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INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

July – December 1993

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INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

July – December 1993

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(301/492-8925)

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Foreword

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

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

Case name (owner(s) of facility)

Full text reference (volume and pagination)

Issuance number

Issues raised by appellants

Legal citations (cases, regulations, and statutes)

Name of facility, Docket number

Subject matter of issues and/or rulings

Type of hearing (for construction permit, operating license, etc.)

Type of issuance (memorandum, order, decision, etc.).

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

1. Case Name Index

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

2. Digests and Headers

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

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

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

3. Legal Citations Index

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

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

4. Subject Index

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

5. Facility Index

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

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CLI-93-15 GEORGIA POWER COMPANY, et al. (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-321, 50-366, 50-424, 50-425; REQUEST FOR ACTION; July 14, 1993; MEMORANDUM AND ORDER

A The Commission sua sponte vacates and remands to the NRC Staff for further consideration the Staff's partial decision under 10 C.F.R. § 2.206, DD-93-8, 37 NRC 314 (1993). The Commission takes such action in view of the commonality of some of the issues decided in the petition both with matters in a pending license transfer proceeding and with other matters remaining for decision in the section 2.206 petition.

B The Commission generally discourages use of section 2.206 procedures as an avenue for deciding matters that are under consideration in a pending adjudication; however, this general rule is not intended to bar petitioners from seeking immediate enforcement action from the NRC Staff in circumstances in which the presiding officer in a proceeding is not empowered to grant such relief.

CLI-93-16 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3; OPERATING LICENSE AMENDMENT; August 19, 1993; MEMORANDUM AND ORDER

A The Commission considers the appeal of a licensing board decision, LBP-93-5, 37 NRC 96 (1993), which granted a Petitioner's request for intervention and for hearing on a proposal by the Georgia Power Company to transfer its operating authority over the Vogtle nuclear power plant to a new licensee; the Board's decision also admitted one consolidated contention. The Commission denies the appeal and affirms the Licensing Board's order, finding that the Petitioner has standing to intervene and has submitted admissible contention.

B The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated.

C Lack of either technical competence or character qualifications on the part of licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application.

D In making determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. However, not every licensing action throws open an opportunity to engage in an inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute.

E The past performance of management or high-ranking officers, as reflected in deliberate violations of regulations or untruthful reports to the Commission, may indicate whether a licensee will comply with agency standards, and will candidly respond to NRC inquiries.

F To determine whether a petitioner has established sufficient interest to intervene in a proceeding the Commission has long applied judicial concepts of standing.

G For standing, a petitioner must allege an "injury in fact" from the licensing action being challenged, and this injury must be to an interest arguably within the zone of interests protected by the governing statute. The alleged injury must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision.

H For proceedings involving the issuance of a construction permit or operating license, the Commission generally has recognized a presumption in favor of standing for those petitioners who have sufficient contacts within the geographic area that could be affected by a release of fission products. However, for

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this presumption to apply to license amendment proceedings, the proposed action must involve "clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences." Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Otherwise the petitioner must allege a specific "injury in fact" that will result from the proposed action.

I A request to transfer operating authority under a full-power license for a power reactor may be deemed an action involving "clear implications for the offsite environment," for purposes of determining threshold injury.

J Under 10 C.F.R. § 2.714(b)(2)(iii), if an application contains disputed information or omits required information, the petitioner normally must specify the portions of the application that are in dispute or are incomplete. However, a petitioner need not refer to a particular portion of the licensee's application when the licensee neither identified, nor was obligated to identify, the disputed issue in its application.

CLI-93-17 ONCOLOGY SERVICES CORPORATION, Docket No. 30-31765-EA (Suspension Order) (Byproduct Material License No. 37-28540-01); ENFORCEMENT ACTION; August 19, 1993; MEMORANDUM AND ORDER

A The Commission denies Oncology Services Corporation's request to reverse LBP-93-10, 37 NRC 455 (1993), which granted in part the Nuclear Regulatory Commission Staff's motion for an additional delay of this enforcement proceeding, and vacates as moot portions of LBP-93-6, 37 NRC 207 (1993), an order that had granted the NRC Staff's original motion for a stay.

B The presiding officer may delay an enforcement proceeding for good cause. 10 C.F.R. § 2.202(c)(2)(ii). In determining whether good cause exists, the presiding officer must consider both the public interest as well as the interests of the person subject to the immediately effective order.

C In determining whether to delay the conduct of an enforcement hearing pursuant to 10 C.F.R. § 2.202(c)(2)(ii), the Commission need not choose between the test applied by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars* (\$8,850) in United States Currency, 461 U.S. 555 (1983), and the test applied by the Supreme Court in *FDIC v. Mallen*, 486 U.S. 230, 242 (1988), but may weigh the factors considered by the Court in both cases.

D In determining whether good cause exists for delay of an enforcement proceeding, the factors to be considered in balancing the competing interests include (1) length of delay, (2) reason for delay, (3) risk of erroneous deprivation, (4) assertion of one's right to prompt resolution of the controversy, (5) prejudice to the licensee, including harm to the licensee's interests and harm to the licensee's ability to mount an adequate defense.

E The determination of whether the length of delay is excessive depends on the facts of the particular case and the nature of the proceeding.

F The risk of erroneous deprivation is reduced if the licensee is given an opportunity to request that the presiding officer set aside the immediate effectiveness of the suspension order by challenging whether the suspension order, including the need for immediate effectiveness, is based on adequate evidence.

G Staff's showing of possible interference with an investigation being conducted by the NRC Office of Investigations and a strong interest in protecting the integrity of the investigation in conjunction with a demonstration that the risk of erroneous deprivation has been reduced weighs heavily in the Staff's favor.

H Irrespective of whether the licensee failed to challenge the basis for the immediate effectiveness of the Staff's suspension order, a licensee's vigorous opposition to a stay and its insistence on a prompt adjudicatory hearing are entitled to strong weight.

I Without a particularized showing of harm to the licensee's interests, licensee's argument that the stay affects its interests and the licensee's vigorous opposition to a stay do not tip the scale in favor of the licensee when balancing the competing interests.

CLI-93-18 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA-2, 50-323-OLA-2 (Construction Period Recovery); OPERATING LICENSE AMENDMENT; August 19, 1993; MEMORANDUM AND ORDER

A The Commission declines to address the issue, referred by the Licensing Board, of whether an Applicant should be required to disclose to Intervenor a document prepared by the Institute for Nuclear Power Operations. The Commission noted that, after the Board had referred the issue to the Commission, the Applicant agreed to disclose the document and the Licensing Board issued a protective order addressing the

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- conditions under which the document is to be released. The Commission found that these events rendered Commission interlocutory review of the matter unnecessary under 10 C.F.R. § 2.786(g).
- B** Where subsequent developments indicated the absence of any immediate controversy suggesting that interlocutory review was appropriate of a licensing board's order to disclose an assertedly privileged document, the Commission declines review of the licensing board's referred ruling.
- CLI-93-19** SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312-DCOM; DECOMMISSIONING; September 10, 1993; MEMORANDUM AND ORDER
- A** The Commission provides guidance to the Atomic Safety and Licensing Board on one aspect of Environmental and Resources Conservation Organization's (ECO's) environmental contention which the Commission admitted in its decision, CLI-93-3, 37 NRC 135 (1993).
- CLI-93-20** VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station). Docket No. 50-271-OLA-5; OPERATING LICENSE AMENDMENT; September 16, 1993; MEMORANDUM AND ORDER
- A** The Commission affirms the Licensing Board's ruling that the Board lacked authority under 10 C.F.R. § 2.107(a) to address a notice of withdrawal that the Licensee had filed after a hearing request had been referred to the Atomic Safety and Licensing Board Panel but before the Licensing Board had issued a Notice of Hearing. The Commission reverses the Licensing Board's related ruling that the NRC Staff's acceptance of the withdrawal had the effect of terminating the proceeding. In the interest of efficiency, the Commission dismisses the proceeding on its own authority, rather than remanding it to the Board
- B** Under 10 C.F.R. § 2.107(a), the Licensing Board assumes jurisdiction to address the withdrawal of an application in a license amendment proceeding only after the issuance of a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Prior to that issuance, the Commission (or NRC Staff, by delegation of authority) has exclusive jurisdiction to address such withdrawals.
- C** The Commission's regulations do not grant the NRC Staff the authority to terminate a license amendment proceeding after a hearing request has been referred to the Atomic Safety and Licensing Board Panel but before the presiding licensing board or officer has issued a Notice of Hearing. Nor has the Commission, through case law, accorded Staff such authority. Rather, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances.
- CLI-93-21** CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440-OLA-3; OPERATING LICENSE AMENDMENT; September 30, 1993; MEMORANDUM AND ORDER
- A** The Commission considers the appeal of a Licensing Board decision, LBP-92-4, 35 NRC 114 (1992), which denied, on the basis of lack of standing, the appellants' petition for leave to intervene and for a hearing on a request by Cleveland Electric Illuminating Company to amend its operating license for the Perry facility, Unit 1. The license amendment transfers the reactor vessel material surveillance withdrawal schedule from the Perry plant's technical specifications and transfers the schedule to the facility's updated safety analysis report. On the ground that the appellants alleged sufficient injury for standing, the Commission grants the appeal, reverses the Licensing Board's order, and remands the Petitioners' contention to the Board for an evaluation of the contention's admissibility.
- B** To determine whether a petitioner has established the requisite interest to intervene in a proceeding, the Commission has long applied contemporaneous judicial concepts of standing.
- C** To demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. The injury also must be to an interest arguably within the zone of interests protected by the governing statute. Injury may be actual or threatened.
- D** The loss of the rights to notice, opportunity for a hearing, and opportunity for judicial review constitutes a discrete injury.
- E** Standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury.
- F** For construction permit and operating license proceedings, the Commission generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant. In license amendment proceedings, residence near a nuclear facility is sufficient to establish injury for standing if the proposed action involves an "obvious potential for offsite consequences."

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- See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).
- CLI-93-22 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-CivP (Civil Penalty); ENFORCEMENT ACTION; September 30, 1993; MEMORANDUM AND ORDER AFFIRMING IN PART AND REVERSING IN PART ATOMIC SAFETY AND LICENSING BOARD'S ORDER, AND REMANDING ISSUES
- A The Commission affirms in part the Atomic Safety and Licensing Board's decision, LBP-91-9, 33 NRC 212 (1991), in which the Licensing Board granted the Nuclear Regulatory Commission Staff's motion for summary disposition in a proceeding to impose a \$6250 civil penalty on the Licensee, Advanced Medical Systems, Inc. The Commission reverses the Licensing Board's disposition of one violation and remands to the Board for further proceedings all issues related to that violation.
- B The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact and the evidence must be viewed in the light most favorable to the party opposing summary disposition.
- C To preclude summary disposition, when the proponent has met its burden, the party opposing the motion may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are not sufficient.
- D The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or that fact will be deemed admitted.
- E When the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebuttal evidence or submit an affidavit explaining why it is impractical to do so. If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained or may take other appropriate action.
- F A licensee is excused from complying with the maximum permissible dose standards set out in 10 C.F.R. § 20.101(a), only if the licensee can satisfy the conditions set forth in section 20.201(b).
- G Prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity.
- H When determining what constitutes a survey, 10 C.F.R. § 20.201 requires consideration of more than quantitative measurements of radiation levels used to determine exposure. It also requires, where appropriate, consideration of physical surveys of the location of materials and equipment.
- I An evidentiary hearing is necessary only if a genuine issue of material fact is in dispute.
- CLI-93-23 FIVE STAR PRODUCTS, INC., and CONSTRUCTION PRODUCTS RESEARCH, INC., OI Docket No. 1-93-027R; ENFORCEMENT ACTION; October 21, 1993; MEMORANDUM AND ORDER
- A The Commission denies Petitioners' motion to quash or modify a subpoena issued by the NRC Staff in the course of an investigation to determine if Petitioners have violated NRC regulations and to determine if safety-related problems exist at NRC-licensed facilities. The new enforcement date for the subpoena is November 1, 1993.
- B Section 50.7 of 10 C.F.R. was adopted both to implement section 211 of the Energy Reorganization Act and to incorporate into NRC regulations the Commission's authority under section 161 of the Atomic Energy Act.
- C In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance.
- D The philosophy underlying the adoption of section 211 of the Energy Reorganization Act and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information.

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- E A defect in materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee.
- F The risk to public health and safety — and the NRC's responsibility to protect that public health and safety — is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue.
- G The protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.
- H The risk to public health and safety, the NRC's responsibility to protect it, and the amount of protection afforded to "whistleblower" employees cannot be measured by the length of the contractual relationship between a licensee and a supplier of goods. This is especially true where the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications.
- I Filling a purchase order issued by an NRC licensee by a vendor or "supplier" constitutes a contract between those two parties.
- J The term "contractor" in section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7 of NRC regulations includes — at a minimum — employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B.
- K Cement and grout sold to NRC licensees under Part 50 Appendix B certification are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2).
- L A vendor or supplier who itself certifies that its products were manufactured and sold in accordance with Part 21 cannot reverse itself and allege that Part 21 does not cover the manufacture of these products.
- M A vendor or supplier who certifies its products were manufactured and sold in accordance with Part 21 is required to "permit duly authorized representatives of the [NRC] to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.
- N An entity that maintains an on-going contractual relationship with a manufacturer to test that manufacturer's products, which are then sold to NRC licensees, is a "subcontractor" of the manufacturer within the meaning of section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7.
- O "Whistleblowers" are protected under section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7, regardless of the accuracy of their allegations.
- P A supplier's subsequent act of ceasing to sell materials certified under 10 C.F.R. Part 50 Appendix B does not remove an employee's protection for engaging in protected activity that occurred prior to that supplier's ceasing to sell such materials.
- Q For purposes of 10 C.F.R. § 50.7, the term "contractor" is not limited to those persons who perform work within the protected area.
- R For purposes of 10 C.F.R. § 50.7, the NRC has jurisdiction over an employer with a long history of providing materials, including safety-related materials, to the nuclear industry and over acts by that employer that are directly related to its transactions with NRC licensees.
- S Congress intended, in passing the Energy Reorganization Act, that the NRC have the ability to conduct its own investigations under the Atomic Energy Act during the pendency of a Department of Labor proceeding.
- T The remedies provided by an arbitrator in a "whistleblower" case are similar to those provided by the Department of Labor in such a case — they assist the employee as an individual. Those remedies do not assist the NRC in performing the duties assigned it by Congress — protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC.
- U The Commission will not rule on claims of privilege in discovery disputes in the abstract.
- CLI-93-24 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-CivP (Civil Penalty); ENFORCEMENT ACTION; November 24, 1993; ORDER
- A The Commission denies petitions, one from the NRC Staff and the other from the Licensee, seeking reconsideration of the Commission's September 30, 1993 Memorandum and Order, CLI-93-22, 38 NRC

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98, which affirmed in part, and reversed and remanded in part, the Atomic Safety and Licensing Board's decision, LBP-91-9, 33 NRC 212 (1991). In LBP-91-9, the Licensing Board granted the Nuclear Regulatory Commission Staff's motion for summary disposition in a proceeding to impose a \$6250 civil penalty on Licensee, Advanced Medical Systems, Inc.

CLI-93-25 STATE OF NEW JERSEY (Department of Law and Public Safety's Requests Dated October 8, 1993), Docket No. 93-01-Misc; TRANSPORT OF NUCLEAR MATERIALS; December 3, 1993; MEMORANDUM AND ORDER

- A The Commission denies the petition for leave to intervene and request for an adjudicatory hearing filed by the State of New Jersey on the legality of barge shipments because there is no pending application for a license or permit for either the Philadelphia Electric Company or the Long Island Power Authority related to the fuel shipments. Moreover, even if there were such a proceeding, New Jersey failed to satisfy Commission rules governing intervention in hearings or reopening of proceedings.
- B Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a.
- C A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the term of the rule, "without the filing of applications with the Commission or the issuance of licensing documents to particular persons." 10 C.F.R. § 70.18. NRC rules establish many general licenses, including a general license for NRC licensees to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. 71.12.
- D There would be no point to the NRC's general licensing scheme if a licensee's mere use of a general license triggered individual licensing proceedings.
- E Good cause is the weightiest of the late intervention standards. Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining factors. New Jersey gave short shrift to the remaining four factors.

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- LBP-93-12 NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Unit 2), Docket No. 50-336-OLA (ASLBP No. 92-665-02-OLA) (FOL No. DPR-65) (Spent Fuel Pool Design); OPERATING LICENSE AMENDMENT; July 9, 1993; DECISION AND ORDER (Terminating Proceeding by Summary Disposition)
- LBP-93-13 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA-2, 50-323-OLA-2 (ASLBP No. 92-669-03-OLA-2) (Construction Period Recovery) (Facility Operating License Nos. DPR-80, DPR-82); OPERATING LICENSE AMENDMENT; July 19, 1993; MEMORANDUM AND ORDER (Granting Discovery Request/Referring Ruling to Commission)
- A Ruling on an intervenor discovery request, the Licensing Board orders production of a report of the Institute for Nuclear Power Operations (INPO), subject to a protective order; refers its ruling to the Commission; and stays the effectiveness of its disclosure directive pending Commission action.
- B Under NRC rules, it is not clear when a balancing of interests is required before permitting disclosure of a report that is claimed to contain trade secrets or privileged or confidential commercial or financial information. The Federal Rules of Civil Procedure clearly permit a balancing. See Fed. R. Civ. P. 26(c)(7). NRC rules include a comparable balancing test, see 10 C.F.R. § 2.740(c)(6), but this test is subject to the provisions of 10 C.F.R. § 2.790. In particular, the balancing test appears to be overridden by section 2.790(b)(6). Cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775 (1980) (access by intervenors to security plan permitted subject to protective order).
- LBP-93-14 ST. JOSEPH RADIOLOGY ASSOCIATES, INC., and JOSEPH L. FISHER, M.D. (d.b.a. ST. JOSEPH RADIOLOGY ASSOCIATES, INC., and FISHER RADIOLOGICAL CLINIC), Docket Nos. 030-00320-EA, 999-90003-EA (ASLBP No. 93-672-02-EA); ENFORCEMENT ACTION; July 20, 1993; ORDER
- LBP-93-15 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); OPERATING LICENSE AMENDMENT; July 21, 1993; MEMORANDUM AND ORDER (Case Management)
- A The Board determined that when a contention is admitted into a proceeding, the contention determines the scope of discovery. However, as a matter of case management, the Board limited the first phase of discovery and hearing to the proffered bases. After the hearing on the first phase, the Board would determine whether it had a complete record for decision or whether further discovery and a further hearing are necessary.
- B An admitted contention determines the scope of the proceeding.
- C Discovery may be limited to admitted bases during the first phase of a proceeding. After the hearing on the first phase, the Board can determine whether it has a complete record for decision or whether further discovery is necessary.
- LBP-93-16 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA-5 (ASLBP No. 92-665-02-OLA-5) (FOL No. DPR-28); OPERATING LICENSE AMENDMENT; July 28, 1993; MEMORANDUM (Termination of Proceeding)
- LBP-93-17 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA-2, 50-323-OLA-2 (ASLBP No. 92-669-03-OLA-2) (Construction Period

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- Recovery) (Facility Operating License Nos. DPR-80, DPR-82); OPERATING LICENSE AMENDMENT; August 13, 1993; MEMORANDUM AND ORDER (Telephone Conference Call, 8/13/93)
- A In response to a request by Intervenor for further discovery concerning alleged attempts to alter fire logs (the subject of an admitted contention) as to which the NRC's Office of Investigation had made preliminary inquiries but found no further inquiry warranted, the Licensing Board defers action on the motion pending cross-examination at the hearing of the custodian of the records regarding any possible falsification. The Board also requires that a sanitized copy of the letter raising the question be made available to the Intervenor.
- LBP-93-18 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); OPERATING LICENSE AMENDMENT; September 8, 1993; MEMORANDUM AND ORDER (Discovery Motion)
- A The Board ruled that statements were privileged both as attorney work-product and attorney-client privilege when the statements were given to Applicant's attorneys at a time that they had reason to believe they were relevant to an OI investigation that could occur. An allegation that the interviewees were "hounded" to make them tell a common story is not enough to overcome the privilege. However, persuasive evidence, presented at a hearing, of "hounding" or other improper attorney conduct could overcome the privilege.
- B Proof at a hearing that clients had been "hounded" or otherwise improperly treated could overcome a claim of privilege, either under the work product privilege or the attorney-client privilege. Where a party is on notice that such proof may be presented, he may be ordered to have disputed documents available at the hearing for purposes of possible production.
- C Attorney-client and work-product privileges are not limited to a controlling group with a corporation. The privileges are broadly construed to encourage full information-gathering by attorneys. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
- D An evidentiary privilege held by a corporation may be waived only by an authorized employee.
- LBP-93-19 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293-OLA (ASLBP No. 93-678-03-OLA) (Facility Operating License No. DPR-35); OPERATING LICENSE AMENDMENT; September 13, 1993; MEMORANDUM AND ORDER (Termination of Proceeding)
- LBP-93-20 ONCOLOGY SERVICES CORPORATION, Docket No. 030-31765-EA (ASLBP No. 93-674-03-EA) (EA 93-006) (Order Suspending Byproduct Material License No. 37-28540-01); ENFORCEMENT ACTION; September 21, 1993; MEMORANDUM AND ORDER (Granting in Part NRC Staff Motion to Delay Proceeding; Requiring Submission of Staff Status Reports)
- A In response to a third NRC Staff motion for an additional delay in conducting a license suspension proceeding, the Licensing Board orders discovery delayed for seventy-five days.
- B In determining whether to delay an enforcement proceeding pending the outcome of a Staff investigation, five factors must be weighed. They are: (1) length of the delay; (2) reasons for the delay; (3) risk of erroneous deprivation of the due process property or liberty interests of the licensee or any other party; (4) assertion of the right to a hearing by the party opposing the delay; and (5) prejudice to the party opposing the delay. See CLI-93-17, 38 NRC 44, 49-52 (1993).
- C In assessing the balancing factor of the reasons for the delay in the proceeding, the presiding officer is called upon to appraise two separate concerns. First, there is the question of what legitimate government interest is served by the delay. This involves an inquiry into the propriety of the Staff's demonstration that there will be a detrimental impact on the investigative process if the delay is not granted. Additionally, there is the question of whether the Staff has shown that there is a legitimate basis for the period of delay it seeks. This involves an inquiry into whether the Staff has made "a credible showing that it is attempting to complete its investigation expeditiously." LBP-93-10, 37 NRC 455, 462, aff'd, CLI-93-17, 38 NRC 44 (1993).
- D It is the rule in administrative hearings that hearsay evidence is generally admissible so long as it is reliable (as well as relevant and material) evidence. See *Duke Power Co. (Perkins Nuclear Power Station, Units 1, 2, and 3)*, ALAB-668, 15 NRC 450, 477 (1982).

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- E Two components that make up the factor of prejudice to the party opposing delay in an enforcement proceeding are prejudice to the party's ability to conduct licensed activities and prejudice to its ability to defend against the charges in the enforcement order.
- F Regarding the ability of the party opposing any delay in an enforcement proceeding to defend itself against the charges leveled by the Staff, although the passage of time is likely to affect the memory of some witnesses, the prejudice arising from this phenomenon is extremely difficult to gauge in the abstract. See CLI-93-17, 38 NRC at 58-59.
- G In granting a Staff request to delay an enforcement proceeding, the presiding officer has the responsibility to minimize the effects of any delay and to monitor closely the status of the Staff's investigation to ensure that due diligence is being exercised to bring its inquiry to a conclusion. See *id.* at 60.
- LBP-93-21 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); OPERATING LICENSE AMENDMENT; September 24, 1993; MEMORANDUM AND ORDER (Georgia Power Motion to Reconsider Scope of Proceeding)
- A The Board acknowledged error in an earlier opinion, resulting from accepting the unopposed arguments of Intervenor and therefore interpreting a portion of the Intervenor's Amended Petition out of context. This opinion narrows the issues.
- B Motions for reconsideration are for the purpose of pointing out errors in the existing record, not for stating new arguments. However, new arguments have been presented and there is no time pressure in the present status of this case. Consequently, the Board chose in its discretion to decide the motion on the merits by granting it.
- C Intervenor must carefully communicate the scope of their contentions so that neither the board nor the other parties need to guess their meaning. Unclear contentions may be construed narrowly rather than having the parties search for materials that might have been referenced by a vague, unspecific reference.
- D The Board refused to rule that contentions could not reference material not included in the petition. It considered it more important that the contentions be clearly worded, with or without references, and that the parties not be required by a nonspecific reference to hunt for a needle in a haystack.
- E The amended petition should be construed in light of all four corners of the document, and individual passages should not be interpreted out of context.
- LBP-93-22 GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); OPERATING LICENSE AMENDMENT; November 17, 1993; MEMORANDUM AND ORDER (Renewed Motion to Compel Staff Production of Documents)
- A The Licensing Board granted, in part, Staff's Motion to defer discovery of certain documents related to an ongoing investigation. In limiting the extent of the deferral, the Board used a balancing test comprised of four factors: (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. It applied the Commission's guidance that these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." Oncology Services Corp., CLI-93-17, 38 NRC 44, 51 (1993), quoting *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 565 (1983). (The Commission also considers the "risk of erroneous deprivation," (38 NRC at 57) which appears to apply primarily in cases of the immediately effective suspension of a license. In this case there is no suspension, so we deal with the harm to GPC entirely under the factor covering "prejudice" to it.) The Board also considered the diligence being exercised by the Staff to bring the investigations to a close. Oncology Services, 38 NRC at 60.
- B The Licensing Board weighed several factors related to the Staff's request for a delay due to an ongoing investigation and concluded that only part of the Staff's requested delay should be granted.
- LBP-93-23 SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312-DCOM-R (ASLBP No. 93-677-01-DCOM-R) (Decommissioning Plan) (Facility Operating License No. DPR-54); DECOMMISSIONING; November 30, 1993; SECOND PREHEARING CONFERENCE ORDER (Proposed Contentions; Summary Disposition Motion)

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- A The Licensing Board issues a Prehearing Conference Order ruling on proposed contentions submitted by the Environmental and Resources Conservation Organization (ECO) in response to Commission Orders in CLI-93-3 (37 NRC 135), CLI-93-12 (37 NRC 355), and CLI-93-19 (38 NRC 81). ECO submitted contentions in three areas — decommissioning funding, loss of offsite power (LOOP) and the Environmental Assessment/Safety Evaluation Report (EA/SER). The Board accepts two separate funding contentions — determining that they raised significant questions with respect to the viability of the decommissioning funding plan and that material submitted in opposition would have required a ruling on the merits, inappropriate at the contention stage of the proceeding. The Board also grants summary disposition of the one LOOP contention previously accepted by the Commission.
- B The rules governing the admissibility of contentions (10 C.F.R. 2.714(b) and (d)) were amended in 1989 to raise the threshold for the admission of contentions. Those rules now require, inter alia, a specific statement of law or fact to be raised or controverted, a brief explanation of the bases, a concise statement of facts or expert opinion that support the contention (with references to specific sources and documents), and sufficient information to show that a genuine issue exists with the applicant or licensee on a material issue. On NEPA issues, contentions are to be based, at least initially, on the applicant's or licensee's environmental report. The contention must, if proved, entitle the claimant to some relief.
- C In adopting a higher threshold for contentions, the Commission was not requiring that an intervenor or petitioner prove its case prior to the admission of its contention. The revised rules are intended to require the intervenor to read pertinent portions of an application, and to state the applicant's position and petitioner's opposing view. They also permit a petitioner to explain deficiencies of an application. However, the mere circumstance that an intervenor may not cite an application document in its contention does not per se invalidate the contention.
- D The scope of permissible contentions is normally bounded by the scope of the proceeding itself. On remand from the Commission, however, the scope of issues is confined to issues identified by the Commission. Beyond that, however, an intervenor may seek to file late-filed contentions, subject to a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(i)-(v), within the scope of the entire proceeding.
- E The "raised threshold" for contentions must be reasonably applied and is not to be mechanically construed. Rules of practice are not to be applied in an "overly formalistic" manner.
- F In considering a late-filed contention, a Licensing Board must balance the five factors set forth in 10 C.F.R. § 2.714(a)(i)-(v). Of these, the preeminent factor has long been recognized as factor (i), good cause for failure to file on time. Where a petitioner or intervenor fails to show good cause, the other four factors must weigh heavily in its favor for a petition or contention to be granted.
- G In considering late-filed contentions, a licensing board's balancing of the five factors must be reasonable — taking into account not only a balancing of the lateness but also each of the other factors, including mitigating circumstances, if any. A board has broad discretion in the circumstances of individual cases.
- H To be accepted, a late-filed contention must satisfy not only the late-filed factors but also the requirements for contentions. A licensing board need not address these considerations in any particular order, although both are required for admissibility. Analyzing the contention requirements first permits a board to determine whether or not a significant health and safety or environmental question is being advanced, thus assisting the board in considering lateness factor (iii), the contribution to an adequate record to be made by the intervenor.
- I The Commission has long accepted contentions challenging the adequacy of regulatory guides.
- J Decommissioning funding costs exclude the cost of removal and disposal of spent fuel (10 C.F.R. § 50.75(c) n.1), but do not clearly exclude costs of interim onsite storage of spent fuel. The cost of casks to store spent fuel in an onsite Independent Spent Fuel Storage Installation do not appear to be excluded.
- K The legal standards governing motions for summary disposition pursuant to 10 C.F.R. § 2.749 were recently reiterated by the Commission in Advanced Medical Systems, Inc., CLI-93-22, 38 NRC 98, 102-03 (1993), reconsideration denied, CLI-93-24, 38 NRC 187 (1993).
- L NRC regulations pertaining to environmental assessments do not require consultation with other agencies. They only require a "list of agencies and persons consulted, and identification of sources used." 10 C.F.R. § 51.30(a)(2).

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- M A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention.
- N There is no 50-mile presumption for determining areas in which environmental impacts must be evaluated. The 50-mile presumption is applicable in determining injury in fact for standing purposes under certain circumstances. The standing requirement has always been significantly less than for demonstrating an acceptable contention.
- O Environmental contentions, to the extent possible, must be submitted on the basis of the licensee's Environmental Report (ER) and may not await the Staff's environmental document. The contentions may be amended or expanded if there are data or conclusions in the NRC issuance that differ significantly from data or conclusions in the ER.
- P An order admitting and denying various contentions is not immediately appealable under 10 C.F.R. § 2.714a where it neither wholly denies nor grants a petition for leave to intervene/request for a hearing.
- Q The following technical issues are discussed: Decommissioning Funding, Loss of Offsite Power.
- LBP-93-24 TWIN FALLS CLINIC & HOSPITAL, Docket No. 30-32240-CivP (ASLBP No. 93-681-01-CivP) (EA 93-082) (Byproduct Material License No. 11-27085-01); ENFORCEMENT ACTION; December 8, 1993; ORDER APPROVING AND INCORPORATING STIPULATION FOR SETTLEMENT OF PROCEEDING AND SETTLING AND TERMINATING THE PROCEEDING
- A Where settlement of a matter as proposed by the parties is in the public interest, it should be approved by the Licensing Board.
- LBP-93-25 SEQUOYAH FUELS CORPORATION, Docket No. 40-08027-MLA (ASLBP No. 91-623-01-MLA) (Source Material License No. Sub-1010); MATERIALS LICENSE AMENDMENT; December 15, 1993; MEMORANDUM AND ORDER (Withdrawal of Application and Termination of Proceeding)
- A The Presiding Officer issues a Memorandum and Order allowing the Sequoyah Fuels Corporation to withdraw its license renewal application and to terminate the license renewal proceeding.
- B Although the power of a presiding officer to grant a withdrawal on prescribed terms and conditions under 10 C.F.R. § 2.107(a) involves discretionary judgment, the Commission's regulation is modeled on Rule 41(a)(2) of the Federal Rules of Civil Procedure and its exercise is reviewable for any abuse. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).
- C In supporting conditions on the withdrawal of an application, the record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate. *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 NRC 967, 978-79 (1981).
- D The jurisdiction and power of a presiding officer in specific cases are limited by the authority delegated by the Commission. *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-316, 3 NRC 167 (1976).
- E The discretionary responsibility of the presiding officer to consider imposing conditions on a license withdrawal must be exercised with due regard to the legitimate interests of all parties in the proceeding. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); see also *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963).
- F The purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).
- G The common law rule supporting the withdrawal regulation reflects that an applicant has an unqualified right to have an action dismissed unless the dismissal would legally prejudice other parties in a way other than by instituting a future proceeding of the same kind. See *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19-21 (1935).
- H Even if a withdrawal request comes after the issuance of a hearing notice, 10 C.F.R. § 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application.
- I Regulations should be construed to avoid absurd results and provide expression to their intended purpose. *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).
- J Conditions imposed on a license renewal application withdrawal by a presiding officer must not only bear a relationship to the conduct and legal harm at which they are aimed, but the harm must be documented in the record. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976).

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K Because the licensee's request to conduct decommissioning in accordance with an overall decommissioning plan generally has been considered a license amendment request, interested parties have been able to exercise hearing rights under section 189(a) of the Atomic Energy Act. See *Kerr-McGee Corp. (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232, 237 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). But see Commission Staff Requirements Memorandum, Chilk to Parler and Taylor, June 30, 1993, where hearings on a reactor decommissioning plan are considered wholly a matter of Commission discretion.

LBP-93-26 **ADVANCED MEDICAL SYSTEMS, INC.** (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-CivP-R (ASLBP No. 93-682-01-CivP-R) (Civil Penalty); **ENFORCEMENT ACTION**, December 14, 1993; **MEMORANDUM AND ORDER**

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ALJ-93-1 LLOYD P. ZERR, Docket No. 93-01-PF (ASLBP No. 93-673-01-PF); PROGRAM FRAUD;
September 20, 1993; RULING ON DEFENDANT'S MOTION TO DISMISS

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DD-93-14 BALTIMORE GAS AND ELECTRIC COMPANY (Calvert Cliffs Independent Spent Fuel Storage Installation), Docket Nos. 72-8, 50-317, 50-318; REQUEST FOR ACTION; August 16, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Material Safety and Safeguards denies a Petition filed by the Maryland Safe Energy Coalition regarding the licensed Independent Spent Fuel Storage Installation (ISFSI) at the Calvert Cliffs Nuclear Power Plant. Petitioner had requested that the NRC: (1) halt the transfer of nuclear waste from the spent fuel pool to the ISFSI until certain alleged safety problems had been fully solved; (2) conduct hearings for further rulemaking and regulation of nuclear waste at the plant; and (3) deny a Certificate of Compliance (COC) and suspend the license issued to the Licensee for dry cask storage of spent fuel until the concerns set forth in the Petition had been addressed by the NRC and the Licensee. Preliminarily, the Director noted that the licensing of this ISFSI did not fall under the Subpart of 10 C.F.R. Part 72 requiring rulemaking and issuance of a COC for approval of the cask design and, therefore, denied this part of the Petition. (Earlier, the Director had informed the Petitioner that its request for further rulemaking and regulation of dry cask storage was a request to modify the Commission's regulations and had advised the Petitioner to follow the provision of 10 C.F.R. § 2.802 if it sought rulemaking.) The Director then considered each of the safety problems alleged by the Petitioner and concluded that the Petitioner had not raised any substantial health and safety issues. The Director, therefore, denied the remaining actions requested in the Petition.

DD-93-15 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440 (License No. NPF-58); REQUEST FOR ACTION; September 21, 1993; SUPPLEMENTAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director, Office of Nuclear Reactor Regulation, supplements his denial of this petition regarding the construction and operation of an interim onsite low-level radioactive waste processing and storage facility that was set forth in DD-93-5 (37 NRC 238 (1993)). In DD-93-5, the Director had concluded that the construction and operation of the proposed interim facility did not raise any substantial public health and safety issues and that the Licensee had complied with all applicable NRC regulations and guidance. This Supplemental Decision was prepared to respond to a letter from the Petitioner to the Commission asserting that DD-93-5 fell far short of demonstrating the safety of the interim low-level waste facility itself and only addressed the effect the facility could have on existing equipment at the plant. In this Supplemental Decision, the NRC Staff reviews the Licensee's safety evaluation and supporting documentation for the design, construction, and operation of the interim facility and concludes that those activities do not raise an "unreviewed safety question" under 10 C.F.R. § 50.59 and that the design and operation of the facility will conform to the Licensee's Final Safety Analysis Report (FSAR) prepared for operation of the Perry plant. In confirming his earlier decision, the Director clarified the following points: (1) with limited exceptions, the design and operation of the interim facility do not involve changes in the handling and storage of low-level radioactive waste as described in the FSAR; (2) those few changes to the FSAR description do not involve unreviewed safety questions; and (3) therefore, under section 50.59, NRC review and approval was not required for construction and operation of the facility, no federal action was required for the construction and operation of this facility, and the requirements of the National Environmental Policy Act (NEPA) and the Commission's NEPA implementing regulations do not apply.

DD-93-16 NUCLEAR ENERGY SERVICES, Docket No. 30-2206; REQUEST FOR ACTION; November 19, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

DIGESTS ISSUANCES OF DIRECTORS' DECISIONS

- A The Director, Office of Enforcement, responds in a Director's Decision to issues raised in a petition filed by Ernest C. Hadley on behalf of Arnold Gundersen (Petitioner) pursuant to 10 C.F.R. § 2.206 and subsequent correspondence from the Petitioner and his wife. The Petitioner requested that action be taken with regard to Nuclear Energy Services (NES). The Petitioner sought, among other things: (1) prompt and decisive enforcement action against NES for procedural and license violations, harassment of Petitioner, and material misstatements made to NRC inspectors; and (2) an immediate review of all pending investigations and the reasons for delay in taking enforcement action against NES. As a basis for this request, the Petitioner asserted that he was terminated from his position as senior vice president with NES after asserting to his management that certain violations had occurred, and that when the Region I inspection report was submitted to NES which erroneously found no merit to his assertions, NES knew, or should have known, that the report contained material misstatements of fact and failed to notify the NRC of such misstatements in violation of 10 C.F.R. § 50.9. The Director has granted in part and denied in part the requests made by the Petitioner. The reasons for the denial are fully set forth in the Decision.
- B The NRC has several enforcement options available to it, including Notices of Violations, civil monetary penalties, and orders to suspend, modify, or revoke licenses.
- C Congress explicitly gave to the Department of Labor the authority and responsibility to provide traditional, labor-related remedies to individuals for their losses resulting from discrimination, while reserving to the NRC the authority under the Atomic Energy Act to take enforcement action against NRC licensees and individuals for violations of NRC requirements. It is not within the NRC's authority to provide a personal remedy to individuals for such discrimination.
- D The NRC has the authority to take enforcement action against NRC licensees and individuals for violations of NRC requirements. Such enforcement action is intended to provide a form of "protection" for whistleblowers in that the purpose of such action is to deter such conduct and to send a message to the licensee and other licensees that discrimination against employees for raising safety concerns will not be tolerated.
- E Matters relating to the conduct of NRC employees, including allegations of employee misconduct, are not within the scope of 10 C.F.R. § 2.206. Rather, such matters are within the authority of the NRC Office of the Inspector General.
- DD-93-17 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293 (License No. DPR-35); REQUEST FOR ACTION; November 19, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A A petition, dated October 30, 1991, requested the Commission to reconsider an earlier Commission approval of a task force recommendation that the NRC not reconsider its "reasonable assurance" finding regarding emergency preparedness at the Pilgrim Nuclear Power Station. The Petitioner set forth ten bases for that request. Subsequently, the Petitioner raised additional concerns, some of which are related to matters raised in the petition, in correspondence with a Commissioner's office, the Office of the Secretary of the Commission, and the Chairman. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, as deemed supplemented by relevant additional matters raised in the subsequent correspondence, and has denied the petition.
- DD-93-18 U.S. DEPARTMENT OF ENERGY (Hanford Site); REQUEST FOR ACTION; December 2, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed by the Confederated Tribes and Bands of the Yakima Indian Nation requesting that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes at the Hanford Site in the State of Washington and to expedite regulation thereof in accordance with the provisions of 10 C.F.R. Part 30 or other applicable chapters of the Code of Federal Regulations. As basis for the request, the Petitioner asserts that DOE currently is in violation of Part 30 requirements for a license since "various near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks," but meeting the 10 C.F.R. Part 60 definition of "geologic repository," have received and currently hold in "long-term storage" or "disposal," "high-level radioactive waste."
- B Application of section 202(4) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842(4), to determine NRC's jurisdiction with respect to certain storage tanks at Hanford turns upon the intention of

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Congress or DOE at the time the facilities were authorized and not on the likelihood that the tanks might in fact be used for long-term storage.

- C DOE has advised NRC that it intends to retrieve and process the high-level wastes in both single-shell and double-shell tanks for disposal in an offsite repository. Should DOE undertake to dispose of these wastes in situ, then the NRC would exercise its regulatory authority, as applicable, under section 202(4).

D The legislative history with respect to section 202(4) of the Energy Reorganization Act of 1974 is clear that Congress did not intend for NRC to regulate any existing facilities, at least until such time as they might be authorized for use as long-term storage or disposal facilities.

E The cribs, ditches, and trenches are not "facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste" and they are not subject to the licensing or related regulatory authority of the NRC pursuant to section 202(4) of the Energy Reorganization Act of 1974.

DD-93-19 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271; REQUEST FOR ACTION; December 14, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies petitions filed with the Nuclear Regulatory Commission (NRC) Staff by Michael J. Daley on behalf of the New England Coalition on Nuclear Pollution (Petitioner) on April 8, 1993, and April 11, 1993, requesting the NRC to take immediate action to require that the Vermont Yankee reactor remain in cold shutdown until plant management can provide proof that the emergency diesel generators at the plant are able to meet their safety function. Petitioner sought relief based on assertions that (1) diesel generator "A" was damaged by overload conditions suffered during testing in August through October of 1990; (2) the "B" unit also suffered under the same testing regime; (3) one of the causes of the repeated failures of the "A" unit in the summer of 1992 was the damage from this testing; (4) the overloading resulted from inappropriate actions taken in response to an NRC-identified violation indicating that the emergency diesel generators had for 20 years not been tested at loads consistent with the maximum expected accident load; and (5) the foregoing raises a number of questions that must be immediately answered if Vermont Yankee is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup power systems.

B The following technical issues are discussed: Design basis emergency diesel generator capacity; definition of load for emergency diesel generators, including real load, reactive load, power factor; diesel generator cylinder liner failure, including role of overload in causing, role of fatigue (from operation) in causing, resulting from original manufacturing flaws in liners, and likelihood of recurrence/probability of existence of other hidden flaws; relation of surveillance and other testing to detection of cylinder liner flaws in emergency diesel generator; and overload of other equipment.

DD-93-20 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293; REQUEST FOR ACTION; December 14, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A A petition, dated May 26, 1993, requested the Commission to take immediate action to delay the scheduled startup of the Pilgrim Nuclear Power Station, or, in the alternative, to order its immediate shutdown if the Pilgrim Station was permitted to start up before the petition could be acted upon. The petition contended that hardware modifications were necessary to eliminate errors in reactor water-level measurement because the system in place at Pilgrim does not adequately measure the water level of the reactor vessel and thus constitutes an unacceptable risk to the health and safety of the public. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

DD-93-21 CAROLINA POWER AND LIGHT COMPANY (Brunswick Steam Electric Plant, Units 1 and 2), Docket Nos. 50-324, 50-325; REQUEST FOR ACTION; December 14, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A A petition, dated April 28, 1993, requested the Commission to immediately shut down the Brunswick Steam Electric Plant on the basis of asserted receipt of allegations from a Brunswick employee. The petition alleged that operations at Brunswick Steam Electric Plant had reached crisis proportions, setting forth five statements as the bases for that conclusion and Petitioner's request for immediate shutdown. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

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DD-93-22 SHIPMENTS OF FUEL FROM LONG ISLAND POWER AUTHORITY'S SHOREHAM NUCLEAR POWER STATION TO PHILADELPHIA ELECTRIC COMPANY'S LIMERICK GENERATING STATION, Docket Nos. 50-352, 50-353, 50-322; REQUEST FOR ACTION; December 23, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed on behalf of the New Jersey Department of Environmental Protection and Energy requesting that the Nuclear Regulatory Commission (Commission): (1) amend Long Island Power Authority's (LIPA) license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to Philadelphia Electric Company (PECo); (2) perform an Environmental Assessment (EA) pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECO, which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with Section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b) which addresses alternative means of transporting fuel from LIPA to PECO; and (4) immediately stay PECO's June 23, 1993 license amendments, the Certificate of Compliance regarding the IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA). The Petitioner further requested that the Commission take immediate action to halt ongoing shipments of fuel from LIPA's Shoreham Nuclear Power Station to PECO's Limerick Generating Station pending consideration of the merits of the petition. As basis for the requests, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECO's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

B Under the existing regulatory scheme, a licensee's transport of nuclear fuel is by general license. No NRC approval of the specific route by which the Shoreham fuel is transported to Limerick is required. Because route selection is a private decision not requiring federal approval, no route-specific NEPA analysis is necessary. The Commission has held that where a licensee can act without NRC approval, there is no federal action requiring an environmental review under NEPA.

C Generic NRC resolution of environmental issues — and the consequent preclusion of case-specific reviews — is fully lawful.

D The S-4 Table, 10 C.F.R. § 51.52, specifically provides that it applies when "irradiated fuel is shipped from the reactor by truck, rail, or barge" (emphasis added). The provisions of the Table encompass the environmental impacts of the shipment of fuel from one reactor to another regardless of whether those impacts are being contemplated as part of NRC action concerning the reactor receiving the fuel or the reactor from which the fuel is being shipped.

E Because the shipment of fuel falls within the "envelope" of environmental consequences that have already been analyzed (and found nil) either generically or in the original impact statements for the specific plants at issue here, NEPA does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

F A general license to transport licensed material is conferred under 10 C.F.R. § 71.12 to any licensee of the Commission, as long as certain provisions are met, provided the licensee obtains approval of the package under other provisions of Part 71.

G Since the transfer of the fuel from LIPA to PECO is expressly authorized by 10 C.F.R. § 70.42, which provides that any licensee may transfer nuclear material to an individual authorized to receive such material under terms of a specific or general license issued by the Commission, LIPA is not required to obtain NRC approval to transfer the fuel to PECO.

H The main purpose of the Coastal Zone Management Act is to encourage and assist states in preparing and implementing management programs to preserve, protect, develop, and restore the resources of the coastal zone of the United States.

I Where a state has an approved program, the Coastal Zone Management Act provides for submission of a consistency certification to obtain a "required Federal license or permit."

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J The NRC did not issue any license or permit for LIPA's selection of a coastal route. Route selection, except in circumstances not applicable here, is a decision made by a private entity. It is not an activity for which LIPA or PECO applied for a "required Federal license or permit." 16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993) Because the NRC does not regulate the route selection, no NRC action fell within the Coastal Zone Management Act.

DD-93-23 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271; REQUEST FOR ACTION; December 28, 1993; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A A petition, dated September 1, 1993, requested the Commission to reconsider the August 2, 1993 proposed civil penalty assessed against the Vermont Yankee Nuclear Power Corporation for operating the Vermont Yankee Nuclear Power Station outside Technical Specifications from October 15, 1992, until April 6, 1993. The petition requested reconsideration based upon four assertions regarding the actions of the Licensee and the NRC's response to these actions. The Director of the Office of Enforcement has considered all of the matters raised in the petition and has denied the petition.

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