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Vol. 25

Index 2

INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - June 1987



U. S. NUCLEAR REGULATORY COMMISSION

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**INDEXES TO
NUCLEAR REGULATORY
COMMISSION ISSUANCES**

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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-87-1 CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL; OPERATING LICENSE; January 9, 1987; ORDER

A The Commission authorizes issuance of a full-power license by the NRC Staff for the Shearon Harris nuclear facility based on (1) Commission review of contested safety-related contentions resolved in the remaining Licensing Board partial initial decision not administratively finalized through Commission appellate review; and (2) issues not contested before the Licensing Board but raised in intervenors' effectiveness comments, at various public meeting presentations, and in a pending § 2.206 petition, all of which were resolved in favor of facility operation.

B To provide grounds for a delay of the effectiveness of a Licensing Board decision authorizing issuance of a full-power license, an intervenor's concerns regarding a contested issue, such as management competence, must challenge the Board's substantive conclusions regarding the issue. Comments that are no more than speculation about the integrity of a member of the agency's Staff responsible for the oversight of utility management competence are not sufficient.

C The Commission's determination to authorize facility operation, reached as a result of its immediate effectiveness review of contested issues addressed in a Licensing Board partial initial decision that subsequently was affirmed by the Appeal Board, does not foreclose a party from filing a petition for Commission review of the merits of the Appeal Board's decision. See 10 C.F.R. § 2.764(g).

D Issues intervenors seek to raise outside of the formal adjudicatory proceeding that have been resolved either in Licensing Board, Appeal Board, or Commission rulings on contested matters, or through the Staff's analysis of § 2.206 petitions, did not provide a basis for delaying the Commission's authorization to the Director of Nuclear Reactor Regulation to issue a full-power operating license.

CLI-87-2 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; April 9, 1987; MEMORANDUM AND ORDER

A The Commission undertakes sua sponte review of the issue of whether a low-power license may issue before a utility applicant submits a radiological emergency plan for the facility's entire plume exposure pathway emergency planning zone. The Commission determines that low-power operation should not be authorized until the applicant has submitted an emergency plan for the plume exposure emergency planning zone, even though a demonstration of offsite emergency preparedness is not required for low-power operation. The Commission believes that in the special circumstances of this case, it is sound regulatory policy to require the filing of a complete radiological offsite emergency plan prior to issuance of any operating license, including a low-power license, for Seabrook.

B The Commission distinguishes the issues it faced in its review of the Shoreham proceeding where a utility offsite emergency plan had been filed, but where uncertainty existed regarding the merits of the emergency plan. The Commission notes that submittal of a complete offsite plan makes possible a summary review to determine if adequate emergency planning is at least possible for Seabrook.

CLI-87-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; June 11, 1987; MEMORANDUM AND ORDER

A The Commission finds that under existing circumstances there can be no low-power operation at Seabrook beyond fuel loading and precriticality testing unless and until the Applicants file a bona fide

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utility offsite emergency plan for Massachusetts that satisfies the Commission's threshold requirements. The Commission accordingly denies Applicants' request to vacate CLI-87-2 (25 NRC 357 (1987)) as moot and to lift the stay on low-power operations at Seabrook.

- B Commission case law has very clearly defined a utility plan as one that provides measures to be taken by the utility to compensate for the absence of governmental participation in emergency planning. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 625, aff'd, CLI-83-13, 17 NRC 741 (1983); id., CLI-85-13, 24 NRC 22 (1986).
- C Where, as here, the Commission has required submittal of an emergency plan in the absence of state and local governmental cooperation in providing some of the materials that normally are essential to support a full-power license under Commission regulations, an adequate filing would be one intended for actual implementation as a utility emergency plan and intended to be subjected to Staff and FEMA review and litigation on that basis.
- D While "realism" may play a role in the ultimate decision on the acceptability of planning that lacks state participation, it cannot repair the void caused by the failure to submit a utility plan that reflects the utility's compensatory measures and efforts to facilitate the state's participation in the event of an emergency.
- CLI-87-4 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL: OPERATING LICENSE; June 11, 1987; MEMORANDUM AND ORDER
- A The Commission decides that while emergency planning issues remain unresolved it has no legal basis to grant without a hearing a utility request for immediate authorization to increase power for Shoreham from 5% to 25% of rated capacity. In the absence of means to resolve differences over these issues, an immediate authorization is not possible because it would be necessary to resolve new factual issues raised by the request under normal adjudicatory procedures pursuant to 10 C.F.R. § 50.57(c) and 10 C.F.R. Part 2, Subpart G. Because the Licensee appears to desire a more expeditious procedure than would be required, the Commission therefore denies the utility's request for a 25% license without prejudice to Licensing Board consideration of the request if the Licensee so desires.
- CLI-87-5 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; June 11, 1987; MEMORANDUM AND ORDER
- A The Commission evaluates, under the criteria of 10 C.F.R. § 2.734, Intervenor's motion to reopen the Shoreham emergency planning record on three issues. The Commission grants the motion to reopen as to the withdrawal of WALK Radio as the primary emergency broadcast system (EBS) radio station for the emergency plan. However, the reopened issue is remanded to the Licensing Board with instructions to delay the admission of contentions until receipt of the utility's modified emergency plan.
- B The Commission denies Intervenor's request to reopen on the two other issues: (1) the lack of an agreement between the utility and the American Red Cross (ARC) for its participation in emergency response; and (2) the absence of agreements between the ARC and certain shelter owners for the use of shelters in a Shoreham emergency. Because the ARC's charter and policy require it to assist in emergency response whether or not there is an agreement, the Commission concludes that movants have not demonstrated that there would have been a materially different result, or that such a result would have been likely, had the absence of the agreements been considered initially.
- C A motion to reopen a closed evidentiary record will not be granted unless the movant satisfies all of the criteria for reopening under 10 C.F.R. § 2.734.
- CLI-87-6 BRAUNKOHLER TRANSPORT, USA (Import of South African Uranium Ore Concentrate), Docket No. 11003919; (Import of South African Natural Uranium Hexafluoride), Docket No. 11003920; (Import of South African Enriched uranium Hexafluoride), Docket Nos. 11003921, 11003922; ADVANCED NUCLEAR FUELS CORPORATION (Import of South African Enriched Uranium Hexafluoride), Docket No. 11003928; EDLOW INTERNATIONAL COMPANY (Import of South African Uranium Ore Concentrate), Docket No. 11003929; (Import of South African Uranium Hexafluoride), Docket No. 11003930; (Import of South African Enriched Uranium Hexafluoride), Docket No. 11003931; IMPORT LICENSES; June 12, 1987; ORDER
- A The Commission grants a written public hearing, as a matter of discretion, on eight pending South African uranium import license applications. Because the Commission has concluded that it is appropriate

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to order further public proceedings in this matter and admit Petitioners as parties, it need not resolve the issue of whether Petitioners are entitled to a hearing as a matter of right.

- B Citing the inappropriateness under its regulations of the usage of formal procedures for export/import license applications, the Commission denies Petitioners' request that formal adjudicatory procedures be used. The Commission notes that formal procedures are particularly inappropriate in this case because the major issues facing it are legal questions which are traditionally resolved through written pleadings.

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ALAB-857 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; January 2, 1987, 1987; DECISION

A The Appeal Board affirms, subject to certain confirmatory action by the applicant, the Licensing Board's supplement to its third partial initial decision, LBP-86-32, 24 NRC 459 (1986), which concerned the adequacy of the number of bus drivers available to evacuate children in two specified school districts in the event of an emergency at the Limerick facility.

B Any factual information provided to the boards should be in affidavit form.

C "Implementing procedures" that supplement emergency plans with details likely to change, such as telephone numbers, are not required for a "reasonable assurance" finding. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983).

D Whether a solution for an emergency planning deficiency can be characterized as "permanent" or "interim" is not important. What is important from a regulatory and legal standpoint is whether "there is reasonable assurance that adequate protective measures [e.g., evacuation] can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1). See also 10 C.F.R. § 50.47(b)(10).

E To reopen a record, certain criteria must be satisfied. See 51 Fed. Reg. 19,535, 19,539 (1986) (to be codified as 10 C.F.R. § 2.734).

F While an applicant has the ultimate burden of proving reasonable assurance, it is not obliged to prove and reprove essentially unchallenged factual elements of its case.

G Under 10 C.F.R. Part 50, Appendix E, § IV, emergency response plans "shall contain information needed to demonstrate compliance with the standards described in § 50.47(b)."

H 10 C.F.R. § 50.54(g) requires a licensee to "follow and maintain in effect emergency plans which meet the standards in § 50.47(b) of this part and the requirements in Appendix E to this part." Changes to an emergency plan that would decrease its effectiveness are permitted only pursuant to prior NRC approval.

I An applicant's commitment to satisfy, through special provisions, the emergency planning standards in 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E, must be formally included in the pertinent emergency plans.

J Important emergency planning information must be readily available in the plans themselves to decisionmakers. ALAB-845, 24 NRC 220, 248-49 (1986).

K Licensing boards must "confront the facts" and "articulate in reasonable detail the basis" for the course of action chosen; they are not obliged, however, to refer specifically to every proposed finding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLJ-78-1, 7 NRC 1, aff'd, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

L Appeal boards may confine their review to "substantial assertions of Licensing Board error." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 143, review pending, CLJ-86-11, 23 NRC 577, 579 (1986).

ALAB-858 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; January 15, 1987; MEMORANDUM AND ORDER

A In this operating license proceeding, the Appeal Board denies intervenors' motion for an immediate stay of proceedings leading to hearings on the State of New Hampshire's Radiological Emergency Response Plan.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- B Appeal board will only entertain a motion for directed certification of a licensing board scheduling order where the complaining party can show that the schedule deprives it of its right to procedural due process. *Houston Lighting & Power Co. (South Texas Project, Units 1 and 2)*, ALAB-637, 13 NRC 367, 370-71 (1981).
 - C Licensing Board decision to conduct simultaneous proceedings does not necessarily deprive an intervenor of its right to a fair hearing.
 - D The provisions of 10 C.F.R. 2.788 governing requests to stay the effectiveness of a decision or action pending filing of and a decision on an appeal or petition for review are not applicable to requests for interlocutory review of a licensing board scheduling order.
 - E An appeal board's stay authority is not limited to circumstances in which 10 C.F.R. 2.788 comes into play but may be exercised pursuant to the appeal board's general supervisory authority over licensing board proceedings. See generally *Philadelphia Electric Co. (Limerick Generating Station, Unit 1)*, ALAB-835, 23 NRC 267, 270 (1986).
 - F Mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a licensing board scheduling order.
 - G Requests for modification of the hearing schedule should be directed in the first instance to the licensing board. Cf. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-338, 4 NRC 10, 12 (1976).
- ALAB-859 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2). Docket Nos. 50-424-OL, 50-425-OL; OPERATING LICENSE; January 21, 1987; MEMORANDUM AND ORDER
- A The Appeal Board rules, in response to the oral request of the Director of the Office of Nuclear Reactor Regulation, that a license condition imposed by the Licensing Board with regard to a matter over which that Board no longer had jurisdiction was null and void and therefore did not preclude issuance of a low-power operating license.
 - B Under NRC case law, once the Licensing Board issues a decision in which it disposes of a particular issue on the merits and a notice of appeal from that decision is filed, the Licensing Board no longer has jurisdiction to act further with regard to that issue. See *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, ALAB-699, 16 NRC 1324, 1327 (1982). Jurisdiction over that matter rests with the Appeal Board.
 - C A license condition imposed by a licensing board with regard to a matter over which that board has lost jurisdiction is null and void.
 - D The Director of the Office of Nuclear Reactor Regulation may issue a low-power operating license on the basis of a licensing board decision or decisions authorizing the issuance of an operating license. 10 C.F.R. §§ 2.764(b), 2.764(f)(1)(i).
 - E Appeal Boards have long established authority to review sua sponte the entirety of licensing board decisions, even where no appeal has been taken. See *Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants)*, ALAB-689, 16 NRC 887, 890, *aff'd* on other grounds, CLJ-62-57, 16 NRC 1691 (1982).
 - F Appeal board sua sponte review authority can include the imposition of license conditions. See, e.g., *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, ALAB-746, 18 NRC 749 (1983).
 - G The following technical issues are discussed: Polymers; Dose rate effects.
- ALAB-860 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2). Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; February 26, 1987; MEMORANDUM AND ORDER
- A The Appeal Board denies intervenors' motion for interlocutory review of a Licensing Board's scheduling order concerning the adjudication of applicant's petition for a waiver of the Commission's regulation requiring a 10-mile plume Emergency Planning Zone for the Seabrook plant.
 - B Except as provided in the footnote to 10 C.F.R. 2.758, the terms of that section do not alter the Appeal Board's usual appellate authority, including the authority to direct certification of licensing board rulings. 10 C.F.R. 2.785.

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- C 10 C.F.R. 2.758 does not expressly address what role, if any, an appeal board may play while a licensing board has a section 2.758 petition before it for consideration. But 10 C.F.R. 2.785 confers on the Appeal Boards all the authority that the Commission would possess in operating license proceedings.
- D If the Commission desires to preclude or to limit the exercise of the Appeal Board's authority in a particular proceeding, it must — and does — say so expressly. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-685, 16 NRC 449, 451-52 (1982).
- E Section 2.758 reveals no Commission intent to override other elements of the Appeal Board's customary appellate jurisdiction, including its authority to direct the certification of licensing board rulings in proper circumstances. See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986).
- F The Commission's Rules of Practice prohibit interlocutory appeals from Licensing Board scheduling rulings. Thus, a motion seeking the Appeal Board's intervention must satisfy the requirements for directed certification. ALAB-858, 25 NRC 17, 20-21 (1987).
- G In order to obtain discretionary interlocutory review of a Licensing Board's scheduling order, a complaining party must demonstrate that the challenged schedule deprives it of procedural due process. ALAB-858, 25 NRC at 21.
- H Allegations of concerns that are premature do not constitute an immediate infringement of procedural rights and do not warrant an Appeal Board's interlocutory intrusion into the Licensing Board's conduct of a proceeding.
- ALAB-861 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5 (EP Exercise); OPERATING LICENSE; March 2, 1987; MEMORANDUM AND ORDER
- A The Appeal Board denies a request by the Federal Emergency Management Agency (FEMA), a non-party to this operating license proceeding, for interlocutory review of portions of a Licensing Board order admitting for litigation two contentions challenging the adequacy of a completed exercise of the applicant's emergency response plan for the Shoreham facility.
- B It is well-settled that a non-party has the right to take an immediate appeal from an order granting discovery against it. This is attributable to the fact that, with regard to a non-party, such an order has the requisite degree of finality (i.e., is not deemed interlocutory). See Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973).
- C Some non-parties to NRC licensing proceedings — i.e., states and other governmental bodies participating in the proceeding by virtue of 10 C.F.R. 2.715(c) — possess broad appellate rights. FEMA's role, however, in NRC proceedings is sui generis. Whether it is entitled to the same appellate rights as enjoyed by State and local governments invoking section 2.715(c) is thus an open and difficult question.
- D The general policy of the Commission does not favor the singling out of an issue for appellate examination during the continued pendency of the trial proceeding in which that issue came to the fore. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).
- E Directed certification will be granted by an Appeal Board only where the ruling below either: (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).
- F The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy or Commission regulations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982). Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding in a pervasive or unusual way — as to justify interlocutory review of a licensing board decision. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 384 (1983); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 (1983).
- G The single exception to the general proscription against interlocutory appeals is provided by 10 C.F.R. 2.714a. Under that section, a party may appeal from the acceptance or rejection of contention(s) at

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- the threshold if, but only if, such acceptance or rejection controlled the Licensing Board's disposition of the petition for intervention advancing the contention(s). 10 C.F.R. 2.714a.
- H The concept of irreparable injury as developed by the courts contemplates that the injury must be both certain and great, and must be actual and not theoretical. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977).
- I Mere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLJ-84-17, 20 NRC 401, 804 (1984), quoting *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-395, 5 NRC 772, 779 (1977), quoting *Renegotiation Board v. Bannerkraft*, 415 U.S. 1, 24 (1974).
- ALAB-862 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; March 30, 1987; DECISION
- A The Appeal Board affirms a Licensing Board order denying a United States Senator's petition for leave to participate in this operating licensing proceeding as a representative of an "interested state" pursuant to 10 C.F.R. § 2.715(c). The Appeal Board, however, allows the Senator's participation in the proceeding as an amicus curiae.
- B Persons making limited appearances are not parties to the proceeding and have no participational rights in it beyond the offering of a written or oral statement. Further, that statement is not part of the official record of the proceeding.
- C 10 C.F.R. 2.715(c) was promulgated to carry out the congressional directive that, in the furtherance of cooperation between the Commission and the states, an opportunity be provided to the representatives of interested states to participate in the adjudication of license applications. It is reasonable to assume that the legislative contemplation was that the concerned state, and not the NRC, would make the decision respecting who is to serve as its spokesman.
- D In contrast to a representative of a governmental body who desires to participate without party status under the aegis of 10 C.F.R. 2.715(c), a person seeking leave to intervene must (whether a private citizen or a public official) provide the Licensing Board with a list of the contentions he or she wishes to litigate, together with a statement of the basis for them. 10 C.F.R. 2.714(b).
- E The Commission's Rules of Practice explicitly refer only to the seeking of leave to file a brief amicus curiae before an Appeal Board or the Commission. But this consideration does not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda amicus curiae on issues of law or fact that still remain for Licensing Board disposition.
- F There is no real difference between an appellate brief amicus curiae and a brief or other submission presented to a trial tribunal that is confined to a discussion of (1) legal issues that have been presented to that tribunal by the parties; and (2) factual issues covered in evidentiary hearings. The crucial factor is that, regardless of where it files its brief, an amicus curiae necessarily takes the proceeding as it finds it.
- G An amicus curiae does not have the right to appeal adverse decisions.
- ALAB-863 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; April 17, 1987; DECISION
- A The Appeal Board in this operating license proceeding affirms a Licensing Board's finding that arrangements for notifying and mobilizing off-duty correctional officers at a state prison in the event of a radiological emergency at the Limerick facility meet the pertinent regulatory requirements for emergency response planning.
- B The Appeal Board is ordinarily reluctant to second-guess a licensing board on scheduling matters, and will review such issues only to ensure that due process has been afforded to a complaining party. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-813, 22 NRC 59, 74 (1985).
- C Claims alleging deprivation of due process due to an expedited hearing schedule must be supported by a showing of specific harm resulting from such schedule. ALAB-845, 24 NRC 220, 251 (1986).
- D Failure to show specific harm from an unduly expedited hearing schedule will result in a finding of harmless error, providing no legal ground for reversal. See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-841, 24 NRC 64, 95, reconsideration denied, ALAB-844, 24 NRC 216 (1986); *Catawba*, 22 NRC at 74.

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- B Licensing board denials of discovery requests and the like are often prime candidates for later appeal; thus, a licensing board is expected to create and to preserve the record of any such action.
- F Under the Commission's Rules of Practice, 10 C.F.R. § 2.720(a), subpoenas are issued upon a showing of only general relevance.
- G Where general relevance has been shown, there is no provision in the Rules of Practice for a licensing board's sua sponte refusal to issue a requested subpoena; rather, a board may quash an already issued subpoena on motion of the person or entity against whom discovery is sought. 10 C.F.R. § 2.720(f).
- H Hearsay evidence is generally admissible in NRC proceedings. See ALAB-836, 23 NRC 479, 509 n.52 (1986), and cases cited; Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-12 (1976).
- I While the overall concept and essential elements of an emergency response plan must be described, a plan need not be formally approved by the pertinent organizations or even final before the reasonable assurance finding required by 10 C.F.R. § 50.47(a)(1) can be made. See, e.g., ALAB-836, 23 NRC at 506, 508; Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 770 (1983).
- J An emergency response plan can be changed during the hearing process without the prior approval of the Federal Emergency Management Agency and other interested entities.
- K Testimony not objected to below cannot be challenged on appeal. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-335, 3 NRC 830, 842 n.26 (1976).
- ALAB-864 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE, May 1, 1987; MEMORANDUM AND ORDER
- A The Appeal Board in the offsite emergency planning phase of this operating license proceeding grants intervenors' joint motion for directed certification of a Licensing Board's scheduling order. The Appeal Board concludes that the hearing schedule in question did not provide the intervenors with a fair opportunity to prepare for trial and orders adjustments in the schedule.
- B Except as specifically provided, the Commission's Rules of Practice prohibit appeals from interlocutory licensing board rulings. 10 C.F.R. 2.730(f).
- C It is well-settled that the Appeal Board will exercise its discretionary power to review an interlocutory ruling by way of directed certification only if that ruling either (a) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. ALAB-858, 25 NRC 17, 20-21 (1987).
- D The Appeal Board ordinarily will review a licensing board scheduling order only upon a showing that the schedule deprives the complaining party of its right to procedural due process. ALAB-858, 25 NRC at 21.
- E Fundamental fairness is at the root of procedural due process.
- F There is no litmus paper test for determining whether, in a particular case, the fundamental fairness standard of due process is satisfied. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 165 (6th Cir. 1973).
- G Assessment of whether the fundamental fairness standard of due process has been met must be made on the basis of the totality of the relevant circumstances disclosed by the record. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).
- H Among the factors to be considered in determining if a hearing scheduling order meets the fundamental fairness test are: (1) the amount of time allotted for prehearing activity; (2) the number, scope and complexity of the issue(s) to be tried; and (3) any established need for expedition. Expediency, however, cannot serve to justify a hearing schedule that is so abbreviated as to make adequate trial preparation a practical impossibility. *Fitzgerald v. Hampton*, 467 F.2d 755, 767 (D.C. Cir. 1972).
- I Due process in administrative hearings does not yield to administrative "convenience or expediency, or because of a natural desire to be rid of harassing delay." *Id.* at 767, quoting *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937).
- J A rebuttable presumption of correctness attaches to FEMA findings on questions of the adequacy and implementation capability of emergency response plans. 10 C.F.R. 50.47(a)(2).

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ALAB-865 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; May 8, 1987; MEMORANDUM AND ORDER

A The Appeal Board in this operating license proceeding denies the requests of the intervenors and the Massachusetts Attorney General for a stay pendente lite of a Licensing Board partial initial decision authorizing the issuance of a license for low-power operation at the Seabrook nuclear facility.

B The four factors to be considered in deciding whether to grant a stay, as set forth in 10 C.F.R. § 2.788(c), are: (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 Although none of the factors to be considered in granting a stay is necessarily dispositive, the potential for irreparable injury and the likelihood of prevailing on the merits generally get primary attention.

D The strength of a movant's showing on one of the four stay factors determines how strong the showing must be on other factors. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

E The most significant factor as well as the first question often turned to in deciding whether to grant a stay request is "whether the party requesting a stay has shown that it will be irreparably injured unless the stay is granted."

F The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury.

G Mere injuries, however substantial, in terms of money, time and energy expended in the absence of a stay, are not enough to establish irreparable injury. *Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3)*, ALAB-385, 5 NRC 621, 628 (1977).

H Change in the environmental status due to a result of low-power testing does not constitute irreparable injury. *Cuomo*, 772 F.2d at 976.

I To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa. *Cuomo*, 772 F.2d at 974.

J When Commission regulations are believed to violate the hearing requirements of the Atomic Energy Act, any issues raised must be directed to the Commission; the regulations are not subject to challenge before the Appeal Board. 10 C.F.R. 2.758(a).

K To prevail on a motion to reopen an evidentiary record, a movant must show that: (1) the motion is timely, although an exceptionally grave issue may be considered in the discretion of the presiding officer even if not timely presented; (2) the motion addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered. 51 Fed. Reg. 19,535, 19,539 (1986).

L When reviewing a Licensing Board determination declining to admit a late-filed contention, the Appeal Board accords it wide latitude.

M The following technical issue is discussed: Safety Parameter Display System (SPDS).

ALAB-866 US ECOLOGY, INC. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), Docket No. 27-39-SC; SHOW CAUSE; June 16, 1987; MEMORANDUM AND ORDER

A On the appeal of the licensee from two Licensing Board memoranda and orders in this show-cause proceeding involving the Sheffield, Illinois Low-Level Radioactive Waste Disposal Site, the Appeal Board vacates the two orders and terminates the proceeding upon the representation of the parties that regulatory jurisdiction over the site has been transferred from the Commission to the State.

B Where a licensing board order under appeal is mooted by the loss of agency jurisdiction over the subject matter prior to the completion of appellate review, the Appeal Board may vacate the order. *United States v. Munstingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

ALAB-867 KERR-McGEE CHEMICAL CORPORATION (Kross Creek Decontamination), Docket No. 40-2061-SC; SHOW CAUSE; June 23, 1987; MEMOPANDUM AND ORDER

A The Appeal Board concludes that the Commission's agreement (under section 274b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021b) transferring certain regulatory authority to the State

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of Illinois has not terminated its jurisdiction over the NRC staff's appeal in this show cause proceeding, and, accordingly, the Board denies the staff's motion to terminate the proceeding.

- B Adjudicatory bodies have the authority and the responsibility to determine in the first instance the scope of their own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 NRC 293, 299-300 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977).
 - C Where a tribunal finds in favor of its jurisdiction to act upon a particular request for relief presented to it, it normally then goes ahead and rules upon the merits of the request without awaiting appellate confirmation that such jurisdiction in fact exists. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980).
 - D Adjudicatory boards are bound by the unequivocal determinations of the Commission.
 - E The staff's failure to provide any reasons for a determination is akin to a party's failure to brief its case adequately and an adjudicatory board's failure to give specific reasons for its findings and conclusions; in each case, a fair opportunity for meaningful response by one who disagrees is precluded. See Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Public Service Co. of New Hampshire Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLI-78-1, 7 NRC 1, aff'd, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).
 - F Section 274c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021c, imposes more stringent requirements for the transfer of authority over section 11e(2) byproduct material than for the transfer of authority over source and other material. See Petition of Sunflower Coalition, CLI-82-34, 16 NRC 1502, 1504 (1982). See also "Evaluation of Agreement State Radiation Control Programs: Final General Statement of Policy," 52 Fed. Reg. 21,132, 21,135 (1987).
 - G The following technical issues are discussed: Source material; Byproduct material; Rare earths.
- ALAB-858 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Unit 1), Docket No. 50-445-CPA; CONSTRUCTION PERMIT AMENDMENT, June 30, 1967; DECISION
- A On appeals of the applicants and the NRC staff pursuant to 10 C.F.R. § 2.714(c), the Appeal Board affirms the Licensing Board's grant of the intervenors' petitions to intervene in this construction permit extension amendment proceeding.
 - B The Commission's regulations provide that a contention filed after the first prehearing conference in a proceeding may be admitted by a licensing board only upon a favorable balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1). See 10 C.F.R. § 2.714(a)(3).
 - C The five factors of 10 C.F.R. § 2.714(a)(1) were placed in the regulations to "giv[e] the Licensing Boards broad discretion in the circumstances of individual cases." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).
 - D Appellate review of a licensing board's balancing of the five factors of 10 C.F.R. § 2.714(a)(1) is necessarily limited to determining whether the Board abused its discretion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763-64 (1982).
 - E To demonstrate that a licensing board abused its discretion in balancing the five factors of 10 C.F.R. § 2.714(a)(1), the appellants have a substantial burden on appeal: "It is not enough for [them] to establish simply that the Licensing Board might justifiably have concluded that the totality of the circumstances bearing upon the five lateness factors tipped the scales in favor of denial of the [contention]. In order to decree that outcome, we must be persuaded that a reasonable mind could reach no other result." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).
 - F Once intervenors satisfactorily explain the lateness of their contention (the first factor), a much lesser showing on the other four factors is required in order for them to prevail. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), aff'd, CLI-78-12, 7 NRC 939 (1978).

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- G An issue is not properly briefed by incorporating by reference papers filed with a licensing board. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-367, 5 NRC 92, 104 n.59 (1977).
- H Regarding the five factors set forth in 10 C.F.R. § 2.714(a), "[f]or purposes of the fifth factor, the question is whether, by filing late, the [intervenor] has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983) (emphasis in the original).
- I Although the Rules of Practice do not state a precise equation for determining what is an adequate basis for a contention, "such judgment must be exercised case-by-case, with the underlying purposes of this requirement in mind." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986), and licensing boards exercise "a considerable amount of discretion . . . in this area." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).
- J The basis requirement of 10 C.F.R. § 2.714(b) is merely a pleading requirement designed to make certain that a proffered issue is sufficiently articulated to provide the other parties with its broad outlines and to provide a licensing board with enough information for determining whether the issue is appropriately litigable in the instant proceeding.
- K The basis requirement of 10 C.F.R. § 2.714(b) generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons. See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 540-41 (1986); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973). See also Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-72-23, 5 AEC 5, 5-6 (1972).
- L The fact that a contention complies with the basis requirement of 10 C.F.R. § 2.714(b) does not mean that the issue is destined to go to hearing — such a contention is subject to being rejected on the merits prior to trial under the summary disposition provisions of the Rules of Practice. See 10 C.F.R. § 2.749; Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).
- M The regulation, 10 C.F.R. § 2.714(b), does not require the detailing of admissible evidence as support for a contention. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980).
- N In assessing the admissibility of a contention, it is not permissible for a licensing board to reach the merits of the contention and "[w]hether the contention ultimately can be proven on the merits is 'not the appropriate inquiry at the contention-admission stage.'" Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986).
- O Because a licensing board exercises a substantial amount of discretion in determining the adequacy of the basis for a contention, appellate review is limited to whether the board abused its discretion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 231 (1986). See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).

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LBP-87-1 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL); OPERATING LICENSE; January 7, 1987; MEMORANDUM

A The Board requested additional information concerning the adequacy of a reinspection program that relies in part on sampling that is designed to detect an error rate of at least 5% at the 95% level of confidence. The Board seeks to learn the basis for concluding that a plant with just less than a 5% error rate has attained an adequate level of safety. It inquires into how that rate compares to what might be expected from conscientious implementation of the quality assurance requirements of 10 C.F.R. Part 50, Appendix B, and how such an error rate impacts on fault-tree analysis of the reliability of the AFWS.

B The following technical issues are discussed: Sampling, reinspection by; Fault-tree analysis, effect of construction errors on; Construction errors, rate to be expected.

LBP-87-2 FLORIDA POWER & LIGHT COMPANY, et al. (St. Lucie Nuclear Power Plant, Unit No. 2), Docket No. 50-389-OLA (ASLBP No. 87-544-01-LA) (Spent Fuel Transfer Amendment); OPERATING LICENSE AMENDMENT; January 16, 1987; MEMORANDUM AND ORDER

A The Licensing Board dismisses, for lack of standing, the only hearing request in an operating license amendment proceeding and, accordingly, terminates the proceeding.

B Under 10 C.F.R. § 2.714(a), an intervention petition must set forth with particularity the petitioner's interest in the proceeding, how that interest may be affected by the results of the proceeding, and the specific aspect(s) of the proceeding as to which the petitioner wishes to intervene.

C Residence more than 100 miles from a reactor site is not sufficient to establish a petitioner's interest in a proceeding.

D A statement of a citizen's right or a civic duty to participate in a proceeding constitutes a generalized grievance shared in substantially equal measure by all or a large class of citizens and does not result in distinct and palpable harm sufficient to support a petitioner's standing.

E A petitioner who fails to meet the standing requirements of 10 C.F.R. § 2.714(a) could be permitted to intervene as a matter of discretion, assuming he met the standards established by the Commission for such discretionary intervention. In particular, a petitioner would have to demonstrate how his participation would assist in developing a sound record in the proceeding.

F Where the spent fuel pools of two facilities are to be shared, the requirements of General Design Criterion 5 become applicable. They must be analyzed by an applicant and evaluated by the NRC Staff.

G In the absence of a hearing on an operating license amendment, the Staff is not required to make the "no serious hazards consideration" finding of 10 C.F.R. § 50.92(e). See 10 C.F.R. § 50.91.

LBP-87-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (ASLBP No. 82-471-02-OL) (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; February 6, 1987; MEMORANDUM AND ORDER

A The Licensing Board denies the Commonwealth of Massachusetts' motion requesting that the Board admit a late-filed contention, reopen the record in the onsite emergency planning phase of this proceeding, and either refrain from issuing any decision that might authorize the issuance of an operating license for operation not in excess of 5% rated power or, if deciding to authorize the issuance of a low-power license, to condition the issuance of such a license upon the Applicant's compliance with 10 C.F.R. § 50.47(b)(5).

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- B** In order to determine whether to grant a motion to admit a late-filed contention, the Board must consider the five factors set forth in 10 C.F.R. § 2.714(a)(1). With respect to the first factor, the movant must show good cause for failing to file its contention in a timely manner.
- C** Even if favorable to the movant, the second and fourth factors in § 2.714(a)(1) are accorded less weight than factors one, three, and five. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).
- D** With respect to the third factor, the movant must identify its prospective witnesses and summarize their proposed expert testimony. Braidwood, supra, 23 NRC at 246-47.
- E** With respect to the fifth factor, the movant must show that the admission of the late-filed contention would not broaden the issues and delay the proceeding.
- F** The Commission has directed licensing boards to see to it that the process moves along at an expeditious pace, consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).
- G** Pursuant to § 2.714(a)(1), the Board may only determine whether or not to admit the late-filed contention, but may not at that time summarily dispose of the contention in light of affidavits attached to opposing responses.
- H** It is well established in the Commission's case law that the first factor is a crucial element in the analysis of whether a late-filed contention should be admitted. If the proponent of a contention fails to satisfy this element of the test, it must make a "compelling" showing with respect to the other four factors. Braidwood, supra, 23 NRC at 244; Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

I A motion to reopen a closed evidentiary record is governed by 10 C.F.R. § 2.734.
LBP-87-4 RADIOLOGY ULTRASOUND NUCLEAR CONSULTANTS, P.A. (Strontium-90 Applicator), Docket No. 30-12688-MLA (ASLBP No. 87-542-01-MLA); MATERIALS LICENSE AMENDMENT; February 9, 1987; DECISION

- A** In a materials license proceeding where the Commission authorized an informal hearing, the Presiding Officer denies an Applicant's appeal and affirms the NRC Staff's denial of a requested license amendment.
- B** The failure of a materials license applicant to respond to questions posed by a Presiding Officer in itself could serve as a valid basis for denying an applicant's appeal from a Staff determination to deny a license application.
- C** Although a hearing based solely on written submissions is the preferred method of proceeding in an informal proceeding, a Presiding Officer may also be granted discretion to entertain "oral presentations."
- D** A proposed therapeutic use of byproduct material under 10 C.F.R. Part 35 must also meet the criteria set forth by the Commission in a February 9, 1979 Statement of General Policy.
- E** Under the Commission's February 9, 1979 Statement of General Policy, a proposed therapeutic use of strontium-90 must be demonstrated to be "safe and effective." For nonroutine uses, the NRC Staff makes such a determination after consultation with the NRC Advisory Committee on the Medical Uses of Isotopes.
- F** Under the Commission's February 9, 1979 Statement of General Policy, the greater the potential hazard to a patient from byproduct material or its use by a physician, the more NRC may elect to circumscribe areas that might otherwise be regarded as within the discretion of a physician. The Policy Statement finds that the risk to patients from all therapeutic uses of radioactive drugs "is not low."

G The following technical issue is discussed: Therapeutic use of strontium-90 applicator.

LBP-87-5 U.S. ECOLOGY, INC. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), Docket No. 27-39-SC (ASLBP No. 78-374-01-OT); SHOW CAUSE; February 20, 1987; MEMORANDUM AND ORDER

- A** In this Memorandum and Order, the Licensing Board denies Licensee's Motion for Summary Judgment as to the issues of "possession" of buried waste and the right of the Licensee to unilaterally terminate its license without action by the Commission.

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- B The issue of whether a licensee possesses buried nuclear waste is not dispositive of its responsibilities with respect to that waste. The concept of "possession" as it relates to source, byproduct, or special nuclear material in this case pertains only to the critical mass limitation defined in 10 C.F.R. § 150.11(b).
- C A licensee's responsibility for nuclear waste does not terminate with the burial of the waste.
- D License language subjecting the licensee to "all other applicable rules, regulations, orders of the Atomic Energy Commission now or hereafter in effect" was intended to bind the licensee to the type of site stabilization and closure requirements ultimately promulgated in 10 C.F.R. Part 61.
- E A license is a grant by the Nuclear Regulatory Commission "of the right to engage in conduct that would be improper without such a grant." That right carries with it specified obligations set out in the form of regulations, official guidance, and orders.
- LBP-87-6 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION, et al. (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-OLA-1, 50-289-OLA-2 (Steam Generator Plugging Criteria); OPERATING LICENSE AMENDMENT; February 27, 1987; MEMORANDUM AND ORDER
- A The Licensing Board grants Licensee's motion for termination of proceedings with respect to Technical Specification Change Requests 148 and 153.
- B Absent objections, the Board grants the motion to terminate proceedings.
- LBP-87-7 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA (ASLBP No. 87-547-02-LA); OPERATING LICENSE AMENDMENT; February 27, 1987; MEMORANDUM AND ORDER
- A In a spent fuel pool expansion proceeding which is to be subject to the hybrid hearing procedures in 10 C.F.R. Part 2, Subpart K, the Licensing Board considers the standing to intervene of various petitioners and establishes schedules for further filings and for a prehearing conference.
- B Intervention rules are the same for hearings involving hybrid procedures as for other proceedings. A petitioner for intervention must demonstrate standing; the specific aspect(s) of the subject matter of the proceeding as to which the petitioner wishes to intervene; and, prior to the first prehearing conference, at least one valid contention.
- C An organization can establish standing either as an organization or as a representative of one or more of its members whose interests may be affected. Residence of at least one member in close proximity to the facility, standing alone, would establish such representative standing. To do so, the organization must provide the name and address and representation authorization from at least one member with a sufficient interest in the proceeding.
- D Although a licensing board may grant intervention as a matter of discretion, it need not consider doing so where a party has not addressed the criteria governing discretionary intervention.
- LBP-87-8 SEQUOYAH FUELS CORPORATION (Sequoyah UF₆ to UF₄ Facility), Docket No. 40-8027-MLA (ASLBP No. 85-513-03-ML); MATERIALS LICENSE AMENDMENT; March 4, 1987; DECISION
- A After considering numerous filings and conducting a 3-day oral hearing, the Presiding Officer authorizes the issuance of a license amendment permitting the operation of a facility to convert depleted uranium hexafluoride to depleted uranium tetrafluoride at the Applicant's Gore, Oklahoma plant. This authorization is subject to four conditions: first, in order to ensure that the automatic telephone emergency notification system will function properly, the Applicant is to verify that all residences within a 2-mile radius of the facility have telephones and make provisions acceptable to Staff to notify any that do not; second, the Applicant is to verify that all telephone numbers listed in its emergency response plan are accurate at each major exercise of the plant; third, the Applicant is to maintain the level of staffing outlined in its testimony presented at the hearing and to promptly report any changes in the duties of those individuals to Staff; and fourth, Applicant's President and its General Manager are each to spend at least one full workday each month at the facility while it is in operation.
- LBP-87-9 MICHAEL F. DIMUN, M.D. (Byproduct Materials License No. 37-13604-02), Docket No. 30-19378-ML (ASLBP No. 87-548-01-SC); SHOW CAUSE; March 10, 1987; MEMORANDUM AND ORDER
- A In a proceeding involving an Order to Show Cause why a license should not be revoked for nonpayment of a fee due the government, the Presiding Officer dismisses the Licensee's hearing request as moot and terminates the proceeding, where the Licensee pays the amounts due the government.

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LBP-87-10 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (ASLBP No. 82-471-02-OL) (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; March 25, 1987; PARTIAL INITIAL DECISION

A The Licensing Board authorizes issuance of a license to operate Seabrook Station, Unit 1, up to 5% of rated power. It resolves the three onsite emergency planning and safety contentions relating to (a) Applicants' emergency classification and action level scheme, (b) electrical equipment environmental qualification time duration, and (c) Applicants' safety parameter display system. It authorizes the issuance of this low-power license provided that, prior to the issuance thereof, Applicants have satisfied one condition imposed with respect to contention (b). With respect to contention (c), the Board orders that, if a full-power operating license is ultimately authorized by the other Licensing Board which is considering offsite emergency planning issues, prior to the issuance thereof, Applicants must have satisfied three conditions.

B NUREG-0737, Supplement 1, does not require implementation of requirements for the safety parameter display system prior to initial criticality. However, to protect the public health and safety, implementation of certain SPDS requirements must be effected prior to operation at power levels above 5% of rated power.

C The following technical issues are discussed: Emergency Classification and Action Level Scheme; Electrical Equipment Environmental Qualification; and Safety Parameter Display System.

LBP-87-11 TOLEDO EDISON COMPANY, et al. (Davis-Besse Nuclear Power Station, Unit 1), Docket No. 50-346-ML (ASLBP No. 86-525-01-ML); MATERIALS LICENSE; April 15, 1987; DECISION ON THE DISPOSAL OF WASTE AT DAVIS-BESSE

A In this Decision, the Presiding Officer affirms the decision of the Commission to grant Licensee's application to dispose of water treatment sludge and secondary-side demineralizer resins by land burial at the site of the Davis-Besse Nuclear Power Station. The Board finds that the low-level radioactive waste, mixed with the water treatment plant waste, presents no hazard to public health and safety because the means of burial securely confines the waste; water will not infiltrate the engineered waste disposal cells on the site; and there is reasonable assurance that neither radioactive nor chemical substances will be carried into the ground water.

B Reasonable assurance that the public health and safety and environment will be protected when waste is buried can be found if (a) secure confinement of waste at its burial location is assured, even if the waste is a significant source of radioactive or chemically toxic constituents; or (b) the waste itself is not a significant source of hazardous materials, even if the conditions of confinement are not so secure as to guarantee that nothing would escape from the burial site in the future.

LBP-87-12 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; April 22, 1987; MEMORANDUM AND ORDER

A In this Memorandum and Order, the Licensing Board finds that Applicants' petition for a waiver of the regulations requiring planning for a plume exposure pathway emergency planning zone in excess of a 1-mile radius fails to make a prima facie showing on its technical merits that the waiver should be granted. Accordingly, the Board holds that the petition may not be considered further.

B The prima facie showing required by 10 C.F.R. § 2.758 for a waiver of a Commission regulation requires the Board to determine whether the petition for waiver with its accompanying affidavits, weighed against the responses of the other parties, presents legally sufficient evidence to justify the waiver request.

LBP-87-13 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-10-03-OL); OPERATING LICENSE; May 13, 1987; PARTIAL INITIAL DECISION ON EMERGENCY PLANNING ISSUES

A In this Partial Initial Decision, the Board rules on all outstanding emergency planning issues, finding in favor of the Applicant, provided that certain conditions are met concerning information to be provided to the public in Applicant's emergency planning booklet.

B When a board requires proposed findings to be filed, the failure of a party to file findings on an issue may be deemed a default by the party, and the board may refuse to rule on the issue.

C An applicant does not have to prove that every individual within the planning area will be covered by the emergency plan under every conceivable set of circumstances. The Commission requires not perfection but rather prudent planning calculated to meet the needs of the affected population.

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LBP-87-14 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-410-03-OL); OPERATING LICENSE; May 19, 1987; CONCLUDING PARTIAL INITIAL DECISION

- A** In this Concluding Partial Initial Decision, the Board finds in favor of the Applicant with respect to a single remaining contention involving allegations of harassment and intimidation of quality control inspectors.
- B** The quality assurance process is no more immune from error than the underlying construction program. Quality assurance failures should be considered grounds for denial of an operating license only if they are so pervasive as to require a finding that there has been a breakdown in quality assurance procedures of such dimensions as to raise legitimate doubt as to the overall integrity of the facility and its safety-related components and structures.
- C** In considering whether or not quality assurance personnel are restrained in the performance of their duties by cost and schedule considerations, the question is not whether they are absolutely free from such considerations, but whether they have sufficient independence from cost and schedule when opposed to safety considerations.

LBP-87-15 INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION, Docket No. LRP (ASLBP No. 86-519-02-SP); SPECIAL PROCEEDING; May 21, 1987; RECOMMENDED DECISION

- A** In this Recommended Decision, the Board reports the findings of its inquiry conducted pursuant to the Order of the Commission in CLI-85-18, 22 NRC 877 (1985).
- B** Although the "preponderance of the evidence" standard could be applied to all issues in the proceeding, the Board chooses to apply the "clear and convincing evidence" standard to findings of manipulation and falsification because those findings are likely to have strong reputational impacts and because they tend to involve the most serious memory difficulties in this proceeding conducted 7 to 8 years after the incidents giving rise to the inquiry.

LBP-87-16 BABCOCK AND WILCOX (Parks Township, Pennsylvania, Volume Reduction Facility), Docket No. 70-364-MLA (ASLBP No. 815-511-01-ML); MATERIALS LICENSE AMENDMENT; May 18, 1987; SUPPLEMENTAL DECISION (On Remanded Issue)

- A** This Supplemental Decision (on Remanded Issue) reverses Condition 2 ordered by LBP-86-40, 24 NRC 841, 900 (1986), which authorized the NRC Staff to issue a license amendment to Babcock & Wilcox authorizing it to operate an incinerator at its Parks Township Facility, provided certain conditions had been met. Condition 2 required an expansion of the NRC's environmental monitoring contract with the Commonwealth of Pennsylvania to include monitoring of tritium (H-3), carbon-14 (C-14), and iodine-125 (I-125). Subsequently the Commonwealth refused to sign the contract calling for the expansion of the monitoring system, and as a result the Commission remanded LBP-86-40 to the Presiding Officer for reconsideration of Condition 2. This Supplemental Decision reverses Condition 2 on the grounds that the NRC Staff will require B&W to expand its monitoring program to include routine offsite environmental monitoring.
- B** The following technical issues are discussed: Releases of H-3, C-14, and I-125 by the incinerator and their health effects; reasons for requiring offsite environmental monitoring of these radionuclides; the expanded environmental monitoring that the Staff will require of B&W.

LBP-87-17 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA (ASLBP No. 87-547-02-LA); OPERATING LICENSE AMENDMENT; May 26, 1987; PREHEARING CONFERENCE ORDER

- A** In a proceeding involving the proposed expansion in capacity of a spent fuel pool, the Licensing Board rules on standing and contentions, grants two petitions to intervene, and establishes schedules for discovery and oral argument.
- B** Under NRC rules, admission to a proceeding as an intervenor requires the submission of at least one valid contention within the scope of issues set forth in the notice initiating the proceeding.
- C** A contention must have its bases set forth with reasonable specificity. In setting forth the bases for contentions, however, a petitioner need not detail the evidence that will be offered to support each contention.

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- D In reviewing a contention and its bases for adequacy, a licensing board must not reach the merits of the contention.
- E The "no significant hazards consideration" determination under 10 C.F.R. § 50.91 is a procedural determination stemming from the Sholly amendments to § 189a of the Atomic Energy Act. The determination can only be made by the NRC Staff or Commission and cannot be challenged in an adjudicatory licensing proceeding.
- F An allegation falling within the scope of a licensing proceeding that relates to a proposal under review may be heard notwithstanding that it may also constitute a generic issue.
- G The Commission's Policy Statement on Severe Reactor Accidents, 50 Fed. Reg. 32,138 (Aug. 8, 1985), explicitly removes plant-specific reviews of control or mitigation of beyond-design-basis accidents from adjudicatory consideration. Only the risk of such accidents may be explored, as contemplated by the Commission's Statement of Interim Policy on "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40,101 (June 13, 1980).
- H In an operating license amendment proceeding, the public is entitled to be apprised in clear terms in the Staff's SER that a particular issue is being resolved in a given manner. Where a detailed description of an issue does not appear in the application documents or in the Staff's SER, a party is not barred by res judicata from raising the issue in a later proceeding.
- I If the NRC Staff were to determine, pursuant to 10 C.F.R. § 51.22(c)(9), that an environmental assessment need not be prepared because a proposed action involves "no significant hazards consideration," that determination would become litigable under 10 C.F.R. § 51.104(b).
- J Although there is no per se requirement for an environmental impact statement in a proceeding involving the expansion in capacity of a spent fuel pool, there is also no categorical exclusion. Whether such a statement need be prepared is a litigable question.
- K The possibilities or effects of a reactor site being used as a long-term or open-ended storage facility for high-level radioactive waste may not be considered in a licensing proceeding seeking expansion of the storage capacity of a spent fuel pool. 10 C.F.R. §§ 2.758(a), 51.23, and 51.95(b).
- L The adequacy of an environmental assessment may be litigated pursuant to 10 C.F.R. § 51.104(b). However, a contention questioning the potential inadequacy of such assessment may not be raised prior to the issuance of such assessment. Instead, it may only be considered as a late-filed contention following issuance of the assessment. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 466-67 (1982), rev'd in part on other grounds, CLJ-83-19, 17 NRC 1041 (1983).
- M The Commission encourages the litigation of environmental questions as early as possible in a proceeding. Notwithstanding the lack of any formal requirement for an applicant's environmental report in a proceeding involving expansion of the capacity of a spent fuel pool, a contention questioning the adequacy of an applicant's environmental information submitted in support of such expansion may be accepted.
- N If a licensing board in a license amendment proceeding were to reject all proposed contentions of every petitioner for intervention, the board would have to dismiss the petitioners and terminate the proceeding. Following termination, it would lose its jurisdiction to consider late-filed contentions.
- O Interpretation of NRC rules to permit the timely filing of safety-based contentions at a given time but to allow environmental contentions only to be submitted later, on a late-filed basis, constitutes an improper disparity between the litigation of Atomic Energy Act and NEPA issues. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1117 (1971).
- P An agency's evaluation of alternatives is governed by two sections of NEPA — § 102(2)(C) when an impact statement is required, and § 102(2)(E) whether or not an impact statement is prepared.
- LBP-87-18 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL); OPERATING LICENSE; June 1, 1987; MEMORANDUM AND ORDER
- A The Licensing Board holds that work prepared for intervenors as part of a nonrecord filing is privileged under the nontestifying witness corollary to the attorney work product privilege and need not be produced in discovery. The fact that the nonrecord filing of the intervenors was made in response to a Board Memorandum and Order does not make the people who prepared the filing "witnesses."
- B Intervenors need not respond to discovery requests addressed to nontestifying witnesses. The participation of a person in making a nonrecord filing does not make him a witness.

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- C A party is not obligated to make a detailed search of the record in order to respond to interrogatories concerning how it has used a certain term ("Walsh-Doyle issues") in the record.
- LBP-87-19 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-410-03-OL); OPERATING LICENSE; June 10, 1987; MEMORANDUM AND ORDER DENYING INTERVENORS' MOTION TO ADMIT LATE-FILED CONTENTIONS ON FINANCIAL QUALIFICATIONS
- LBP-87-20 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Unit 1), Docket No. 50-445-CPA (ASLBP No. 86-528-02-CPA); CONSTRUCTION PERMIT AMENDMENT; June 22, 1987; MEMORANDUM AND ORDER
- A The Licensing Board finds a management report prepared by Applicants in preparation for rate-making proceedings to be privileged under the nontestifying witness corollary to the attorney work product privilege, but requires the information to be supplied to the intervenors if relevant to Appendix B, Part 50 determinations of the cause of deficiencies in construction or design.
- B Information that is relevant to the contention and is related to Applicants' obligation to determine the cause of deficiencies in their plant, shall be disclosed in discovery even though it is privileged under the nontestifying witness corollary to the attorney work-product privilege.
- LBP-87-21 FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-1, 50-251-OLA-1 (ASLBP No. 84-496-03-LA) (Vessel Flux Reduction); OPERATING LICENSE AMENDMENT; June 23, 1987; MEMORANDUM AND ORDER
- A In this Memorandum and Order, the Licensing Board concludes that an issue raised by a Staff Board Notification, over which it had retained jurisdiction, does not adversely affect its previous disposition of the sole remaining contention in the proceeding. The Board grants Licensee's motion to terminate the proceeding.
- B To justify reopening the record, supporting information must be more than mere allegation; it must be tantamount to evidence. Thus, intervenors' "belief" that a regulatory criterion would be exceeded if reanalysis were required is not sufficient to warrant reopening.
- C The licensing board has no authority to order the licensee to perform a reanalysis for the purpose of determining whether the record should be reopened. The board must decide the motion to reopen on the information before it.
- LBP-87-21A PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA, 50-323-OLA (ASLBP No. 86-523-03-LA); OPERATING LICENSE AMENDMENT; May 22, 1987; MEMORANDUM AND ORDER
- A In this Memorandum and Order, the Licensing Board requires the parties to submit all filings pertaining to the record for decision on computer-readable diskettes in order to permit electronic storage and retrieval.
- B Commission policy encourages licensing boards to expedite the hearing process and to produce a record that leads to high-quality decisions by using the authority granted them in 10 C.F.R. § 2.718 to regulate the course of hearings and the conduct of the parties. This Board seeks to further that policy by drawing on available computer technology to create an electronically searchable hearing record.

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ALJ-87-1 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-SP (ASLBP No. 87-545-01-SP) (BML No. 34-19089-01) (EA 86-155); SPECIAL PROCEEDING; January 14, 1987; MEMORANDUM AND ORDER FOLLOWING FIRST PREHEARING CONFERENCE

ALJ-87-2 HURLEY MEDICAL CENTER (One Hurley Plaza, Flint, Michigan), Docket Nos. 30-01993, 70-176 (License Nos. 21-00338-02, SNM-1393) (EA 85-89); CIVIL PENALTY; March 3, 1987; INITIAL DECISION

A In an Initial Decision, the Administrative Law Judge sustains a civil penalty in the amount of \$2500 imposed against the Licensee by the Director of Inspection and Enforcement for failure to comply with NRC requirements concerning the possession and use of a variety of nuclear materials in diagnostic and therapeutic medicine.

B In this enforcement action, the NRC Staff and the Licensee, a community hospital, had stipulated to fourteen violations of NRC requirements. The issue remaining was whether a civil penalty should be imposed in accordance with the General Statement of Policy and Procedure for NRC Enforcement Actions (10 C.F.R. Part 2, Appendix C), and in consideration of the safety significance of the stipulated violations. The Commission's Policy and Procedure for NRC Enforcement Actions, by its express terms, must be followed by the administrative law judge in determining whether a civil penalty should be imposed, mitigated, or entirely remitted.

C When several Severity Level IV violations stemming from Licensee's general failure to exert management oversight and control over its radiation safety program are found, the Severity Level IV violations may be aggregated into a Severity Level III violation and a civil penalty appropriate to the escalated violation is imposed.

D Where the NRC Staff fails in its burden of proof with respect to some of the charged violations, the administrative law judge cannot substitute his own judgment for that of the Director of Inspection and Enforcement if doing so would mean imposing a penalty on charges not specified in the Director's order imposing the civil penalty, thus distinguishing *Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 848-49 (1980).

E As a matter of fair notice and due process, a licensee in a civil penalty proceeding must be timely informed of the theory of the case against it, citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

F The administrative law judge may not save the Director of Inspection and Enforcement from a failed theory of the Director's case by substituting another theory because the Director, not the administrative law judge, has the burden of proof, and the licensee is entitled to an impartial decisionmaker. The function of the adjudicator may not be commingled with the function of the prosecutor, citing *Wong Yang Sun v. McGrath*, 339 U.S. 33, 46 (1950).

ALJ-87-3 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289-CH (ASLBP No. 85-514-02-OT); SPECIAL PROCEEDING; April 2, 1987; INITIAL DECISION

A The Administrative Law Judge finds that a license condition imposed as part of the Appeal Board's decision on management-related issues in the Three Mile Island, Unit 1 restart proceeding, ALAB-772, 19 NRC 1193, 1224 (1984) should not be vacated. The condition barred an employee of the Licensee from supervisory responsibilities in the training of nonlicensed personnel at the plant. This Initial Decision holds

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that the employee's conduct and attitude toward the NRC regulatory process require that he not be permitted to serve in a supervisory position that affects public health and safety.

- B The Judge notes that Commission regulations do not address qualifications for the position in question, Supervisor, Nonlicensed Operator Training. However, where the holder of that position may adversely affect public health and safety because of attitudes and behavior toward the NRC and the regulatory process, the Commission can take necessary action that will provide reasonable assurance that the activities authorized by the operating license will be conducted without endangering the health and safety of the public. This is so even if the result is to disqualify an individual from being employed in a particular category.

- C The Judge further finds that the imposition of the condition was not done as a sanction, nor is its purpose to forever bar the employee from that position. It was done as a matter of providing reasonable assurance for the protection of public health and safety. The employee can regain the subject position, if he demonstrates that he is so qualified to meet its requirements.

ALJ-87-4 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-SP (ASLBP No. 87-545-01-SP) (BML No. 34-19089-01) (EA 86-155); SPECIAL PROCEEDING; May 4, 1987; MEMORANDUM AND ORDER CONCERNING NRC STAFF'S MOTION FOR STAY OF PROCEEDING

ALJ-87-5 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320 (ASLBP No. 86-534-01-OL) (Civil Penalty); CIVIL PENALTY; June 22, 1987; MEMORANDUM AND ORDER RULING ON DEPARTMENT OF LABOR MOTION TO QUASH SUBPOENA

- A In this Memorandum and Order, the Administrative Law Judge overrules the Department of Labor's motion to quash a subpoena on the grounds that the Department's so-called "Touhey" regulation (29 C.F.R. § 2.22) does not constitute a substantive privilege against disclosure of information otherwise producible in discovery.

- B Regulations promulgated under 5 U.S.C. § 301 providing control over the custody and use of executive department records are housekeeping regulations only. The statute, by its express terms, does not authorize the withholding of information from the public.

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DD-87-1 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 1, 2, and 3), Docket Nos. 50-206, 50-361, 50-362; REQUEST FOR ACTION; January 29, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Inspection and Enforcement denies a petition of the City of Laguna Beach, California (Petitioner), to extend the 10-mile radius of the emergency planning zone (EPZ) for the San Onofre Nuclear Generating Station to include South Laguna and Laguna Beach.

B The bases for the action requested in the petition are concerns about the lack of emergency planning for Laguna Beach, the topography of the South Orange County coastline as it relates to the transportation network, and the effect on the residents of Laguna Beach as others who live to the south drive through Laguna Beach as part of an evacuation procedure. The petition also referred to the "recent circumstances in the Soviet Union" as a basis for reconsidering the emergency planning zone issue for San Onofre.

C The current plume exposure EPZ for San Onofre is adequate, and Laguna Beach and South Laguna, which lie outside the EPZ but within the public education zone for San Onofre, are adequately addressed in the existing emergency plans for Orange County and the State of California.

D Reviews performed to date of the Chernobyl accident and the Chernobyl plant design have not identified any aspects of the accident that show a clear-cut nexus to U.S. commercial nuclear power plants. At this time, it is too early to determine whether any changes to current emergency planning regulations will be required.

DD-87-2 COMMONWEALTH EDISON COMPANY (AND ALL LIGHT-WATER REACTORS) (Zion Station, Unit 1), Docket No. 50-295; (Byron Nuclear Power Station, Unit 1), Docket No. 50-373; (LaSalle County Station, Unit 1), Docket No. STN 50-454; REQUEST FOR ACTION; February 10, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director, Office of Nuclear Reactor Regulation, denies an emergency relief petition dated August 13, 1986, and sponsored by a number of individuals.

B The petition sought suspension of the operating licenses for the Zion Station Unit 1, LaSalle County Station Unit 1, and Byron Nuclear Power Station Unit 1 facilities of the Commonwealth Edison Company (CECO) and other similarly situated facilities due to alleged inadequacies in containment integrated leak rate test (CILRT) practices. It was alleged that the testing was at variance with the Commission's requirements for a CILRT, specifically 10 C.F.R. Part 50, Appendix J. It was alleged that there were deficiencies in computer programs used during the testing and that certain data were improperly replaced by other data, allegedly in violation of the Commission's requirements.

C The Director determined that the allegations raised in the petition concerning the application of certain CECO computer programs to containment leak rate testing at CECO facilities were unsubstantiated. Rather, based upon CILRTs conducted by CECO for its LaSalle, Zion, and Byron facilities, and the independent review and oversight of these tests conducted by NRC inspectors, these facilities and others similarly situated conform to the Commission's requirements with respect to containment leak rate testing.

DD-87-3 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289, 50-320; REQUEST FOR ACTION; March 6, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Acting Director of the Office of Nuclear Reactor Regulation denies a petition filed by Randy King in 1983 on behalf of the Three Mile Island Public Interest Resource Center (TMI-PIRC) and others requesting that the Commission "halt all work at TMI Units 1 and 2 immediately, save for maintenance

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necessary for safety." TMI-PIRC based its request on the allegations of Richard D. Parks concerning implementation of the quality assurance program and related areas at the Three Mile Island Nuclear Station, Unit 2.

DD-87-4 PORTLAND GENERAL ELECTRIC COMPANY, et al. (Trojan Nuclear Plant), Docket No. 50-344; REQUEST FOR ACTION; March 5, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A By Petition dated November 3, 1986, submitted pursuant to 10 C.F.R. § 2.206, John Aram, on behalf of Forelows On Board, Elaine Kelley, and Lloyd K. Marbet (Petitioners) requested the Nuclear Regulatory Commission (NRC) to institute a proceeding to suspend the operating license of the Trojan Nuclear Plant, to hold public hearings on such a proceeding, and to suspend immediately the operating license for the Trojan facility pending completion of such a proceeding. The Petitioners alleged that the Portland General Electric Company, the Licensee, failed to disclose the magnitude and extent of certain seismic design deficiencies in the walls of the control building and the turbine building, and diesel generator enclosures.

B The Director of the Office of Nuclear Reactor Regulation denied Petitioners' requests because the Petitioners raised technical issues that the Licensee, the Staff, and other parties had resolved in proceedings before the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board, and the Petitioners had submitted no new information that would cause the Staff to alter its previous decisions.

C The Nuclear Regulatory Commission, having already considered and resolved the technical issues that a petitioner raises, need not reconsider those issues if the petitioner provides no new information. See *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, CLI-78-7, 7 NRC 429, 434 (1978), *aff'd sub nom. Porter County Chapter of the Isaac Walton League of America v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979).

DD-87-5 BABCOCK & WILCOX (Parks Township, Pennsylvania Facility), Docket No. 70-364; REQUEST FOR ACTION; March 13, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Material Safety and Safeguards denies petitions filed by Frances L. Munko and Mildred E. Chelko requesting action with regard to the Babcock and Wilcox Parks Township facility. The Petitioners requested that a proceeding be instituted to revoke the license for the facility and that the site be cleaned up, and Ms. Chelko further requested that any other site that contained material from previous activities or licenses be cleaned up. The Petitioners had asserted that present and past releases and residual contamination from activities at the facility posed a threat to their health and safety and, in addition, Ms. Munko asserted that since the Licensee had terminated fuel production operations at the facility, this constituted the end of plant life and necessitated decontamination of the facility for release to unrestricted use.

B Where petitioners have not provided the factual basis for their request with the specificity required by 10 C.F.R. § 2.206, action need not be taken on their request.

C The Commission has determined that the NRC need not consider psychological impact or mental stress to the public in exercising its regulatory responsibilities under the Atomic Energy Act.

D The Supreme Court has held that the NRC need not consider psychological impact or mental stress to the public under the National Environmental Policy Act (NEPA).

E Absent any basis for application of financial protection under § 170, protection of economic interests is not within the scope of the Atomic Energy Act.

DD-87-6 CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400; REQUEST FOR ACTION; April 2, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A By Petition dated October 17, 1986, submitted pursuant to 10 C.F.R. § 2.206, Robert Epling, Steven P. Katz, and Joseph T. Hughes, Jr., on behalf of the Coalition for Alternatives to Shearon Harris, and Wells Edleman (Petitioners), requested the Nuclear Regulatory Commission (NRC) to institute a proceeding to modify, suspend, or revoke the construction permit for the Shearon Harris Nuclear Power Plant and to deny or delay issuing an operating license for the plant. Petitioners alleged deficiencies in Carolina Power & Light Company's (Licensee) quality assurance program for safety-related electrical components, that the Licensee lacked the requisite character and technical capability to operate Shearon Harris as demonstrated by alleged discrimination against two employees, and that the Licensee improperly documented and performed certain construction procedures.

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- B By letter dated November 12, 1986, the Director of the Office of Nuclear Reactor Regulation (the Director) acknowledged Petitioners' requests and informed them that the NRC had issued a low-power operating license for Shearon Harris on October 24, 1986. The NRC considered the issues raised in the Petition in accordance with the Commission's Policy for Handling of Late Allegations (50 Fed. Reg. 48,506 (1985)) and determined that the Petition did not raise any significant safety concerns that the NRC would have to resolve before issuing the full-power license. The Commission, in approving the full-power authorization, concluded that the Petition did not appear to raise any substantial, significant safety issue or to show a basis for delaying full-power operation.
- C The Director denied all of Petitioners' requests. Because the NRC knew of this evidence that Petitioners submitted to document the alleged breakdown in quality assurance and the NRC had already confirmed that the Licensee had satisfactorily implemented its quality assurance program at Shearon Harris, the Director found that basis for Petitioners' requests unsubstantiated. Because Petitioners' evidence of Licensee discrimination against employees showed only isolated incidents of possible discrimination, and did not suggest that the Licensee lacked the character or technical capability to operate the plant, the Director rejected that basis for Petitioners' requests. Finally, because the NRC found Petitioners' allegations of improperly documented or improperly conducted construction activities either untrue or devoid of safety significance, the Director rejected that basis for Petitioners' requests.
- D The Nuclear Regulatory Commission, having already considered and resolved a technical issue that a petitioner raises, need not reconsider that issue if the petitioner provides no new information. See *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, CLI-78-7, 7 NRC 429, 434 (1978), *aff'd sub nom., Porter County Chapter of the Isaac Walton League of America v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979).
- E When a petitioner submits a petition pursuant to 10 C.F.R. § 2.206 requesting suspension or revocation of a construction permit and the Nuclear Regulatory Commission has already begun considering whether to issue an operating license for the facility, the Commission will consider the issues raised in the petition according to the Commission's Policy for Handling of Late Allegations. 50 Fed. Reg. 48,506 (1985). If the issues do not present significant safety concerns, the Nuclear Regulatory Commission may issue the low-power or full-power operating license.
- F The Nuclear Regulatory Commission will examine in depth any petitioner's allegations of defective construction in a nuclear power plant, even if the alleged remains confidential. If the Nuclear Regulatory Commission finds that those allegations have no basis in fact, or, if the allegations are true, that they do not adversely affect safety, the Nuclear Regulatory Commission will deny the petitioner's requests.
- DD-87-7 SEQUOYAH FUELS CORPORATION (Gore, Oklahoma Facility), Docket No. 40-8027; REQUEST FOR ACTION; April 21, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Material Safety and Safeguards denies petitions of Barbara Synar, Native Americans for a Clean Environment (NACE), Paula Strachan, David Singer Burner, and Ed Henshaw requesting action with regard to the Sequoyah Fuels facility. The petitions raised concerns regarding the Licensee's ammonium nitrate fertilizer program and adequacy of security.
- B Section 2.206 of 10 C.F.R. requires that the petitioner set forth sufficient facts to provide a basis for the requested action.
- C Absent a request for a hearing on an amendment to a materials license, there is no requirement that one be held.
- D Absent any basis for application of financial protection under § 170, protection of economic interests is not within the scope of the Atomic Energy Act.
- DD-87-8 CHEM-NUCLEAR SYSTEMS, INC. (Midwest Facility), Docket No. 30-18618; REQUEST FOR ACTION; April 30, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Acting Director of the Office of Nuclear Material Safety and Safeguards denies a petition filed by Mrs. Gisela Topolski of Joliet, Illinois, requesting the suspension of the license of Chem-Nuclear Systems, Inc. Petitioner's request appeared to be based on allegations that (1) the Licensee failed to disclose to local authorities its real intent to use a supercompactor; (2) the Licensee failed to make environmental studies which would have revealed a number of problems with the operation of the supercompactor in what Petitioner deems to be an unsuitable residential area; (3) the Licensee's change of name to Chem-Nuclear Systems, Inc., did not change its character and that its character is indicated by the conduct of its majority

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stockholder, Waste Management, Inc., which (a) left thirty-seven states with leaking landfill sites and (b) failed to train its employees; (4) the Licensee's technology and equipment is from the 1950s; and (5) employees who report violations lose their jobs.

B Where a petitioner has not provided the factual basis for his request with the specificity required by 10 C.F.R. § 2.206, action need not be taken on the request.

DD-87-9 VIRGINIA POWER COMPANY (Surry Nuclear Power Station, Units 1 and 2), Docket Nos. 50-280, 50-281; REQUEST FOR ACTION; June 5, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition and supplemental petition submitted by Mr. Thayer Cory and Ms. Judy Zwelling, on behalf of Citizen Action for a Safe Environment (CASE) requesting (1) that the Director of Nuclear Reactor Regulation require Virginia Power Company (the Licensee) to show cause why reopening the Surry Nuclear Power Station would not endanger the health and safety of the community and (2) that the Nuclear Regulatory Commission (NRC) issue an order directing that both reactors at Surry Nuclear Power Station remain shut down until the Licensee takes a number of actions specified in the petition.

DD-87-10 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; REQUEST FOR ACTION; June 25, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Special Projects denies a petition by the Brazos Electric Power Cooperative, Inc. The Petitioner requested that the Nuclear Regulatory Commission order Licensee and License Applicant Texas Utilities Electric Company to assume co-owner/co-applicant Brazos' ownership interest in the Comanche Peak Project based upon the allegation that Texas Utilities Electric Company had made material false statements to the atomic safety and licensing boards presiding over the Comanche Peak operating license and construction permit extension proceedings.

B Where a petition pursuant to 10 C.F.R. § 2.206 challenges the sufficiency of representation by applicants in licensing proceedings, this is a matter within the power and responsibility of the boards themselves to address rather than the Director of an NRC off. See 10 C.F.R. §§ 2.713, 2.718(e), (m).

C False statements that relate solely to the scope of representation of several co-owners/co-applicants in NRC licensing proceedings do not involve matters that affect the public health and safety, the environment, or the common defense and security and would not be considered material false statements under § 186 of the Atomic Energy Act.

D It is beyond the NRC's authority to direct utility owners to buy out the ownership interest of a co-owner. The NRC's authority does not extend to contractual arrangements among co-owners except insofar as they might affect matters regarding public health and safety, the environment, or the common defense and security.

DD-87-11 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), Docket Nos. 50-528, 50-529, 50-530; REQUEST FOR ACTION; June 22, 1987; DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Mr. Myron L. Scott and Mr. Stephen M. Kohn, on behalf of the Coalition for Responsible Energy Education (CREE), requesting action with regard to the Palo Verde Nuclear Generating Station. CREE had requested the initiation of a proceeding to revoke the licenses of Palo Verde Units 1, 2, and 3 based on an alleged deceptive response given by an Arizona Public Service Company (APS) official to a control question during a polygraph examination. CREE claimed that this response by this official raised serious questions about APS' management integrity and established that documentation at the nuclear facility had been falsified.

B A show-cause proceeding under 10 C.F.R. § 2.206 must be based on substantial health and safety issues.

C A response by an APS official to a control question during a polygraph examination was not considered to be reliable information for purposes of initiating a show-cause proceeding under 10 C.F.R. § 2.206.

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ISSUANCE OF DENIAL OF PETITION FOR RULEMAKING

PRM-87-1 PUBLIC CITIZEN, Docket No. PRM-50-41; January 14, 1987; DENIAL OF PETITION FOR RULEMAKING

- A The Commission denies a petition for rulemaking submitted by Public Citizen. The Petitioner requests that, to comply with the mandate of the NRC Training Authorization, § 306 in the Nuclear Waste Policy Act of 1982, NRC adopt specific regulations or other regulatory guidance setting forth detailed requirements for training and fitness for duty of nuclear power plant personnel. The denial states that NRC is denying the petition, among other reasons, because it has determined that the statute does not cover fitness for duty and with respect to training that it provides NRC with flexibility to issue the regulatory guidance in the form of a policy statement.
- B Section 306 (NRC's Training Authorization Section) of the Nuclear Waste Policy Act of 1982 (NWPA) does not cover fitness for duty. Therefore, NRC has not engaged in a rulemaking; nonetheless, the Commission has issued a policy statement on this subject.
- C Section 306 of NWPA provides NRC with flexibility to issue regulatory guidance on training and qualification in the form of a policy statement; NRC does not have to engage in a rulemaking on this subject.

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