.206

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

John G. Davis, Director

In the Matter of

Docket Nos. 70-1308
72-1-SP
(10 C.F.R. § 2.206)

GENERAL ELECTRIC COMPANY
(GE Morris Operation Spent Fuel Storage Facility)

November 4, 1985

The Director of the Office of Nuclear Material Safety and Safeguards denies the Petition submitted by Catherine Thiel Quigg on behalf of the Illinois Safe Energy Alliance. The Petition requested that the Director of Nuclear Material Safety and Safeguards prepare an environmental impact statement for the General Electric Morris Operation and that the Commission reconsider a decision by the Licensing Board which authorized the Director to renew the license of the General Electric Company to store spent (irradiated) fuel at the facility without requiring a Federal environmental impact statement.

NEPA: ENVIRONMENTAL IMPACT STATEMENT

NEPA does not require that an environmental impact statement be prepared when an action does not directly or indirectly bring about any change in the environmental status quo.

RULES OF PRACTICE: § 2.206 PETITIONS

Section 2.206 procedures are not to be used as a vehicle for reconsideration of issues previously decided.

NRC: RESPONSIBILITIES UNDER NEPA

NEPA does not require the Commission to reconsider environmental decisions whenever new information developed subsequent to the action becomes available. Rather, it is unnecessary for an agency to reopen the NEPA record unless the new information would clearly mandate a change in result.

NEPA: ENVIRONMENTAL IMPACT APPRAISAL

The function of an environmental impact appraisal is to supply reasons why an action with potentially significant environmental impacts does not require a detailed environmental impact statement. Thus, to pass muster, the appraisal must simply reflect that a hard look was taken at the problem, identify the relevant areas of concern, and make a convincing case that the impact is insignificant.

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

I.

On August 29, 1985, Catherine Thiel Quigg, on behalf of the Illinois Safe Energy Alliance, filed a Petition pursuant to 10 C.F.R. § 2.206 requesting that the Director of the Office of Nuclear Material Safety and Safeguards (NMSS) prepare a Federal environmental impact statement for the General Electric Morris Operation (GEMO). The Petition also requested that the Nuclear Regulatory Commission reconsider a decision by the Licensing Board which authorized the Director of NMSS to renew the license of the General Electric Company (GE) to store spent (irradiated) fuel at the facility without requiring a Federal environmental impact statement (EIS). *See* LBP-82-14, 15 NRC 530 (1982). The Petitioner asserts as a basis for this request that the granting of a license to GEMO to store 750 tons of spent fuel until the year 2002 constituted a major Federal action significantly affecting the quality of the human environment which requires a detailed environmental impact statement pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. According to the Petitioner, there have been substantial changes from the original proposed use of the GEMO facility, and environmental assessments supporting the use of GEMO as a nuclear waste depository are seriously deficient.

For the reasons given below, I have concluded that the Petitioner's request should be denied.

II.

A brief historical review is helpful at this point to place the Petitioner's assertions in proper perspective. GEMO was originally constructed as a pilot irradiated fuel reprocessing operation, known as the Midwest Fuel Reprocessing Plant, pursuant to a construction permit issued by the Atomic Energy Commission (AEC) on December 28, 1967. Following construction, the facility was tested during a period of attempted cold operation using unirradiated uranium. The testing was not successful in establishing routine operation, and GE subsequently notified the AEC that it was suspending efforts to operate the reprocessing facility. However, before completion of the cold testing, an application was submitted by GE for the receipt and storage of irradiated light-water reactor fuel, and Materials License SNM-1265 was issued to permit such activities on December 27, 1971.[1] Following termination of the construction permit, a spent fuel storage license was reissued for a term of 5 years on August 23, 1974.[2] An amendment to the license was issued on December 3, 1975, that permitted an increase in the storage capacity of the facility from 100 metric tons uranium (100 MTU) to 750 MTU of spent nuclear fuel. An Environmental Impact Appraisal (EIA) was issued on December 3, 1975, that considered this change.

By letter dated February 27, 1979, GE applied for renewal of Materials License No. SNM-1265 for a license term of 20 years. The Licensee submitted a "Consolidated Safety Analysis Report for Morris Operation," NEDO-21326C (CSAR) dated January 1979, in support of the application. The Staff assessed the environmental aspects of the proposed license renewal in an EIA issued in June 1980. *See* NUREG-0695, "Environmental Impact Appraisal Related to the Renewal of Material License SNM-1265 for the Receipt, Storage and Transfer of Spent Fuel."

On December 12, 1980, the Commission put into effect a new part to its regulations, 10 C.F.R. Part 72, which covered the specific licensing requirements for the storage of spent fuel in an independent spent fuel storage installation, and stated that the licensing action related to the renewal of the license for the Morris Operation was to proceed in accordance with that part. 45 Fed. Reg. 74,693 (Nov. 12, 1980), *corrected at* 45 Fed. Reg. 78,623 (Nov. 26, 1980). Accordingly, on January 12,

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[1] A "Final Environmental Impact Statement Related to the Operation of the Midwest Fuel Recovery Plant by General Electric Co." (Docket No. 50-268) was issued in December 1972 that, among other things, addressed storage of fuel at the facility.

[2] The license was issued pursuant to 10 C.F.R. Part 70. Part 72, which now covers the specific licensing requirements for the storage of spent fuel in an independent spent fuel storage installation, was not at that time a part of the Commission's regulations.

1981, GE submitted an amendment to its application under 10 C.F.R. Part 72. A Safety Evaluation Report (SER) was issued in July 1981, documenting the Staff's review and evaluation of the safety of the continued receipt, storage and transfer of spent nuclear fuel at the Morris Operation. *See* NUREG-0709, "Safety Evaluation Report Related to the Renewal of Materials License SNM-1265 for the Receipt, Storage and Transfer of Spent Fuel Pursuant to 10 CFR Part 72."

The State of Illinois and others intervened in the license renewal proceeding, and the matter was referred to the Licensing Board for hearing. Following the conclusion of discovery, GE filed a motion for summary disposition of all contentions of the only remaining intervenor, the State of Illinois. On March 2, 1982, the Licensing Board granted GE's motion for summary disposition, and authorized the Director of NMSS to issue the license renewal. LBP-82-14, *supra*, 15 NRC at 530. A license was issued on May 4, 1982.

III.

The Petitioner contends that the decision permitting GE to store 750 tons of spent fuel at GEMO was a "major federal action significantly affecting the quality of the human environment," which, under NEPA, requires "a detailed environmental impact statement by the responsible government officials." In support of this contention, the Petitioner cites numerous examples of purported "environmental impacts" of GEMO on the human and physical environment and "deficiencies" in previous GEMO environmental assessments. Broadly characterized, these include: (1) concerns about hydrologic and geologic conditions at GEMO, including effects from potential leaks from radwaste tanks, flooding and earthquakes; (2) the assertion that existing environmental assessments are not in compliance with NEPA; (3) an assertion that the environmental impact of dry storage at GEMO has never been evaluated; (4) assertions that the effects of storing spent fuel with high burnup for long term at GEMO have not been and should be evaluated; (5) claims that the consequences of "clandestine acts" against high-burnup spent fuel and sabotage prevention technologies have not been but should be evaluated; and (6) an assertion that GE has evaded NEPA by going beyond its original contractual obligations to acquire new spent fuel storage customers.

In its 1982 decision, the Licensing Board considered and specifically rejected the claim that an EIS should be prepared. The State of Illinois had maintained, in Contention 7, that NRC "has an obligation under the National Environmental Policy Act (NEPA) 42 U.S.C. § 4332

(1969) to issue an environmental impact statement which will account for environmental impact of normal operation of the Morris facility." In holding that this contention presented no genuine triable issue of material fact, the Board noted that the Staff had concluded that the proposed licensing action would not significantly affect the quality of the human environment and that there would be no significant environmental impact from the proposed action. It held that GE proposed only to continue, without change, the activities that it had carried on, which were licensed subsequent to NEPA and after environmental review under that law. Citing *Consumers Power Co.* (Big Rock Point Plant), ALAB-636, 13 NRC 312 (1981), the Board stated that NEPA does not require that an EIS be prepared when an action does not directly or indirectly bring about any change in the environmental status quo. LBP-82-14, *supra*, 15 NRC at 549-50.

Although the Petitioner makes numerous claims of purported "impacts" on the environment necessitating the preparation of an EIS, none of these claims presents any new information. All of these alleged "impacts" were considered by the Licensing Board either explicitly, or implicitly, as the Board had before it the EIA, CSAR and SER which analyzed each of these issues.[3] The Commission has cautioned before that § 2.206 procedures are not to be used as a vehicle for reconsideration of issues previously decided. *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 and 2), CLI-85-4, 21 NRC 561, 563 (1985), *citing Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 177 (1975); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 444 (1981); *Rockford League of Women Voters v. NRC*, 679 F.2d 1218 (7th Cir. 1982). Furthermore, NEPA does not require the Commission to reconsider environmental decisions whenever new information developed subsequent to the action becomes available. Rather, it is unnecessary for an agency to reopen the NEPA record unless the new information would clearly mandate a change in result. *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-17, 10 NRC 613, 621 (1979); *Georgia Power Co.* (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), DD-79-4, 9 NRC 582, 584-85 (1979); *see also Greene County Planning Board v. FPC*, 559 F.2d 1227 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). For this reason, the Petitioner's argument that an EIS must be prepared must fail.

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[3] These issues are briefly treated in § IV, *infra*.

IV.

The remainder of this Decision briefly describes the prior evaluations of the six general areas described above which the Petitioner raises.

1. The Petitioner asserts that hydrologic and geologic conditions are unfavorable for high-level radioactive waste storage, that potential leaks from radwaste tanks could threaten the underlying drinking water aquifers and should be evaluated, that GEMO lies between flood plains and should be evaluated for the probability and effects of flooding, and that the potential for damage from earthquakes should be evaluated.

NRC Response: Sections 6.3 of the EIA and 7.3 of the SER discussed the hydrological monitoring program at GEMO, and methods to control potential leaks. The Licensing Board considered risks of radiation from loss of fuel basin cooling and leakage from fuel basins in dismissing Contention 1(b)(ii). LBP-82-14, *supra*, 15 NRC at 537. Sections 2.6, 2.7 and 7.4 of the SER considered geologic conditions, including seismology and the effects of potential earthquakes. The Licensing Board considered the ability of the Morris Operation to withstand earthquakes in dismissing Contention 1(b)(iii). LBP-82-14, *supra*, 15 NRC at 537. The potential for flooding was evaluated in § 2.8 of the SER.

2. The Petitioner asserts that environmental assessments are not in compliance with NEPA because they do not contain necessary geological and ecological data for determining potential adverse consequences from the operation of GEMO.

NRC Response: The Licensing Board had before it the existing environmental assessments, and did not indicate that it found these assessments inadequate. The detailed listing and examination of data that the Petitioner asserts should have been included in the environmental assessments for GEMO need not be included in an environmental impact appraisal. An environmental impact appraisal (or environmental assessment) is intended to be a concise document that briefly provides sufficient evidence and analysis to establish a basis for determining whether to prepare an EIS or to make a finding of no significant impact. *See* 10 C.F.R. § 51.14(a). The function of an environmental impact appraisal is to supply reasons why an action with potentially significant environmental impacts does not require a detailed environmental impact statement. Thus, to pass muster, the appraisal must simply reflect that a hard look was taken at the problem, identify the relevant areas of concern, and make a convincing case that the impact is insignificant. *Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear

Station), ALAB-651, 14 NRC 307, 317 (1981). The more detailed discussion which the Petitioner asserts should have been included in the GEMO environmental assessments might be included in an environmental impact statement, if one were required, because an environmental impact statement must weigh all potential environmental effects and alternatives, as its purpose is to assure that the agency has fully considered environmental effects and alternatives to the proposed action and has incorporated all practical means to avoid or mitigate possible adverse environmental effects of the action. However, as noted before, the Licensing Board explicitly found that such a detailed environmental impact statement did not need to be prepared in this instance.

3. The Petitioner contends that the environmental impact of dry storage at GEMO has never been evaluated.

NRC Response: The Licensing Board stated that dry storage would not be permitted under the license renewal. LBP-82-14, *supra*, 15 NRC at 540.[4]

4. The Petitioner contends that the long-term storage of spent fuel with high burnup at GEMO has not been evaluated, and should be evaluated, including impact on local water supplies and potential for increased occupational radiation exposure.

NRC Response: The SER explicitly considers spent fuel with burnup of 44,000 megawatt-days per metric ton of uranium (MWd/MTU). NUREG-0709 at 3-1, § 3.2. GE's license for the Morris Operation explicitly prohibits storing spent fuel with a burnup higher than this. Water use for this fuel was specifically considered in the EIA in § 3.3. The Licensing Board specifically considered the effects of occupational exposure to radiation in dismissing Contention 3. LBP-82-14, *supra*, 15 NRC at 539-42.

5. The Petitioner contends that sabotage prevention technologies for GEMO need to be evaluated, and the consequences of terrorist attack against high-burnup spent fuel have not been evaluated.

NRC Response: The Licensee is required to comply with applicable requirements in 10 C.F.R. Parts 72 and 73 and implement a security plan to provide physical protection of the facility and licensed material.

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[4] The Petitioner complains that the Department of Energy, in cooperation with the Tennessee Valley Authority, conducted a dry storage cask experiment at GEMO. The Licensing Board's statement that dry storage would not be permitted does not mean that GEMO is prohibited from conducting tests such as this under conditions routinely encountered at GEMO in the receipt and shipment of spent fuel in dry shipping casks. This test was conducted pursuant to 10 C.F.R. § 72.33, which does not require a formal NRC review and approval. Nonetheless, NRC Staff met with the GE staff in August 1984, examined the REA-2023 cask used in testing, and determined that GE was acting in accordance with the conditions of its license and NRC regulations.

The Licensee has in place a physical security plan which meets these requirements. GE's license for the Morris Operation does not allow storage of spent fuel with a higher burnup than 44,000 MWd/MTU, and the Staff considered and found adequate GE's physical protection program for the Morris Operation for spent fuel up to this level of burnup in § 11 of the SER. The Licensing Board considered the Staff's assessment of GE's physical protection program in dismissing Contentions 1(b)(iv) and 2. LBP-82-14, *supra*, 15 NRC at 538-39.

6. The Petitioner contends that GE has evaded NEPA by going beyond its original contractual obligations as the Midwest Fuel Reprocessing Plant to acquire new spent fuel storage customers for the long term. According to the Petitioner, the EIA states that GE was not committed to future acceptance of spent fuel beyond 350 tons, so that the 400 tons now being shipped to GEMO go beyond the original GE reprocessing contracts and constitute a change in the nature and scope of the GEMO operation requiring an environmental impact statement.

NRC Response: GEMO is licensed to receive 750 megawatt-tons of uranium (MTU), and the EIA was prepared on the basis of that capacity. Therefore, regardless of whether or not it has gone beyond its original contractual obligations, it is operating within its licensed capacity and the scope of the operation has not changed.

V.

For the reasons stated above, the Petitioner's request has been denied. The Petitioner has presented no new information which was not considered at the time of the renewal of the license. Accordingly, initiation of further proceedings is not appropriate.

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

Original signed by
Donald B. Mausshardt for
John G. Davis, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Silver Spring, Maryland,
this 4th day of November 1985.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Darrell G. Eisenhut, Acting Director

In the Matter of **Docket No. 50-309**
(10 C.F.R. § 2.206)

MAINE YANKEE ATOMIC POWER COMPANY
(Maine Yankee Atomic Power Station)

November 12, 1985

The Acting Director of the Office of Nuclear Reactor Regulation denies the petition of the State of Maine asserting that there were a number of alleged deficiencies at the Maine Yankee Atomic Power Station of the Maine Yankee Atomic Power Company associated with environmental qualification of electrical equipment that represented a hazard to continued safe operation of the facility.

TECHNICAL ISSUE DISCUSSED: ENVIRONMENTAL QUALIFICATION OF ELECTRICAL EQUIPMENT

The Licensee's program for environmental qualification of electrical equipment complies with the requirements of 10 C.F.R. § 50.49. Proposed resolutions for each of the environmental deficiencies identified are acceptable. Continued operation of the facility until implementation of the program is complete will not result in undue risk to the public health and safety.

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

INTRODUCTION

On November 19, 1984, the Nuclear Regulatory Commission (NRC) promulgated its final rule on environmental qualification of electrical equipment (49 Fed. Reg. 45,571). The rule requires licensees of operating power plants to meet the schedule for environmental qualification set out in the rule, specifically in 10 C.F.R. § 50.49(g). In adopting the final rule, the Commission directed the Director of the Office of Nuclear Reactor Regulation to consider, pursuant to 10 C.F.R. § 2.206, four comments filed in response to the Notice of Proposed Rulemaking issued on March 7, 1984 (49 Fed. Reg. 8445). Each of the four comments alleged equipment qualification deficiencies at specific plants. The Commission's action had the effect of requiring the Director of the Office of Nuclear Reactor Regulation to issue a formal decision pursuant to § 2.206 considering the plant-specific comments filed in the rulemaking noted above. The comments filed by the State of Maine through its Attorney General (hereinafter referred to as Petitioner) dated June 26, 1984, were among those identified by the Commission for consideration. On January 4, 1985, I advised the Petitioner by letter that I would issue a formal decision regarding the Petitioner's comments concerning the Maine Yankee Atomic Power Station in the reasonably near future. My decision in this matter follows.

DISCUSSION

Petitioner's comments mainly relate to alleged inadequacies in a number of equipment qualification items identified by the Franklin Research Center (FRC) and set out in its Technical Evaluation Report (TER) for the Maine Yankee Atomic Power Station of the Maine Yankee Atomic Power Company (Licensee). It is important to recognize that the FRC study to which the Petitioner refers was one initiated by the Nuclear Regulatory Commission itself to assist it in assessing the adequacy of the Licensee's equipment qualification program for the Maine Yankee Station. The TER provided by FRC has been available to the

NRC Staff since February 23, 1983, and has been specifically addressed by both the Licensee and the NRC Staff.[1]

On February 8, 1979, the NRC Office of Inspection and Enforcement issued IE Bulletin 79-01, "Environmental Qualification of Class IE Equipment." This Bulletin, together with IE Circular 78-08 (issued on May 31, 1978) requested affected licensees to perform reviews to assess the adequacy of their environmental qualification programs. The NRC Staff's review of this area is discussed in a Safety Evaluation (SE) dated June 1, 1981, and resulted in further requests for information from the Licensee. Following submittal by the Licensee of additional information on September 2, 1981, March 5, 1982, February 11, 1982, June 24, 1982, and October 18, 1982, the NRC Staff asked FRC to evaluate that information in order to: (1) identify all cases where the Licensee's response did not resolve the significant qualification issues, (2) evaluate the Licensee's qualification documentation in accordance with established criteria to determine which equipment had adequate documentation and which did not, and (3) evaluate the Licensee's qualification documentation for safety-related electrical equipment located in harsh environments consistent with TMI "Lessons Learned" implementation. A TER was issued by FRC on February 23, 1983, to document its evaluation. It is this document to which the Petitioner makes reference. A second SE was subsequently prepared by the NRC Staff and issued to the Licensee April 8, 1983, with the FRC TER as an attachment.[2] This TER identified a number of electrical equipment environmental qualification deficiencies and the SE concurred with the bases and findings of the TER. Based on these findings, the Staff requested the Licensee to provide its plans for qualification or replacement of certain items and justification for continued operation in the near term.

A meeting was held with the Licensee on April 4, 1984, in order to discuss the Licensee's proposed method of resolving the environmental qualification deficiencies identified in the 1983 SE and FRC TER. During this meeting with the Licensee, a proposed resolution for each of these deficiencies was discussed and the NRC Staff found the Licensee's approach for resolving them acceptable. The approach described by

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[1] The background associated with the NRC Staff's review of the Licensee's equipment qualification program for the Maine Yankee Station is provided in Attachment 1, Safety Evaluation by the Office of Nuclear Reactor Regulation, Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station, Docket No. 50-309, issued December 13, 1984 (hereinafter referred to as the Maine Yankee SE).

[2] Safety Evaluation for Environmental Qualification of Safety-Related Electrical Equipment, Docket No. 50-309, April 8, 1983, with Technical Evaluation Report entitled "Review of Licensee's Resolution of Outstanding Issues from NRC Equipment Environmental Qualification Safety Evaluation Reports (F-11 and B-60), Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station," Franklin Research Center, February 23, 1983.

the Licensee for addressing and resolving the identified deficiencies included replacing equipment, performing additional analyses, utilizing additional qualification documentation beyond that reviewed by FRC, obtaining additional qualification documentation, or determining that some equipment was outside the scope of 10 C.F.R. § 50.49 and therefore not required to be environmentally qualified. The discussions also included the Licensee's general methodology for compliance with § 50.49 and justification for continued operation with those equipment items for which environmental qualification was not yet complete.[3]

Subsequent to the April 4, 1984 meeting, the Licensee provided further information for resolution of the identified deficiencies by its letter dated May 31, 1984. With its review of this submittal, the NRC Staff completed its evaluation of the acceptability of the Licensee's electrical equipment environmental qualification program, including the type of documentation the Licensee indicated it has retained. The Staff's findings are found in the attached Maine Yankee SE dated December 13, 1984 (Attachment 1).

The resolution of Petitioner's comments for specific items of equipment identified by FRC and discussed in the TER is contained in Attachment 2. Resolution is complete for all items identified in the FRC TER; therefore, justifications for continued operation are not required.

In addition to specific items raised in the TER prepared by FRC, Petitioner identifies two other general concerns regarding environmental qualification of equipment at the Maine Yankee Station. First, the Petitioner asserts that information in the record was incomplete and cursory, thereby making it extremely difficult to conduct any meaningful analyses. Petitioner argues that this failing made it difficult to comment on the adequacy of the qualification review. The Petitioner further claims that the Licensee's responses to the TER are inadequate, unsubstantiated, or nonexistent and, consequently, neither the Petitioner nor the NRC is in a position to ascertain whether the concerns raised in the TER have been adequately addressed. The Petitioner was not present at the meetings at which the Licensee and the NRC Staff discussed resolutions of the items identified in the TER and also apparently did not have

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[3] A final rule on environmental qualification of electrical equipment important to safety became effective on February 22, 1983 (48 Fed. Reg. 2729). This rule, 10 C.F.R. § 50.49, specifies the requirements of electrical equipment important to safety located in a harsh environment. Effective November 19, 1984, this rule was amended to remove the June 30, 1982 deadline for environmental qualification of electrical equipment imposed by previous Commission order and established a new date for final environmental qualification of electrical equipment (49 Fed. Reg. 45,571). Accordingly, March 31, 1985, was established as the new deadline for the Maine Yankee Atomic Power Station. All open items were resolved by the Licensee prior to March 31, 1985.

Maine Yankee's letter to the NRC of May 31, 1984, wherein the Licensee responded to each concern raised in the TER. Thus, in fact, adequate information was available to the Staff to permit it to assess the adequacy of the resolutions proposed for items identified in the TER.

Second, Petitioner claims that the scope of review by the NRC was limited. Specifically, the Petitioner alleges that there was no independent NRC analysis or determination that the Licensee's responses to the TER warrant a finding of environmental qualification. The approaches described by the Licensee for addressing and resolving the identified deficiencies included replacing equipment, performing additional analyses, utilizing additional qualification documentation beyond that reviewed by FRC, and determining that some equipment is outside the scope of § 50.49 and therefore is not required to be environmentally qualified. Equipment located in a mild environment is an example of this latter category. The NRC Staff discussed the proposed resolutions in detail on an item-by-item basis with the Licensee during the meeting of April 4, 1984. Replacing or exempting equipment, for an acceptable reason, is clearly an acceptable method for resolving environmental qualification deficiencies. The more lengthy discussions with the Licensee concerned the use of additional analyses or documentation. In the attached Maine Yankee SE, the NRC Staff has documented its review and evaluation of the Licensee's electrical equipment environmental qualification program. The result of that evaluation was that the Staff found the Licensee's qualification program acceptable.

Clearly, the Staff has conducted an independent view of the Licensee's environmental qualification program and has documented that review. Prior to reaching such a conclusion with respect to the environmental qualification programs at several other plants, the Staff has performed audits of the Licensee's documentation. This action was taken because the Staff had concerns regarding the acceptability of the programs being implemented by the associated licensees. However, the Staff does not have a similar concern for the Maine Yankee facility and believes it is reasonable to conclude that the considerable efforts expended by the Maine Yankee Atomic Power Company have substantially enhanced the status of environmental qualification of the electrical equipment at the Maine Yankee Atomic Power Station.

Nonetheless, a follow-on implementation review will be performed by personnel in NRC Region I as part of the Staff's overall effort to monitor implementation of all licensees' environmental qualification programs. A schedule has not yet been established for the Maine Yankee implementation review. The primary objective of this review will be to verify that the Licensee's files contain the appropriate analyses and other

necessary documentation to support the Licensee's conclusion that the equipment is properly qualified. The inspections will also provide reasonable assurance that the Licensee's program for surveillance and maintenance of environmentally qualified equipment is adequate to assure that this equipment is maintained in the as-analyzed or as-tested condition. The method used for tracking periodic replacement parts, and implementation of the Licensee's commitments and actions, e.g., regarding replacement of equipment, will also be verified.

CONCLUSION

In summary, the NRC Staff has reviewed each of the items relied upon by the Petitioner. The FRC TER dated February 23, 1983, and NRC's letter to the Licensee dated April 8, 1983, do indicate various environmental qualification deficiencies. Those deficiencies were identified by the FRC and the NRC Staff in reviewing the information available at that time. Thus, the Petitioner has not raised any environmental qualification issues of which the Staff was unaware.

Since the TER was issued, the Licensee has provided considerable additional information regarding the identified electrical equipment deficiencies and has proposed a resolution of each of them that has been found acceptable by the Staff. The attached Maine Yankee SE dated December 13, 1984, documents the Staff's review which concludes that the Licensee's electrical equipment qualification program complies with the requirements of § 50.49, and that the proposed resolutions for each of the environmental qualification deficiencies identified in the FRC TER are acceptable. The Staff will continue to monitor the Licensee's progress in implementing its environmental qualification program. Consequently, I conclude that the overall state of equipment qualification of the Maine Yankee facility is adequate to assure the public health and safety

Darrell G. Eisenhut, Acting
Director
Office of Nuclear Reactor
Regulation

Dated at Bethesda, Maryland,
this 12th day of November 1985.

[Attachment 1 has been omitted from this publication but may be found in the NRC Public Document Room, 1717 H Street, NW, Washington, DC 20555.]

ATTACHMENT 2

RESOLUTION OF PETITIONER'S COMMENTS REGARDING THE FRANKLIN RESEARCH CENTER'S TECHNICAL EVALUATION REPORT

Petitioner's specific comments regarding items identified in the February 23, 1983 FRC TER and Maine Yankee's resolutions for each of those items are listed below. Those resolutions have been reviewed by the Staff and found to be acceptable.

1. Item 3: FRC found that Maine Yankee had not adequately evaluated the aging degradation of a limit switch in the primary auxiliary building. In its May 20, 1983 response to the April 8, 1983 SE, Maine Yankee still listed the limit switch as unqualified.

In its resolution of the TER items, Maine Yankee, by letter dated May 31, 1984, stated that the limit switch had been replaced with a qualified limit switch, with appropriate documentation on file.

2. Item 6: FRC found that Maine Yankee had not established that the terminal block located in the primary auxiliary building at elevation 11'0" was environmentally qualified.

In its resolution of TER items, Maine Yankee, in its May 31, 1984 letter, stated that qualification documentation, not previously available, had been obtained and was on file at Maine Yankee to establish qualification for this item.

3. Item 8: FRC found that Maine Yankee had not established that electrical cable for power located in the containment spray pump area had been qualified for steam exposure.

Maine Yankee stated, in its May 31, 1984 letter, that qualified documentation not previously available had been obtained and was on file at Maine Yankee to support qualification of this equipment.

4. Item 9: FRC found that Maine Yankee had not provided sufficient information to establish that installed cables located in the containment spray pump area were identical to the tested cables.

Maine Yankee stated, in its May 31, 1984 letter, that the cable used at Maine Yankee has insulation of a sufficiently similar type as that qualified by Okonite Report No. NQRN-3. Thus, applicable portions of that report had been used to qualify the cable used at Maine Yankee.

5. Item 12: FRC found that Maine Yankee had not established that certain power cables located in the reactor containment were sufficiently similar to those used in qualification tests.

Maine Yankee stated, in its May 31, 1984 letter, that the original documentation reviewed by FRC had been superseded by documentation traceable to IEEE 383-1974 testing of the above-mentioned cables, thus establishing qualification.

6. Item 14: FRC found that Maine Yankee had not established that electrical cables installed in the reactor containment at elevation 3'0" which provides electrical power to control valves were sufficiently similar to those used in qualification tests.

Maine Yankee stated, in its May 31, 1984 letter, that the cable manufacturer had verified, by letter dated March 16, 1984, that the cable tested is identical to the purchased cable.

7. Item 15: FRC found for electrical cable for instruments at elevation 20'0" of the reactor containment that, although Maine Yankee had provided results for tests enveloping the accident conditions of the Surry plant, the testing did not envelope the Maine Yankee accident profile, or radiation requirements. Thus, qualification had not been established.

Maine Yankee, in its May 31, 1984 letter, stated that additional qualification documentation not previously available to FRC was obtained and is on file at Maine Yankee. The new documentation establishes qualification.

8. Item 16: FRC found that Maine Yankee had not provided a schedule for the replacement of an unqualified motorized valve actuator located in the primary auxiliary building.

Maine Yankee has replaced the actuator and, in its May 31, 1984 letter, stated that its Documentation Review Package is now adequate to show full qualification for the new piece of equipment.

9. Item 18: FRC found that, for a motorized valve actuator located in the containment, the aging degradation had not been evaluated adequately and the criteria regarding duration had not been adequately established.

Maine Yankee stated, in its May 31, 1984 letter, that the equipment reviewed by FRC has been replaced by new equipment for which it has adequate equipment qualification documentation on file.

10. Item 23: FRC found that Maine Yankee had not provided a schedule for the replacement of an environmentally unqualified motorized valve actuator located in the containment.

Maine Yankee has replaced the actuator and, in its May 31, 1984 letter, stated that its Documentation Review Package is now adequate to show full qualification for the new piece of equipment.

11. Item 37: FRC found that Maine Yankee had not established qualification for electrical penetration located in the reactor containment elevation 46'0".

In its May 31, 1984 letter, Maine Yankee stated that its Qualification Documentation Review Package now contains sufficient new documentation to establish environmental qualification for the electrical penetration.

12. Item 38: FRC found that electrical cable installed at elevation 46'0" of the reactor containment was not properly qualified.

This equipment is not in the scope of 10 C.F.R. § 50.49 and has been deleted from the Master List because it has no required Design Basis Accident usage. The distribution cabinets are used for power distribution to pressurizer heaters which are not required for accident mitigation.

13. Item 39: FRC found that qualification had not been established for the hydrogen analyzer located at elevation 11'0" in the primary auxiliary building.

Maine Yankee stated, in its May 31, 1984 letter, that this equipment is not in the scope of § 50.49 because it has been relocated to a mild environment. This hydrogen analyzer has been relocated to an area in the Primary Auxiliary Building which is removed from the radiation levels due to the charging pumps and recirculation piping and is accessible to personnel. A qualified hydrogen analyzer (Item 43) has been installed and is available as an alternate indication. Also, in its May 31, 1984 letter, Maine Yankee stated the following concerning qualification of the backup hydrogen analyzer (Item 43):

> Qualification of this installed equipment has been demonstrated by type testing. The qualification documentation has been obtained and is on file at MYAPCo (QDR-5436-038-1816).

14. Item 44: FRC found that qualification had not been established for a motor control center located at elevation 30'0" in the containment spray pump area.

Maine Yankee, in its May 31, 1984 letter, stated that this equipment is not in the scope of § 50.49 and has been deleted from the Master List because it is located in a mild environment. Since the submittal of the documentation for the TER, a calculation of the post-accident radiation dose has been performed for the specific location of the motor control center. The revised calculation demonstrates that the actual radiation dose is less than 1×10^4 R. This is not considered to be a harsh environment.

15. Item 45: FRC found that Maine Yankee had not established qualification for a radiation detector located in the reactor containment at the top of the crane wall.

In its May 31, 1984 letter, Maine Yankee stated that sufficient documentation which addresses similarity, aging and radiation criteria is now on file to demonstrate qualification for this equipment.

16. Item 47: FRC found that qualification had not been established for a solenoid valve located in the reactor containment at elevation 51'7".

Maine Yankee, in its May 31, 1984 letter, stated that a more comprehensive test report has been obtained which establishes qualification.

17. Item 51: FRC found that qualification had not been established for a solenoid valve located at elevation 11'0" in the primary auxiliary building.

Maine Yankee, in its May 31, 1984 letter, stated, as in Item 47, that a more comprehensive report has been obtained which demonstrates qualification for the specified Maine Yankee normal service and accident environment.

18. Item 64: FRC found that qualification had not been established for an electric motor located in the containment spray pumps area at elevation 20'0" because qualification documentation was not adequate.

Maine Yankee, in its May 31, 1984 letter, stated the following:

> Additional qualification documentation, not previously available to FRC, has been obtained and is on file at MYAPCo (QDR-5436-038-0303). The qualification has been established by engineering evaluation of the data provided in: 1) Siemens-Allis Test Report No. NQ7304852, "Equipment Qualification for Class 1E Safety-Related Service in Power Generation Station", dated February 13, 1981 (FRC Reference: PGR #19), and 2) Acton Test Report No. 15564-22, "Analysis of

Class 1E Qualification of Siemens-Allis Form Wound Containment Spray Pump Motors for Maine Yankee Atomic Power Station", dated April 7, 1981.

The qualification documentation provides parameter by parameter analysis to demonstrate that the equipment is qualified for the specified Maine Yankee normal service and accident environmental conditions.

19. Items 65 and 66: FRC found that equipment qualification had not been established for an electric motor located in the primary auxiliary building at elevation 21'0" and another electric motor located in containment spray pump area at elevation 14'6" because similarity had not been established between the tested insulation systems and the installed equipment insulation systems.

Maine Yankee, in its May 31, 1984 letter, stated the following:

The motors at Maine Yankee are manufactured by the Westinghouse Large Motor Division for Class 1E applications as specified by the NSSS vendor Combustion Engineering. The qualification is based on Westinghouse Report, WCAP-8754, "Environmental Qualification of Class 1E Motors for Nuclear Out-of-Containment Use" (FRC Reference: PGR #604). This report and Revision 1 to the report clearly demonstrate traceability to Maine Yankee plant. Section 2 of the WCAP Report states the following: "The same insulating system (Thermalastic Epoxy) and only two different types of bearing are used on all nuclear Class 1E motors manufactured by Westinghouse Large Motor Division. Therefore, a generic qualification can be done to qualify all such motors to the requirements of IEEE 323-1974." Therefore, the Maine Yankee equipment is traceable to the WCAP Report.

20. Item 67: FRC found that, for an electric motor located in the reactor containment at elevation 24'0", qualification had not been established because similarity between installed equipment and test specimens had not been adequately established.

In its May 31, 1984 letter, Maine Yankee stated the following:

Similarity between Maine Yankee and tested equipment has been established in Qualification Documentation Review package QDR-5436-038-0341. The QDR groups all the previous data reviewed by FRC into a concise and auditable package that demonstrates qualification. In addition to the previously submitted data, the QDR provides traceability between materials of construction of the motor (nomex, kapton, ML polyimide enamel magnet wires, DC997 silicone varnish) to motors tested to IEEE 334-1974, IEEE 323-1974. The vendor (Reliance) has certified that the Maine Yankee motors are of the same construction as the tested motor.

Cite as 22 NRC 870 (1985) DD-85-18

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

James Knight, Acting Director

In the Matter of

Docket Nos. 50-352
50-353
(10 C.F.R. § 2.206)

PHILADELPHIA ELECTRIC COMPANY
(Limerick Generating Station,
Units 1 and 2)

November 12, 1985

The Acting Director of Nuclear Reactor Regulation denies a petition under 10 C.F.R. § 2.206 which requested that the NRC stay the activities of the Delaware River Basin Commission until the Licensee complied with certain environmental license conditions.

NRC: JURISDICTION

The NRC has no authority over the Delaware River Basin Commission (DRBC) and, consequently, may not stay any of its activities or cause any applications before the DRBC to be withdrawn.

LICENSE CONDITIONS

Licensees are expected to adhere to all NRC requirements and license conditions. However, NRC action is inappropriate in the absence of any present violation of a regulation or license condition.

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

On October 1, 1985, Robert L. Anthony (Petitioner) filed a petition with the Nuclear Regulatory Commission (NRC) asking the NRC to take certain actions with respect to applications filed by the Philadelphia Electric Company (Licensee) with the Delaware River Basin Commission (DRBC) related to the operation of its Limerick Nuclear Generating Station, Unit 1 (the facility). Principally, Petitioner requested that the NRC stay DRBC consideration of the Licensee's applications and require that the applications be withdrawn until Licensee complies with certain environmental license conditions imposed by the NRC. The Commission has referred this matter to the Office of Nuclear Reactor Regulation for its consideration pursuant to 10 C.F.R. § 2.206. For the reasons stated in this Decision, the Petitioner's request is denied.

On September 20, 1985, the Licensee filed with the DRBC applications to modify current restraints established by the DRBC upon the Licensee regarding the withdrawal of water from the Schuylkill River associated with the operation of the Limerick facility. Petitioner seeks to have the NRC stay consideration by the DRBC of the Licensee's applications to the DRBC. The DRBC is a regional agency created by an intergovernmental compact and given Federal ratification by a joint resolution of Congress.[1] The NRC has no authority over the activities of the DRBC and consequently may not stay any of its activities or cause any applications before the DRBC to be withdrawn. The NRC is thus not in a position to grant the relief sought by Petitioner regarding this aspect of its petition.[2] *See Wabash Valley Power Association* (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-81-18, 14 NRC 925, 927 (1981).

Petitioner also has concerns regarding the Licensee's compliance with certain environmental license conditions appended to Facility Operating License No. NPF-27 which the NRC issued to the Licensee on October 26, 1984, to authorize operation of the Limerick facility. License No. NPF-27 was superseded by Facility Operating License No. NPF-39, which was issued on August 8, 1985, to permit full-power operation of the facility. License No. NPF-39 includes the same environmental license conditions as were contained in License No. NPF-27. Petitioner appears to be concerned that the Licensee will receive authorizations

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[1] *See* DD-82-13, 16 NRC 2115, 2117 n.3 (1982).

[2] Petitioner has recognized the need to file his concerns directly with the DRBC by submitting a written document to the DRBC on October 1, 1985.

from the DRBC regarding water usage which permit it to operate in a manner in violation of the environmental license conditions. Such a course of action by the Licensee is certainly a possibility, albeit highly speculative at this point in time. Petitioner alleges no present violations by the Licensee of any NRC requirements including the license conditions. I have recently addressed in a Director's Decision adherence by this Licensee to its environmental license conditions.[3] The issue in that matter was the potential use by the Licensee of alternate sources of supplemental cooling water for the Limerick facility and a concern on the part of that Petitioner that such alternate use would not receive NRC scrutiny. I noted there that the requirements placed upon the Licensee by the terms of its Environmental Protection Plan (EPP) to assure that activities undertaken by the Licensee affecting the environment would receive appropriate review. The language of that Decision is appropriate in this matter and bears repeating here:

> The requirements of the EPP are triggered at the time of the Licensee's proposed action. The Licensee must meet these requirements and take the appropriate actions prior to taking the action itself. Compliance with these requirements in a timely manner so as to gain the relief of any changes sought is a matter for the Licensee's consideration. Consequently, to the extent that the Licensee wishes to operate the Limerick facility in a mode different from that presently represented in its license application, it must examine that proposed change in light of the terms of the license conditions set out above. It must make the appropriate determinations and, should the activity involve an unreviewed environmental question, the Licensee must obtain prior NRC approval. Should the activity involve a change in the EPP, a license amendment is required. These provisions of the license for the Limerick Unit 1 facility provide adequate assurance that any change contemplated by the Licensee having potential environmental implications will be appropriately dealt with.

DD-85-8, 21 NRC at 1566.

In summary, the NRC is without authority to stay DRBC considerations with respect to water quality matters placed before it by this Licensee. Furthermore, in the absence of any present violation of any regulation or license condition, I do not consider it appropriate to take any action in this matter. I do, however, fully expect the Licensee to adhere to all NRC requirements and license conditions, including those which specifically govern the types of changes which might be forthcoming from any consideration given by DRBC to the Licensee's current proposal regarding water use for its Limerick facility.

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[3] DD-85-8, 21 NRC 1561 (1985).

Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is *denied*. As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

James P. Knight, Acting
Director
Office of Nuclear Reactor
Regulation

Dated at Bethesda, Maryland,
this 12th day of November 1985.

Jo Ann Resnar
W-501

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