NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1994

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.
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Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

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Issuances
The Commission denies a petition to intervene and request for a hearing on a license application for the export of 280 kilograms of high-enriched uranium, in the form of mixed uranium and thorium carbide fabricated as unirradiated fuel, to COGEMA in France to be processed for recovery of the uranium and thorium. The Commission determines that the Petitioner is not entitled to intervene as a matter of right under the Atomic Energy Act and that a hearing, as a matter of discretion, would not be in the public interest and is not needed to assist the Commission in making the determinations required by the Atomic Energy Act of 1954, as amended, for issuance of the export license.

RULES OF PRACTICE: STANDING TO INTERVENE

Institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient for an organization to establish standing under section 189a of the Atomic Energy Act of 1954, as amended.
RULES OF PRACTICE: STANDING TO INTERVENE

Section 304(b)(2) of the Nuclear Non-Proliferation Act of 1978 mandates that the Commission establish procedures for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the Atomic Energy Act of 1954, as amended. The criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing in export licensing cases as a matter of discretion accommodate this mandate.

ATOMIC ENERGY ACT: NONPROLIFERATION (SECTION 134)

The focus of section 134 of the Atomic Energy Act of 1954, as amended, is on discouraging the continued use of high-enriched uranium ("HEU") as reactor fuel and not on prohibiting the exportation, per se, of HEU.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Nuclear Control Institute ("NCI") filed a Petition for Leave to Intervene and Request for Hearing on an application from Transnuclear, Inc. ("Transnuclear") for a license to export 280 kilograms of high-enriched uranium ("HEU") in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor, to COGEMA in France to be processed for recovery of the uranium and thorium. For the reasons stated in this Memorandum and Order, we deny the Petition for Leave to Intervene and Request for Hearing.

II. BACKGROUND

Transnuclear filed an application, dated May 5, 1993, for a license to export 280 kilograms of HEU containing 260.9 kilograms of uranium-235 (93.15% enriched) and 2481 kilograms of thorium, in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor,1 to

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1 The fabricated fuel is from the now-decommissioned Fort St. Vrain Power Station, a high-temperature gas-cooled thorium fuel cycle prototype reactor located at Platteville, Colorado, and owned by the Public Service Company of Colorado. The material is currently owned by Nuclear Fuel Services (NFS) and stored at the Erwin, Tennessee facility of NFS.
COGEMA in France to be processed for recovery of the uranium and thorium. On June 24, 1993, NCI filed a Petition for Leave to Intervene and Request for Hearing on the Transnuclear license application. NCI asserts that it is a nonprofit, educational corporation based in the District of Columbia, and engages in disseminating information to the public concerning the risks associated with the use of nuclear materials and technology. Petition at 1-2.

NCI seeks intervention to argue that (1) the proposed export, if authorized, would be inimical to the common defense and security of the United States; (2) approval of the proposed export would be contrary to section 134 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2160d (the "Schumer Amendment"); and (3) the license application is deficient in meeting the information requirements of NRC regulations in that it does not sufficiently describe the ultimate intended end use of the material to be exported. Petition at 10-11.

NCI requests that the Commission (1) grant NCI's Petition for Leave to Intervene, (2) order a full and open public hearing at which interested parties may present oral and written testimony and conduct discovery and cross-examination of witnesses, and (3) act to ensure that all pertinent information regarding the issues addressed by NCI is made available for public inspection at the earliest possible date. Id. at 1-2, 18.

Transnuclear filed an Opposition in Response to Petition to Intervene ("Response") on July 27, 1993. Before responding to the petition, Transnuclear amended its application on July 16, 1993, to require that the exported material be blended down and used as low-enriched uranium ("LEU") for research or test reactors. In its Response, Transnuclear argues that the NRC is not statutorily required to provide an adjudicatory hearing on export licenses and that, in any case, NCI is not entitled to a hearing as a matter of right because NCI lacks standing. Response at 2-4. Transnuclear further argued that a discretionary hearing would not be in the public interest or assist the Commission in making its statutory determination because Transnuclear's amended license application makes clear that the uranium recovered from the exported material

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3 The Energy Policy Act of 1992, Pub. L. No. 102-486, signed into law on October 24, 1992, among other things, added new restrictions on the export of uranium, in a new section 134 of the Atomic Energy Act (the "Schumer Amendment"). The Schumer Amendment permits the issuance of a license for export of uranium enriched to 20% or more in the isotope-235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to other requirements of the Atomic Energy Act, the NRC determines that (1) there is no alternative nuclear reactor fuel or target enriched in the isotope-235 to a lesser percent than the proposed export that can be used in that reactor; (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium; and (3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor. The applicability of the Schumer Amendment to the instant application is discussed infra.
will be blended down to LEU, thus removing the relevance of the contentions proffered by NCI. *Id.* at 8-10.

NCI filed a timely Reply to Applicant's Opposition to the Petition for Leave to Intervene and Request for Hearing ("Reply") on August 16, 1993. In its Reply, NCI argues that a hearing of right is available in export licensing cases. *Reply* at 2-4. NCI concedes that Commission case law has denied standing, as a matter of right, to organizations with interests substantially similar to NCI's in proceedings substantially similar to the instant one, but argues that the Commission should expand its approach to standing in export licensing proceedings to meet congressional expectations regarding public participation in such proceedings. *Id.* at 5-7. NCI further argues that, notwithstanding Transnuclear's stated intention to blend down the material after it is exported, NCI's contentions remain valid because granting the license will increase the amount of HEU in international transport and commerce, and the expressed intention to down blend is unacceptably vague. *Id.* at 7-14.

Subsequent to NCI's Reply, COGEMA submitted a letter dated September 8, 1993, confirming that COGEMA will notify the NRC, in writing, within 30 days after all the exported material has been blended down to LEU. In a letter dated September 24, 1993, COGEMA again confirmed the earlier notification commitment and further confirmed that commercial arrangements regarding the material require that all the exported material be blended down with no substitutions or sale of HEU allowed, and that COGEMA will retain title to the material until it has been blended down to LEU.

**III. THE PETITIONER'S STANDING**

**A. NCI Does Not Have Standing to Intervene as a Matter of Right**

Section 189a of the Atomic Energy Act of 1954, as amended, provides, among other things, that the Commission grant a hearing, as a matter of right, to any person "whose interest may be affected by" a proceeding under the Act for the granting of any license. 42 U.S.C. §2239(a)(1). To determine if

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*The Commission’s regulations at 10 C.F.R. § 110.84 list the factors to be considered in taking action on a hearing request or intervention petition in a licensing proceeding for the export of nuclear materials. Section 110.84(b) addresses considerations to determine whether a petitioner has standing to intervene as a matter of right and provides that:

(b) If a hearing request or intervention petition asserts an interest which may be affected, the Commission will consider:

(1) The nature of the alleged interest;

(2) How the interest relates to issuance or denial; and

(3) The possible effect of any order on that interest, including whether the relief requested is within the Commission’s authority, and, if so, whether granting relief would redress the alleged injury.

10 C.F.R. §110.84(b).*

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a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, "the Commission has long applied contemporaneous judicial concepts of standing." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), citing Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), aff'd, Environmental & Resources Conservation Organization v. NRC, No. 92-70202 (9th Cir. June 30, 1993); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). To satisfy the judicial concept of standing, a petitioner must demonstrate "a concrete and particularized injury that is fairly traceable to the challenged action." CLI-93-21, 38 NRC at 92 (1993).

NCI asserts a claim of interest for standing based on its institutional interests in the dissemination of information concerning nuclear weapons and proliferation in general and the use of HEU in particular. Petition at 3. The Commission has long held that institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a. See, e.g., Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572-78 (1976); Transnuclear, Inc. (Ten Applications for Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 529-32 (1977); Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 257-60 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 70 (1981). See also Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59-61 (1992) (rejection of "informational interests" as grounds for standing in reactor licensing case).

NCI "concede[s] that there is a line of Commission cases, starting with the pre-NNPA [Nuclear Non-Proliferation Act] decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), denying standing to organizations with interests substantially similar to Petitioner in proceedings substantially similar to the present one." Reply at 5. NCI argues, however, that the Commission's approach to standing should be expanded to realize the congressional intention to increase public participation in export licensing through enactment of section 304 of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155a ("NNPA"). Reply at 5-7.

The mechanism for increased public participation that NCI urges already is provided for in the Commission's regulations. Section 304(b)(2) of the NNPA mandated that the Commission promulgate regulations establishing procedures "for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act." 42 U.S.C. § 2155a(b)(2). The Commission amended its regulations
in 1978 expressly to accommodate this mandate by adding the criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing as a matter of discretion. See Statement of Considerations, 43 Fed. Reg. 21,641, 21,642-43 (1978). The regulation specifically sets forth the Commission policy to hold a hearing or otherwise permit public participation if the Commission finds that such a hearing or participation would be in the public interest and would assist the Commission in making the required statutory determinations.

Thus, even though NCI has not established a basis on which it is entitled to intervene as a matter of right, the Commission could hold a hearing under 10 C.F.R. § 110.84(a)(1) and (2) if such hearing would be in the public interest and assist the Commission. See Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987).

B. A Discretionary Hearing Would Not Assist the Commission and Be in the Public Interest

The issues raised by NCI — (1) the common defense and security of the United States, (2) compliance with the Schumer Amendment, and (3) assurance of the ultimate intended end use of the material — do concern matters that the Commission considers in making an export license decision. There is no indication in NCI's pleading, however, that it possesses special knowledge regarding these issues or that it will present information not already available to and considered by the Commission.

The Executive Branch and the Commission staff have addressed the issues sufficiently in their respective reviews of the application. The transportation, international safeguards, and foreign physical security concerns associated with the issue of the common defense and security were addressed by the Executive Branch and the Commission staff in their consideration of the application. The Commission has reviewed the Executive Branch’s and Commission staff’s evaluation of the ultimate end use of the material and the effect of the COGEMA September 8 and 24, 1993 letters regarding that end use. NCI offers no reason for the Commission to differ with the views expressed by the Executive Branch and the Commission staff on these matters.

5 Section 110.84(a) of Title 10 of the Code of Federal Regulations provides that:
   (a) In an export licensing proceeding, or in an import licensing proceeding in which a hearing request or intervention petition does not assert or establish an interest which may be affected, the Commission will consider:
      (1) Whether a hearing would be in the public interest; and
      (2) Whether a hearing would assist the Commission in making the statutory determinations required by the Atomic Energy Act.

10 C.F.R. § 110.84(a).
The only remaining issue raised by NCI is compliance with section 134 of the Atomic Energy Act of 1954, as amended (the Schumer Amendment), 42 U.S.C. § 2160d. NCI contends that, notwithstanding that the HEU is to be blended down for use as LEU reactor fuel, the Schumer Amendment issue "remains alive" because of the terms of the Amendment. Reply at 13-14. A fair reading of the entire amendment, however, shows that, while Congress may have been concerned about the transportation of HEU, the focus of the statute is on discouraging the continued use of HEU as reactor fuel and not on prohibiting the exportation, per se, of HEU. Any other reading would be inconsistent with the plain meaning of the legislation since it allows for the exportation of HEU fuel for use in a reactor, provided that certain provisions are in place to ultimately convert the reactor to use LEU. See 42 U.S.C. § 2160d(a)(2) and (3). Further, assuming *arguendo* that the terms of the Schumer Amendment are ambiguous, a review of its legislative history clearly shows that the intent of the amendment is to "put into law what was, from 1978 to 1990, the policy of both Democratic and Republican administrations — prohibiting the NRC from licensing the exports of bomb-grade uranium fuel. . . ." 138 Cong. Rec. H11440 (daily ed. October 5, 1992) (remarks of Representative Schumer) (emphasis added). The NRC Staff advises that the material the Applicant seeks to export, although fabricated as HEU fuel for the now defunct Fort St. Vrain reactor, is not in a form that can be used as HEU fuel or target material in a research or test reactor without first processing the material to recover its uranium content. Exporting the material for processing, blending down, and subsequent fabrication into LEU fuel or target material for test and research reactors may aid in discouraging the continued use of HEU as fuel in reactors by increasing the availability of LEU fuel. The action, if nothing else, meets one of the goals of the Schumer Amendment, in that it will remove 280 kilograms of HEU from the world inventory and, thereby, help encourage "developing alternative fuels that will enable an end to the bomb-grade exports." *Id.*

In summary, nothing in the NCI Petition and Reply indicates that a hearing would generate significant new insights for the Commission regarding the instant application. To the contrary, conducting a public hearing on issues concerning matters about which the Commission already has abundant information and analyses would be contrary to one of the purposes of the NNPA, namely,

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6 The Schumer Amendment states, in part:

a. The Commission may issue a license for the export of highly enriched uranium to be used as a fuel or target in a nuclear research or test reactor only if, in addition to any other requirement of this [Act], the Commission determines that—

(1) there is no alternative nuclear fuel or target enriched in the isotope-235 to a lesser percent than the proposed export, that can be used in that reactor;

42 U.S.C. § 2160d. The meaning of the phrase "to be used as a fuel" in the first sentence, in the context of the whole provision, clearly means "to be used as an HEU fuel." The NCI argument depends on reading the word "fuel" in the first sentence as meaning either "HEU fuel" or "LEU fuel."
“that United States government agencies act in a manner which will enhance this nation's reputation as a reliable supplier of nuclear materials to nations which adhere to our nonproliferation standards by acting upon export license applications in a timely fashion.” Westinghouse, CLI-80-30, 12 NRC 253, 261 (1980) (citation omitted). For these reasons, NCI’s petition and request for a public hearing should be denied as not in the public interest and not necessary to assist the Commission in making its statutory determinations.

IV. CONCLUSION AND ORDER

For the reasons stated in this decision, NCI has not established a basis on which it is entitled to intervene as a matter of right under the Atomic Energy Act. Further, a hearing, as a matter of discretion pursuant to 10 C.F.R. § 110.84(a), would not be in the public interest and is not needed to assist the Commission in making the determinations required for issuance of the export license to Transnuclear. The Petition for Leave to Intervene and Request for Hearing is denied.

It is so ORDERED.

For the Commission?

JOHN C. HOYLE

Assistant Secretary of the Commission

Dated at Washington, D.C.,
this 19th day of January 1994.

7 Commissioner de Planque was not present for the affirmation of this order; if she had been present, she would have approved it.
Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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Robert M. Lazo, *Deputy Chief Administrative Judge (Executive)
Frederick J. Shon, *Deputy Chief Administrative Judge (Technical)

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Dr. Harry Foreman  Dr. Emmeth A. Luebke  Dr. George F. Tidey
Dr. Richard F. Foster  Morton B. Margulies*  Sheldon J. Wolfe

*Permanent panel members
This proceeding was initiated pursuant to the request of the Licensee herein, Innovative Weaponry, Inc., for a hearing on the NRC order modifying its byproduct material license.\(^1\) By a notice served on December 27, 1993, the

\(^1\) Order Modifying License (Effective Immediately), 58 Fed. Reg. 34,598 (June 28, 1993).
Licensee withdrew its request for a hearing. Accordingly, the Board terminates this proceeding as moot.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 11, 1994
In the Matter of Docket No. 030-31765-EA
(ASLBP No. 93-674-03-EA)
(EA 93-006)
(Order Suspending
Byproduct Material License
No. 37-28540-01)

ONCOLOGY SERVICES CORPORATION January 24, 1994

In this license suspension proceeding, the Licensing Board rules on prediscovery motions to dismiss or for summary disposition regarding a dozen of the litigation issues specified by licensee Oncology Services Corporation.

ENFORCEMENT ACTIONS: LEGAL BASIS

As a creature of the Congress, the agency can only wield that enforcement authority it has been given by legislative enactment. See 5 U.S.C. § 558(b).

ENFORCEMENT ACTIONS: LEGAL BASIS

Previous judicial interpretation makes it clear that the Commission’s enforcement authority under sections 161b, 161i(3), and 186a of the Atomic Energy Act (AEA), 42 U.S.C. §§ 2201(b), 2201(i)(3), 2236(a), is wide-ranging, perhaps uniquely so. See Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).
ENFORCEMENT ACTIONS: LEGAL BASIS

The Commission’s broad authority under AEA section 182, 42 U.S.C. § 2232(a), to define regulatory requirements likewise has received judicial recognition. See Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C. Cir. 1989) (determination of what constitutes “adequate protection” of the public health and safety for reactor facilities under section 182 is a matter congressionally committed to the Commission’s sound discretion).

AGENCY ORDER: COMPARISON TO REGULATION

A valid agency order mandating requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally. See AEA § 161b, 42 U.S.C. § 2201(b). See also Wrangler Laboratories, ALAB-951, 33 NRC 505, 518 & n.39 (1991).

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

The choice of whether to use a general rule or an individual order to establish a standard is one within “the informed discretion” of the agency. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). This principle recognizes that in the face of a broad congressional mandate such as that given to the NRC, an agency simply cannot be expected to anticipate and promulgate a rule relative to each activity that a regulated entity undertakes. Therefore, to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders. See Chenery, 416 U.S. at 203. In the words of the Supreme Court, to do otherwise “is to exalt form over necessity.” Id. at 202.

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

There may be instances when an agency’s determination to proceed by order rather than rulemaking would amount to an abuse of discretion. See Bell Aerospace, 416 U.S. at 294.
AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

A general “due process” concern about the agency’s failure to give explicit prior notice of the standards set forth in an order generally is not sufficient to establish an agency abuse of discretion in making a choice to proceed by order rather than by regulation, given the Supreme Court’s recognition of the discretion afforded agencies to utilize individual orders to establish binding standards. See Beazer East, Inc. v. EPA, Region III, 963 F.2d 603, 609 (3d Cir. 1992).

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

In determining whether an agency has abused its discretion in choosing to proceed by order rather than regulation, the critical factor appears to be whether the challenged agency order “fill[s] interstices in the law” or whether it creates a new standard, either because the order overrules past precedents relied upon by the party subject to the ruling or because it is an issue of first impression. See United Food & Commercial Workers International Union, Local No. 150-A v. NLRB, 1 F.3d 24, 34 (D.C. Cir. 1993). Only in the latter instance is a concern about the retroactive application of the order warranted.

ENFORCEMENT ACTIONS: BASIS FOR IMPOSITION OF ENFORCEMENT SANCTION

When it relies on the agency’s general statutory mandate to “protect the public health and safety” instead of a specific, previously issued regulation, order, regulatory guide, or license condition as the basis for imposing an enforcement sanction, the Staff must be prepared to establish with specificity the health and safety consequences of the licensee action or inaction about which it complains. Ultimately, the Staff must show how the standard to which it would hold the licensee (and presumably others similarly situated) regarding those matters is a reasonable component of agency’s general statutory mandate to protect the public health and safety.
RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

After all factual allegations in an issue specified in an enforcement proceeding are presumed to be true and all reasonable inferences are made in favor of the party sponsoring the issue, if there is no set of facts that would entitle that party to relief on the issues, dismissal is appropriate. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

LICENSESING BOARDS: AUTHORITY TO DISMISS ISSUES IN ENFORCEMENT PROCEEDING

RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

Consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), it is within the Licensing Board’s authority in an enforcement proceeding to entertain a Staff motion seeking dismissal of issues specified by the opposing party. See 10 C.F.R. § 2.718.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

LICENSESING BOARDS: REVIEW OF NRC STAFF’S ACTIONS

The Commission intended to define the scope of an enforcement proceeding under 10 C.F.R. § 2.202 to limit the Licensing Board to a determination regarding the sufficiency of the legal and factual predicates outlined in the Staff’s enforcement order as of the time the order was issued. The extent to which subsequent circumstances warrant agency action to modify or withdraw a suspension order generally is a matter that is within the discretion of the Staff and is not subject to consideration in an agency adjudication. Cf. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), vacated in part and rehearing en banc granted on other grounds, 760 F.2d 1320 (1985), aff’d en banc, 789 F.2d 26, cert. denied, 479 U.S. 923 (1986).

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

LICENSESING BOARDS: JURISDICTION (STAFF ORDERS)

RULES OF PRACTICE: REVIEW OF NRC STAFF’S ACTIONS; SETTLEMENT OF CONTESTED PROCEEDINGS

The question of the presiding officer’s authority to consider whether the Staff should act to revise or withdraw a challenged suspension order can be
distinguished from instances in which the Staff actually has acted (1) to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order, or (2) to enter into an agreement to take such actions to settle a proceeding. In both of the latter instances, agency rules provide that the Staff’s action is subject to scrutiny by the presiding officer. See 10 C.F.R. §§ 2.203, 2.717(b).

MEMORANDUM AND ORDER
(Ruling on Parties’ Pre-discovery Motions to Dismiss or for Summary Disposition)

In a July 15, 1993 memorandum and order, the Board requested that the NRC Staff and licensee Oncology Services Corporation (OSC) consider whether certain of the nearly 100 issues previously identified by OSC for litigation in this license suspension proceeding are subject to motions to dismiss or for summary disposition. The Staff now asks that we dismiss twelve OSC issues while OSC maintains that it is entitled to summary disposition on five of these issues.

For the reasons set forth below, we deny OSC’s summary disposition motion and grant the Staff’s dismissal request as to ten of the twelve issues.

I. BACKGROUND

By order dated January 20, 1993, the Staff suspended OSC’s byproduct materials license authorizing the use of sealed-source iridium-192 for high dose rate (HDR) human brachytherapy treatments at six OSC facilities in Pennsylvania. One of the principal bases for the Staff’s suspension determination is a November 16, 1992 incident at OSC’s Indiana (Pennsylvania) Regional Cancer Center (IRCC). Following treatment at IRCC, an HDR brachytherapy patient was returned to her nursing home with a iridium-192 source mistakenly lodged in the area of her abdomen. Also cited by the Staff in support of license suspension are the results of December 8, 1992 inspections of OSC facilities in Lehighton and Exton, Pennsylvania, and a December 18, 1992 letter in which OSC’s radiation safety officer (RSO) allegedly improperly delegated corporate health and safety responsibilities to OSC satellite facilities.

According to the Staff, the factual circumstances surrounding these matters, as described in the suspension order, “demonstrate a significant corporate management breakdown in the control of licensed activities.” 56 Fed. Reg. 6825, 6826 (1993). While noting that the agency was continuing to investigate OSC’s activities, the Staff nonetheless found that
as a result of the information available to date and the incident in which an iridium-192 source was unknowingly left within a patient, [the Staff] lack[s] the requisite reasonable assurance that [OSC's] current operations can be conducted under [its license] in compliance with the Commission's requirements and that the health and safety of the public, including [OSC's] employees and patients, will be protected.

Id. at 6827. Based on these findings, the Staff imposed an immediately effective suspension of OSC's license.

This proceeding was convened in response to OSC's timely request for a hearing to contest the order. In response to the first of three Staff requests for a delay of the proceeding to permit the agency to complete its investigations of the November 1992 incident and related matters, we issued a March 1993 memorandum and order postponing discovery by the parties.1 See LBP-93-6, 37 NRC 207, vacated in part as moot, CLI-93-17, 38 NRC 44 (1993). At the same time, in an effort to have the parties begin defining the parameters of this proceeding, the Board directed that they file a joint prehearing report setting forth, among other things, the "central" issues for litigation. See id. at 221, 223. OSC specified ninety-nine issues. See Joint Prehearing Report (May 5, 1993) at 2-7, 8-16 [hereinafter Prehearing Report]. The Staff agreed with the wording of nineteen of these issues, see id. at 3-4, 6, 8-9, 11-12, 14-16, but objected to the remaining eighty, see NRC Staff's Objections to Issues Proposed by [OSC] (May 11, 1993).2

After reviewing these Staff objections and OSC's response thereto, we issued the previously referenced July 15 memorandum and order. In it we directed that as to thirty-seven of the OSC issues, either the Staff or OSC should provide a filing that requested dismissal or summary disposition of particular issues or that outlined why those issues are not appropriate for further Board consideration at present. See Memorandum and Order (July 15, 1993) at 10, 13-14 (unpublished) [hereinafter July 15, 1993 Order]. We also indicated that either party was free to include any of the other prehearing report issues in any dispositive motion it filed. See id. at 3 n.1.

On August 16, 1993, both the Staff and OSC filed such motions. The Staff initially asked that we dismiss thirty-one of the thirty-two issues we had identified for its specific consideration, as well as an additional seven OSC issues not referenced by the Board. See NRC Staff's Motion to Dismiss Cert'in Issues Proposed by [OSC] (Aug. 16, 1993) at 9-32 [hereinafter Staff Motion to Dismiss]. For its part, OSC moved for summary disposition regarding the

1 Subsequently, we granted two additional Staff delay requests, postponing discovery through early December 1993. See LBP-93-10, 37 NRC 455, aff'd, CLI-93-17, 38 NRC 44 (1993); LBP-93-20, 38 NRC 130 (1993). On November 16, the Staff informed the Board that it was not requesting any further delays in the proceeding as a result of the investigations. See Letter from M. Zobler, NRC Staff, to the Licensing Board (Nov. 16, 1993).
2 The Staff proposed nine issues, but OSC agreed to the wording of only one. See Prehearing Report at 1-2, 7-8. None of these Staff issues are the subject of OSC's pending dispositive motion.
five issues that we had asked it to address further. See Response of [OSC] to the July 15, 1993 Order of the [Licensing Board] (Requesting Further Party Filings on Controverted Issues) and Motion of [OSC] for Summary Judgment with Respect to Certain of Those Issues (Aug. 16, 1993) at 10-20 [hereinafter OSC Summary Disposition Motion].

Both parties subsequently filed a response opposing the other’s dispositive motion and a reply to those responses. As part of its response, the Staff requested that we dismiss the five issues designated by OSC for summary disposition. See NRC Staff’s Response to [OSC’s] Motion for Summary Judgment with Respect to Certain Issues and NRC Staff Motion to Dismiss (Sept. 16, 1993) at 30-33 [hereinafter Staff Summary Disposition Response/Motion to Dismiss]. Additionally, with its reply to the Staff’s response, OSC filed a motion to strike the Staff’s additional dismissal request. See Reply of Licensee [OSC] to NRC Staff’s Response to [OSC’s] Motion for Summary Judgment with Respect to Certain Issues and Motion of [OSC] to Strike the NRC Staff’s September 16, 1993 Motion to Dismiss as Untimely, Unauthorized and Prejudicial (Oct. 1, 1993) at 19-20 [hereinafter OSC Reply to Staff Summary Disposition Response/Motion to Strike].

After reviewing these various pleadings, we issued a November 17, 1993 memorandum and order in which we denied OSC’s motion to strike the Staff’s additional dismissal request. See Memorandum and Order (Denying OSC Motion to Strike Additional Staff Motion to Dismiss Certain OSC Issues and Permitting Further OSC Response to Additional Motion to Dismiss; Requesting Additional Filings Regarding NRC Staff Motions to Dismiss Certain OSC Issues) at 3-4 (Nov. 17, 1993) (unpublished) [hereinafter November 17, 1993 Order]. We also directed that the Staff provide additional information relative to its pending dismissal motions. See id. at 4-8. This request was prompted by statements in the Staff’s reply to OSC’s response to the Staff’s initial motion to dismiss indicating that for certain of the issues specified by OSC, the Staff’s dismissal request was predicated on its belief that these issues had been raised prematurely. See NRC Staff’s Reply to [OSC’s] Response to NRC Staff’s Motion to Dismiss Certain Issues Proposed by [OSC] (Oct. 1, 1993) at 5-7. As presented by the Staff, “dismissing” such an issue now would not necessarily foreclose OSC from later attempting to introduce evidence regarding that issue as part of its challenge to the Staff’s January 1993 enforcement order.

Noting that the intent of our July 15 order was to identify those issues that either party believed could be conclusively resolved at this point in the proceeding, in our November 17 memorandum and order we asked that the Staff again review the issues for which it requested dismissal and specify which, if any, were now subject to definitive resolution. See November 17, 1993 Order at 6-7. In its November 29 response to this request, the Staff has indicated that twelve of OSC’s issues currently are subject to “dismissal” under the terms of
our November 17 issuance. See NRC Staff Response to the [Licensing Board's] Order Dated November 17, 1993 (Nov. 29, 1993), at 5-7 [hereinafter Staff Response to November 17, 1993 Order]. Five of these are the same issues for which OSC seeks summary disposition in its favor. See id. at 6 n.2. In its reply to the Staff's response, OSC reiterates its position that none of these twelve issues is subject to dismissal. See Response of Licensee [OSC] to Staff Filings of November 29, 1993 and September 6, 1993 (Dec. 13, 1993) at 3-6 [hereinafter OSC Response to November/September Staff Filings].

We consider the twelve issues specified in the Staff's November 29 response as being ripe for decision at this time.3

II. ANALYSIS

A. OSC Summary Disposition Motion

1. The OSC Issues

In analyzing the parties' motions, we begin with OSC's summary disposition request because it potentially is dispositive of the Staff's request to dismiss the same five issues. In our July 15 order, we asked that, given its response to the Staff's objections to five of its issues — OSC Legal Issues n, s, t, v, and x — OSC give further consideration to whether it should seek summary disposition regarding those issues. See July 15, 1993 Order at 10-14. Those issues were specified by OSC as follows:

OSC Legal Issue n. Whether the RSO not visiting the Lehighton facility during a period of 6-9 months constitutes a violation of 10 C.F.R. § 35.21, 10 C.F.R. § 35.20 or any applicable conditions of the license?

OSC Legal Issue s. Whether, under any applicable regulations or licensing conditions, an appropriate corporate radiation safety communication must be issued before any media disclosure of an event?

OSC Legal Issue t. Whether the failure to issue an appropriate corporate radiation safety communication prior to media disclosure of an event constitutes a basis to support an effective immediately suspension order?

OSC Legal Issue v. Assuming that OSC voluntarily suspended licensed HDR operations at Exton and Lehighton, whether there was any specific regulatory requirement that OSC inform the physicists at Exton and Lehighton of the November 1992 IRCC incident via "corporate radiation safety communication" designed to prevent "the recurrence of an event such as the November 16, [1992] event," during the period of voluntary suspension and prior to the time

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3If it finds it appropriate to do so, the Staff may renew its dismissal request relative to any of the other issues specified in its motions, subject to any time limitations we place on filing dispositive motions.
that OSC and Dr. Cunningham, the RSO, had an understanding of what had occurred on November 16, 1992?

OSC Legal Issue x. Whether 10 CFR Parts 20, 30, or 35 or any license conditions require a licensee to establish and implement a periodic corporate audit program?

See Prehearing Report at 4-6.

2. The Parties’ Positions

In its summary disposition filing, OSC asserts that, for purposes of its motion, it will assume that the factual allegations made by the Staff regarding each of these issues is correct, i.e., that the RSO did not visit the Leighton facility for six to nine months; that physicists at the Leighton and Exton facilities learned of the November 1992 IRCC incident from the media rather than a corporate radiation safety communication; and that OSC did not have a periodic corporate audit program in place. See OSC Summary Disposition Motion at 13. According to OSC, even with this assumption, these “Visitation, Audit, and Communication grounds” (as OSC labels them) cannot constitute a basis for the Staff’s finding in its enforcement order that there has been a “significant corporate management breakdown” warranting license suspension. OSC maintains that in each instance the Staff has failed to indicate that the purported improper actions violate any specific statutory provision, regulation, license condition, technical specification, or order so as to constitute a proper basis for an enforcement action. Indeed, OSC suggests that this question of a lack of authority has far-reaching implications for this case because, as with these issues, the agency’s reliance upon “corporate mismanagement” as the general basis for its suspension action likewise has no foundation in a specific regulatory requirement that would provide grounds for instituting an enforcement action. See id. at 13-14.

OSC cites three grounds in support of its position. See id. at 14-20. First, it contends that three provisions in the Atomic Energy Act of 1954 (AEA), sections 161b, 182a, and 186a, 42 U.S.C. §§ 2201(a), 2232(a), 2236(a), mandate that to establish a binding norm by which a licensee must abide, the agency has to promulgate an explicit regulatory requirement, i.e., a rule, order, technical specification, or license provision, and that such requirements can only be prospective in application. OSC also declares that 10 C.F.R. Part 2, App. C, § VI.C(2)(a), cited in the Staff’s objections to OSC’s issues as supporting the agency’s authority to suspend OSC’s license, is a “policy statement” rather than a rule. This, OSC asserts, means that it can have no binding effect.

Finally, OSC contends that any finding that the matters set forth in these issues constitute a basis for an enforcement action would violate its right to due process under the Constitution’s fifth amendment. According to OSC, because
there is no specific regulatory requirement covering the conduct involved in these issues, the Commission has violated OSC's rights by failing to provide it with notice of the legally binding standard to which it must conform its conduct. By the same token, OSC asserts that even if section VI.C(2)(a) of Appendix C is a legally binding requirement, its statement that a suspension order may be used "[t]o remove a threat to the public health and safety, common defense and security, or the environment" violates OSC's due process rights because it is too vague to provide OSC with notice of the standards to which it must conform and because it impermissibly permits arbitrary and discriminatory enforcement.

In response, the Staff declares that the Commission is not limited to issuing enforcement orders based only upon a violation of its regulations. Instead, it asserts that AEA section 161 places orders — such as the Staff's January 1993 enforcement order — that are issued to protect the public health and safety on an equal footing with agency rules designed to afford the same standard of protection. Further, citing the Supreme Court's decision in SEC v. Chenery Corp., 332 U.S. 194 (1947), the Staff states that in carrying out its statutorily imposed responsibility to protect the public health and safety, the agency is not limited to promulgating rules, which usually have only prospective application. Rather, it can in appropriate circumstances take action by issuing an order that delineates a standard of conduct and applies that standard to the party that is the subject of the order. Finally, the Staff asserts that the AEA provisions referred to by OSC (which also are cited in the January 1993 order) provide the Commission with broad authority to act by issuing rules or orders, among other things permitting it to suspend a license for any conditions that would warrant refusing to grant an original license application or as otherwise may be necessary to protect public health and safety or to minimize danger to life or property. See Staff Summary Disposition Response/Motion to Dismiss at 10-13.

3. The Board's Determination

OSC undoubtedly is correct that section VI.C(2)(a) of Appendix C is not a legally binding requirement. Yet, this circumstance alone will not sustain its overall position. Section 2.202(a)(1) of 10 C.F.R. states that in issuing an enforcement order such as that at issue here, the Staff must "[a]llleg[e] the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the action proposed." This language suggests that the Commission contemplated that orders need not be based upon a violation of a specific regulatory requirement, such as a rule, license condition, or technical specification.

Yet, it also is true that as a creature of the Congress, the agency can only wield that enforcement authority it has been given by legislative enactment.
See 5 U.S.C. § 558(b). AEA section 186a, 42 U.S.C. § 2236(a), permits revocation and, by necessary implication, suspension of a license for, among other things, "any failure to observe any of the terms and provisions of this Act." Moreover, there apparently are statutory "terms and provisions" that could provide authorization for the Staff's allegations of wrongdoing here. Under sections 161b and 161i(3), id. §§ 2201(b), 2201(i)(3), the agency is empowered to issue orders "to protect health or minimize danger to life or property." Previous judicial interpretation makes it clear that the Commission's authority under these provisions is wide-ranging, perhaps uniquely so. See Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).

Given the broad sweep of this legislative charge, we cannot say on the present record that the agency would be unable to impose specific requirements regarding either "corporate management" or the visitation, audit, and communications components of the Staff's overall management deficiency finding that are implicated in the five OSC issues. Further, a valid agency order mandating such requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally. See AEA § 161b, 42 U.S.C. § 2201(b). See also Wrangler Laboratories, ALAB-951, 33 NRC 505, 518 & n.39 (1991). What may be less clear, and is the crux of OSC's concern here, is the extent to which such orders can have retroactive application, i.e., whether the agency for the first time in an order can declare that certain conduct, or a failure to act, on the part of a licensee was improper so as to warrant sanctions.

The Supreme Court's pronouncements in this area, particularly its decisions in Chenery, 332 U.S. at 203, and NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), establish that the choice of whether to use a general rule or an

4 A further indication of the agency's broad authority to impose requirements is found in AEA section 182a, 42 U.S.C. § 2232(a), regarding license applications. It states that the Commission has the authority to require an applicant to provide information that, by rule, the Commission finds is necessary to determine that the applicant has the technical, financial, and other qualifications appropriate for a license. In turn, AEA section 186a, id. § 2236(a), permits suspension for any conditions revealed by an inspection or other means that would warrant refusal to grant an original license application. The Commission's broad authority under section 182 to define regulatory requirements likewise has received judicial recognition. See Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C. Cir. 1989) (determination of what constitutes "adequate protection" of the public health and safety for reactor facilities under section 182 is a matter congressionally committed to the Commission's sound discretion).

5 OSC refers to the Administrative Procedure Act (APA) provision on license revocations and suspensions, 5 U.S.C. § 558(c), as providing a basis for its assertions regarding the need for the agency to allege a violation of a specific agency regulatory requirement, such as a rule, as the basis for a suspension order. See OSC Reply to Staff Summary Disposition Response/Motion to Strike at 11-12. We find this provision inapplicable.

Section 558(c) permits an agency, in cases where the "public health, interest, or safety requires," to take action without observing the requirements for affording prior notice and a "compliance" opportunity that otherwise are mandated prior to imposing a suspension. This "immediate effectiveness" authority does not, however, address the question of what violations must be alleged to provide an appropriate basis in support of the order. Rather, this depends principally upon the provisions of the agency's organic statute, such as the AEA. See 5 U.S.C. § 558(b). See also U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 88-89, 91 (1947), reprinted in Administrative Conference of the U.S., Federal Administrative Procedure Sourcebook 154-55, 157 (2d ed. 1992).
individual order to establish a standard is one within "the informed discretion" of the agency. This principle recognizes that in the face of a broad congressional mandate such as that given to the NRC, an agency simply cannot be expected to anticipate and promulgate a rule relative to each activity that a regulated entity undertakes. Therefore, to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders. See Chenery, 416 U.S. at 203. In the words of the Court, to do otherwise "is to exalt form over necessity." Id. at 202.

There may be instances, however, when an agency's determination to proceed by order rather than rulemaking would amount to an abuse of discretion. See Bell Aerospace, 416 U.S. at 294. OSC's general "due process" concern about the agency's failure to give it explicit prior notice of the standards set forth in an order generally is not sufficient to establish such an abuse, given the Supreme Court's recognition of the discretion afforded agencies to utilize individual orders to establish binding standards. See Beazer East, Inc. v. EPA, Region III, 963 F.2d 603, 609 (3d Cir. 1992). Instead, the critical factor appears to be whether the challenged agency order "fill[s] interstices in the law" or whether it creates a new standard, either because the order overrules past precedents relied upon by the party subject to the ruling or because it is an issue of first impression. See United Food & Commercial Workers International Union, Local No. 150-A v. NLRB, 1 F.3d 24, 34 (D.C. Cir. 1993). Only in the latter instance is a concern about retroactive application warranted.7

OSC has made no showing that the Staff's expressed concern about a "corporate management breakdown" or the propriety of OSC's actions relative to the specific audit, communication, and visitation matters referenced in the five OSC issues are inconsistent with some prior administrative precedent. Nor can we say that this is an instance involving a question of first impression

6 OSC maintains that the Chenery decision is inapposite here because (1) that case was decided prior to the effective date of the APA's suspension provision, 5 U.S.C. § 558(c), which OSC asserts directly addresses the instant situation, and (2) the Court's ruling did not address a situation such as this one in which an agency took summary enforcement action based upon conduct that was not previously identified as subject to any regulatory requirement or guideline. See OSC Reply to Staff Summary Disposition Response/Motion to Strike at 10 n.4. Even putting aside our doubts about the applicability of section 558(c) to the instant case, see supra note 5, we are not aware of any authority suggesting that the vitality of the Chenery decision is impacted by the fact that it was decided before the APA became effective. See Bell Aerospace, 416 U.S. at 292 n.23 (although Chenery did not involve APA rulemaking, it is analogous). Further, the tenants of that decision have been viewed as applicable in enforcement cases such as this proceeding. See National Distillers & Chem. Corp. v. Dep't of Energy, 498 F. Supp. 707, 720 (D. Del. 1980), aff'd, 662 F.2d 754 (Temp. Emer. Ct. App. 1981).

7 In United Food & Commercial Workers, 1 F.3d at 35, the United States Court of Appeals for the District of Columbia Circuit noted that any exceptions to the rule regarding the general validity of the retroactive application of individual agency orders may not withstand scrutiny under the Supreme Court's recent holding in Harper v. Virginia Dep't of Taxation, 125 L. Ed. 2d 74 (1993), abolishing exceptions to the retroactive application of judicial rulings in civil cases. Like the District of Columbia Circuit, we need not reach that question here given our finding below that the Staff's order does not run afoul of existing exception standards.
relative to the agency's regulatory program. Previously, the Staff's combination of individual instances of licensee conduct have been found to support an overall finding of "corporate management breakdown" sufficient to warrant an enforcement action. See Tulsa Gamma Ray, Inc., LBP-91-40, 34 NRC 297, 317-18 (1991). See also 10 C.F.R. Part 2, App. C, § VII.A (particularly serious violations, such as "serious breakdowns in management controls" may warrant escalation of enforcement sanctions). In fact, whether the Staff's management deficiency allegation will stand depends on its ability to fill a number of "interstices," among which are questions about the extent of an RSO's responsibility to stay abreast of matters at a corporate licensee's various facilities; the need for and timing of information bulletins by a corporate licensee to alert other potential material users under its license about possibly hazardous conditions; and the need for a periodic audit program by a corporate licensee when it has authorized material users at a number of facilities.

Accordingly, we must deny OSC's request for summary disposition on its Legal Issues n, s, t, v, and x. This is not to say, however, that the validity of the Staff's general charge of a "corporate management breakdown" or its specific concerns regarding the audit, communications, and visitations matters referred to in these OSC issues are now established. Because of its apparent reliance on the agency's general statutory mandate to "protect the public health and safety" instead of a specific, previously issued regulation, order, regulatory guide, or license condition as the basis for these matters, the Staff must be prepared to establish with specificity the health and safety consequences of the licensee action or inaction about which it complains. Ultimately, the Staff must show how the standard to which it would hold the Licensee (and presumably others similarly situated) regarding those matters is a reasonable component of the agency's general statutory mandate to protect the public health and safety.

B. Staff Motion to Dismiss OSC Summary Disposition Issues

Having thus rejected OSC's summary disposition motion regarding its Legal Issues n, s, t, v, and x, we next consider whether to grant the Staff's motion to dismiss these same issues. As the Staff correctly observes, if after all factual allegations in these issues are presumed to be true and all reasonable inferences are made in favor of OSC, there is no set of facts that would entitle OSC to relief on these issues, dismissal is appropriate. See Staff Summary Disposition Response/Motion to Dismiss at 26 (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). See also Staff Motion to Dismiss at 8.

8 Notwithstanding any OSC suggestion to the contrary, see Response of Licensee [OSC] to NRC Staff's Motion to Dismiss Certain Issues Proposed by [OSC] (Sept. 16, 1993) at 2-4, and consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), we find it within our authority to entertain the Staff's motions seeking dismissal of some OSC issues. See 10 C.F.R. § 2.718.
Applying this standard here, we note that OSC Legal Issues n, s, and x only ask whether there are any rules or license conditions that govern certain OSC activities. Because we have concluded that a negative Staff response to these questions would not adversely impact the Staff’s prosecution of this action, these issues can be dismissed.

Legal Issues t and v present a somewhat different question, however. Both are worded more broadly. Legal Issue t inquires whether the Staff’s purported concern about the timing of a corporate safety communication regarding the November 1992 IRCC incident constitutes an appropriate “basis” for the order. As we outlined above, this is still an open question. So too, Legal Issue v asks whether any “regulatory requirement” mandated a corporate safety communication when licensed activities at other facilities were voluntarily suspended, a specification that can still be explored in the context of the statutory provisions discussed above. Therefore, given their wording, we will permit these issues to stand.⁹

C. Staff Motion to Dismiss Other OSC Issues

As noted previously, the Staff also seeks dismissal of seven other OSC issues. Within the framework we used for differentiating among issues in our July 15 order, we consider these matters.

1. Unreferenced Factual Occurrences

The first category of OSC issues identified in our July 15 order are those relating to factual circumstances that are not referenced in the Staff’s January 20 suspension order. See July 15, 1993 Order at 5-6. Although the Staff designated a number of these in its initial motion to dismiss, in response to our November 17 memorandum and order it has indicated that only two — Factual Issues bk and bl — are now subject to dismissal. See Staff Response to November 17, 1993 Order at 7. These issues were set forth by OSC as follows:

OSC Factual Issue bk. Whether on April 2, 1993, the NRC approved an amendment sought by OSC changing its Radiation Safety Officer from David E. Cunningham Ph.D., to Bernard Rogers, M.D.?

OSC Factual Issue bl. Whether substantial patient need exists for HDR treatment at the facilities of OSC?

Prehearing Report at 28.

⁹We note, however, that the reference in Legal Issue t to the immediate effectiveness of the January 1993 order is superfluous, given OSC’s failure to challenge that condition at the appropriate time. See LBP-93-6, 37 NRC at 211 n.9.
The Staff asserts that both these issues are irrelevant because they fail to
disprove or challenge any of the bases for the January 1993 enforcement order. See Staff Motion to Dismiss at 20, 32. OSC responds that both these issues are relevant to the overarching question of whether there was a significant corporate management breakdown threatening the public health and safety so as to “justify a continuing license suspension.” OSC Response to November/September Staff Filings at 6.

Both of these issues involve matters that are irrelevant to this proceeding. With its Factual Issue bk, OSC raises the question of whether a licensee’s post-suspension efforts (and the Staff’s response to those efforts) can be considered as factors that can mitigate or nullify the bases for a suspension order. In the context of this proceeding, OSC apparently wants to present evidence showing that, regardless of the situation at the time the suspension order was imposed, subsequent events demonstrate that it now is exercising effective corporate management control so that the suspension order should not be upheld. See Response of Licensee [OSC] to NRC Staff’s Motion to Dismiss Certain Issues Proposed by [OSC] (Sept. 16, 1993) at 13 [hereinafter OSC Response to Staff Motion to Dismiss].

Under the January 1993 suspension order, the issue to be considered is whether the order “should be sustained.” 58 Fed. Reg. at 6827. If we were writing on a clean slate, we might well find that our inquiry into whether the order is to be “sustained” should encompass postsuspension activities proffered as corrective actions that support modifying or remitting the suspension. We do not do so, however. As defined by the Commission, our authority pursuant to this directive is to consider “whether the facts in the order are true and whether the remedy selected is supported by those facts.” Boston Edison Co. (Pilgrim Nuclear Power Station), CL1-82-16, 16 NRC 44, 45 (1982), aff’d, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). Likewise, in 10 C.F.R. § 2.202(b), the Commission has directed that an answer to an enforcement order is to specify “the reasons why the order should not have been issued.” Moreover, while the Commission’s enforcement policy explicitly notes that licensee “corrective actions” are a factor to be considered in imposing the other two types of enforcement actions, a notice of violation or a civil penalty, see 10 C.F.R. Part 2, App. C, §§ VI.A, VI.B.2(b), it makes no such representation concerning orders, including a suspension order such as that involved here.10

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10Section VI.C.2 of Appendix C does state that “[o]rdinarily, a licensed activity is not suspended (nor is a suspension prolonged) for failure to comply with requirements where such failure is not willful and adequate corrective action has been taken.” So too, the January 1993 suspension order states that it is being entered “pending... the institution of appropriate corrective actions on the part of the licensee.” 58 Fed. Reg. at 6827. These statements, along with the provision of the order providing for the Staff to relax or rescind any of its provisions upon a good cause showing by OSC, see id., are an explicit recognition of the Staff’s authority to consider and act upon corrective actions put forth by OSC. Nonetheless, given the Commission’s explicit (Continued)
What this tells us is that the Commission intended to define the scope of the proceeding to limit the Board to a determination of the sufficiency of the legal and factual predicates outlined in the order as of the time the order was issued.\(^\text{11}\)
The extent to which subsequent circumstances warrant agency action to modify or withdraw a suspension order generally is a matter that is within the discretion of the Staff and is not subject to consideration in an agency adjudication.\(^\text{12}\)

Cf. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), vacated in part and rehearing en banc granted on other grounds, 760 F.2d 1320 (1985), aff'd en banc, 789 F.2d 26, cert. denied, 479 U.S. 923 (1986). Accordingly, because it seeks to present a postsuspension event that is not relevant to establishing whether the Staff suspension order should be sustained, OSC Factual Issue bk must be dismissed.

Factual issue bl must suffer the same fate, albeit for a different reason. The Staff's order is based upon a judgment about whether the license suspension is necessary to protect the public health and safety in conformity with the agency's regulatory responsibilities under the AEA. See supra pp. 20-21. Whatever the patient "need" for the treatment with licensed materials, the agency cannot authorize their use until it is satisfied that the licensee will act consistent with this statutory mandate. Accordingly, OSC Factual Issue bl is irrelevant to our consideration of whether the Staff's January 1993 order should be sustained and is, therefore, dismissed.\(^\text{13}\)

2. **Applicability of 10 C.F.R. Part 35, Subpart G**

In our July 15 order, we also referenced a category of OSC issues regarding the applicability of the requirements of 10 C.F.R. Part 35, Subpart G, which

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\(\text{notes:}\)

\(^{11}\) The fact that the suspension order here was made immediately effective and continues to be effective does not affect this authority. The immediate effectiveness provision in the Commission's regulations states that the only grounds for contesting effectiveness are that "the order is not based on adequate evidence but on mere suspicion, unfounded allegations, or error." 10 C.F.R. § 2.202(c)(1)(2)(i). Under this provision, the focus remains on the stated bases for the order, not subsequent licensee actions in response to the suspension.

\(^{12}\) This question of the presiding officer's authority to consider whether the Staff should act to revise or withdraw a challenged suspension order can be distinguished from instances in which the Staff actually has acted (1) to modify or suspend a previously issued order during the pendency of an adjudicatory proceeding regarding that order, or (2) to enter into an agreement to take such actions to settle a proceeding. In both instances, agency rules provide that the Staff's action is subject to scrutiny by the presiding officer. See 10 C.F.R. §§ 2.203, 2.717(b). It also is not apparent whether, at some point, Staff inaction on modifying or lifting a suspension order in the face of licensee corrective actions effectively may become a type of action that would give the Board authority under section 2.717(b) to consider the sufficiency of those corrective actions.

\(^{13}\) The issue of patient "need" may well be relevant to the question of whether to grant a request to delay a proceeding. See LBP-93-6, 37 NRC at 216-20. At present, however, that is not a matter in controversy in this case. See supra note 1.
concerns the use of sources for brachytherapy. See July 15, 1993 Order at 6-7. In response to our November 17 memorandum and order, the Staff now seeks dismissal of two of these matters — OSC Legal Issues c and d. See Staff Response to November 17, 1993 Order at 6. These issues were detailed by OSC as follows:

OSC Legal Issue c. Whether the regulations in 10 C.F.R. Part 35 Subpart G “Sources for Brachytherapy” apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans (“HDR”).

OSC Legal Issue d. If the regulations in 10 C.F.R. Part 35 Subpart G “Sources for Brachytherapy” apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the treatment of humans (HDR) then whether the specific survey requirement of 10 C.F.R. § 35.404(a) applies to Iridium-192 HDR?

Prehearing Report at 2.

The Staff argues that these issues should be dismissed as irrelevant because the January 1993 suspension order was not based upon any violation of 10 C.F.R. Part 35. See Staff Motion to Dismiss at 20-21. OSC contends that these issues are relevant because its compliance with Part 35 would satisfy any survey requirement under 10 C.F.R. Part 20, including section 20.201 that is cited in the order. It also maintains that, even if Part 35 is not applicable, the Staff’s own uncertainty about whether the requirements of Part 35 are germane to HDR use is evidence that NRC never communicated with licensees properly about the applicable requirements and is relevant to demonstrating that the November 1992 IRCC incident was rooted in a “regulatory failure” rather than an OSC management breakdown. See OSC Response to Staff Motion to Dismiss at 15-16.

As worded, these issues are a poor delineation of the matters OSC evidentially wants to contest, at least as outlined in its response. The question of alternative compliance is already raised much more clearly in OSC Legal Issues e and f, which the Staff does not contend are subject to definitive resolution at this time. See Staff Response to November 17, 1993 Order at 8. By the same token, OSC Legal Issues a, ac, and ad, which are not among the twelve issues specified by the Staff, are much more to the point regarding any “regulatory failure” concern that OSC may wish to pursue.

OSC is responsible for spelling out the matters it wishes to litigate with sufficient specificity. Given the Staff’s acknowledgment that 10 C.F.R. Part 35 was not a basis for the January 1992 order, these two issues require too much “reading between the lines” to link them to the particular concerns OSC now contends it wants to present. We thus dismiss these two issues.
3. **Omnitron 2000 HDR Remote Afterloader Issues**

The third category of issues we identified were those relating to the Omnitron 2000 HDR remote afterloader that was in use at OSC’s IRCC facility during the November 1992 incident. *See* July 15, 1993 Order at 7. Among these are issues regarding defects or deficiencies in that device, or in the training, instructions, and emergency procedures provided by the manufacturer regarding that device, and questions about OSC employee compliance with and reliance upon Omnitron training and procedures.

The Staff indicated in its November 17 filing that three of these issues now are subject to dismissal. *See* Staff Response to November 17, 1993 Order at 7. They provide as follows:

*OSC Factual Issue z.* Whether the Omnitron 2000 HDR unit was defective?

*OSC Factual Issue ab.* Whether despite Omnitron’s knowledge of deterioration of the source wire due to a chemical reaction resulting from its packaging, Omnitron failed to notify OSC of the defect and OSC was not otherwise informed of the possibility of deterioration?

*OSC Factual Issue ad.* Whether any of the Omnitron 2000 design, manufacturing and/or warning defects was a cause of the November 16, 1992 incident?

*See* Prehearing Report at 11-12.

The Staff’s position regarding all three of these issues is the same: Under the factual circumstances described in the suspension order relative to the November 1992 IRCC incident, OSC had a regulatory obligation pursuant to Condition 17 of its license and 10 C.F.R. § 20.201(b) to perform a survey of the patient that would not be excused by any alleged defects in the Omnitron 2000. *See* Staff Motion to Dismiss at 22. OSC asserts that under the terms of the January 1993 order, a central question is whether its actions relating to taking a survey were, in the words of the January 1993 order, “reasonable under the circumstances to evaluate the extent of radiation hazards that may be present.” 58 Fed. Reg. at 6825. Further, according to OSC, any assessment of the reasonableness of its action can only be made after determining whether the Omnitron 2000 was defective, whether that defect was the cause of the November 1992 IRCC incident, and whether the machine’s manufacture knew of and failed to inform OSC about that defect. *See* OSC Response to Staff Motion to Dismiss at 14-15.

We agree with OSC that as to the issue of its personnel’s compliance with section 20.201(b), a central question is whether its actions relating to a survey were “reasonable under the circumstances.” We disagree, however, that its proposed concerns regarding defects in the Omnitron 2000 as embodied in Factual Issues z, ab, and ad have any relevance in answering that question.
In this context, the relevant “circumstances” are those that existed at the time of the incident. Undoubtedly, an important aspect of those circumstances is what pertinent OSC management and operating personnel knew about the Omnitron afterloader and any possible defects or problems, as garnered from such things as their operational experience or any information they were privy to as a result of training or instruction manuals. Consequently, a relevant area for litigation is the state of knowledge of OSC personnel about Omnitron afterloader defects and problems at the time of the incident.  

This is not, however, what these three “defect” issues seek to explore. As we understand it, OSC contends that at the time of the incident it did not know of any defect in the operation of the afterloader or its safety systems that could cause the metal drive wire to break and leave the iridium-192 source lodged in a patient without alerting the operator. See OSC Summary Disposition Motion at 3-4. If this indeed was the state of knowledge of OSC personnel at that time, then inquiry into whether the Omnitron machine actually was defective so as to be a cause of the November 1992 IRCC incident or whether the manufacturer should have told OSC about problems with the machine based upon some alleged duty to discover and disclose defects will not shed any light on the central question of what OSC personnel knew at the time of the incident. Indeed, for purposes of this action, even if it is assumed that the answers to each of these three “defect” issues is “yes,” we would be no closer to resolving the focal issue of whether the actions of OSC personnel regarding a survey were “reasonable under the circumstances.”

Accordingly, we dismiss OSC Legal Issues z, ab, and ad as not relevant to this proceeding.

III. CONCLUSION

Based upon our review of the parties’ filings, we conclude that in this instance the Staff’s reliance on matters that apparently do not constitute a violation of any specific pre-existing rule, order, license condition, or technical specification as a basis for its January 1993 suspension order did not constitute an abuse of discretion so as to warrant summary disposition in favor of licensee OSC relative to those matters. We will, however, grant the Staff’s request that OSC Legal Issues n, s, and x asserting such Staff reliance was improper be dismissed from this proceeding.

14 Other OSC issues raise questions about such matters. See, e.g., Prehearing Report at 10 (OSC Factual Issue n (Omnitron training regarding source wire breakage)); id. at 11 (OSC Factual Issue u (use of emergency procedures in the Omnitron manual)); id. at 12 (OSC Factual Issue ur (user reliance on Omnitron procedures)).
In addition, we conclude that OSC Factual Issues bk and bl should be dismissed, the former for seeking consideration of irrelevant postsuspension activities and the latter for attempting to introduce the extraneous factor of "patient need." We also dismiss OSC Legal Issues c and d for failing to delineate the matters OSC apparently wishes to litigate under those issues.

Finally, we find that the allegations about whether the Omnitrack 2000 afterloader involved in the November 1992 IRCC incident was defective and a cause of the incident are irrelevant to the matters at issue here — in particular, the focal question of whether the actions of OSC personnel regarding taking a survey during the November 1992 IRCC incident were "reasonable under the circumstances." We thus dismiss OSC Factual Issues z, ab, and ad as well.

For the foregoing reasons, it is this 19th day of January 1994, ORDERED, that
1. OSC's August 16, 1993 motion for summary disposition is denied.
2. The Staff's August 16, 1993 motion to dismiss is granted as to OSC Legal Issues c and d and OSC Factual Issues z, ab, ad, bk, and bl.
3. The Staff's September 16, 1993 motion to dismiss is granted as to OSC Legal Issues n, s, and x and is denied as to OSC Legal Issues t and v. \footnote{Copies of the memorandum and order are being sent this date to OSC counsel by facsimile transmission and to Staff counsel by E-Mail transmission through the agency's wide area network system.}

THE ATOMIC SAFETY AND LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 24, 1994

\footnote{Copies of the memorandum and order are being sent this date to OSC counsel by facsimile transmission and to Staff counsel by E-Mail transmission through the agency's wide area network system.}
In the Matter of GULF STATES UTILITIES COMPANY, et al. (River Bend Station, Unit 1) Docket No. 50-458-OLA (ASLBP No. 93-680-04-OLA)

January 27, 1994

In this Decision, the Licensing Board grants a petition to intervene and request for a hearing. Standing was granted on the basis that the property interest of a petitioner in a nuclear facility, who was a co-owner of the facility, might be jeopardized by potential unsafe operation of the facility caused by underfunding. The Board accepted one of seven contentions. The accepted contention was based on potential unsafe operation of the facility caused by a lack of funding.

IMMEDIATE EFFECTIVE ORDERS

License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings are not subject to review by licensing boards.

STANDING: STANDING BASED ON PROPERTY INTERESTS

In past NRC cases, standing based on injury to property has been denied because the property interests in question were too far removed from the purpose of the underlying statutes governing those proceedings. Those cases
primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility's impact on local utility rates and the local economy. Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing since the Atomic Energy Act affords radiological protection for both human life and property. There is standing in this proceeding since the Petitioner's stated interest is to protect its property, the nuclear facility, from radiological hazards arising from the facility's unsafe operation.

STANDING: INJURY IN FACT

Injury-in-fact in this proceeding was based upon potential damage to a co-owner's property interest in a nuclear facility. Potential property damage included loss of the co-owner's share of the facility, loss of plant power and revenue, and potential liability to third parties from radiological accidents.

STANDING: SPECULATIVE INJURY

A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action.

STANDING: FINANCIAL QUALIFICATIONS

Licensee's argument that a lack of funding could not adversely affect plant safety because the plant would be safely shut down is rejected by the board. This argument contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses.

FINANCIAL QUALIFICATIONS

Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings, this exemption does not apply to operators of a nuclear facility that are not electric utilities.

CONTRACTUAL DISPUTES BETWEEN CO-OWNERS OF NUCLEAR FACILITIES

Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between
co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.

JURISDICTION OF LICENSING BOARDS: MATTERS WITHIN THE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION

Contractual disputes among electric utilities regarding interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related operational agreements are matters that fall within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities.

ENFORCEMENT ACTIONS: ENFORCEMENT OF NRC LICENSE CONDITIONS

Licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). The petitioner's only recourse in this instance is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).

MEMORANDUM AND ORDER
(On Petition to Intervene)

I. INTRODUCTION

Petitioner Cajun Electric Power Cooperative, Inc. (Cajun), seeks to intervene in Gulf States Utilities Company’s (Gulf States) applications to amend the River Bend Station facility operating license. The amendments (1) authorize Gulf States to become a wholly owned subsidiary of Entergy Corporation (Entergy); and (2) include Entergy Operations Inc. (EOI) on the license as a new licensee to operate, manage, and maintain River Bend. The petition was filed in response to a July 7, 1993 “Notice of Consideration of Issuance of Amendments to Facility Operating License, Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing.” 58 Fed. Reg. 36,423, 36,435-36 (1993).

The River Bend Station, a 940-MWe, single-unit, boiling water reactor, is located in Feliciana Parish, Louisiana. The facility is owned jointly by Gulf States and Cajun.

Cajun seeks two forms of relief in this proceeding. First, Cajun seeks to have additional conditions imposed on the license amendments to protect the
financial underpinning for River Bend operations and to preserve Cajun's rights and interests in River Bend. Second, Cajun requests the enforcement of two existing license conditions.¹

II. THE PARTIES

Cajun is an electricity generation and transmission company supplying twelve rural Louisiana electric cooperatives serving approximately one million people. Cajun and its twelve members are nonprofit cooperatives under the Rural Electrification Act of 1936, 7 U.S.C.A. §§ 901, et seq. (1980). In addition to other generating facilities, Cajun owns 30% of the River Bend station, an interest Cajun values at approximately $1.6 billion.

Gulf States, a Texas corporation headquartered in Beaumont, owns the remaining 70% of River Bend which Gulf States operates for itself and Cajun under a joint agreement the two entered into in 1979. Under that joint agreement, both companies share proportionately the costs, benefits, and expenses of the facility. At the time the petition at issue here was filed, Gulf States was the operator for River Bend.

Entergy Operations Inc. (EOI) is a wholly owned subsidiary of Entergy Corporation. EOI operates nuclear units for four subsidiary companies owned by Entergy, its parent. EOI will operate River Bend in place of Gulf States under the terms of the proposed new Gulf States/EOI River Bend Station Operating Agreement.

Entergy Corporation will be the parent corporation of Gulf States if the merger is approved. Entergy is the parent corporation of EOI and several mid-south regional electric utilities including Arkansas Power & Light Co., Louisiana Power & Light Co., Mississippi Power & Light Co., and New Orleans Public Service, Inc.

III. REQUIREMENTS FOR INTERVENTION

As a threshold matter, Cajun must satisfy the NRC's requirements for intervention. Those requirements are set forth at 10 C.F.R. § 2.714(a)(2) (1993) which requires the statement of a cognizable interest in the proceeding, how that

¹ At the outset of this proceeding, Cajun also had claimed that a hearing should be held to decide whether these license amendments should have been made immediately effective. However, 10 C.F.R. § 50.91 (1993) of the Commission's rules makes clear that license amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. At the prehearing conference, counsel for Cajun conceded that immediate effectiveness findings are not subject to review by licensing boards, and he withdrew this issue from the proceeding. Tr. 8-9.
interest would be affected, the reasons why intervention should be allowed, and the specific subject matter as to which intervention is sought.

A. The Legal Standard for Standing

Judicial tests of standing are applied in NRC proceedings to determine whether a petitioner has sufficient interests to be entitled to intervene. These judicial tests require a petitioner to show that: (1) the proposal will cause "injury in fact" to the petitioner and (2) the injury is arguably within the zone of interests to be protected by the statutes governing the proceeding. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993); Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In addition to these two elements of standing, the asserted injury must be redressable in the instant proceeding. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991).

B. The Positions of the Parties Regarding Standing

1. Cajun

Cajun contends that its ownership interest in the River Bend facility in and of itself confers standing in this proceeding. Among other things, it claims that the license amendments may cause unsafe operation of the plant because EOI (the new operating company resulting from the merger) will be thinly capitalized and may have insufficient operating funds due to pending legal actions against Gulf States. It also claims that safety will be jeopardized because the new arrangement (using EOI as operator rather than Gulf States) will foreclose Cajun from dealing directly with the plant's operator, thus preventing Cajun from confirming that the plant is being operated safely and from being able to influence its safe operation. Cajun contends that unsafe operations can jeopardize Cajun's ownership property interest in the plant and increase the potential for third-party liability resulting from accidents.

Cajun also makes the procedural argument that Gulf States does not have the right under state law to make changes that directly threaten Cajun's ownership in the plant and that Cajun should be allowed standing in this proceeding, as a co-owner, to contest whether Gulf States has the right to jeopardize this interest.

2. Gulf States

Gulf States opposes Cajun's standing primarily on the basis that Cajun's alleged injury is purely economic and therefore not within the zone of interests
protected by the Atomic Energy Act which is confined to radiological health and safety matters. Gulf States also argues that the scenario relied upon by Cajun to establish standing (i.e., safety concerns at the plant caused by a lack of funding) is illusory since the plant can be safely shutdown even if these concerns occur. Moreover, it claims that the same lack of funding alleged by Cajun would result without the license amendments because the responsibility for the cost of operating the plant will remain with Gulf States and Cajun even if the amendments are not granted. Gulf States additionally states that Cajun’s argument concerning insufficient resources for safe operation is too speculative to be the basis for intervention. Finally, Gulf States contends that, to the extent that Cajun has attempted to gain standing by identifying injury to its member rural electric utility cooperatives, it has failed to do so in three respects. First, Cajun has failed to demonstrate that it has the authority to represent those persons who are members of those cooperatives. Second, Cajun has failed to show specific injury to them. Third, in any event, those persons are not members of Cajun but members of Cajun’s members.

Gulf States additionally makes the procedural argument that there are two separate license amendments involved in this case and therefore two proceedings — one involving Gulf States’ merger application with Entergy Corporation and the other involving the replacement of Gulf States with EOI as the operator of the River Bend plant. Gulf States maintains that the board must find standing for each of these proceedings.

3. Staff

Staff supports Cajun’s standing to intervene. According to Staff, injury-in-fact by the amendments has been established because Cajun has shown it will suffer concrete and particularized harm traceable to the license amendment if the proposed new plant operator does not have the resources to safely maintain and operate River Bend or if the proposed amendment would cause a lessening of Cajun’s influence, as an owner, to see that the plant is safely maintained and operated. Staff also states that Cajun has shown that it might sustain an actual injury if Gulf States lacks the authority to file the application on its behalf and that the grant of the application might adversely affect rights Cajun has under the present license. Staff additionally notes that Cajun has established that the alleged harm might be redressed in this proceeding by denying the amendment and keeping Gulf States primarily responsible for the safe operation of River Bend, or by granting the amendment with appropriate license conditions to protect Cajun’s interests.

Staff concludes that Cajun’s petition is within the zone of interests protected by the governing statute because the Atomic Energy Act states that the Commission shall provide for the protection of property, as well as of life, from
radiological hazards. As authority, it cites sections 103b, 42 U.S.C.A. § 2133(b) (1973), and 161b, 42 U.S.C.A. § 2201(b) (West Supp. 1974-1993) of the Act providing that licenses may be issued to those who will observe standards to “minimize danger to life and property” and it cites section 170 providing for the indemnification of damages caused by radiological accidents. As additional authority, it cites section 2f of the Act where Congress found that the use and control of atomic energy is necessary “for protection against possible interstate damage” occurring from the operation of nuclear facilities in interstate commerce. 42 U.S.C.A. § 2012(f) (1973).

C. Analysis of Standing

At the outset, we do not agree as a practical matter with Gulf States’ argument that two proceedings are involved here — the merger proceeding and the operator proceeding — and that separate standing must be established for both. Although there were two Federal Register notices on July 7, 1993, regarding Gulf States’ license amendments, one pertaining to the merger and one pertaining to the designation of an operator for the facility, the two amendments appear to be different facets of the same undertaking and do not require separate findings. That is, there is one nuclear power plant, one license being amended, and one part owner of that plant seeking to intervene. Gulf States’ view of the matter could double the litigation burden and costs, an unhappy result this agency normally seeks to avoid.

Aside from this procedural issue, the issue here is whether the property interest of Cajun in River Bend is sufficient to confer standing in this license amendment proceeding. We conclude that it is.

There are a limited number of NRC cases involving standing that involve property interests. Most have held that the property interests involved were insufficient to confer standing since they were outside the zone of interests designed to be protected by the Atomic Energy Act — namely, interests related to health, safety, and radiological matters. The property interests in those cases primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility’s impact on local utility rates and the local economy. See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing. The ratepayer/taxpayer cases failed to find standing because the property interests were too far removed from the purpose of the underlying statutes governing those proceedings. Cajun’s stated interest in this proceeding,
on the other hand, is to protect its property, River Bend, from radiological hazards arising from unsafe plant operation. Cajun's asserted interest in avoiding damage to property from nuclear-related accidents coincides with the Atomic Energy Act's stated purpose of affording protection from radiological hazards. As Staff correctly points out, radiological protection under the Act is afforded for both human life and property. In fact, the protection of property is specifically mentioned in the Atomic Energy Act in several places, including sections 103b and 161b which speak of minimizing "danger to life or property." 42 U.S.C.A. §§ 2133(b) and 2201(b) (West Supp. 1974-1993). Cajun's property interest in River Bend thus clearly meets the zone of interests requirement for standing. 2

Both license amendments found in the July 7, 1993 Federal Register Notice play a role in the potential radiological hazards that Cajun has alleged in this proceeding. The amendment naming a new plant operator will install an allegedly underfunded operator whose lack of funding may jeopardize the safe operation of River Bend. According to Cajun, potential underfunding stems from multiple legal actions against Gulf States that could cause considerable financial difficulty, including bankruptcy. The merger amendment to permit Gulf States to become a subsidiary of Entergy Corporation also can cause unsafe operations since the terms of the merger agreement allegedly allow for underfunding at the plant. Thus, both amendments play a part in this proceeding and both are contributors to Cajun's standing arguments.

Cajun also has demonstrated injury-in-fact sufficient to confer standing. Because it is a co-owner of River Bend, it arguably can suffer substantial damage to its property interest from the plant's unsafe operation, including loss of its share of the plant, loss of plant power and revenue, and potential liability to third parties from radiological accidents. 3

We reject Gulf States' argument that the alleged injury to Cajun is too speculative to be the basis for intervention. A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only "that it may be injured in fact" by the proposed action. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 104-05 (1976). In this case, Cajun has supplied information to establish that safety at the plant may be jeopardized by potential plant underfunding and a lack of oversight by Cajun. It has specifically alleged in this regard that only Gulf

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2 We note that standing arguably may be granted for property interests other than those associated with physical damage from radiological hazards. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CL1-85-2, 21 NRC 282, 316-17 (1985). However, we see no need in this case for us to determine whether standing may be granted for property interests that do not directly pertain to radiological hazards.

3 Cajun has not specifically claimed standing based upon potential personal injury to individuals. However, it has listed various rural electric distribution cooperatives that are Cajun members whose service areas include individual members who are living adjacent to the River Bend facility. We agree with Gulf States that Cajun cannot obtain standing through those individuals who are members of these member cooperatives because it has neither demonstrated authority to represent them nor has it alleged any specific injury to them.
States will be responsible for funding the plant under the current terms of the merger agreement and that Gulf States' officials have conceded the potential for bankruptcy to Gulf States from pending litigation. We view these allegations as adequate to establish the necessary injury in fact.

We also reject Gulf States' argument that a lack of funding could not adversely affect plant safety. This argument clearly contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses. The regulatory basis for section 50.33(f) would include numerous safety factors including a consideration that insufficient funding might cause licensees to cut corners on operating or maintenance expenses. Even though, as Gulf States asserts, the plant could be safely shut down if funds are lacking, under section 50.33(f) financial assurances would still have to be provided.\(^4\) We note that even during shutdown there are accident risks associated with a nuclear reactor. See generally, NUREG-0933, "A Prioritization of Generic Safety Issues" (1991).

Finally, we reject Gulf States' argument that the license conditions are immaterial to Cajun's property interests since the responsibility for operating costs at River Bend will still rest with Gulf States and Cajun, just as they did before the merger. This claim is controverted in Cajun's petition where Cajun asserts that the new Operating Agreement runs only between Gulf States and EOI and, therefore, Gulf States has the full obligation to compensate EOI for River Bend operation and EOI cannot look to Cajun for payment. Gulf States' argument also fails to recognize that license conditions could arguably be imposed that would help alleviate Cajun's financial concerns.

For the reasons explained in this section, we conclude that the potential injury to Cajun's property interest in River Bend establishes the requisite "injury in fact" for standing in this proceeding and that the potential injury to this interest is within the zone of interests protected by the Atomic Energy Act.\(^5\)

\(^4\) Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings (see 10 C.F.R. § 50.33(f); Public Service Co of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231 (1989)), the matter here concerns the financial viability of the operating company, EOI, which is not an electric utility. (For a more detailed analysis of this question, see discussion for Contention 2, infra.)

\(^5\) Our ruling does not reach Cajun's argument that standing can also be derived from its rights as a co-owner of River Bend alone. Cajun appears to argue that co-owners and co-licensees of nuclear facilities should be allowed to contest license amendments that are contrary to their ownership interests (especially where, as here, state law does not allow a joint ownership agreement to be amended in the manner proposed) regardless of the subject matter at issue. Our subject matter jurisdiction is limited by statute, and we find Cajun's contractual property interest at issue here inappropriate to confer standing. Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court. Contract disputes are not within the scope of this proceeding and will not be addressed by this board.
IV. CAJUN'S CONTENTIONS

To be admitted as a party in this proceeding, Cajun must not only establish standing, but also must proffer at least one admissible contention. The standards for admissible contentions are set out in 10 C.F.R. § 2.714(b)(2) and (d)(2) (1993). These regulations require that Cajun's contentions include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contentions, and a concise statement of the alleged facts or expert opinion which support the contentions, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contentions. In addition, section 2.714 (b)(2)(iii) requires that Cajun present sufficient information to show that a genuine dispute exists on a material issue of law or fact. And, of course, Cajun's contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

Cajun has listed the following seven contentions for litigation in this proceeding. See "Cajun Electric Power Cooperative Inc.'s Amendment and Supplement to Petition for Leave to Intervene Comments and Request for Hearing," dated August 31, 1993, at 7-22. Gulf States and Staff oppose these contentions on the basis that they are economic in nature and outside of the scope of health and safety issues in this proceeding, that they fail to have a sufficient basis, and that they would not entitle Cajun to relief even if proven.

Contention 1. The Proposed Amendments Fail to Reflect the Public Interest and Interests of Co-owners, Wholesale Customers and Customers That May Be Affected by the Outcome of the Cajun and Texas Litigation

Cajun contends that the NRC should consider the adverse financial impact that Gulf States, Entergy, and EOI would experience from a judgment or settlement resulting from presently pending litigation against Gulf States. These cases include Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Co., No. 89-474-B, United States District Court for the Middle District of Louisiana, and Southwest Louisiana Electric Membership Corp. v. Gulf States Utilities Co., No. 92-2129, United States District Court for the Western District of Louisiana. The case brought by Cajun involves an attempt by Cajun to rescind the River Bend Operating Agreement and collect damages of over $1.6 billion for alleged misrepresentation by Gulf States regarding Cajun's ownership purchase in River Bend. Cajun cites statements of Michael J. Hamilton of Price Waterhouse to establish that a decision in this litigation in favor of Cajun could bankrupt Gulf States and reduce the present net earnings of Gulf States/Entergy from
$2.20 per share to a loss of $3.34 per share. Cajun further claims Entergy will not protect Gulf States in the event of these litigation losses since the Entergy/Cajun Reorganization Plan allows Entergy to withdraw from the merger if Cajun prevails.

Contention 1, insofar as its allegations may establish the potential for unsafe operation of River Bend, does not directly refer to safety concerns but, in fact, is an integral part of Contention 2 which does refer to safety. In essence, Contention 1 states a basis for Contention 2 since the allegations in Contention 1 regarding the Gulf States litigation are an element in proving the allegation of underfunding and reduced safety in Contention 2. In fact, Cajun asserts the Contention 1 allegations concerning financial damage resultant from litigation as a basis for Contention 2. See Item (c) under Contention 2, below, and related discussion. Accordingly, for all the foregoing reasons, Contention 1 is denied.

Contention 2. The Proposed License Amendments May Result in a Significant Reduction in the Margin of Safety at River Bend

Cajun’s claim in this contention is that safety at River Bend will be jeopardized because the proposed new operator, EOI, will be underfunded. It asserts, as bases for this contention, that:

(a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. (These allegations are based on provisions in the River Bend Operating Agreement and the statements of Edwin Lupberger, Chief Executive Officer of Entergy, and Donald Hintz, Chief Executive Office of EOI.)

(b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. (Cajun cites the proposed Operating Agreement as the source for this allegation.)

(c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. (To support this allegation, Cajun has provided the specific information described above in Contention 1.)

(d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. Officials of Entergy and EOI have admitted that EOI would be forced to shut down River Bend if EOI lacked adequate funds. (Cajun has cited the testimony of Edwin Lupberger and Donald Hintz in a Federal Energy Regulatory Commission (FERC) proceeding as a source for these allegations.)

See Cajun Amendment and Supplement at 11-13 and references therein.
We find these bases adequate to satisfy the contention requirements of this proceeding. Cajun, of course, is not obliged to prove its entire case at this time. See discussion in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205-06 (1993).

In its opposition to Contentions 1 and 2, Gulf States primarily argues that both contentions are contrary to the Commission’s “financial qualification” rule which exempts electric utilities from demonstrating financial qualification. However, this reliance is misplaced since the exemption in 10 C.F.R. § 50.33(f) applies only to electric utilities, and EOI is not an electric utility. Contentions 1 and 2 concern EOI’s, and not Gulf States’, financial qualifications. EOI will be the facility’s operator and it is EOI’s underfunding that allegedly will cause safety concerns at River Bend.

Clearly, EOI is not an electric utility. EOI’s sole function will be to operate and maintain the plant. An electric utility, as defined in 10 C.F.R. § 2.4 (1993), is an “entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority.” Gulf States will be the entity functioning as an electric utility with respect to River Bend since it will continue to distribute and sell the River Bend power and will be the entity responsible for recovering its costs.

Other arguments Gulf States makes in opposing Contention 2 are the same arguments it made for opposing Cajun’s standing. These include Gulf States’ allegations that the responsibility for funding plant operations will remain with Gulf States and Cajun, that the economic injury that Cajun asserts is too speculative to be a basis for a contention, and that the plant could safely shut down if funds were lacking. We have found these arguments wanting in the standing section of this decision and they are wanting here. For all the foregoing reasons, Contention 2 is accepted.

Contention 3. The Proposed License Amendment Cannot Be Approved Without Cajun’s Consent

In this contention, Cajun contends that the proposed license amendment requests were not properly made on Cajun’s behalf and that the amendments are contrary to Cajun’s ownership interest in the facility. We reject this contention for the reasons set out in our discussion regarding standing. Cajun has contracted with Gulf States to have Gulf States operate River Bend. That authority included the power to seek license amendments. When antitrust and radiological health and safety concerns are not involved, contractual disputes between co-owners in a nuclear facility should not be resolved by the NRC. Such questions should be handled by appropriate state, local, or federal courts.

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Contestion 4. The Proposed License Amendments Will Adversely Affect Cajun’s Rights Regarding the Operation of River Bend

Cajun contends that the transfer of ownership and operation of River Bend violates Cajun/Gulf States contracts and that NRC approval of these transfers must be conditioned to protect Cajun’s rights as a 30% co-owner of River Bend. Cajun claims in this regard that operational decisions for River Bend will no longer be made to protect the interests of Gulf States and Cajun, but rather will be made on behalf of the entire Entergy System which consists of a number of other electric utilities. Cajun also claims that the transfers to EOI will destroy Cajun’s contractual privity with the plant’s operator, which in turn will adversely affect River Bend safety by preventing Cajun from sharing plant operational information and participating in plant decisionmaking.

Just as for Contention 3, we reject this contention because it involves non-safety-related contractual matters between co-owners of a nuclear facility. Jurisdiction for such issues lies in other forums, not this one. No significant health or safety concern has been presented here since Cajun has not asserted or shown any basis to establish that a safety problem would exist without its oversight at River Bend.

Contestation 5. The Proposed License Amendments Cannot Be Approved Without Certain License Conditions

In this contention, Cajun lists seven license conditions which it alleges will alleviate the problems caused by the license amendments. On their face, these contentions appear related only to contractual disputes between the co-owners of River Bend, and they do not appear necessary for the plant’s safe operation. Consequently, we reject these conditions with the proviso that Cajun can later request license conditions for Contention 2 that include aspects of these proposed conditions if Cajun can demonstrate their safety significance.

Contestation 6. The Proposed Ownership Amendment Should Be Approved Only with Conditions Adequate to Remedy Its Adverse Impacts on the Cajun/Gulf States Interconnection Agreement

In this contention, Cajun alleges that the proposed Gulf States merger will adversely impact the Cajun/Gulf States interconnection agreements to

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6 Cajun requests conditions that: (1) require a tripartite agreement among Gulf States, EOI, and Cajun; (2) require EOI to be the direct agent of Cajun; (3) require EOI to be directly liable to Cajun; (4) allow Cajun to have input into River Bend decisions regarding maintenance, fuel outages, budgets, and capital improvements; (5) allow Cajun to have access to EOI records and River Bend operational data; (6) require EOI to submit River Bend cost management and regulatory reports to Cajun; and (7) allow Cajun to attend Institute for Nuclear Power Operation (INPO) meetings and have access to INPO documents.
the economic detriment of Cajun and its consumers. According to Cajun, these agreements include, among other things, interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related, operational agreements. This contention describes utility functions that clearly lie within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities. See 42 U.S.C.A. § 2019.

Moreover, to the extent that Cajun’s interconnection agreement concerns relate to Cajun’s antitrust license conditions in the River Bend NRC license, they have been evaluated by Staff as part of a Staff antitrust review involving the Gulf States’ merger. See 58 Fed. Reg. 16,246 (1993). Antitrust matters were not included in the notices governing this proceeding and this board has no jurisdiction over them. Accordingly, the contention is denied.

**Contention 7. The River Bend License Conditions Must Be Enforced**

In this contention, Cajun requests that Gulf States and EOI be required to comply with the current River Bend license conditions. Cajun alleges that Gulf States is violating Condition 10 (by seeking to void a transmission contract between Gulf States and Cajun) and Condition 12 (by refusing to provide certain delivery points for electric power). We reject this contention since licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). Cajun’s only recourse to enforce these conditions is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).7

**V. CONCLUSION**

Cajun’s Contention 2 regarding a potential safety risk caused by underfunding of the plant’s operator is accepted. The remaining contentions are rejected because they do not concern health and safety matters or any other basis for Licensing Board jurisdiction. They involve contractual disputes and disagreements between co-owners of nuclear facilities, which are not within the jurisdiction of this forum. Matters argued by the parties but not addressed herein were not considered material to the decision reached.

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7 We note that the license conditions to which Cajun refers are the River Bend antitrust license conditions which were inserted in the River Bend license to alleviate antitrust concerns and ensure competition among utilities in Gulf States’ service area. As discussed regarding Contention 6, supra, the antitrust aspects of the Gulf States’ merger were the subject of a separate antitrust review conducted by NRC Staff and were not included in the notices governing this proceeding.
We conclude that Cajun has met the requirements for standing. It has proffered one viable contention, demonstrated an "injury in fact," and alleged an injury that falls within the zones of interest sought to be protected by the governing statutes. Cajun’s petition to intervene is therefore granted, and a hearing is hereby ordered in this proceeding.

VI. APPEAL RIGHTS

In accordance with 10 C.F.R. § 2.714a (1993), Gulf States or Staff may seek appeal on the question of whether the petition and request for a hearing should have been wholly denied. Cajun may not appeal this Order because it does not wholly deny its petition.

An appeal to the Commission may be sought by filing a petition for review, pursuant to 10 C.F.R. § 2.714a(a) (1993), within 10 days after service of this Order. Any other party to the proceeding may, within 10 days after service of the appeal, file an answer supporting or opposing the appeal.

VII. DISCOVERY AND SCHEDULING

Discovery shall begin immediately. The parties shall commence negotiation concerning appropriate trial schedules and file a report with suggested scheduling by March 1, 1994.
END

6/15/94

FILMED

DATE