

NUREG-0750
Vol. 21
Index 2

INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - June 1985



U. S. NUCLEAR REGULATORY COMMISSION

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**INDEXES TO
NUCLEAR REGULATORY
COMMISSION ISSUANCES**

January - June 1985

U.S. NUCLEAR REGULATORY COMMISSION

Foreword

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

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

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

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

1. Case Name Index

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

2. Digests and Headers

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

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

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

3. Legal Citations Index

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

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

4. Subject Index

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

5. Facility Index

This index consists of an alphabetical arrangement of facility names from the issuance. The name is followed by docket number, type of hearing, date, type of issuance, issuance number, and full text reference.

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

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

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

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

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

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

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

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

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

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- D The traditional standard for reopening applies in determining whether a record should be reopened on the basis of new information. The standard does not apply where the issue is whether the record should be reopened because of an inadequate record.
- E Any interested person with the requisite standing may seek to intervene in a § 189a licensing proceeding. To establish standing, an individual must at a minimum show (1) the action being challenged could cause injury in fact to that individual, and (2) such injury is within the zone of interests protected by the Atomic Energy Act. See, e.g., *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).
- F It is unresolved in the courts whether an individual who suffers economic injury as a result of a board's decision to bar him from working in a certain job would be within the zone of interests protected by the Atomic Energy Act. See, e.g., *Consumers Power Co.* (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).
- G The Due Process Clause of the Fifth Amendment prohibits a federal agency from depriving an individual of liberty or property interests without providing that individual an opportunity for a hearing. Individuals indirectly affected by government action may not have any hearing rights. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).
- H A person's liberty interest is implicated where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, or where the government's action imposed a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).
- I Merely making a discharged employee less attractive for employment is not a deprivation of liberty. See, e.g., *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977).
- J To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it, and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Roth*, supra, 408 U.S. at 577.
- K The government may not prevent an individual from working in his chosen profession without providing him notice and an opportunity to request a hearing, see, e.g., *Orr v. Trinter*, 444 F.2d 128 (6th Cir.), cert. denied, 408 U.S. 943 (1971), although there is no hearing requirement where the only thing at stake is a specific job with no claim of entitlement. See *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).
- L The Energy Reorganization Act of 1974 (42 U.S.C. § 5851) and the Commission's regulations (10 C.F.R. § 50.7) protect employees from discrimination for raising health and safety issues.
- CLI-85-3 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL, OPERATING LICENSE, March 15, 1985; MEMORANDUM AND ORDER
- A The Commission authorizes the issuance to the Applicant of a full-power operating license for the Waterford Steam Electric Station, Unit 3. At the same time it declines to stay the effectiveness of its Decision for a 2-week period as requested by Intervenor. Issuance of the Decision is without prejudice to the Intervenor's motions to reopen that are currently before the Atomic Safety and Licensing Appeal Board.
- B The standard for an operating licensing decision is whether there is reasonable assurance of public health and safety to allow plant operation, either for the full licensing term or until additional analysis is completed that would provide additional assurance for the full-term license.
- CLI-85-4 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289, 50-320 and (Oyster Creek Nuclear Generating Station), Docket No. 50-219 (Petition for Relief Under 10 C.F.R. § 2.206), PETITION FOR RELIEF, April 4, 1985; MEMORANDUM AND ORDER
- A The Commission clarifies the basis for the denial by the Director, Office of Nuclear Reactor Regulation, of a petition requesting that the licenses held by the General Public Utilities Nuclear Corporation to operate the Three Mile Island and Oyster Creek nuclear facilities be revoked on the ground that it lacks the necessary character to operate them safely. As a separate matter, the Commission denies the Petitioners' request for a hearing under the Atomic Energy Act on the Licensee's character.

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- B** The principle is now firmly established that parties must be prevented from using 10 C.F.R. § 2.206 as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented. Consolidated Edison Co. of New York (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 177 (1975). See also, e.g., Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 444 (1981).
- C** Because there must be finality to administrative decisionmaking, those who are not parties to a proceeding must be prevented from using 10 C.F.R. § 2.206 as a means to reopen issues previously adjudicated. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1979), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).
- D** There is no right to a hearing under the Atomic Energy Act simply because questions are raised about a licensee's character.
- CLI-85-5 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP (Restart), SPECIAL PROCEEDING, April 5, 1985; MEMORANDUM AND ORDER**
- A** The Commission affirms a Licensing Board member's decision denying intervenors' motion seeking his disqualification from further participation in the Three Mile Island, Unit 1 restart proceeding.
- B** The parties in an adjudicatory proceeding have a right to an impartial adjudicator, both in reality and in appearance to a reasonable observer. However, they do not have a right to the judge of their choice.
- C** The right to an impartial adjudicator does not mean that favorable rulings must be divided equally between the parties, or that a judge may not occasionally use strong language toward a party or in expressing his views on matters before him.
- D** The fact that a judge's actions may be controversial or may provoke strong reactions by the parties does not provide grounds for disqualification.
- E** In considering whether information in an extrajudicial communication demonstrates bias, it is the source of the information, not the forum in which it is communicated, that controls.
- F** Even if Canons 2 or 3 of the Code of Judicial Conduct are violated in a particular case, disqualification will not follow per se.
- G** The purpose of Canon 2B of the Code of Judicial Conduct which states that a judge "should not lend the prestige of his office to advance the private interests of others" and further that the judge "should not testify voluntarily as a character witness" is to prevent a judge's testimony from having an undue influence in a trial.
- H** Canon 3A(6) of the Code of Judicial Conduct which states that a "judge should abstain from public comment about a pending or impending proceeding in any court" is meant to apply to general public comment, not to imparting specific information to a court.
- CLI-85-6 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit No. 2), Docket No. 50-247-SP and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3), Docket No. 50-286-SP, SPECIAL PROCEEDING, May 7, 1985; DECISION**
- A** Petitioner requested shutdown of Indian Point Units 2 and 3. In response, the Commission initiated a discretionary Licensing Board proceeding designed to gather information on whether to shut down the units or to take other enforcement action. The Commission concludes that the record developed by the Licensing Board shows that neither shutdown nor imposition of additional remedial actions beyond those implemented voluntarily by the Licensees is warranted at this time. The Commission, however, directs the Staff, inter alia, to confer with FEMA and report to the Commission on the current status of emergency planning and on whether deficiencies identified by the Board and Commission in this proceeding have been corrected.
- B** The Atomic Energy Act provides ample legal authority for NRC to impose customized requirements designed to minimize risk to public health and safety (see, e.g., Atomic Energy Act, § 161(b), 42 U.S.C. § 22011(b)), and there is no constitutional problem with doing so.

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- C The Atomic Energy Act does not preclude prudent risk reduction measures, provided it is rational to conclude that risk will be reduced. Consequently, the Commission could impose special requirements for plants in densely populated areas.
- D The following technical issue is discussed: Probabilistic Risk Assessments (PRAs).
- CLI-85-7 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Restart), SPECIAL PROCEEDING, May 9, 1985, ORDER.
- A The Commission denies intervenors' motion to reconsider its decision (CLI-85-2, 21 NRC 282 (1985)) that no further hearings are warranted in the TMI-1 restart proceeding.
- B The burden is on the movant to establish prior to reopening that the standards for reopening are met. A movant is not entitled to engage in discovery in order to support a motion to reopen. Rather, the issue in each case is whether the available information meets the standards for reopening, i.e., timely raises a significant safety issue which might have affected the Licensing Board's decision, such that the record should be reopened and discovery initiated.
- C If a motion to reopen is to succeed, it is not enough merely to express a willingness to provide unspecified, additional information at some unknown date in the future. See generally, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983).
- D A party may not raise in a petition for reconsideration a matter not placed in contest before. See, e.g., Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-477, 7 NRC 766, 768 (1978).
- CLI-85-8 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Restart), SPECIAL PROCEEDING, May 16, 1985, MEMORANDUM AND ORDER.
- A The Commission denies intervenors' motion to reopen the record in the TMI-1 restart proceeding and intervenors' request that the Commission sponsor a health effects study prior to making a restart decision.
- B Under established Commission practice three factors are considered in determining whether a motion to reopen should be granted: "(1) Is the motion timely; (2) does it address significant safety (or environmental) issues; and (3) might a different result have been reached had the newly proffered material been considered initially." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985).
- CLI-85-9 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Restart), SPECIAL PROCEEDING, May 29, 1985, MEMORANDUM AND ORDER.
- A The Commission lifts the effectiveness of its 1979 enforcement order directing that TMI-1 remain shut down and permits TMI-1 to resume operation subject to the completion of two conditions. The Commission holds that the two management-related issues which remain pending before the agency do not warrant keeping TMI-1 shut down until agency proceedings have been completed.
- B The law normally affords a licensee the opportunity to challenge an enforcement action in a public hearing prior to the time an enforcement action takes effect. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973).
- C The law obligates the Commission to lift the effectiveness of an immediately effective shutdown order once the concerns which led to making the order immediately effective have been adequately resolved. See, e.g., Pan American Airways v. CAB, 684 F.2d 31 (D.C. Cir. 1982); Northwest Airlines v. CAB, 539 F.2d 748 (D.C. Cir. 1976); Air Line Pilots Ass'n, International v. CAB, 458 F.2d 846 (D.C. Cir. 1972), cert. denied, 420 U.S. 972 (1975).
- D A provision in the law allows immediate action when required by the public health and safety or public interest. See 10 C.F.R. § 2.202(f), which implements 5 U.S.C. § 558(c).
- E A generally applicable standard for integrity is whether there is reasonable assurance that the licensee has sufficient character to operate the plant in a manner consistent with the public health and safety and applicable NRC requirements.
- F In determining whether a licensee has the requisite integrity to operate a nuclear power plant, the Commission may consider evidence regarding licensee behavior having a rational con-

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nection to the safe operation of the plant. This does not mean, however, that every act of a licensee is relevant. To be so, the action must have some reasonable relationship to licensee's character, i.e., its candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety.

G Acts bearing on a licensee's character generally should not be considered in isolation. The pattern of licensee's relevant behavior, including corrective actions, should be considered.

H Licensee behavior includes acts of licensee employees, since all organizations carry on their activities through individuals.

I That a Licensing Board has imposed license conditions does not convert an enforcement proceeding into a license amendment proceeding. Once the Commission establishes a formal adjudicatory hearing in an enforcement case, it need not grant separate hearings on any license conditions that are imposed as a direct consequence of that enforcement hearing.

J Restart of a nuclear power plant following its ordered shutdown does not constitute a license amendment, but involves lifting a suspension, and hence does not create new hearing rights. See, e.g., *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984); *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-79-7, 9 NRC 680, aff'd, *Friends of the Earth v. United States*, 600 F.2d 753 (9th Cir. 1979); *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, CLI-80-10, 11 NRC 438 (1980), aff'd, *Save the Valley v. NRC*, 714 F.2d 142 (6th Cir. 1983) (Table).

K Section 2.204 of 10 C.F.R., which provides that the Commission shall make a license amendment immediately effective upon finding that the public health, safety, or interest so requires, applies only when the Commission makes the determination to make a license amendment effective without affording an opportunity for a prior hearing.

L The standards in 10 C.F.R. § 2.764(f)(2)(i), which provides that the Commission shall make a Licensing Board decision authorizing a unit to operate at full power immediately effective "if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors," apply only to initial licensing decisions.

M The standard for determining whether to lift the immediate effectiveness of an enforcement order is whether the concerns which led to making that order immediately effective have been adequately resolved. Once the Commission finds this has been done, it is legally obligated to lift the immediate effectiveness of the order, regardless of the nature of the latest Licensing Board decision on the matter. This is a matter peculiarly within the Commission's knowledge and involving the most discretionary aspects of its enforcement authority.

N The Commission cannot ignore its legal obligation to lift the immediate effectiveness of a shutdown order once the concerns which led to making that order immediately effective are satisfied, even if a single issue not significant for safe plant operation remains pending before the Licensing Board. See, e.g., *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-79-7, 9 NRC 680 (1979) (resumption of operation authorized prior to hearing); see also *ICC v. Oregon Pacific Industries*, 420 U.S. 121, 127 (1975) (Powell, J., concurring); *Pan American Airways v. CAB*, 684 F.2d 31 (D.C. Cir. 1982); *Northwest Airlines, Inc. v. CAB*, 539 F.2d 748 (D.C. Cir. 1976); *Airline Pilots Ass'n, International v. CAB*, 458 F.2d 846 (D.C. Cir. 1, cert. denied, 420 U.S. 972 (1975)).

O The NRC is not a legislative body and it lacks discretion to act on the basis of issues that are not within the scope of the laws established by Congress.

P In the Atomic Energy Act, Congress has directed the NRC to make decisions regarding the licensing of nuclear reactors on the basis of its own expert judgment and analysis of whether the detailed regulatory requirements of the Commission have been satisfied.

CLI-85-10 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Unit 1), Docket No. 50-206: OPERATING LICENSE SUSPENSION, February 19, 1985; DENIAL OF REQUEST FOR HEARING AND REQUEST FOR STAY

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- A The Commission denies a request for a hearing on an order conditionally rescinding a previous suspension of the operating license for San Onofre Nuclear Generating Station Unit 1 and refuses to stay resumed operation of the facility. The Commission concludes that the rescinded suspension order, which imposed certain seismic upgradings as a condition for resumed operation, did not amend the San Onofre license and therefore may be lifted without the procedural steps, including offer of a hearing, required for a license amendment.
- B An order that does not expand a licensee's authority under its operating license or direct the licensee to take action inconsistent with or not already authorized by the existing license need not be treated as a license amendment.
- C A license suspension is an action which can be entirely distinct from a license amendment.
- D A licensee's voluntary commitment to make a plant safer than its license requires does not contradict the license or in general call for additional authorization.
- E The decision whether to incorporate into the license a cutback in licensee authority or the imposition of new burdens is one of agency discretion and intent, rather than statutory compulsion.
- CLI-85-11 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station; Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL, OPERATING LICENSE; June 11, 1985, MEMORANDUM AND ORDER
- A The Commission declines to make effective a Licensing Board authorization for issuance of a full-power operating license for the Limerick Generating Station (unpublished Order of May 24, 1985) because the authorization relied on a Licensing Board grant of an exemption from the emergency planning regulations raising important questions regarding intervenors' hearing rights which had not yet been resolved.
- CLI-85-12 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station), Docket No. 50-322-OL-8, OPERATING LICENSE; June 20, 1985, ORDER
- A The Commission reaffirms the holding of CLI-84-9, 19 NRC 1323 (1984), that where an environmental impact statement has been prepared for full-power operation, the National Environmental Policy Act (NEPA) does not require the Commission to prepare a supplemental environmental impact statement ("SEIS") which weighs the costs and benefits of low-power operation on the assumption that there will never be full-power operation.
- B Even if full-power operation is uncertain, the benefit to be gained from low-power operation (e.g., early identification of problems to assure that full-power operation will not be delayed, if and when it is authorized) is enough to permit a finding that the benefits of low-power operation outweigh its costs.
- C While parties are entitled to challenge the sufficiency of radiological emergency preparedness for a nuclear power plant, the Commission's ultimate finding on the adequacy of preparedness is controlling.

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

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

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

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

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

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

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

B When an appeal board has finally determined some issues in a proceeding and others are still pending before it, the board has jurisdiction over new matters raised by a party if there is a "reasonable nexus" or "a rational and direct link" between the new issues and those pending. A total identity or commonality of issues is not required. See, e.g., Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-379, 11 NRC 223, 226 (1980).

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

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

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

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

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

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

- A Because the Licensing Board's substantive determination in a partial initial decision (LBP-84-13, 19 NRC 659) that the applicant is likely to be able to meet the character and competence requirements necessary to obtain an operating license for the South Texas plant is expressly subject to change in light of forthcoming hearings, the Appeal Board declines to review that determination. It affirms the Licensing Board's ruling on the standard to be applied in measuring character and competence and various other rulings.
- B Generally, appeal boards do not review licensing board determinations that do not constitute a final resolution on the merits. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 190 (1983).
- C The Commission's regulatory scheme recognizes that an applicant is bound to make errors necessitating correction during the course of construction of a nuclear power plant. See, e.g., 10 C.F.R. § 50.55(e), 10 C.F.R. Part 50, Appendix B, § XVI.
- D Plainly, whether a plant was properly built bears on whether it can be operated safely. Construction quality assurance issues are a frequent component of operating license proceedings. See, e.g., Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 345 (1983).
- E Neither the Atomic Energy Act nor the Commission's case law provide a complete definition of character or competence. Prior decisions simply identify the factors that are pertinent to an inquiry into those matters.
- F Although no cases are precisely on point, the clear import of prior appeal board decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses.
- G Denial of a license requires a finding that it is not possible for the ascertained quality assurance failings either to be cured or to be overcome to the extent necessary to reach an informed judgment that the facility has been properly constructed. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).
- H A review of the totality of circumstances is required to permit a reasonable prediction regarding whether an applicant for an operating license can and will comply with the safety and environmental standards imposed by statute and the Commission's regulations and procedures.
- I Even an applicant's poor past conduct need not automatically foreclose a finding that it now possesses the requisite high degree of character or competence to obtain an operating license.
- J That a board reaches conclusions and makes findings contrary to those urged by a party does not establish bias. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).
- K A mere demonstration that a board erred by curtailing cross-examination is not sufficient to warrant appellate relief. The complaining party must demonstrate actual prejudice — i.e., that the ruling had a substantial effect on the outcome of the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984).
- L The authority of a board to demand cross-examination plans is encompassed by the board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. (10 C.F.R. §§ 2.718(e), 2.757(c)). See also Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). Indeed, such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious. Statement of Policy on Conduct of Licensing Proceedings, CLJ-81-8, 13 NRC 452, 457 (1981).

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- M** Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. See 10 C.F.R. § 2.762(d).
- N** It is firmly established that the scope of cross-examination is ordinarily limited to matters raised in direct testimony. See Waterford, *supra*, 17 NRC at 1096 and cases cited.
- O** The use of prefiled, written testimony generally is permitted by the Administrative Procedure Act in licensing cases and authorized by the Commission's Rules of Practice. 5 U.S.C. § 556(d); 10 C.F.R. § 2.743(b).
- P** The use of witness panels is a long-standing practice in licensing hearings, consistent with Commission policy. See 10 C.F.R. Part 2, Appendix A, § VI(d)(4).
- Q** A party may not raise on appellate review licensing board practices it did not object to at the hearing stage.
- R** To justify overturning a licensing board's scheduling decision, an appeal board must be satisfied that the licensing board set a schedule that deprives a party of its right to procedural due process. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978). See also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983).
- S** An appellant carries the burden of presenting an appeal board with an adequate brief in the first instance and bears the risk of any oversight by the board if it fails to do so. A failure to brief issues adequately deprives the appeal board precisely of that assistance which the Rules of Practice are designed to have an appellant provide, i.e., to flesh out the bare bones of claims on appeal and to present the board with sufficient information or argument to allow an intelligent disposition of the issues. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1619 n.133 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 475 (1975), and United States v. White, 454 F.2d 435, 439 (7th Cir. 1979). See also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786-87 (1979).
- T** The five-factor test normally used to determine whether to grant a non-timely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date, should also be applied to determine whether one intervenor may be allowed to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding. See 10 C.F.R. §§ 2.714(a)(1), (b).
- U** There is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976). The Commission's regulations limit operating license proceedings to "matters in controversy among the parties" or matters raised on a licensing board's own initiative *sua sponte*. 10 C.F.R. §§ 2.104(c), 2.760.
- V** Where only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. Under NRC procedure, however, it does serve to remove the withdrawing party's contentions from litigation. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976).
- W** The mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981). Safety or environmental matters not the subject of contentions or raised by a board *sua sponte* are left for nonadjudicatory resolution by the NRC staff. Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 189-90 (1976).
- X** Under principles announced in *Prairie Island*, an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), *aff'd* in pertinent part, CLI-75-1, 1 NRC 1 (1975).

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Y The Commission's regulations require that, at the outset of a case, each intervenor submit a list of the contentions which it seeks to have litigated. 10 C.F.R. § 2.714(b). Moreover, one may not introduce affirmative evidence on issues raised by another intervenor's contentions. *Prairie Island*, supra, 8 AEC at 869 n.17.

Z Because contentions can be withdrawn or settled through negotiation, a non-sponsoring party assumes at least some risk that the pursuit of its interests may not be wholly within its control. *Clinch River*, supra, 4 NRC at 392. See *Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3)*, ALAB-440, 6 NRC 642, 645 (1977).

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

BB If, in the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 C.F.R. § 2.714(a). *Gulf States Utilities Co. (River Bend Station, Units 1 and 2)*, ALAB-444, 6 NRC 760, 796 (1977).

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

A The Appeal Board affirms with one exception the conclusions reached in the Licensing Board's October 29, 1984 initial decision that granted the applicant's request for an exemption from certain regulatory requirements and authorized low power testing of the Shoreham facility. See LBP-84-45, 20 NRC 1343. The Appeal Board reverses the Licensing Board's conclusion on one matter, remands it to the Board for further proceedings, and vacates the exemption as to certain phases of low power operation.

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

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

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

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

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

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

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

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

A Finding the existing record inadequate on which to rule on a motion to reopen made by intervenors, the Appeal Board defers ruling on the motion. With limited exception, it strikes the

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brief and affidavits submitted by the NRC staff in opposition to the motion and calls for additional information from the staff and the applicant.

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

C An appeal board is required to state "the reasons or basis" for its conclusions. See Administrative Procedure Act, 5 U.S.C. § 557(c). It cannot properly fulfill this responsibility if the raw material with which it must work — i.e., the pleadings and other matter that make up the record — is grossly inadequate.

D Legal counsel — through whom a party expresses its position — must bear a large responsibility for the form and quality of submissions made in licensing proceedings.

E The NRC staff's conduct and contribution must conform to the same standards applicable to other parties.

F Where a party (particularly, where represented by legal counsel) submits a helter-skelter collection of materials, it must live with the consequences. See *Pacific Gas and Electric Co. (Dabhol Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-775, 19 NRC 1361, 1368 n.22 (1984).

ALAB-802 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, March 26, 1985, DECISION

A The Appeal Board in this operating license proceeding denies intervenor's request to reopen the record to receive further evidence on the issue of quality assurance, and affirms the Licensing Board's partial initial decision (LBP-83-77, 18 NRC 1365 (1983)), which found applicants' quality assurance program for the Perry Plant adequate.

B Neither the Administrative Procedure Act nor the Commission's Rules of Practice require an adjudicatory tribunal to ensure that a party appearing before it is represented by counsel. Rather, it is the responsibility of the party itself not merely to decide whether it wishes to be represented by counsel but, in addition, to take the necessary measures to implement its decision. See generally *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-772, 19 NRC 1193, 1246-47 (1984), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985).

C There is not a bright line separating proper and excessive involvement on the part of the tribunal hearing the evidence. A trial judge must have great latitude in that regard, especially where certain of the parties are represented by lay persons and the judge concludes that they are in need of assistance.

D More than a mere disagreement among staff members is necessary to compel testimony by staff witnesses not otherwise scheduled to testify. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, ALAB-715, 17 NRC 102 (1983).

E The Commission's Rules of Practice do not prohibit the admission of hearsay evidence. *Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2)*, ALAB-669, 15 NRC 453, 477 (1982); *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-355, 4 NRC 397, 411-12 (1976).

F The requirement in 10 C.F.R. Part 50, Appendix B, Criterion XVI, that quality assurance deficiencies be identified and corrected promptly does not mean that they must all be corrected as quickly as humanly possible.

G Although ultimately all deficiencies of potential safety significance must be corrected, it is not necessary to rectify all of them at once. How rapidly a particular deficiency need be cured will depend upon such factors as its nature and significance, the stage of plant construction, and whether the deficiency might shortly be covered up by further construction work.

ALAB-803 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL, OPERATING LICENSE, April 4, 1985, DECISION

A The Appeal Board finds no cause to recant its earlier findings that there are no significant safety concerns associated with cracking in the concrete basement at Waterford, and denies intervenors' second motion to reopen the record for a hearing on this issue.

B An essentially bare allegation of falsified documents is not enough to support a motion for reopening a closed record.

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- C A motion to reopen a closed record must be timely, address a significant safety or environmental issue, and show that a different result might have been reached had the newly proffered material been considered initially. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-598, 11 NRC 876, 879 (1980). See also *id.*, ALAB-775, 19 NRC 1361, 1365-67 & n.18, *aff'd*, *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984).
- D The staff should not be reluctant to acknowledge and discuss disagreements among its personnel on issues involved in a hearing. Airing legitimate differences of opinion and the steps taken to resolve them often contributes to a more effective treatment of the issues, regardless of which view ultimately prevails.
- E Dissenting staff members should be afforded the opportunity to express their views and to participate in the staff review process. Further, the substance of their views must be given full consideration by the staff. See *San Luis Obispo Mothers for Peace*, *supra*, 751 F.2d at 1322.
- F Where a question of possible violation by a "special government employee" of the Commission's conflict of interest rules has been handled in accordance with the agency's internal procedures, it is not the Appeal Board's function to review independently either the General Counsel's determination, or the judgment as to the need for punitive measures.
- G Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted in NRC adjudicatory proceedings. 10 C.F.R. § 2.743(c). A witness's violation of the Commission's ethics regulations could, in certain circumstances, undercut the reliability of that witness's testimony.
- H The following technical issue is discussed: *Cracking in Reinforced Concrete Basement*.
- ALAB-804 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; April 10, 1985; DECISION.
- A The Appeal Board affirms the Licensing Board's decision dismissing intervenor's revised contentions on two issues concerning the environmental impacts of the Limerick supplementary cooling water system.
- B An operating license proceeding is not intended to provide a forum for the reconsideration of matters originally within the scope of the construction permit proceeding. See *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-785, 20 NRC 848, 870-71 (1984).
- C All contentions must satisfy the long standing requirement of the Commission's Rules of Practice that both the contention and its bases be set forth with reasonable specificity. See 10 C.F.R. § 2.714(b). *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974).
- D The NRC's adjudicatory boards should not have to conduct or complete a party's research for it.
- ALAB-805 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; April 10, 1985; MEMORANDUM AND ORDER.
- A Finding that the standard for interlocutory review of a Licensing Board ruling has not been met, the Appeal Board denies intervenor's motion for directed certification of the Licensing Board's rejection of its request that a specified individual be called as a Board witness in this operating license proceeding.
- B Review of an interlocutory licensing board ruling via directed certification is discretionary and granted infrequently. A party invoking review by this means must demonstrate that the board's action "either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner." *Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1)*, ALAB-588, 11 NRC 533, 536 (1980), and cases cited; *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2)*, ALAB-675, 15 NRC 1105, 1110 (1982). See also *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-405, 5 NRC 1190, 1192 (1977).
- C In the absence of a potential of truly exceptional delay or expense, the risk that a licensing board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by

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that board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), quoting from Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973).

ALAB-806 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE, May 1, 1985; DECISION.

A The Appeal Board reverses a Licensing Board decision dismissing intervenors as a party in this operating license proceeding for failure to file sufficiently specific contentions in a timely fashion, reinstates their status as a party, accords them a period of time in which to file revised contentions, and remands this matter to the Licensing Board for action consistent with this opinion.

B Licensing boards are not empowered to accept contentions on a conditional basis. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466 (1982).

C Contentions based on materials not available until a later point in the proceeding should be adjudged by balancing all five factors governing late-filed contentions, found at 10 C.F.R. § 2.714(a)(1). Catawba, CLI-83-19, 17 NRC 1041, 1045-47 (1983).

D Licensing boards are accorded wide latitude in balancing the factors set forth in 10 C.F.R. § 2.714(a)(1). Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

E In considering factor two of 10 C.F.R. § 2.714(a)(1) — the availability of other means whereby the petitioner's interest will be protected — informal negotiation among the parties (even under a board's aegis) is not an adequate substitute for a party's right to pursue its legitimate interest in issues on which informal negotiation is unsuccessful. Cf. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985) (neither the formal participation by the NRC staff in a licensing proceeding nor the availability of staff review outside the hearing process constitutes an adequate protection of a private party's rights when considering factor two).

F A public hearing on emergency plans for a nuclear power plant, held under the auspices of the Federal Emergency Management Agency, is no more a means to protect an intervenor's interest under section 189a of the Atomic Energy Act, 42 U.S.C. § 2239a, than either informal negotiation or NRC staff review.

G Commission policy favors legitimate efforts to reach a good faith, mutually satisfactory resolution of issues without the need for litigation. See 10 C.F.R. § 2.759. See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

H In determining whether a contention is set forth with adequate bases and specificity in accordance with the requirements of 10 C.F.R. § 2.714(b), consideration of its substantive merits is not appropriate. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980); Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 216-17 (1974).

ALAB-807 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-OLA (Steam Generator Repair); OPERATING LICENSE AMENDMENT, May 3, 1985; DECISION.

A The Appeal Board affirms the Licensing Board's initial decision (LBP-84-47, 20 NRC 1405 (1984)) authorizing issuance of an operating license amendment to permit the applicant to operate Unit No. 1 at Three Mile Island Nuclear Station (following repair of the steam generator tubes by kinetic expansion) and denies intervenors' motion to reopen the record to explore newly discovered information.

B Licensing Board orders that dispose of some but not all of a party's contentions are considered interlocutory. Appeals from such orders must await the issuance of the board's decision disposing of the remaining issues. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165 (1983).

C To prevail on a motion to reopen the record, the movant must demonstrate that its request is timely, that it addresses significant safety or environmental issues, and that a different result might have been reached had the newly proffered material been considered initially. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983).

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- D If the Commission makes a determination that a license amendment involves "no significant hazards" pursuant to 42 U.S.C. § 2239(a)(2)(A) (Supp. 1985), the Commission may issue the amendment and make it effective immediately notwithstanding any request for a hearing. The hearing may take place after issuance of the amendment. See 49 Fed. Reg. 24,231, 24,232 (1983).
- E A Licensing Board is precluded by law from appointing anyone to assist an intervenor with its case. See Pub. L. No. 98-360, § 502, 98 Stat. 403 (1984). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247, 1273 (1984), rev'd in part, on other grounds, CLI-85-2, 21 NRC 282 (1985).
- F A person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Cf. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-48 (1984).
- G The NRC licensing boards, by their very composition, take account of, and in large measure are intended to satisfy, the need for scientific expertise in deciding the cases that come before them. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981).
- H Protective orders and in camera proceedings are the customary and favored means of handling disputes in which one party to a proceeding seeks purportedly proprietary information from another.
- I Protective orders and in camera proceedings are especially useful as an interim measure to avoid delay in the proceedings pending definitive resolution of whether, and to what degree, information should be withheld from the general public.
- J The Commission's regulations expressly provide that the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under protective order by parties to a proceeding, and that in camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. 10 C.F.R. § 2.790(b)(6)(iii).
- K A motion to reopen the record to explore newly discovered information need not be granted unless it is likely that a different substantive outcome would result. Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1209 (1983). Cf. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983).
- L The following technical issues are discussed: Steam Generator Tube Repair (Kinetic Expansion); Steam Generator Tube Corrosion.
- ALAB-808 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; June 11, 1985; MEMORANDUM AND ORDER.
- A The Appeal Board denies intervenor's motion for a stay of the Licensing Board's third partial initial decision in this operating license proceeding (LBP-85-14, 21 NRC 1219), which resolved certain offsite emergency planning issues in favor of the applicant.
- B Under the Commission's Rules of Practice, a party may seek a stay of "a decision or action." 10 C.F.R. § 2.788(a). See 42 Fed. Reg. 22,128, 22,129 (1977). Thus, outright denial or dismissal of a stay motion on the ground that the decision is merely passive would not appear to be justified.
- C 10 C.F.R. § 2.788(f) explicitly authorizes the filing of a request to stay a licensing board decision before either that licensing board or an appeal board, but not both at the same time. See also 10 C.F.R. § 2.721(d); 42 Fed. Reg. at 22,129.
- D Stay motions are decided by weighing the following four factors set forth in 10 C.F.R. § 2.788(e): "(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) Whether the party will be irreparably injured unless a stay is granted; (3) Whether the granting of a stay would harm other parties; and (4) Where the public interest lies."
- E The second factor of 10 C.F.R. § 2.788(e), irreparable harm, is often the most important in deciding whether a stay is warranted. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984).

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- F The delegation to the NRC staff of post-hearing verification of certain emergency planning measures can be proper, depending on exactly what is left for verification. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-07 (1983).
- G The predictive nature of findings is the essence of litigation in the emergency planning area. Thus, an emergency plan need not be final, just sufficiently developed to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. See id. at 1103-04.
- H In comparison with low-power authorization, different and more serious considerations pertain to full-power authorization. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 959-60 (1984).
- I By Commission rule and policy, consolidation of intervenors with the same interest is acceptable and encouraged, providing that no undue prejudice results. 10 C.F.R. § 2.715a, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).
- J Limitations on cross-examination are appropriate in certain circumstances and, even where improper, actual prejudice must be shown to establish reversible error. Waterford, 17 NRC at 1096.
- K Exclusion of evidence for lack of sponsoring testimony is consistent with NRC precedent. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).
- L Rate issues and the like are not cognizable under the Atomic Energy Act, which is concerned with protection of the public health and safety from radiological hazards. State utility commissions, and in some instances the Federal Energy Regulatory Commission, exercise economic regulatory jurisdiction.
- M For stay purposes, it is often necessary and appropriate to take into account various matters not actually litigated in the proceeding — providing proper documentation is supplied. See 10 C.F.R. § 2.788(b)(4).
- N Under the third stay criterion, the Commission has in the past taken into account the economic harm that an applicant might suffer if a stay of its license is granted. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977).
- ALAB-809 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL, OPERATING LICENSE; June 17, 1985; DECISION
- A The Appeal Board vacates and remands two Licensing Board orders granting applicant an exemption from certain requirements of 10 C.F.R. § 50.47 and authorizing the Director of Nuclear Reactor Regulation to issue a full-power operating license to PECO. The Board finds that the Licensing Board failed to apply the proper standards for granting the exemption and that its decision lacks a reasoned basis.
- B 10 C.F.R. § 50.47 embodies the NRC's emergency planning requirements. It requires a finding of "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" before issuance of an operating license.
- C The principal authority for granting exemptions from any of the 10 C.F.R. Part 50 requirements for an operating license is found in 10 C.F.R. § 50.12(a). By its very terms, this provision and the criteria specified in it must be addressed before any exemption from Part 50 requirements can be authorized. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Unit 1), CLI-84-19, 20 NRC 1055, 1059 n.7 (1984).
- D Where an applicant seeks an exemption from the requirements of 10 C.F.R. § 50.47, the standards of both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) must be satisfied.
- E The exemption authority in 10 C.F.R. § 50.12 is "extraordinary" and "available . . . only in the presence of exceptional circumstances." Long Island Lighting Co. (Snorham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984).
- F Through the exemption regulations, the Commission has recognized that some circumstances might warrant license issuance despite an applicant's inability to satisfy all regulatory requirements. Before such extraordinary relief is authorized, however, an applicant must show that it is justified under the appropriate NRC standards.

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G. Merely listing the parties' filings and noting the extensive briefing of a matter is not a substitute for the reasoned decisionmaking contemplated by the Administrative Procedure Act, 5 U.S.C. § 557(c). See *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

H. Both 10 C.F.R. §§ 50.12(a) and 50.47(c)(1) presuppose identification of the particular respects in which an applicant is unable to comply with the regulatory requirements from which it seeks an exemption.

ALAB-810 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL; OPERATING LICENSE, June 19, 1985; MEMORANDUM AND ORDER

A. The Appeal Board denies intervenors' motion for a stay of the effectiveness of the Licensing Board's partial initial decision in this operating license proceeding authorizing the issuance of a low power license for the Shoreham facility. The Appeal Board, however, continues a previously granted emergency stay for a brief additional period to afford intervenors the opportunity to seek relief from the Commission.

B. 10 C.F.R. § 2.788(c) requires that claims of entitlement to a stay be assessed in the context of four criteria: "(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) Whether the party will be irreparably injured unless a stay is granted; (3) Whether the granting of a stay would harm other parties; and (4) Where the public interest lies."

C. It is not within the province of the Appeal Board to pass judgment, for stay purposes or otherwise, upon the correctness of Commission rulings.

D. The potential mootness of an appeal does not per se constitute irreparable injury; it also must be established that the activity that will take place in the absence of a stay will bring about concrete harm. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-794, 20 NRC 1630, 1635 (1984).

E. If the movant for a stay fails to meet its burden on the first two section 2.788(c) factors, it is unnecessary to dwell long on whether a stay would cause serious injury to the applicant or to delve deeply into public interest considerations. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-794, 20 NRC 1630, 1635 (1984).

F. The function of the Appeal Board in passing upon stay motions is to determine, on an application of the four section 2.788(c) factors, whether the movant has established an entitlement to the sought relief.

ALAB-811 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE, June 27, 1985; DECISION

A. The Appeal Board finds in this reopened operating license proceeding that the Licensee's Unit 2 verification program is sufficient to establish that the design of Diablo Canyon, Unit 2, meets its licensing criteria and provides adequate confidence that the Unit 2 safety-related structures, systems and components are designed to perform satisfactorily in service. The Appeal Board therefore concludes that there is reasonable assurance that Unit 2 can be operated without endangering the health and safety of the public and the license authorization granted to the Director of NRR by the Licensing Board's initial decision remains effective.

B. Predictive findings are a legitimate component of the Commission's licensing process. That process contemplates that operating license proceedings generally will be completed before construction of the facility is finished in order to avoid unnecessary and costly delays in plant operation. See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981). See also *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-653, 16 NRC 55, 79 (1981), reprinted (with protected security plan information deleted) as an attachment to CLI-82-19, 16 NRC 53 (1982); *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-781, 20 NRC 819, 834-35 (1984).

C. Supervision of a party's compliance with a commitment is left to the staff. If one party is dissatisfied with the way another party has fulfilled a commitment the matter may, in appropriate circumstances, be brought back to the licensing board. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-781, 20 NRC 819, 835 n.58 (1984).

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

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

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

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

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- F A progression in seismological review techniques may constitute "current information which has been developed since issuance of the construction permit," within the meaning of 10 C.F.R. § 50.34(b)(1), thus calling for a reevaluation at the operating license stage of review without need to resort to the backfit standards of 10 C.F.R. § 50.109.
- G Where an operating license and a show cause proceeding are being carried on simultaneously and are consolidated, and where the proceedings would utilize different procedural rules, the rules governing the operating license proceeding would apply in consolidated hearings on joint issues.
- H Use of site-specific response spectra to define the vibratory ground motion at a site of the safe shutdown earthquake is consistent with 10 C.F.R. Part 100, Appendix A, §§ IV(a), V(a)(1) and VI(a).
- I The terms "important to safety" and "safety-related," when applied to seismic design requirements, are used interchangeably in 10 C.F.R. Part 100, Appendix A.
- J An inadequacy in seismological data may warrant requiring, pursuant to 10 C.F.R. Part 100, Appendix A, § V(a)(1)(iv), that the controlling earthquake be larger than the maximum earthquake that has occurred historically within the tectonic province.
- K The following technical issues are discussed: Dewatering; Differential settlement of structures; Ground acceleration value resulting from safe shutdown earthquake; Quality assurance; Safe shutdown earthquake (intensity, resulting vibratory ground motion); Seismic design criteria; Seismic shutdown; Site-specific response spectra (SSRS); Soil compaction; Soil density; Soil liquefaction; Structural design — cantilever designs; Structural design — evaluation of cracks; Tectonic provinces; Underground piping — corrosion; Underpinning of safety structures.
- LBP-85-3 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE; January 23, 1985; MEMORANDUM AND ORDER
- A Licensing Board rules on petitions for reconsideration and clarification of its Memorandum and Order ruling on the admissibility of contentions (LBP-84-42, 20 NRC 1296). In response to Staff's motion, Licensing Board rules that Kerr-McGee's contention (which seeks a determination that its plan for permanently disposing of mill tailings at its West Chicago is acceptable) is an acceptable contention, that Staff's obligation to supplement the record on NEPA issues springs from the People's contention rather than Kerr-McGee's, that Staff must circulate a supplemental impact statement to accomplish this supplementation, and that the Board will not refer its ruling admitting Kerr-McGee's contention to an appeal board for interlocutory review. The Board denies the People's motion for reconsideration of its ruling removing references to Part 61 from one of their subcontentions on the ground that Part 61 is inapplicable and grants their motion for reconsideration of the denial of another subcontention which seeks to require Staff to respond to certain comments on the DES.
- B Under the Administrative Procedure Act, the Atomic Energy Act, and the Commission's Rules of Practice, an application cannot be denied without stating reasons for the denial. These reasons must indicate why the application does not comply with the statute and regulations under which it is filed. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 87 L. Ed. 626, 636 (1943); *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2)*, ALAB-770, 19 NRC 1163 (1984); 5 U.S.C. § 555(e), 10 C.F.R. § 2.103(b).
- C Where an FES disregards broad areas of environmental impact or fails to apprise the public of the nature of the proposed action and its expected consequences, recirculation of the statement is necessary.
- D Admission of a contention which will require further Staff review does not result in unusual delay which justifies referral for interlocutory review. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 464 (1982), rev'd on other grounds, CL1-83-19, 17 NRC 1041 (1983).
- LBP-85-4 GENERAL ELECTRIC COMPANY (GETR Vallecitos), Docket No. 50-70-OLR (ASLBP No. 83-481-01-OLR); OPERATING LICENSE RENEWAL; February 13, 1985; MEMORANDUM AND ORDER
- A Having earlier concluded that petitioner has standing to participate in this proceeding, the licensing board reviews his contentions and concludes that five should be admitted despite

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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H A failure to adhere to the reporting requirements of 10 C.F.R. § 50.55(e) does not per se reflect an operating license applicant's lack of managerial character or competence, particularly where the NRC Staff believes that the reporting requirements have been satisfied. But a party is nevertheless free to attempt to demonstrate that any particular failure to report was motivated by deficiencies in character or competence.

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

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

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

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

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

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

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

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

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

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

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

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- C The circumstance that a particular contention no longer being pursued has already been admitted to a proceeding is not in itself sufficient to satisfy the standard for sua sponte review, nor is the incompleteness of Staff review of the issue.
- D A licensing board may take into account the pendency and likely efficacy of NRC Staff nonadjudicatory review in determining whether or not to invoke its sua sponte review authority.
- E Emergency Planning Zones must currently extend "about 10 miles" in radius from a plant; 10 C.F.R. §§ 50.47(b)(10), (c)(2), and 10 C.F.R. Part 50, Appendix E, § I, n.1.
- F The fact that evacuation of particular individuals would require them to begin their journey by heading toward a plant will not necessarily be fatal to the effectiveness of an emergency plan. The effectiveness of any plan will depend upon the particular circumstances in question.
- LBP-85-9 HOUSTON LIGHTING & POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; March 29, 1985; MEMORANDUM AND ORDER
- A The Licensing Board denies an intervenor's late-filed contention on soil stability but, as part of its consideration of the lead Applicant's competence, directs a hearing on certain soils questions.
- B Late-filed contentions may be admitted only after balancing all five of the factors set forth in 10 C.F.R. § 2.714(a)(1). Factors (ii) and (iv), concerning representation of a party's interest in a contention by other means or parties, are entitled to relatively less weight than the others.
- C Factor (ii), involving other means for a party to protect its interest, is limited to the availability of other fora in which the party itself might protect its interest and is not satisfied through nonadjudicatory resolution of issues by license applicants or the NRC Staff (whose programs do not focus on the interests of particular parties). Nor is factor (iv), involving representation by other parties, satisfied through participation by applicants or the NRC Staff.
- D The most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding, is the extent to which the intervenor may reasonably be expected to assist in developing a sound record.
- LBP-85-10 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-SP (Restart); SPECIAL PROCEEDING; April 11, 1985; LICENSING BOARD RESPONSE TO CLI-85-2
- A In response to the Commission's directions as set forth in CLI-85-2 of February 25, 1985, 21 NRC 282, the Licensing Board reports its conclusions that the Licensee has made an appropriate response in its training program to the cheating episodes, and that it has carried its ultimate burden of proof in the remanded proceeding, but that the Board is considering finding deficiencies in the training program that may require correction.
- LBP-85-11 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456, 50-457; OPERATING LICENSE; April 17, 1985; SPECIAL PRE-HEARING CONFERENCE ORDER
- A In this Order the Board rules on three contentions and sets out the prehearing schedule. The first two contentions were timely filed earlier in the proceeding. One concerns the possible impact of a railroad accident near the Braidwood facility involving trains transporting explosive material to the Joliet Arsenal. The contention is admitted despite previous consideration of the issue at the uncontested construction permit hearing. The Board denies the second contention, which asserted that the population center calculation must include aggregated areas of recreational facilities. The Board also denies the admission of a late filed quality assurance contention, but because of the significance of the issue directs Intervenor to submit an amended petition specifying in greater detail the contention and the underlying factual support for their allegations.
- B Intervenor may initially submit a reasoned explanation for raising a contention, thereafter buttressing the contention with increased factual data. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 182 (1981).
- C When an issue presented in a contention was addressed at the construction permit stage, the Licensing Board must consider whether collateral estoppel applies.

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- D When collateral estoppel is applied to bar litigation of the same issue in a subsequent proceeding, newly discovered facts or changed circumstances or a special public interest may cause the issue in question to be relitigated. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CL1-74-12, 7 AEC 203 (1974).
- E Collateral estoppel applies to administrative proceedings. United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 537 (1977), and to NRC proceedings. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 211-16 (1974), rev'd on other grounds, CL1-74-12, 7 AEC 203 (1974).
- F Collateral estoppel requires proper jurisdiction, a prior valid final judgment on the merits, actual litigation of the issue, and the party against whom the doctrine is asserted must have been a party or in privity with a party to earlier litigation.
- G Under an "LWA-1" request (10 C.F.R. § 50.10(e)(1) and (2)), a site suitability evaluation determines whether the site is suitable for reactors of the general type and size proposed. Analysis of an issue for general site suitability purposes may be so disparate from that undertaken in an operating license proceeding that collateral estoppel may be inapplicable where the issue at hand in the later operating license proceeding involves the specific design of the nuclear plant.
- H When an earlier construction permit proceeding is uncontested, the requirement of identity of parties cannot be met by the party asserting collateral estoppel, because where there had been no adverse party in the prior proceeding, there can be no identity of parties.
- I Foreclosure of an issue by collateral estoppel is weakened when the specific issue in the earlier proceeding is uncontested, although a related issue was contested. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 nn 8 & 9 (1982). A totally uncontested construction permit proceeding is not the equivalent of prior actual litigation of the issue required for collateral estoppel.
- J To satisfy 10 C.F.R. § 100.11(a)(3), distance to the population center from the reactor must be at least one and one-third times the distance from the reactor to the outer boundary of the low population zone (LPZ).
- K An aggregate population of several recreational facilities is not a population center where the separate areas are located in different directions from the nuclear plant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42-53 (1977).
- L The Board is free to reject aggregation of the population in different directions to form the population center of 25,000 or more persons, particularly when no change would be effected in the LPZ, even assuming such aggregation was proper. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42-53 (1977).
- M The Licensing Board must balance the five factors of 10 C.F.R. § 2.714(a)(1) when determining whether an untimely contention may be admitted. The good cause factor necessitates that Intervenor demonstrate a convincing and reasonable explanation for the tardiness of their petition. See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).
- N When Intervenor indicates an ongoing awareness of facts which could have been employed in support of the contention, and the petition is extremely late, the good cause factor is not met.
- O The 2nd and 4th factors are generally accorded less emphasis than other factors of § 2.714(a)(1). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).
- P A Licensing Board may take into account representation provided by Intervenor's counsel in a previous NRC licensing proceeding when determining whether the Intervenor will contribute to the record, at least where the issue being raised in both proceedings is similar and involves allegations against the same Applicant.
- Q Admission of any new contention may broaden the issues and thereby delay the completion of a proceeding simply by virtue of there being more issues on which evidence must be presented. Tardiness in filing a contention does not per se broaden the proceeding. If the late filed contention would have been admissible if timely filed, there is no net increase in the number of issues to be tried.

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- R There is strong reason to reject a contention when it is filed late without good cause close to the hearing date such that admission of the contention would deprive the other parties of the opportunity to obtain necessary information about the contention. See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).
- S Delay caused by broadening the issues due to admission of a new contention is mitigated by a Licensing Board's requirement that intervenors resubmit a detailed petition (including the underlying data supporting the contention) so the adjudication will encompass only a carefully focused, well-reasoned contention which raises significant issues.
- T The Board may include in its analysis of 10 C.F.R. § 2.714(a)(1)(v) the fact that other contentions originally scheduled for litigation were withdrawn by intervenors.
- U Enlargement of the proceeding may be offset by limiting the proceeding to only those issues which are necessary for a determination of whether to authorize a low power operating license.
- V If the issues underlying the contention are viewed as serious and significant (e.g., QA/QC questions), the Board may balance the contention's potential significance with the possibility of minor delay and some net broadening of issues in the proceeding.
- W It is particularly crucial to set forth with specificity the bases of a broad QA/QC contention.
- X An NRC Licensing Board may permit intervenors to depose an NRC Staff official if other means are unavailable to enable intervenors to more specifically explain the related portion of intervenors' contention based on testimony by that NRC Staff official.
- Y A Licensing Board may reject a late contention in its original form for lack of specificity and basis, but provide intervenors with an opportunity to resubmit an amended contention. The Board may require specification with exactitude including each alleged quality assurance deficiency, data on which each deficiency is premised and the overall unacceptable patterns formed when individual incidents are aggregated.
- LBP-85-12 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; April 17, 1985; PARTIAL INITIAL DECISION ON EMERGENCY PLANNING
- A In this Partial Initial Decision the Licensing Board considers whether a utility-sponsored offsite emergency plan meets the requirement of 10 C.F.R. § 50.47(a)(1) that there be reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The utility plan does not rely on participation of the State or local government. Although the Board makes findings of fact on each contention litigated, the Board does not reach an ultimate conclusion on the adequacy of the utility plan because the record has been reopened to take evidence concerning the identification of the relocation center. When this matter is resolved the Board will decide whether the utility plan provides the requisite assurance.
- B New York State and Suffolk County statutes prohibiting Applicant from performing activities necessary to implement emergency plans are not preempted by federal laws where the State and local laws exist for purposes of exercising the State's traditional police powers, such as regulation of traffic. The Board does not agree with Applicant that recent NRC Authorization Acts allowing the NRC to consider a utility-sponsored emergency plan in the absence of State or local government planning provide a basis for finding preemption.
- C The following technical issues are discussed: Evacuation shadow phenomenon; Emergency planning zone boundary; Notification and information to public; Sheltering; Selective evacuation and selective sheltering; Wind shifts; Nomogram; Evacuation time estimates; Road obstacles and cars without fuel; Weather; Buses for the public; Protection for schoolchildren; Ingestion pathway; Recovery and reentry; Loss of offsite power.
- D The following issues concerning implementation of emergency plan by utility employees are discussed: Utility employees' role conflict; Conflict of interest for utility employees; Credibility of utility; Notification and mobilization of utility employees; Communications with utility employees; Training of utility employees; Strike by utility employees; Utility's legal authority to implement plan.

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LBP-85-13 GENERAL ELECTRIC COMPANY (GETR Vallecitos), Docket No. 50-70-OLR (ASLBP No. 85-407-01-LR); OPERATING LICENSE RENEWAL; April 23, 1985; MEMORANDUM AND ORDER

LBP-85-14 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; May 2, 1985; THIRD PARTIAL INITIAL DECISION ON OFFSITE EMERGENCY PLANNING

- A In this Third Partial Initial Decision, the Licensing Board concludes its consideration of seventeen offsite emergency planning issues, concluding as to those issues that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

LBP-85-15 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (ASLBP No. 79-429-09-SP) (Restart Remand on Management-Training); SPECIAL PROCEEDING; May 3, 1985; PARTIAL INITIAL DECISION ON THE REMANDED ISSUE OF LICENSED-OPERATOR TRAINING AT TMI-1

- A In response to ALAB-772 (19 NRC 1193 (1984)) remanding the issue of the adequacy of training for licensed operators at Three Mile Island Unit 1, the Licensing Board finds that the training program is fundamentally adequate, but that a licensing condition must be imposed to assure needed improvements.

- B The Licensing Board concludes that the Licensee has responded appropriately to the cheating incidents identified in the Partial Initial Decision of July 27, 1982 (LBP-82-56, 16 NRC 281) by acknowledging responsibility for the cheating; improving channels of communication among management, operators and training employees; by establishing adequate security measures to prevent cheating on examinations, and by improving the TMI-1 licensed-operator training program.

- C Licensing Board finds that a licensed-operator training program must have a method of assessing the performance of trained operators in the job setting for revisions to or for validating the training program.

- D Although the Commission's Policy Statement on Training and Qualification of Nuclear Power Plant Operators (50 Fed. Reg. 11,147 (Mar. 20, 1985)) endorses accreditation by the Institute of Nuclear Power Operations (INPO) of operator training programs as an acceptable method of demonstrating an adequate training program; and although the TMI-1 licensed-operator training program has been accredited by INPO, the Licensing Board declined to give prima facie effect to the accreditation because: (1) other parties had no opportunity to challenge the accreditation and (2) even if prima facie effect had been afforded the accreditation, other evidence of record indicates that INPO failed to follow its own criteria and the accreditation was therefore inaccurate.

LBP-85-16 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL); OPERATING LICENSE; May 24, 1985; MEMORANDUM AND ORDER

- A The Licensing Board requires Applicants to file a statement of Current Management Views as to the status of the plant, including an assessment of the adequacy of the record Applicants have created in this case. Applicants also are required to file a Case Management Plan that sets forth the issues in the case, their alleged disposition, whether they are moot, and a suggested order of litigation. In addition, the Board schedules a prehearing conference to resolve outstanding discovery requests.

- B Under circumstances where Staff documents have raised a variety of questions about plant design and construction, the Board may order Applicants to set forth their current view of the adequacy of management, including the adequacy of individual officials continuing to serve in management.

- C Applicants may be required to file a comprehensive plan for the management of the case, covering each of the issues, including how they have been or may be disposed of.

LBP-85-17 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL); OPERATING LICENSE; May 30, 1985; MEMORANDUM

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LBP-85-18 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL, OPERATING LICENSE, June 14, 1985, PARTIAL INITIAL DECISION ON EMERGENCY DIESEL GENERATORS

- A The Licensing Board finds, with respect to the issues in controversy, that the three Emergency Diesel Generators (EDGs) manufactured by Transamerica Delaval, Inc. (TDI) for use at the Shoreham nuclear plant are acceptable, for the first fuel cycle, to supply emergency electrical power as required by General Design Criterion 17. The issues in controversy involved the cylinder block, crankshaft, and LILCO's proposed "qualified load" of 3300 kW.
- B The Board recommends that the Commission direct the commencement of an investigation of whether TDI has violated its legal obligations to report potential defects in its diesel generators pursuant to § 206 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5846, and 10 C.F.R. Part 21 of the Commission's regulations.
- C This decision authorizes the issuance of a full power operating license for the first fuel cycle insofar as the emergency diesel generator issues are concerned. However, there are still off-site emergency planning issues pending before another Licensing Board. Accordingly, this decision, effective immediately, authorizes the NRC Staff to issue only a low power (up to five percent of rated power) operating license, providing the Staff has made findings supporting such a license on all issues not in controversy.

LBP-85-19 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL), OPERATING LICENSE, June 18, 1985, MEMORANDUM AND ORDER

- A The Licensing Board denies a motion by the Intervenor to reopen the record of Phase I of the proceeding but permits certain questions raised by the motion to be considered under the aegis of a contention previously accepted for litigation in Phase II of the proceeding. The Board determines that the material supporting the motion (other than that accepted for litigation) does not include information which might change the result previously reached by the Board on the issues in question.
- B Before an appeal from a PID is filed, the Licensing Board has jurisdiction to consider a motion to reopen the record on which the PID is based. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983).
- C When an appeal from a PID has been filed, a motion to reopen the record is within the jurisdiction of the Appeal Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324 (1982).
- D When an appeal from a PID has resulted in the Appeal Board's ruling on certain legal and procedural questions but declining to rule on other factual findings and conclusions because they are subject to supplementation or change as a result of further consideration during other phases of the proceeding, the Licensing Board has jurisdiction to entertain a motion to reopen the record on issues in the PID not yet addressed by the Appeal Board.
- E A Licensing Board has jurisdiction to consider a motion to reopen the record on issues discussed in a PID where a reasonable nexus is shown between the material upon which the motion is based and the issues remaining to be litigated by the Board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841-42 (1984).
- F When an Appeal Board decision on certain aspects of a PID does not forbid the Licensing Board from relitigating, in appropriate circumstances, issues already addressed in the earlier PID but not ruled upon by the Appeal Board, and the Licensing Board is familiar enough with the earlier record to evaluate the newly submitted documents which a motion to reopen the record seeks to add as evidence, a Licensing Board has jurisdiction to consider the motion on the merits.
- G The ABA Code of Professional Responsibility has been applied to attorneys appearing before administrative agencies generally, and the NRC specifically. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 916 & n.26 (1982).
- H In evaluating an attorney's conduct, the Licensing Board may consider the American Bar Association's Model Rules of Professional Responsibility (adopted by the ABA on August 2, 1983) and also the earlier Code of Professional Responsibility, if the jurisdiction where the attorney is admitted has not ratified the adoption of the ABA Rules.

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- I Without sufficient documentation, a Board should not conclude that an attorney's testimony (if he is called to testify by the opposing side as a factual witness) would prejudice his clients.
- J A party may overcome the request for disqualification of its attorney under Code DR 5-102(A) or ABA Model Rule 3.7(a) if substantial hardship would be created for the client if the attorney were precluded from continuing in his or her role as counsel.
- K An attorney consistently involved in the licensing proceedings to obtain a construction permit and/or operating license for a nuclear power plant may become so precious to his client that the forced unavailability of his services would cause substantial hardship to his client.
- L Once the possible prejudice which may accrue from continued representation by an attorney is highlighted to the client, the client is free to make the determination to continue with the same counsel.
- M The legal standards for reopening the record require (1) the motion must be timely filed; (2) the motion must address a significant safety or environmental issue; and (3) if a decision has already been reached on the question for which reopening the record is sought, the motion must demonstrate that the information sought to be added to the record might alter the results previously reached. This latter criterion is the most important of the three.
- N The criteria for reopening a record must be applied separately for each issue for which reopening is sought, regardless of the circumstance that one or more issues may remain to be heard or decided. See *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2)*, ALAB-486, 8 NRC 9, 22 (1978).
- O Timeliness in filing a motion to reopen the record is important, but may be subsumed by the significance of the information in question.
- P A motion to reopen the record is not timely if it is submitted 6 months after the proponent became aware of all the information comprehended by the motion. A claim by the proponent of the motion that the 6-month delay resulted from numerous filing deadlines in the same proceeding is inadequate to excuse the untimeliness.
- Q A significant factor in evaluating the timeliness of a motion to reopen the record is the proponent's opportunity to gain access to the information on which the motion is based. *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-83-82, 18 NRC 256, 258 (1983); see also *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-775, 19 NRC 1361, 1369 (1984).
- R Where a motion to reopen a record is untimely filed, but where a portion of the material supporting the motion is accepted for litigation under another issue, discovery on the accepted material may nevertheless be denied as untimely.
- LBP-85-20 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456, 50-457; OPERATING LICENSE, June 21, 1985; MEMORANDUM AND ORDER ADMITTING ROREM ET AL AMENDED QUALITY ASSURANCE CONTENTION
- A The Licensing Board admits a late-filed quality assurance contention which was originally rejected in a Special Prehearing Conference Order "SPCO" (LBP-85-11, 21 NRC 609, 627-38 (1985)) because it lacked bases and specificity. In the SPCO, the Board ruled that if intervenors filed a new QA contention, it must meet specific pleading requirements and must raise potentially significant QA issues. The Board finds that the amended contention substantially complies with the directives of the SPCO, and that with the exception of allegations related to harassment, intimidation and retaliatory action against Braidwood site employees, the contention is acceptable as an issue in controversy. However, with regard to the portion of the contention alleging harassment by supervisors of site QC inspectors employed by the electrical contractor, the Board defers its ruling pending intervenors' submission of an elaborated pleading setting forth the specific examples of harassment and retaliation, including those witnesses intervenors will present, and the subject of each witness's testimony to support each alleged incident which intervenors claim constitutes the harassment.
- B It is within a Licensing Board's discretion to permit the amendment of a petition to intervene at any time. A Licensing Board may, in its discretion, provide intervenors with an opportunity to file an amended contention after rejecting the contention as it was originally filed.

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provided the amended contention is acceptable under a balancing of the factors governing late filings as well as the bases and specificity requirements applicable to all contentions. 10 C.F.R. § 2.714(a)(3); see also 10 C.F.R. § 2.714(b).

- C Action by a Licensing Board rejecting a contention, but allowing an intervenor to file an amended contention, is not tantamount to admitting the contention conditionally. See *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 466-67 (1982).
- D When an intervenor has been given the opportunity to refile an amended late contention, the Licensing Board does not have to draw the final balance of 10 C.F.R. § 2.714(a)(1)(i-v) factors until the amended contention is filed.
- E A Licensing Board may set out, in advance, more stringent standards for an intervenor to meet if circumstances such as lateness and the broad subject matter of the contention require a more precisely pleaded contention. Because of the inherently broad nature of most QA contentions, the basis and specificity requirements must be rigorously applied. See *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, LBP-83-39, 18 NRC 67, 89 (1983).
- F A contention which identifies and summarizes the incidents relied upon, and appends specific portions of documents in support of intervenor's position, does not contravene the *Browns Ferry* ruling that a contention may not incorporate massive documents by reference in an effort to support a basis for the alleged proposition. *Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2)*, LBP-76-10, 3 NRC 209, 216 (1976).
- G The *Callaway* case (noting that a nuclear plant is bound to contain isolated instances of imperfect workmanship due to imperfect QA supervision) is not to be used as a shield by applicants who wish to protect against litigating the merits of QA/QC allegations, particularly where the contention is pleaded with specificity and bases. *Union Electric Co. (Callaway Plant, Unit 1)*, ALAB-740, 18 NRC 343, 346 (1983).
- H An intervenor is required to plead its contention with specificity in order that issues which will be subject to subsequent discovery and proof in an evidentiary hearing will be clearly framed for the other parties. *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2)*, LBP-80-30, 12 NRC 683, 687 (1980). When the parties are provided sufficient notice so as to have general knowledge of what they must defend against or oppose, a Licensing Board may rule that the contention meets the specificity standard. See *Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, ALAB-216, 8 AEC 13, 20-21 (1974).
- I A harassment/intimidation contention containing bare allegations that site employees have contacted intervenors, in confidence, to express concerns regarding quality deficiencies, retaliatory action and inaction by applicant in addressing those complaints, fails for not informing the Board or parties of the specific issues intervenor seeks to litigate.
- J Even if the Licensing Board has suggested in an earlier order that it would be helpful to the Board in evaluating a contention to know the identity of intervenor's expected witnesses and the subject of their testimony, it is not an absolute requirement for intervenors to identify their witnesses prior to admission of a late contention. If an intervenor does not identify its witnesses, it will not necessarily preclude a Licensing Board from finding for an intervenor on the contribution to the record factor of 10 C.F.R. § 2.714(a)(1).
- K A party can attempt to make its case solely through cross-examination. *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1096 n.30 (1983); *Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B)*, ALAB-463, 7 NRC 341, 356 (1978); *Wisconsin Electric Power Co. (Point Beach Nuclear Plant)*, ALAB-137, 6 AEC 491, 504-05 (1973); accord, *Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, ALAB-226, 8 AEC 381, 389 (1974).
- L When an intervenor has participated beneficially in another proceeding where the litigation focused on issues closely aligned to those currently proposed for adjudication, and the applicant in both cases is the same, the Licensing Board is entitled to infer that intervenors will contribute to the record. 10 C.F.R. § 2.714(a)(1)(ii).
- M A Licensing Board may require an intervenor to name its witnesses by a specific date, if not doing so would impede the discovery process and the filing of summary disposition motions.
- N The significance of a proposed issue may counterbalance the potential delay which litigation of the issue may cause in the proceeding. 10 C.F.R. § 2.714(a)(1)(v).

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- O Applicant will not avoid its share of responsibility for delay under 10 C.F.R. § 2.714 (a)(1)(v), by claiming that a late-filed contention which concerns applicant's corrective action programs will delay the proceedings, where the delay stems from the corrective actions employed by Applicant to remedy past problems, and not from the lateness of the contention.
- LBP-85-21 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (ASLBP No. 79-429-09-SP) (Restart Remand on Management-Training); SPECIAL PROCEEDING, June 24, 1985, MEMORANDUM AND ORDER APPROVING PLAN FOR REVISING LICENSED-OPERATOR TRAINING PROGRAM
- A In this Memorandum and Order the Licensing Board approves Licensee's plan for the evaluation of the effectiveness of its training program, as required by the Board in its Partial Initial Decision of May 3, 1985 (LBP-85-15, 21 NRC 1409).

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

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

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

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

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

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

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

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

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

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

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

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authority and organizational freedom to supervise quality assurance by becoming heavily indebted to its contractors and other creditors.

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

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

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

DD-85-5 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293; REQUEST FOR SHOW CAUSE ORDER; April 5, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies the petition of Mr. John F. Doherty asserting that there were a number of alleged deficiencies at the Pilgrim Station of the Boston Edison Company associated with equipment qualification that represented a hazard to continued safe operation of the facility. Petitioner sought issuance to the Licensee of an order to show cause why the license for the Pilgrim facility should not be revoked or suspended due to the alleged deficiencies.

B 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.

DD-85-6 MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Plant), Docket No. 50-309; REQUEST FOR ACTION; May 13, 1985; FINAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Inspection and Enforcement denies the remaining portion of a Petition under 10 C.F.R. § 2.206 which requested that the Nuclear Regulatory Commission take action to remedy alleged serious deficiencies in the offsite emergency response plans for the Maine Yankee Atomic Power Station. On September 30, 1983, an "Interim Director's Decision Under 10 C.F.R. § 2.206," DD-83-15, 18 NRC 738, was issued examining a number of issues raised by the Petition and granting in part and denying in part Petitioner's request with respect to those issues. However, Petitioner's concern regarding the adequacy of State Route 27 was noted to be still under consideration. The remaining issue was referred to the Federal Emergency Management Agency (FEMA) for evaluation. Based on FEMA's evaluation that State and local radiological emergency plans and preparedness are not adversely affected by the alleged limitations for evacuation purposes of State Route 27, the Director denies the remainder of the Petition.

B Evacuation planning, including the use of State Route 27 as an evacuation route for peak summer populations, is adequate for the Maine Yankee facility.

DD-85-7 UNION ELECTRIC COMPANY (Callaway Plant, Unit 1), Docket No. 50-483; REQUEST FOR LICENSE SUSPENSION; May 17, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition submitted by Michele Varricchio and Billie Garde of the Government Accountability Project on behalf of the Concerned Citizens About Callaway and others. The petition had identified forty-eight allegations related to the adequacy of construction of the Callaway Plant and requested that in view of the allegations, the Callaway low-power license be suspended until the allegations were investigated and appropriate reinspection performed to determine the extent of the problem raised by each allegation.

B A reactor operating license will only be issued by the Commission if it can be found there is reasonable assurance that power operation presents no undue risk to public health and safety.

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- C When assessing the significance of allegations, the NRC makes an initial determination whether an allegation, if true, is relevant to safe operation of the facility. Allegations deemed not relevant to safe operation of the facility and allegations determined to be frivolous, or too vague or general in nature to provide sufficient information to investigate, receive no further consideration. Allegations raising a safety concern are pursued further.
- D Petitions filed under 10 C.F.R. § 2.206 provide members of the public with a means of bringing safety problems concerning nuclear facilities to the Commission's attention. Section 2.206 petitions are not information-gathering devices for members of the public.
- DD-85-8 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353, REQUEST FOR ACTION, May 17, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206.
- A The Director of the Office of Nuclear Reactor Regulation denies the Petition pursuant to 10 C.F.R. § 2.206 of Del-Aware Unlimited, Inc. (Petitioner) requesting that the Commission staff require the Philadelphia Electric Company (Licensee) to provide to the Commission a full disclosure of its intended sources of interim supplemental cooling water for the Limerick Generating Station and the environmental consequences associated with their use. Interim supplemental cooling water may be required due to delays in construction of the Point Pleasant Diversion (PPD) Project which has been approved to provide supplemental cooling water for the Limerick facility. Petitioner also contends that an interim supplemental cooling water service proposed by the Licensee to the Delaware River Basin Commission (DRBC) constitutes a long-term or permanent solution superior to the currently planned PPD Project. The Director denied the Petition, noting that to the extent the Licensee wishes to operate the facility in a mode different from that presently represented in the license application, it must examine that proposed change in accordance with the environmental conditions of its license. The Director further notes that the Petition fails to provide information which suggests that the Licensee would be either unwilling or incapable of adhering to its license conditions in this regard.
- B Should the Licensee wish to utilize a source of supplemental cooling water other than that approved by the NRC, even though interim in nature, the Licensee would have to comply with its environmental license conditions prior to such use.
- DD-85-9 DUKE POWER COMPANY, et al (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413, 50-414, REQUEST FOR ENFORCEMENT ACTION, June 4, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206.
- A The Director of Inspection and Enforcement grants in part and denies in part requests filed by the Palmetto Alliance and the Government Accountability Project for enforcement action against the Duke Power Company on the basis of violations of NRC regulations and alleged harassment and intimidation of quality control inspectors.
- B Where factual matters are common to a licensing proceeding and to a petition under 10 C.F.R. § 2.206, the Staff will consider the facts raised in the § 2.206 petition only to the extent that the facts bear on whether the Staff should exercise its independent responsibility for enforcement of NRC requirements.
- C Under the NRC's employee protection regulations, including 10 C.F.R. § 50.7, adherence to procedures and reporting of safety concerns to management can constitute "protected activities." Contact with representatives of the Commission is not necessary to establish a violation.
- D The finding of a violation of the Commission's employee protection rules is not dependent on an initial finding by the Department of Labor that the employer has discriminated against the employee in violation of § 210 of the Energy Reorganization Act.
- E A conclusion of no violation by the Board in a licensing proceeding does not bar the Staff from finding a violation and taking enforcement action where the Board's conclusion was not necessary to its decision and the Board was not empowered to take enforcement action for violations of NRC requirements.
- F Whether a harassment incident constitutes a violation of the requirement of Criterion I of Appendix B to maintain sufficient authority and organizational freedom for quality assurance personnel depends on such factors as the nature of the incident, the persons involved in the incident, and the actions of management and supervisory personnel in response to the incident.

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- G Sanctions for violations of NRC requirements are not automatic, but their choice rests with the sound discretion of the Commission based on consideration of such factors as the significance of the underlying violations and the effectiveness of the sanction in securing lasting corrective action.
- H The legislative history of § 210 of the Energy Reorganization Act provides no support for the Licensees' suggestion that the Commission lacks authority to impose civil penalties for violations of NRC regulations related to employee protection against discrimination. Civil penalties for such violations, as well as for other violations of NRC requirements, are appropriate if a civil penalty may positively affect the conduct of the licensee or other similarly situated persons and are not grossly disproportionate to the gravity of the offense.
- I The Director will not institute enforcement proceedings in response to a § 2.206 petition where the petition merely seeks to relitigate matters that were properly before the Licensing Board in the licensing proceeding.

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DPRM-85-1 NUCLEAR RADIATION CONSULTANTS, Docket No. PRM-35-5, BYPRODUCT MATERIALS RULEMAKING; February 12, 1985; DENIAL OF PETITION FOR RULEMAKING

- A The Commission denies a petition for rulemaking which requested that the Commission amend its regulations governing the medical uses of byproduct material to permit any health professional with appropriate training and experience to obtain a license to use a specific medical diagnostic device containing the radioactive isotope Gd-153. The petition is denied because only physicians licensed by a State to practice medicine have the competence to diagnose diseases and initiate therapy.

DPRM-85-2 NATURAL RESOURCES DEFENSE COUNCIL, INC., Docket No. PRM-20-7, WASTE DISPOSAL RULEMAKING; March 29, 1985; DENIAL OF PETITION FOR RULEMAKING

- A The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by the Natural Resources Defense Council, Inc. The Petitioners requested that the Commission adopt interim regulations for shallow-land disposal of low-level radioactive waste. The petition is being denied on the grounds that the promulgation of the final rule creating 10 C.F.R. Part 61 (entitled "Licensing Requirements for Land Disposal of Radioactive Waste") provides the means of ensuring consistent and safe practices for near-surface disposal of radioactive waste. Thus, the seven issues raised in the petition were encompassed in the Part 61 requirements.

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