NUCLEAR REGULATORY COMMISSION ISSUANCES

August 1993

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
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B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel
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**ATOMIC ENERGY ACT: LICENSEE’S CHARACTER**

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.

**ATOMIC ENERGY ACT: LICENSEE’S CHARACTER**

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.
ATOMIC ENERGY ACT: LICENSEE'S CHARACTER (STANDARD FOR DETERMINATION)

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.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER (STANDARD FOR DETERMINATION)

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.

RULES OF PRACTICE: STANDING TO INTERVENE

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

RULES OF PRACTICE: STANDING TO INTERVENE

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.

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

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 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.

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

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.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

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.

MEMORANDUM AND ORDER

I. INTRODUCTION

Georgia Power Company (GPC or Licensee) has appealed the Atomic Safety and Licensing Board's Memorandum and Order, LBP-93-5, 37 NRC 96 (1993), which granted Allen L. Mosbaugh's petition for leave to intervene and for hearing on a proposed transfer of the licenses to operate the Vogtle Electric Generating Plant (Vogtle) Units 1 and 2. The proposed licensing action would transfer all operational control of Vogtle Units 1 and 2 from GPC, the present Licensee, to Southern Nuclear Operating Company, Inc. (Southern Nuclear). The Licensing Board granted Mr. Mosbaugh standing and admitted a consolidated contention which alleges that Southern Nuclear lacks the requisite character and integrity to be a Commission licensee. On appeal, GPC argues that Mr. Mosbaugh's petition should have been wholly denied because Mr. Mosbaugh both lacks standing and failed to submit an admissible contention. Mr. Mosbaugh and the Nuclear Regulatory Commission (NRC) Staff oppose GPC's appeal. For the reasons stated in this Order, we deny the appeal and affirm the Licensing Board's admission of the Petitioner as a party to this proceeding.
II. BACKGROUND

On October 14, 1992, the NRC Staff published in the Federal Register a notice of opportunity for hearing on the proposal to transfer all operating authority over the Vogtle plant from GPC, the current operator, to Southern Nuclear. 57 Fed. Reg. 47,135 (Oct. 14, 1992). Southern Nuclear presently functions as an unlicensed support services company. If the transfer is approved, Southern Nuclear would have the exclusive authority to possess, manage, use, operate, and maintain the facility. The proposed transfer would involve only the authority to operate Vogtle and would not change the ownership interests in the plant; GPC and the other named owners would continue to own the Vogtle plant in the same percentages as today.

Both GPC and Southern Nuclear are wholly owned subsidiaries of Southern Company. Southern Company incorporated Southern Nuclear in December 1990 for the purpose of consolidating within Southern Nuclear those Southern Company personnel engaged in nuclear operations. As a transitional stage prior to the incorporation of Southern Nuclear, Southern Company organized the Southern Nuclear Operating Company (SONOPCO) “project.” Numerous SONOPCO project — now Southern Nuclear — personnel are also officers of GPC. GPC explains that this process of “double-hatting” is a common method to maintain a licensed utility’s authority and control over transitional organizations, prior to the transfer of operating authority to a new affiliate.1

On October 22, 1992, Messrs. Allen L. Mosbaugh and Marvin B. Hobby filed a joint petition to intervene and for hearing on the proposed transfer of the Vogtle licenses. The Petitioners claimed that Southern Nuclear’s management does not have the character, competence, or integrity to ensure the safe operation of the Vogtle plant, and therefore should not become the licensee. Petition to Intervene and Request for Hearing of Allen L. Mosbaugh and Marvin B. Hobby at 2 (Oct. 22, 1992) [hereinafter Petition]. In an unpublished order dated November 17, 1992, the Licensing Board concluded that Mr. Hobby, who alleged only injury to his economic interests, had not demonstrated sufficient interest for standing and, accordingly, the Board dismissed Mr. Hobby’s petition. Mr. Hobby has not appealed. Mr. Mosbaugh claimed that he resides within 50 miles of the Vogtle plant and will face increased risk of radiological harm as a consequence of the proposed transfer. The Board ordered Mr. Mosbaugh to submit an amended petition, to contain both his particularized contentions and a more detailed statement of his contacts in the Vogtle plant area.

GPC has claimed that the transfer would not result in any significant change in nuclear operations personnel or support organizations. Therefore, of particular

1GPC’s Brief in Response to the Board’s January 15, 1993 Request for Information and Briefs at 18 (Feb. 4, 1993)
note in this proceeding is the Licensee's repeated assertion that even after the transfer of operating authority to Southern Nuclear, "the change in the actual personnel in control of licensed activities will be insignificant." For example, GPC states that once the proposed transfer becomes effective, the onsite organization responsible for operations at the facility will be transferred as a unit to Southern Nuclear. GPC claims that the transfer also would not significantly alter offsite line management; three of the four GPC officers who are the current Vogtle offsite managers are also officers of Southern Nuclear, and GPC states that upon the authorization of the transfer these three officers would continue managing the plant, although they would do so only as officers of Southern Nuclear, not of GPC. GPC thus characterizes the proposed change as resulting primarily in a licensee name change, not a change in the individuals managing the Vogtle plant, and therefore not a change that would result in any new injury to Mr. Mosbaugh.

In LBP-93-5, the Licensing Board determined that Mr. Mosbaugh satisfied the Commission's requirements for both standing and an admissible contention, and admitted Mr. Mosbaugh as a party to the proceeding. The Board rejected GPC's argument that Mr. Mosbaugh faces no injury as a consequence of the proposed transfer. The Board found that Mr. Mosbaugh resides periodically at a house located about 35 miles from the plant. Mr. Mosbaugh was found to have alleged, with an adequate basis, that the proposed transfer does not meet the NRC's safety requirements, and that even though "material safety deficiencies he has alleged may already be occurring," the transfer of control from GPC to Southern Nuclear could affect Mr. Mosbaugh's health, safety, and property interests. The Board also found three of the Petitioner's submitted contentions acceptable, but in the interest of efficiency consolidated these into a single admitted contention. In essence, this contention alleges that the authority to operate Units 1 and 2 should not be transferred to Southern Nuclear because the company lacks the requisite character, competence, integrity, truthfulness, and willingness to abide by regulatory requirements.

GPC has appealed the Licensing Board's decision pursuant to 10 C.F.R. § 2.714a (1993). On appeal, GPC presents principally four arguments. GPC claims that the Board erred in concluding that (1) the proceeding is an appropriate forum in which to address Mr. Mosbaugh's allegations; (2) Mr. Mosbaugh demonstrated that he would sustain an injury in fact from the proposed transfer sufficient for standing; (3) the injury complained of is likely to be redressed by a decision favorable to Mr. Mosbaugh; and (4) Mr. Mosbaugh satisfied the Commission's requirements concerning the admission of contentions.

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3Id.
Mr. Mosbaugh answers the Licensee’s appeal primarily with a defense of the Licensing Board’s finding of standing. The Staff, which initially had concurred with the Licensee that Mr. Mosbaugh had not demonstrated injury, now supports the Licensing Board’s finding of standing, based upon the Board’s analysis of redressability. NRC Staff Brief in Response to Licensee’s Appeal at 6-7 (Mar. 16, 1993). Staff has not taken a position on the adequacy of Mr. Mosbaugh’s contentions. The Staff, however, maintains that the Licensee’s character can be an appropriate consideration in this proceeding.

III. ANALYSIS

A. Scope of the Proceeding

Because this issue has importance to GPC’s arguments on both Mr. Mosbaugh’s standing and his contention, we first address GPC’s claim that this proceeding is not an appropriate forum in which to address Mr. Mosbaugh’s allegations. GPC emphasizes that character issues have not been considered in other transfer proceedings and that “[a]bsent specific direction from the Commission in enforcement proceedings, an applicant for a license transfer need only demonstrate financial and technical qualifications.” GPC Appeal Brief at 43-44 (footnote omitted). GPC suggests that under Commission precedent the Commission permits inquiries into a licensee’s character only after the initiation of enforcement actions. Id. at 40-41.

We concur with the Staff that the character of a proposed licensee is an appropriate issue in a proceeding to consider transfer of operating authority. The adequacy of a licensee’s corporate organization and the integrity and competence of its management are certainly matters that the Commission may consider in its licensing and oversight responsibilities under the Atomic Energy Act (AEA). Section 182a of the AEA authorizes the Commission to decide, by rule or regulation, what information is necessary to determine the qualifications of an applicant, including the “character” of the applicant. See 42 U.S.C. § 2232(a).

Although the Commission has not enacted regulations that specifically refer to “character,” it has considered the character of licensees and applicants when directly relevant to the proposed action.

4 However, in a "Partial Director’s Decision Under 10 C.F.R. § 2.206," DD-93-8, 37 NRC 314, 117-24 (1993), that was issued after the Staff’s brief was filed, the Staff rejects the merits of one of the bases for Mr. Mosbaugh’s contentions, i.e., the alleged de facto transfer of the licenses to Southern Nuclear. Because some of the factual issues addressed in DD-93-8 overlap with those now pending in this proceeding, we vacated DD-93-8 and remanded the petition to the Staff for further consideration at the conclusion of this proceeding. See generally CL-I-93-15, 38 NRC 1 (1993).

Commission precedent establishes that 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. See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLJ-80-32, 12 NRC 281, 291 (1980). The Commission has looked to whether a licensee’s management displays “the climate, resources, attitude, and leadership that the Commission expects of a licensee.” In making determinations about “integrity” or “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.” 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.

Under 10 C.F.R. § 50.80(c), before the Commission may approve an application for a transfer of license it must determine that the proposed transferee is “qualified to be the holder of the license,” and that the transfer of the license is otherwise consistent with applicable provisions of law, and Commission regulations and orders. The regulation does not permit a lower standard of qualifications of a proposed transferee than of an initial license holder. The predictive findings that the Commission must make prior to the issuance of an initial license are no less relevant and no less applicable to a proposal to change the operator of a nuclear facility. For instance, the Commission may issue an operating license only after finding that there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and that such activities will be conducted in compliance with regulations. 10 C.F.R. § 50.57(a)(3). These threshold determinations are equally appropriate in a proposed transfer of operating authority under a license to a new licensee. 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. See Three Mile Island, CLJ-85-9, 21 NRC at 1140.

GPC would like us to view the proposed amendment as no more significant than a change of corporate name. But the significance of a total transfer of

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7 Id. at 1136-37.
9 See also AEA § 184, 42 U.S.C. § 2234 (“No license . . . shall be transferred, assigned or in any manner disposed of, voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing”). 10 C.F.R. § 50.54(c).
operational control and responsibility over a nuclear power plant licensed to operate at full power makes relevant to this proceeding the proposed Licensee's integrity and willingness to abide by regulatory requirements. As Staff has emphasized, the proposed transfer may not be approved "[i]f personnel who will be involved in the operation of the facility lack the character to operate the facility." A resolution of properly admitted contentions regarding character or integrity has a direct bearing on the Commission's ability to find that Southern Nuclear will operate the Vogtle facility in compliance with Commission rules, regulations, and the AEA, and without endangering the health and safety of the public.

We do not mean to suggest that every licensing action throws open an opportunity to engage in a free-ranging 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. Where, as here, the proposed action concerns the transfer of the license to a new organization and management that will be responsible for the safe operation of the plant, character issues may be directly relevant.

B. Mr. Mosbaugh's Standing

We next turn to GPC's argument that Mr. Mosbaugh failed to allege an injury both linked to the proposed transfer and redressable by this proceeding, and that accordingly he lacks standing to intervene in this proceeding. To determine whether a petitioner has established sufficient interest to intervene in a proceeding, the Commission has long applied judicial concepts of standing. 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. See generally Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991) (Seabrook). Injury may be actual or threatened. Wilderness Society v. Griles, 824 F.2d 4, 11 (D.C. Cir. 1987).

The standing dispute in this appeal centers on the nature and redressability of Mr. Mosbaugh's injury, not on whether that injury is to an interest that falls within the "zone of interests" protected by the AEA. Because GPC anticipates

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10 NRC Staff Response to Licensing Board Questions at 6 (Feb. 5, 1993).

that the proposed transfer will result in only what it deems to be a negligible change in personnel, the Licensee argues that Mr. Mosbaugh faces no potential injury from the transfer. GPC states that “the only anticipated change in personnel at this time is that the Executive Vice President of GPC (who is also the President of Southern Nuclear) will no longer report to the President of GPC but will instead report solely to the Board of Directors of Southern Nuclear,” and that this reporting change is insignificant because the president of GPC will remain a member of the Board of Directors of Southern Nuclear. GPC’s Answer to Petition at 11 & n.5. GPC thus concludes that no potential for adverse offsite consequences will arise from the assumption of operating responsibilities by Southern Nuclear. Id. For the same reason, the Licensee emphasizes that the injury of which Mr. Mosbaugh complains, if it exists, would not likely be redressed by a decision favorable to him, but would exist regardless of whether the transfers are granted or denied. GPC’s Appeal Brief at 20, 27. We address injury and redressability separately and seriatim.

1. Injury in Fact to Mr. Mosbaugh’s Interests

Mr. Mosbaugh predicates his alleged injury upon his contacts in the area near the Vogtle plant, namely periodic residence at a house in Groveton, Georgia, located approximately 35 miles from the plant. Mr. Mosbaugh alleges that the management of Southern Nuclear lacks the character, competence, and integrity to safely operate the Vogtle plant, and lacks the candor, truthfulness, and willingness to abide by the regulatory requirements necessary to operate a nuclear facility. Petition at 1-2. More specifically, Mr. Mosbaugh alleges that the highest levels of Southern Nuclear’s management intentionally submitted material false information to the NRC in a Licensee Event Report.12 Mr. Mosbaugh further claims that Southern Nuclear managers deliberately submitted additional material false statements to the NRC Staff to obstruct an NRC investigation by the Office of Investigations (OI). Amended Petition at 16-19. Moreover, Mr. Mosbaugh alleges that Southern Nuclear officials, in violation of NRC regulations and of the Georgia Power Company’s license, used legal and illegal methods to “wrench the control of Plant Vogtle” from GPC and, as a result, GPC, the current Licensee, has ceased to be in control of operations at the plant.13

12 Amendments to Petition to Intervene and Request for Hearing at 15-16 (Dec. 9, 1992) [hereinafter Amended Petition]
13 Transcript of January 12, 1993 Prehearing Conference at 67-71 [hereinafter Prehearing Conference Transcript] (remarks by Mr. Mosbaugh’s counsel); see also Amended Petition at 5-14; Petitioner’s Brief in Response to the Board’s Request for Information at 1-5 (Feb. 5, 1993); Allen L. Mosbaugh’s Brief in Opposition to GPC’s Appeal of the Licensing Board’s Feb. 18, 1993 Memorandum and Order at 4-7 (Mar 22, 1993)
Mr. Mosbaugh submits that at the time that Georgia Power Company received its operating license, GPC personnel had the requisite integrity and abided by safety regulations, but over time GPC’s previous “management team was reconfigured to accommodate the Southern Company’s establishment of SONOPCO. As a result of this transition, all of GPC’s line managers over the plant manager have been replaced.” This new management team chosen to staff Southern Nuclear allegedly has evinced a willingness to risk safety and deceive the NRC.

Mr. Mosbaugh concludes that the influence of Southern Nuclear management personnel at Vogtle resulted in a corporate culture prone to taking risks in areas of safety. Due to the alleged “new corporate milieu” of intentional corporate misconduct by top management at Southern Nuclear, the Petitioner argues that a transfer of operational authority to Southern Nuclear would “encourage Southern Nuclear management to engage in the very type of misconduct Mr. Mosbaugh fears could result in a nuclear accident,” and thus would increase the possibility of an accident and “otherwise represent[] an unsafe operating condition.” Amended Petition at 3. Thus, Mr. Mosbaugh emphasizes that the formal transfer of operating control to Southern Nuclear will ratify a management organization that has violated and currently is in violation of Commission requirements, and that a transfer to individuals who tolerate — if not encourage — violations will place him, by virtue of his frequent presence in the plant area, at greater risk of radiological injury.

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. See, e.g., Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979) (North Anna). Especially given the possible health consequences of accidental releases, the siting of a plant in a petitioner’s environment may be deemed a direct and present injury. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978).

However, the Commission has stressed that this presumption in favor of an interest to intervene applies only in “proceedings for construction permits, op-

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14 See, e.g., Petitioner’s Brief in Response to Board’s Request for Information at 4 n.4; Prehearing Conference Transcript at 109.
15 Id.; Petitioner’s Brief in Response to the Board’s Request for Information at 4 n.4. 
16 Id.; Prehearing Conference Transcript at 71. Consequently, the Petitioner argues that "it is incumbent upon GPC to show that the proposed new management of Southern Nuclear — not the old management of GPC — has the requisite character and integrity to operate a nuclear facility." Petitioner’s Brief in Response to the Board’s Request for Information at 6.
17 Id.; at 71.
18 Id. at 71.
19 Petitioner’s Brief in Response to the Board’s Request for Information at 6-7.
erating licenses, or significant amendments thereto," where the proposed action involves "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) (St. Lucie). In the absence of "such obvious potential for offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken." Id. at 330. For example, proximity alone did not establish the requisite injury for standing in St. Lucie because the proposed action primarily affected the occupational safety of workers in radiation areas within the plant, and posed no readily apparent potential for safety consequences to the offsite public.

The Licensing Board concluded in LBP-93-5 that Mr. Mosbaugh's petition satisfies threshold standing requirements. The Board determined that the petitioner owns a house located approximately 35 miles from the Vogtle plant, and since August 1991 has resided at this home approximately 1 week each month. The Licensing Board determined that the proposal to transfer operational authority to Southern Nuclear presents an "obvious potential for offsite consequences," and that, accordingly, because of his frequent presence near the plant Mr. Mosbaugh had adequately established an interest to intervene. LBP-93-5, 37 NRC at 108. The Board reasoned that allegations of intentional withholding of safety-related information by key Southern Nuclear officials pertain to the plant's overall safety, and "[t]he risk of non-safety-conscious management is as great as many other risks that could be adjudicated in an operating license case." Id.

On appeal, GPC contests the Board's conclusion that the proposed action involves an obvious potential for offsite consequences. To the Licensee, the proposed amendments involve "little more than a name change" since any change in the personnel who will control licensed activities will be minor. GPC Appeal Brief at 15-16. GPC therefore claims that the transfer of operating control poses no injury to Mr. Mosbaugh.

We concur with the Licensing Board that Mr. Mosbaugh sufficiently has alleged an injury linked to the proposed amendments. Mr. Mosbaugh has established in the Board's estimation regular, though intermittent, residence near the plant. Compare North Anna, 9 NRC at 57 (periodic recreational activity). A request to transfer full operating authority over a power reactor may be deemed a "significant" amendment or action involving "clear implications for the offsite environment," for purposes of determining threshold injury.

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20 37 NRC at 107. In response to Mr. Mosbaugh's petition, the Licensee had challenged Mr. Mosbaugh's assertion that he resides in Georgia. The Board reached its findings about Mr. Mosbaugh's contacts in the Vogtle plant area based upon supplemental filings and an evidentiary hearing held January 12, 1993.
We agree with the Petitioner that although key officers at Southern Nuclear may already be in managerial roles as GPC officers at Vogtle, the officers' current presence at Vogtle does not obviate the need for Southern Nuclear to show that it has the willingness to follow NRC regulatory requirements before the company is granted the responsibility for the plant's operations. Amended Petition at 1 n.1. As Staff counsel stated before the Licensing Board, "character has to be looked at, even though it appears to us that these are the same people named both times . . . . To issue a license amendment . . . would be an indication that the NRC in some way says at that point character was [acceptable] in the past and that character can continue into the future." Thus, we cannot accept at this threshold stage GPC's conclusion that no injury would result from transferring responsibility for safe operation to persons in Southern Nuclear's corporate management who are alleged to have violated agency regulations and to have submitted false information to the NRC. Given the need to ensure before the licenses are transferred that Southern Nuclear's management will operate the Vogtle facility consistent with regulatory requirements, we will assume that the transfer has potentially significant public health and safety implications.

GPC's approach would have us ignore matters concerning the individuals filling positions in the new organization simply because they presently occupy similar positions of responsibility in the old one. This approach would insulate the proposed licensee from scrutiny for reasons having nothing to do with the relevance of the matters to the licensing action at issue or with the specificity of the allegations.

Whether some or even all of the key personnel are already managing the facility does not eliminate the implications of granting total control over operations to corporate management alleged to be lax on safety. If Mr. Mosbaugh's allegations are correct, the license transfer would act to ratify and reward corrupt management. The Commission has acknowledged that high-level management plays a significant role in assuring "that a proper attitude is followed throughout the organization." *Three Mile Island*, CLI-85-9, 21 NRC at 1139. In assessing threshold standing, we simply cannot conclude

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21 Prehearing Conference Transcript at 99-100.
22 The Licensee states that the Licensing Board's ruling directly conflicts with *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978) (*Fermi*). GPC's Appeal Brief at 35: "*Fermi* involved a proceeding to amend a construction permit to add new co-owners. The Licensing Board in *Fermi* concluded that the scope of the proceeding did not encompass consideration of whether Detroit Edison had violated Commission regulations by transferring ownership interests in advance of Commission action on the proposed amendment. GPC claims that the Licensing Board in LBP-93-5 should have rejected Mr. Mosbaugh's allegations because he likewise seeks only to litigate historical allegations. We find the instant case distinguishable. Here, Mr. Mosbaugh claims that Southern Nuclear personnel currently lack the character to operate the plant. This claim is based on alleged intentional violations committed by Southern Nuclear officers, which are cited to depict an alleged corrupt management organization that is unfit to operate a nuclear power plant. There were no such allegations about the character of the new co-owners in *Fermi*; whether Detroit Edison had violated Commission regulations in the past simply had no relevance to that proceeding.
that Mr. Mosbaugh would not face increased risk of radiological injury from a formal transfer of operating responsibility to an organization whose high-ranking officers are allegedly willing to violate safety regulations.

GPC itself has stressed the significance of the authority and "final say," so to speak, exercised by the company named as the exclusive operating licensee. For instance, under the current license, in an irreconcilable dispute between the president and chief executive officer (CEO) of GPC and the president and CEO of Southern Nuclear over whether an employee of GPC should be fired, the GPC president, as president of the Licensee, would prevail.23 A "double-hatted" officer of GPC and Southern Nuclear stressed that if such a conflict "can't be ironed out, obviously, the stronger hand in this is [the current Licensee] . . . . [T]he sanctity of the license and responsibility is absolute. There can never be a dilution . . . in the sanctity of that operational responsibility."24

Quite simply, transfer of the license will mean that a different corporate entity, Southern Nuclear, will be responsible for activities at Vogtle. Even if the same personnel will be operating the plant on the day after the transfer, they will be reporting to a different organization. This new organization will have the ability to replace the plant management and affect plant operation in any number of ways. Thus, we do not accept GPC's argument that the amendments represent nothing more than a corporate "name change."

If a licensing action involves an obvious potential for offsite consequences, the petitioner need not meet the heightened requirement under St. Lucie for specification of the "injury in fact" that will result from the action taken, nor must the petitioner particularize the causal relationship between the alleged injury and the results of the proceeding. See St. Lucie, 30 NRC at 329-30; North Anna, 9 NRC at 56. Mr. Mosbaugh's intermittent residence in the plant's vicinity, coupled with his allegation that personnel of the company that will be authorized to control the Vogtle facility lack the integrity to operate the plant safely, is sufficient to meet the "injury" requirement for standing in this proceeding.

23 See Transcript of Public Meeting on Implementation of Southern Nuclear Operating Company at 39 (Jan. 11, 1991) (referring to analogous hypothetical dispute between the presidents of Alabama Power Company and Southern Nuclear), attached to GPC's Response to the Board's Jan. 15, 1993 Request for Information (Feb. 4, 1993). The Licensee emphasizes that after the transfer the only change in line management personnel responsible for licensed activities will be that Mr. McDonald, a senior officer at GPC and Southern Nuclear, will no longer report to Mr. Dahlberg, the president of GPC, and instead will report to the Board of Directors of Southern Nuclear. The Licensee submits that this change will be insignificant because Mr. Dahlberg is on the Southern Nuclear Board of Directors. At this point, in determining threshold standing, we are not prepared to resolve the extent to which the license transfer may result in any changes in the relative influence of personnel at the Vogtle facility, and if so, what the effects might be of such a shift in influence.

24 Id. at 39.
2. Redressability of Mr. Mosbaugh's Injury

Notwithstanding a finding of injury to Mr. Mosbaugh's interests, GPC contends that Mr. Mosbaugh cannot satisfy the redressability component of the standing test. GPC argues that even if Mr. Mosbaugh's claims are adjudicated and found to have merit, with the result that the transfer is disapproved, his asserted injury would not be redressed by this proceeding. Disapproval of the transfer, GPC argues, will merely leave the plant under its present management, which employs the same personnel whose integrity Mr. Mosbaugh is attacking. Therefore, this argument goes, a hearing on Mr. Mosbaugh's contentions cannot result in any relief from his claimed injuries, and his case for standing fails the redressability test.

We find GPC's argument unpersuasive. The underlying implication of GPC's approach is that approval of the proposed transfer would in fact be an action of no real consequence or significance. But an adjudication that ended by confirming Mr. Mosbaugh's allegations about the unfitness of Vogtle management, if upheld on further administrative review, most assuredly would do more than simply result in denial of the transfer amendment. Mr. Mosbaugh's asserted injuries would be redressed if he should prevail in this proceeding or even partially prevail. For example, as the Licensing Board suggested, Mr. Mosbaugh could obtain relief if the transfer was granted subject to changes in the structure and personnel of Southern Nuclear.25 As the Staff states, "an order prohibiting or limiting the activities of certain of these officers at Vogtle might prevent potential harm from operation under the proposed transfer."26 Moreover, determinations made in this proceeding, i.e., a finding of adverse character, would have a collateral estoppel effect on related licensing actions or in later proceedings brought on the same facts.27 The consequence of such adverse findings resulting

25 LBP-93-5, 37 NRC at 105. GPC argues that the Board erred in suggesting its own theory of redressability, unadvanced by the petitioner. GPC's reliance on Commission precedent to support this argument is misplaced. In Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991), the Commission held that licensing boards may not freely infer bases for contentions in framing specific issues for litigation once standing is established. We do not believe that this decision can be read to prohibit the Board from considering generally the reach of its jurisdiction to fashion a remedy in determining redressability.

26 NRC Staff Brief in Response to Licensee's Appeal at 7. GPC submits that if the Board were to approve the amendments subject to conditions that GPC found unacceptable, GPC might simply reject those conditions "since it can continue operating Plant Vogtle under the current organizational structure." GPC Appeal Brief at 26-27. GPC, however, may not unilaterally withdraw its application. The Commission provides under 10 C.F.R. § 2.107(a) that "[t]he Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." See also Sequoyah Fuels Corp., CLI-93-7, 37 NRC 175, 179 (1993); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

27 Collateral estoppel principles may be applied by the Commission in administrative proceedings to bar re-litigation of previously resolved factual issues. See Alabama Power Co. (Joseph M. Farley Nuclear Plant). (Continued)
from the litigation of Mr. Mosbaugh's allegation is fairly a result of this proceeding. Thus, the Petitioner's alleged injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

The Licensee notes that in *Seabrook*, which also involved allegations about character, the Commission denied standing to the Seacoast Anti-Pollution League (SAPL) for failure to demonstrate that its alleged harm would abate by a favorable decision. However, *Seabrook* is distinguishable on its facts. Fearing the alleged corrupt influence of Northeast Utilities (NU) management on NU's subsidiaries, SAPL challenged a proposed transfer of a substantial ownership interest in the Seabrook plant from Public Service Company of New Hampshire to NAEC, an NU subsidiary. Yet SAPL failed to respond to a notice of a separate proposed amendment to transfer operational authority to NAESCO, another NU subsidiary. This second proposed amendment authorized NAESCO to manage, operate, and maintain the Seabrook facility, actions central to the Petitioner's fears of unsafe operation. As a result, the Commission found that SAPL's alleged injury would not be redressed by the denial of the proposed transfer of an ownership interest to NAEC. 34 NRC at 268. Unlike *Seabrook*, Mr. Mosbaugh's alleged injury stands to be redressed by a favorable decision in this proceeding.

C. Admission of the Consolidated Contention

To be admitted as a party, a petitioner for intervention must not only establish standing, but must also proffer at least one admissible contention. Commission regulations under 10 C.F.R. § 2.714(b)(2) and (d)(2) establish the standards for an admissible contention. Section 2.714(b)(2) mandates that a contention include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. Additionally, the petitioner must present sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Asserted 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).

The Licensing Board found admissible three of Mr. Mosbaugh's proffered contentions, all of which related to the character of Southern Nuclear's manage-
ment. A fourth contention focused upon Southern Company, the parent company of GPC and Southern Nuclear; the Board rejected this fourth contention for lack of an adequate basis for questioning the character of Southern Company. LBP-93-5, 37 NRC at 105. In brief, the bases for Mr. Mosbaugh's contentions concerned (1) whether the formation of Southern Nuclear's relationship to the Vogtle plant, particularly the alleged illegal transfer of operating authority, evidences a lack of trustworthy character in Southern Nuclear's management, and (2) whether high-ranking officers of Southern Nuclear intentionally submitted material false statements to the NRC concerning the March 1990 site area emergency and resumed operation after that event. See id. at 102-03, 104-05. In the interest of efficiency, the Board consolidated the three admissible contentions into the following single contention:

The license to operate the Vogtle Electric Generating Plant, Units I and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by regulatory requirements.

Id. at 110.

On appeal, GPC argues that the Licensing Board erred in concluding that Mr. Mosbaugh satisfied the Commission's requirements concerning the admission of contentions. GPC claims that Mr. Mosbaugh's contentions lacked either factual or legal basis. GPC Appeal Brief at 30. Specifically, GPC submits that the Board incorrectly found that Mr. Mosbaugh satisfied the Commission's contention requirements under 10 C.F.R. §2.714(b)(2)(iii). Id. This provision mandates that the petitioner provide the following as to each contention:

Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.714(b)(2)(iii).

GPC argues that the Petitioner failed to identify any error or omission in GPC's application, and that the Licensing Board improperly implied that the licensee was required to include Mr. Mosbaugh's allegations in its applications and that GPC's failure to do so constituted an omission. GPC Appeal Brief at 31. In this regard, the Licensing Board stated:

We note that 10 C.F.R. § 2.714(b)(2)(iii) requires the specification of how the application fails to contain information that it should contain. In this instance, Mr. Mosbaugh has alleged material facts that are relevant to the application. The omission of these facts from the application is not surprising, since they are adverse to the interest of the Applicant.
Consequently, Mr. Mosbaugh fulfills the requirements of this section because the omission from the application of the facts he has alleged is material to proper consideration of the amendment.

37 NRC at 103-04. GPC stresses that the Board’s suggestion that GPC should have included the Petitioner’s allegations is unreasonable because “[n]owhere in the regulations is there any requirement that an applicant for a license transfer elaborate on its ‘character.’” GPC Appeal Brief at 31.

We disagree with the Licensing Board’s reasoning to the extent that it may suggest that the Petitioner satisfied the requirements under 10 C.F.R. § 2.714(b)(2)(iii) because the Licensee “omitted” from its application Mr. Mosbaugh’s allegations about Southern Nuclear’s character. The Licensing Board’s approach relies upon a legal fiction that is neither contemplated under our regulations nor necessary to satisfy them. We accept arguendo that Commission regulations did not require GPC to include references to character allegations in its application. However, in fairness, we cannot then require that to adequately specify a dispute over a material fact, a petitioner must 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. Such a narrow reading of section 2.714(b)(2)(iii) would have the unintended effect of prohibiting petitioners from raising issues otherwise germane to a proceeding.

Under section 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. But the rule is not intended to preclude contentions that rest on relevant matters not required to be specifically addressed in the application. As we noted in the Statements of Consideration accompanying the revised contention rule:

Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.

54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). Thus, section 2.714(b)(2)(iii) only requires the Petitioner to identify the disputed portion of the application or the omission of required information if the disputed matter is actually considered or is required to be considered in the application. In this special circumstance, no purpose would be furthered by requiring Mr. Mosbaugh to identify a specific portion of GPC’s application, when the Licensee had no requirement to refer to “character.”

The Licensee also argues that the Board should have found Mr. Mosbaugh’s contentions inadmissible because the factual bases for his contentions do not raise any concern with changes in personnel who operate plant Vogtle that would occur upon the issuance of the proposed license amendments. GPC Appeal Brief
at 34. GPC argues that the Petitioner failed to demonstrate a nexus between the contentions and this proceeding. Id. at 35. This argument in effect goes to the Petitioner’s standing, which we have discussed in section III.B of this decision.

The remainder of GPC’s challenge to the contention concerns the claim that Mr. Mosbaugh’s contention is not appropriate for resolution in this proceeding because character issues are not generally addressed in transfer amendment proceedings. For reasons already outlined in section III.A of this opinion, we have decided that this transfer proceeding is an appropriate forum in which to address character issues. We believe that our contention rules provide reasonable discipline when character is a relevant inquiry to ensure that a licensee is not subjected to defending frivolous or unspecific claims. For this reason, our rules require the intervenor to articulate particular contentions and the bases thereof to ensure reasonable specificity and adequate notice of the matters being raised against the proposed action, and to ensure the existence of a genuine dispute of law or fact. See 54 Fed. Reg. 33,168-70 (Aug. 11, 1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 932-33 (1987). In this regard we note, too, that an intervenor is not free to change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention.30

V. CONCLUSION

For the reasons stated in this decision, Georgia Power Company’s appeal is denied and the Licensing Board’s order in LBP-93-5 admitting Mr. Mosbaugh as a party and admitting the consolidated contention, is affirmed.

30 GPC claims that the Licensing Board improperly inferred a legal basis for Mr. Mosbaugh’s contention. GPC Appeal Brief at 33-34 (citing LBP-93-5, slip op. at 7). We disagree. We view the Board only as finding character legally germane to the grant of the proposed license transfer. The Board adds nothing to the contention or the bases proffered by Mr. Mosbaugh.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1993.

30 Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.
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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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

ENFORCEMENT ACTIONS: STAY OF PROCEEDING

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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.
ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

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.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commission has before it a referred ruling from the Atomic Safety and Licensing Board, LBP-93-10, 37 NRC 455 (1993), in which the Licensing Board granted an additional 90-day stay of discovery in this enforcement proceeding. The proceeding stems from a request for a hearing by Oncology Services Corporation (OSC or Licensee) on the Nuclear Regulatory Commission (NRC) Staff’s January 20, 1993 order that suspended OSC’s license to use sealed sources containing iridium-192 for human brachytherapy treatments at specified OSC facilities in Pennsylvania. Order Suspending License (Effective Immediately), 58 Fed. Reg. 6825 (Feb. 2, 1993). The Licensing Board referred its grant of an additional 90-day stay to the Commission in accordance with the Commission’s direction in CLI-93-13, 37 NRC 419 (1993).

The Commission took the unusual step of directing the Licensing Board to refer its ruling because of the peculiar circumstances that arose in the context of the grant of an initial 120-day stay of discovery in this same enforcement proceeding. With respect to the first stay, the Commission granted OSC’s petition for interlocutory review of the Licensing Board’s March 26, 1993 Memorandum and Order, LBP-93-6, 37 NRC 207, which granted in part the Staff’s motion for a 120-day stay of this enforcement proceeding. CLI-93-13, 37 NRC 419 (1993). Because the stay expired by its own terms on June 23, 1993, and because some of the same issues were raised again in the context of Staff’s motion for an additional delay filed June 3, 1993, we directed the Licensing Board to refer to the Commission for review any ruling granting Staff’s motion for an additional delay.

Upon consideration of the record below and the additional filings before us, we vacate as moot portions of LBP-93-6 challenged by OSC in its original petition for review and the Commission declines to review the remaining unchallenged issues. To the extent that any of these issues relate to the grant of an additional stay, they have been reviewed and decided as they relate to LBP-93-10. OSC’s request to reverse LBP-93-10 is denied, and LBP-93-10 is affirmed.
II. BACKGROUND

On December 1, 1992, the NRC was notified of an incident involving the loss of a 3.7-curie iridium-192 source from the Licensee’s Indiana Regional Cancer Center in Indiana, Pennsylvania. The Staff investigated the incident and on January 20, 1993, Staff issued an immediately effective order suspending OSC’s license to provide brachytherapy treatment at the Pennsylvania cancer treatment facilities named in the license. Order Suspending License (Effective Immediately), 58 Fed. Reg. 6825 (Feb. 2, 1993). The suspension under the order is open-ended.

According to the Staff’s order, on November 16, 1992, an iridium-192 sealed-source, which was inserted into a catheter in the abdomen of a nursing home patient, broke off and remained in the patient when the patient was returned to the nursing home that same day. After some 90 hours, the catheter containing the source was dislodged from the patient, and was then handled by various persons who did not know that the catheter contained a radioactive source. The catheter containing the source was only retrieved after it triggered an alarm at a waste disposal facility approximately one week later. The patient died on November 21, 1992. The Staff’s order does not specify the cause of the patient’s death.

The Staff alleges that as a result of this incident the patient received a significant amount of radiation exposure and numerous other individuals, including health care workers, visitors, sanitation workers, and other members of the general public, were exposed unnecessarily to radiation. 58 Fed. Reg. at 6826. The Staff also identified certain practices and procedures which, according to Staff, demonstrated a significant corporate management breakdown in the control of licensed activities. The Staff concluded that this breakdown was of the utmost regulatory concern because it contributed to the occurrence of the incident noted above. Consequently, the Staff concluded that the public health, safety, and interest required an immediately effective suspension of the license. Id. at 6826-27.

Since the initial suspension was imposed, the Staff relaxed the order and, on a case-by-case determination, has allowed OSC to treat more than twenty patients upon a good-cause showing for the individual treatment.1 By letter dated June 3, 1993, the Staff further relaxed its suspension order to allow resumption of licensed activities at two of the facilities named in the OSC license. The suspension remains in effect for the other facilities named in the license. Letter to Douglas R. Colkitt, M.D., President OSC, from Thomas T. Martin, Regional Administrator, Region I, NRC.

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1 See, e.g., Letter from Thomas T. Martin, Regional Administrator, NRC to Dr. Colkitt, OSC, “Modification to Order,” January 22, 1993.
On February 5, 1993, OSC filed a request for hearing on the Staff’s order, and an Atomic Safety and Licensing Board subsequently was established pursuant to OSC’s request. On February 23, 1993, the NRC Staff filed a motion pursuant to 10 C.F.R. § 2.202(c)(2)(ii) (1993), requesting that the Licensing Board delay the conduct of this proceeding for an initial period of 120 days. The Staff asserted that the delay was needed to prevent prejudice to ongoing federal and state investigations regarding the propriety of OSC’s activities under its license. OSC opposed Staff’s stay motion. The Licensing Board granted, in part, the Staff’s motion by staying for 120 days (through and including June 23, 1993) discovery and any portion of the proceeding that necessarily must follow discovery.

In accordance with the Board’s instructions for filing such a motion, the Staff sought an additional stay of the proceeding in a motion filed on June 3, 1993. In LBP-93-10, the Licensing Board granted in part the Staff’s motion for an additional delay. Although the Staff had requested another 120-day stay of the proceedings, the Licensing Board granted only a 90-day stay of discovery (through and including September 21, 1993). In addition, the Licensing Board again required that the Staff provide a status report detailing the progress of any investigation and further instructed that any request for an additional delay must be filed on or before September 1, 1993. LBP-93-10, 37 NRC at 467.

Upon the Licensing Board’s referral of LBP-93-10 to the Commission per our instructions in CLI-93-13, the Commission set a schedule for the filing of briefs and directed the Licensee to specify the basis for any assertion that LBP-93-10 contains errors of fact or is inconsistent with established law or precedent; we also asked both parties to address whether the Commission should vacate LBP-93-6 on the ground that it is moot. Unpublished Commission Order (June 24, 1993). In response to our order, OSC filed a brief requesting that the Commission reverse LBP-93-10 and deny any further stay. The NRC Staff filed a reply brief requesting affirmance of LBP-93-10.

III. MOOTNESS

We first decide whether the Licensing Board’s order granting the original 120-day stay, LBP-93-6, should be vacated on the ground of mootness. The Staff favors vacating as moot the portions of the Licensing Board’s order pertaining to the 120-day stay of the proceeding, but the Staff asserts that the portions of the order regarding unrelated procedural matters still pending before the Licensing Board are not moot and, thus, should not be vacated. NRC Staff Response to Brief of OSC in Response to Commission Order of June 24, 1993, at 21-22 (July 13, 1993) (hereinafter Staff Brief). Although OSC objected to vacating LBP-93-6 as moot, it is apparent that OSC only objected to vacating the portion of the order that pertains to the procedural matters still pending before the Board. See
Brief of OSC in Response to Commission Order of June 24, 1993, at 12 (July 6, 1993) (hereinafter OSC Brief). Thus, neither party has asserted a continuing cognizable interest in the portions of LBP-93-6 that pertain to the grant of the 120-day stay.

When the original stay expired by its own terms on June 23, 1993, the portion of LBP-93-6 pertaining to the 120-day stay ceased to have any operative effect or purpose. In addition, as will be discussed in more detail below, in this order we review all matters raised in the Licensing Board’s subsequent order, LBP-93-10, including matters that were originally raised and contested in the context of LBP-93-6. Thus, the portion of this proceeding relating to the Licensing Board’s granting of an initial 120-day stay, is now moot. Fewell Geotechnical Engineering, Ltd. (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992) (hereinafter Fewell).

In cases such as this, when prior to the outcome of the appellate process, through happenstance, a proceeding becomes moot, the decision below is normally vacated. See United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950); A.L. Meckling Barge Lines, Inc. v. United States, 368 U.S. 324, 329 (1961); Fewell, 35 NRC at 84. Such action is appropriate here with respect to the portion of the Board’s order relating to the granting of the initial 120-day stay.

However, still pending before the Board are matters related to the portion of LBP-93-6 pertaining to the submission of a joint prehearing report detailing the central issues for litigation, issues amenable to summary disposition, an estimate of the length of time needed for both discovery and the holding of an evidentiary hearing, and the status of any settlement discussions. Therefore, this portion of LBP-93-6 is not moot. See LBP-93-6, 37 NRC at 223. Moreover, because neither party has raised before the Commission any challenge relating to these procedural instructions, the Commission leaves undisturbed this portion of LBP-93-6.

IV. GENERAL PRINCIPLES RELATING TO DELAY OF PROCEEDINGS

Our rules of practice specifically authorize the presiding officer to 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
The determination of whether a delay is reasonable depends on the facts of a particular case and requires a balancing of the competing interests. To balance the competing interests in this case, the Licensing Board applied the same test that was applied in *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555 (1983) (hereinafter $8,850). This test, initially developed in *Barker v. Wingo*, 407 U.S. 514 (1972), includes four factors to be considered: “length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id.* at 530 (footnote omitted). In *Barker*, the question at issue was whether the government’s delay in affording a trial to a defendant indicted for murder more than 5 years earlier amounted to a deprivation of the defendant’s Sixth Amendment right to a speedy trial. The Court in *Barker* did not intend for its test to comprise the exclusive factors considered in every case. Rather, the Court stated, “A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.” *Id.* at 530.

In $8,850, the question at issue was whether a delay in a forfeiture proceeding, 18 months after seizure of the property, amounted to a denial of the claimant’s Fifth Amendment right against deprivation of property without due process of law. Although the claim in *Barker* involved the Sixth Amendment right to a speedy trial and not the Fifth Amendment right to due process, the Court in *$8,850* found that the claimant’s challenge to the length of time between the seizure and the initiation of the forfeiture trial “mirrors the concern of undue delay encompassed in the right to a speedy trial.” *$8,850*, 461 U.S. at 564. Thus, the Court concluded that the *Barker* balancing inquiry provided an appropriate framework for determining whether the delay of 18 months amounted to a due process violation.

The Staff argues that it was appropriate for the Board to rely only on the analysis in *$8,850* because the Court there addressed the same question at issue here — whether a delay of a hearing violated an individual’s right to due process. In asserting this argument the Staff maintains that two other cases that applied a different balancing test and are cited by the Licensee here for their relevance, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Matthews v. Eldridge*, 424 U.S. 319 (1976), are inapposite. Staff Brief at 5-8.

It is unnecessary to determine whether the claim here mirrors the claims at issue in *Logan* and *Matthews*. The same interests found relevant to the facts of

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2 In promulgating section 2.202(c)(2)(ii), the Commission stated that “any delay in the proceeding should take into consideration not only the interests of the government but the persons affected by the order as well,” and we instructed presiding officers to stay the proceeding “only if there is an overriding public interest for the delay.” Revisions to Procedures to Issue Orders, Challenges to Orders That Are Made Immediately Effective, Final Rule, 54 Fed. Reg. 20,194, 20,197 (May 12, 1992)
Logan and Matthews were applied in a subsequent case that involved a claim very similar to the one being asserted here. In FDIC v. Mallen, 486 U.S. 230, 242 (1988), the Supreme Court found that the same interests balanced by the Court in Logan and Matthews were also relevant interests to be weighed in determining how long a delay is justified before affording a post-suspension hearing.

At issue in Mallen was whether the government's interest in ensuring the integrity of the banking system justified a delay of up to 90 days in a post-suspension hearing. The private interest involved a suspended bank officer's property right to continued employment. According to the Court in Mallen,

In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken. Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976).

Mallen, 486 U.S. at 242.

We recognize that the balancing in Mallen is arguably different than the balancing in $8,850. In Mallen, unlike in $8,850, the Court analyzed as a separate factor the risk of erroneous deprivation of the property interest at stake. The Court also did not explicitly discuss whether the delay would hamper the private party's ability to defend against the charges brought by the government in the civil proceeding. Instead, the Court in Mallen considered the importance of the private interest—the individual's continued employment—and the harm to this interest occasioned by the delay. In contrast, the balancing by the Court in $8,850 of the prejudice to the claimant seemed to consider only the prejudice to the claimant's ability to mount an adequate defense. See United States v. Premises Located at Route 13, 946 F.2d 749, 756 & n.11 (11th Cir. 1991) ("The lack of marketability and the inability to buy inventory do not constitute prejudice in the manner proscribed by $8,850 . . . [i]e., causing prejudice from the loss of witnesses or evidence.")

The Commission does not believe that we must choose between the tests in Mallen and $8,850. As the Court emphasized in $8,850, "none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, 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." 461 U.S. at 565 (footnote omitted). Both tests have been applied in cases involving the question of whether a delay in a post-deprivation hearing was improper. Therefore, we apply an analysis that considers all of the factors listed above.
In this instance the Licensing Board considered both the prejudice to the Licensee’s ability to defend against the charges in the suspension order and harm to the Licensee’s interest in continuing uninterrupted licensed activity. We believe that the risk of erroneous deprivation is also a relevant consideration.

V. APPLICATION OF THE GENERAL PRINCIPLES

With these general principles in mind we turn to the facts of this particular case to determine whether the Staff has shown a sufficiently compelling interest to justify the delay in the post-suspension hearing.

1. Length of Delay

The Licensing Board viewed the delay requested here, 120 days, of moderate duration, but that it was made more significant by the fact that it comes on the heels of the prior 120-day delay. LBP-93-10, 37 NRC at 460. Thus, the Licensing Board concluded that the Staff must provide a reasonably compelling justification for the requested delay. Id.

The Licensee argues that the delay at this point amounts to at least 210 days (120 days for the first stay plus the additional 90 days for the second stay). OSC Brief at 3. However, because it is not clear whether the Staff will ask for an additional stay, OSC argues that the actual length of delay cannot be determined. Id. The NRC Staff argues that the Licensing Board’s handling of this factor is adequate. Staff Brief at 8.

There are several points of reference that are relevant to our examination of whether the delay here is justified. First, the incident involving the overexposures occurred in November 1992. Therefore, by the time the current stay expires, approximately 10 months will have passed since the occurrence of the incident that provided the catalyst for this enforcement proceeding. This is relevant to the question of prejudice to the Licensee’s ability to mount an adequate defense. Second, the Staff suspended OSC’s license in January 1993. Thus, licensed activity, at least at some of the Licensee’s facilities, will have been suspended for approximately 8 months by the time this stay expires. This is relevant to the question of harm to the Licensee’s interest. Third, the proceeding will have been delayed for 210 days at the request of the Staff. This span of time, and perhaps all of the others listed above, are relevant to our examination of Staff’s reason for delay.

The Licensing Board stated that the delay being requested at this time is “of moderate duration and its significance is enhanced by the fact that it comes on the heels of the prior 120-day delay period.” LBP-93-10, 37 NRC at 460. However, it is not clear on what facts the Licensing Board based its conclusion
that the requested delay is "moderate." "Little can be said on when delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." $8,850, 461 U.S. at 565; cf. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547 (1985) ("[a] 9-month adjudication is not, of course, unconstitutionally lengthy per se").

Therefore, in order to appreciate whether the delay is excessive one must analyze the nature of the proceeding. Compare Barker, 407 U.S. at 530-31. For example, a delay may require a strong justification in a proceeding to revoke a license which depends to a great extent on the testimony of witnesses. However, in a civil penalty proceeding where the penalty has not been paid and the proceeding depends less on witness testimony, a delay may need less justification.

The case here more closely resembles the first example because it involves a suspension of licensed activity and apparently it will require the testimony of witnesses to prove or disprove certain aspects of the Staff's case. Therefore, we find that the delay here, which adds an additional 90 days — with the possibility of further delay — onto what will be an 8-month-long proceeding by the time the stay expires (OSC requested a hearing in early February 1993 and the stay will not expire until late September 1993), to be tolerable only if Staff can demonstrate an important government interest coupled with factors minimizing the risk of an erroneous deprivation.

2. **Reason for Delay**

In this instance, the Licensing Board determined that the Staff had demonstrated an overriding public interest in favor of granting the requested delay by providing the Board with an adequate explanation of the reasons why an ongoing investigation will be impaired without a delay in the proceeding and by making a credible showing that the Staff is attempting to complete its investigation expeditiously.

In its earlier decision, LBP-93-6, the Licensing Board granted a 120-day stay of discovery through June 23, 1993, on the basis that discovery would interfere with investigations being conducted by the NRC's Office of Investigations (OI), the NRC's Office of the Inspector General (OIG), and the Commonwealth of Pennsylvania. In LBP-93-6, the Licensing Board identified two concerns with permitting discovery at that time: (1) naming unidentified witnesses and (2) prematurely disclosing witness interview transcripts and documentary information gathered by Staff investigators.

In LBP-93-10, the Licensing Board granted a stay through September 23, 1993, on the basis that discovery would interfere with the OI investigation by prematurely disclosing witness interview transcripts and documentary information gathered by the investigators. The Staff did not argue, nor did the Licensing
Board find, that a basis for the current delay was that discovery would lead to
the naming of unidentified witnesses. Neither did the Licensing Board rely on
the OIG investigation as a basis for its ultimate determination. Although the
Staff attached to its second stay motion an affidavit from OIG, the Board noted
that, in its view, the OIG’s affidavit was too vague to provide a sufficient basis
for a further stay. LBP-93-10, 37 NRC at 466 n.8. The Staff did not attach to its
second stay motion an affidavit from the Commonwealth of Pennsylvania. The
Staff later informed the Commission that the Commonwealth had terminated its
criminal investigation.3

As we indicate in our discussion of mootness, we are not reviewing matters
that were at issue only in LBP-93-6 and, thus, do not remain in controversy
with respect to the second stay motion. Therefore, we will only review whether
the concerns outlined in the current OI affidavit establish a strong government
interest in favor of delay.

OSC apparently does not dispute that the pendency of a criminal proceeding
is a consideration in determining whether a delay is reasonable. OSC Brief at 4.
However, OSC asserts that the pendency of the government investigation here
does not justify a delay. First, OSC argues that the OI affidavit lacks sufficient
specificity to establish that discovery will hamper the government’s investigation.
OSC maintains that the OI affidavit does not establish that the transcripts in its
possession at the time of the Staff’s motion have “been reviewed in their entirety,
understood, or concluded to evidence regulatory violations.” OSC Brief at 9.
In this respect OSC is challenging, in part, whether there is probable cause for
finding criminal wrongdoing. Second, OSC asserts that the Board improperly
found irrelevant a recent Supreme Court decision, United States Department of

Attached to Staff’s June 3 motion for an additional delay is an affidavit from
OI Region I Field Office Director Barry R. Letts. The Licensing Board found
compelling the following excerpt from this affidavit:

OI continues to believe that the early release of Incident Investigation Team (IIT) doc-
uments/transcripts would adversely impact the ongoing OI investigation, particularly, that
portion focusing on possible incomplete and/or inaccurate statements by cancer center per-
sonnel and corporate officials. The release of the documents/transcripts obtained from the
IIT could adversely impact the investigation because the premature release of information
could jeopardize the integrity of the interviews yet to be conducted, and allow personnel an
opportunity to tailor their testimony or statements in subsequent interviews so as to explain
previous statements in order to avoid culpability or conform testimony with the testimony of
others who have been interviewed. Furthermore, it is my concern that information ob-

3 See Letter from Marian Zohls, Counsel for NRC Staff, to Samuel Chilk, Secretary of the Commission (July
14, 1993), with Attachment, Letter from Lawrence N. Claus, Chief Deputy Attorney General, Commonwealth of
Pennsylvania Office of Attorney General to the Honorable Michael Handler, District Attorney of Indiana County
(July 9, 1993).
tained during the course of the OI investigation conducted subsequent to the Staff's Order Suspending License, could be prematurely released through civil discovery.

Letts Affidavit at 4. The Licensing Board found that OI’s concern here is well grounded. See LBP-93-10, 37 NRC at 461-62. In accepting the legitimacy of this basis for delay, the Licensing Board relies on general language contained in forfeiture cases. See id. at 460-61 (citing United States v. Premises Located at Route 13, 946 F.2d 749, 755 (11th Cir. 1991); United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency, 804 F.2d 1085, 1089 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987)); see also LBP-93-6, 37 NRC at 214 (citing $8,850). While we agree that the Staff’s concern here is well grounded, we think that the forfeiture cases are not dispositive.

As the Court stated in $8,850, the pendency of a criminal trial does not automatically toll the time for instituting a civil proceeding. 461 U.S. at 567-68. Thus, it is necessary to look at the facts of a particular proceeding. In forfeiture proceedings a pending criminal proceeding provides strong support for delay of a civil forfeiture proceeding because, as was the case in $8,850, the criminal proceeding often includes forfeiture as part of the proposed sentence. Thus, in the forfeiture cases it is obvious that the civil proceeding could interfere by either providing opportunities to the claimant to discover the details of a contemplated or pending criminal prosecution or serving to estop later criminal proceedings. In addition, if the government prevails in the criminal case and forfeiture is part of the sentence, the civil forfeiture proceeding will be rendered unnecessary. Id.

In this instance, even if the government prevails in a criminal case brought as a result on the matters to which the Letts affidavit refers, the effect, if any, on the suspension proceeding is unclear. The suspension order does not specifically refer to incomplete and inaccurate statements by cancer center personnel. Nevertheless, Staff indicates that disclosure of information contained in documents and interview transcripts associated with the IIT report would interfere with OI’s investigation. Although imposition of the two stays has prevented discovery up to this time, it is obvious that the IIT documents and transcripts are relevant to this proceeding and are likely to be requested once discovery is permitted. Therefore, the Staff has provided enough detail to demonstrate that discovery here, which would disclose documents and transcripts associated with the IIT report and related documents and transcripts obtained subsequent to the IIT inspection, would interfere with the ongoing OI investigation into possible incomplete or inaccurate statements by cancer center personnel and OSC officials.

The agency has a strong interest in ensuring the truth and accuracy of information provided to the Commission by a licensee. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993). Allegations of this type may form the
basis for further enforcement action, e.g., pursuant to 10 C.F.R. §§ 30.9 and 30.10, and criminal prosecution, e.g., pursuant to 18 U.S.C. § 1001. Therefore, during the course of such an investigation, the government has a strong interest in preventing premature release of information that could jeopardize the integrity of interviews yet to be conducted, and that could allow witnesses to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or to conform testimony with the testimony of others who have been interviewed.

The Licensing Board found, and we agree, that the Staff is diligently pursuing completion of its investigation. LBP-93-10, 37 NRC at 462. Investigations of this type can take time. This investigation involves multiple facilities named in the license. According to Mr. Letts, approximately thirty-five to forty interviews have been completed and OI anticipates conducting approximately twenty-five additional interviews. Letts Affidavit at 3. The investigation has led to compilation of more than 11,000 pages of documentation, and several thousand more pages of material could be received before the investigation is completed. Id. at 2.

OSC argues that this volume of paper establishes nothing more than investigator "insatiety." OSC argues that in order to show a compelling interest in the investigation, OI was required to review the material that it had collected prior to requesting this stay and provide an affidavit that demonstrated that information already in its possession evidenced regulatory violations rather than the possibility of regulatory violations.

It is clearly in the public interest and to some extent in OSC's interest that a decision concerning further wrongdoing is not made with excessive haste. Cf. Mallen, 486 U.S. at 243. Therefore, we do not find that in order to show a compelling interest Staff was required to reach a conclusion regarding the possible wrongdoing prior to concluding its investigation.

Our finding that Mr. Letts' affidavit contains adequate specificity to support Staff's stay motion is not contrary to Landano. The relevance of the holding in Landano to the particular circumstances in this proceeding is questionable. The Landano decision pertains to the degree of specificity that is required in order for the government to prevail on an assertion of confidentiality as an exception to disclosure under Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(D). The Staff is not relying on confidentiality of witness statements as a basis for the present stay. In addition, the Staff has requested only a temporary stay of discovery, rather than an absolute bar against any discovery of investigatory material.

OSC has not demonstrated that the Court in *Robbins Tire* contemplated a greater degree of specificity than that provided by Staff in this proceeding.

3. **Risk of Erroneous Deprivation**

We find of particular relevance to our assessment of the risk of erroneous deprivation the fact that OSC has been provided an opportunity to request that the Board 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. Pursuant to 10 C.F.R. § 2.202(c)(2)(i) the Staff’s order provided OSC an opportunity to contest whether the order, including the need for immediate effectiveness, was based on adequate evidence rather than mere suspicion, unfounded allegations, or error. 58 Fed. Reg. at 6827. Such a challenge had to be filed at the time the answer was filed or sooner. OSC did not avail itself of this opportunity. Additionally, in its pleadings filed in opposition to the stay, OSC has never challenged whether there is adequate evidence to support the basis for the immediately effective suspension order.

OSC was provided a fair amount of detail regarding the reasons and bases for the Staff’s conclusion that the public interest, health, and safety required an immediately effective suspension of OSC’s license to conduct brachytherapy. The order includes specific details regarding Staff’s assessment of the event in question. The Staff also specified the relevant findings that formed the basis of the Staff’s conclusion that there was a significant corporate management breakdown in the control of licensed activities. OSC could have challenged whether there was adequate evidence for any or all of these findings.

Because OSC has been provided this opportunity, we find that the risk of erroneous deprivation has been reduced. This, in conjunction with Staff’s showing of possible interference with the OI investigation, and a strong interest in protecting the integrity of the investigation, weighs heavily in the Staff’s favor.

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4 *Cf. Transco Security, Inc v. Freeman*, 639 F.2d 318 (6th Cir.) (upholding Government Services Administration regulations permitting a suspension of a contractor for a period of 12 to 18 months in order to allow the Department of Justice an opportunity to prepare its case and decide whether to seek an indictment), *c.g. denied*, 454 U.S. 820 (1983); *see also Horizon Bros., Inc v. Laird*, 463 F.2d 1268 (11th Cir. 1972). In *Transco*, the court found that the regulations providing for the 12- to 18-month immediately effective suspension of a contractor accused of fraud were not excessive because under the regulations a suspended contractor would be provided notice and an opportunity to challenge whether there was “adequate evidence” to support a suspension. 639 F.2d at 324.
4. OSC’s Assertion of Its Right to a Hearing

According to the Court in *Barker*, “the more serious the deprivation, the more likely a defendant is to complain. The defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” 407 U.S. at 531-32. Analogously, the Licensee’s vigorous opposition to any stay of the proceeding and its constant insistence on a prompt full adjudicatory hearing are entitled to strong weight.

The Licensing Board found, as the Staff urges, that OSC was not entitled necessarily “to all of the benefit this factor might otherwise engender,” because OSC did not avail itself of the opportunity to challenge the order’s immediate effectiveness. LBP-93-10, 37 NRC at 464. Although OSC did not avail itself of the procedures in section 2.202(c)(2)(i), OSC is entitled to all of the benefit that this factor may provide.

It is possible that resolution of the “adequate evidence” question could delay ultimate resolution of the final controversy. Therefore, it is conceivable that a party challenging an immediately effective order could hasten resolution of the controversy by requesting only a hearing on the merits. This may be attractive to a party that does not believe it has a good chance of prevailing on the “adequate evidence” question.

While OSC maintains that it will ultimately demonstrate that it will prevail on the merits, this is far from saying that the agency as a matter of discretion did not have adequate evidence to impose the suspension in the first place. To prevail in a preliminary hearing pursuant to section 2.202(c)(2)(i), the Staff need only show that it had:

facts and circumstances within the NRC staff’s knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest.

Revisions to Procedures to Issue Orders:  Challenges to Orders That Are Made Immediately Effective (Final Rule) 57 Fed. Reg. 20,194, 20,196 (May 12, 1992). On the merits, to sustain the order the Staff has the burden to prove by a preponderance of the evidence that the basis of its order is true. See Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991).

OSC’s assertion that the stay of this proceeding is interfering with its rights weighs in OSC’s favor.
5. Prejudice to OSC

As stated earlier, we view potential prejudice to the Licensee to include both prejudice to its ability to defend against the charges in the order and prejudice to its interest to conduct activity under its license.

We assume that litigation of the merits of the suspension order will rely to some extent on testimony of witnesses. OSC argues that granting the delay here will allow more than 10 months to lapse between issuance of the order and discovery and a few more months between initiation of discovery and the holding of a hearing. Thus, it may be close to a year before the witnesses actually testify before the Licensing Board. It is certainly conceivable that the passage of time may affect some witnesses’ memories. However, the extent of prejudice from any potentially faded memories is far from clear. Compare Barker, 407 U.S. at 534 (after more than 5 years had lapsed between the perpetration of the crime and trial, “[t]he trial transcript indicates only two very minor lapses of memory — one on the part of a prosecution witness — which were in no way significant to the outcome”).

Moreover, OSC has made no other demonstration that its ability to proffer evidence will be unreasonably compromised by the delay. In contrast we note that in Finlay Testing Laboratories, Inc., LBP-88-1A, 27 NRC 19 (1988), the Licensing Board found compelling the Licensee’s argument that some witnesses had already been relocated and military documents would in due course be moved, stored, transferred, lost, or destroyed. The Licensee here has made no similar argument.

OSC also did not detail the harm to its finances and reputation. Obviously, the suspension order has curtailed the Licensee’s unfettered ability to conduct licensed activities. However, the degree of lost business or financial harm attributable to the suspension order is unclear. The Licensee argues that the Licensing Board ignored an affidavit demonstrating $10,000 in expenses incurred by OSC. OSC Brief at 11 (referring to Exhibit A, Verified Statement of Kerry A. Kearney). Beyond this showing, the Licensee did not specify particular financial harm.

In contrast, the licensee in Finlay argued that it had already lost $400,000 in revenue and would continue to lose over $36,000 in monthly revenues as a result of the suspension. LBP-88-1A, 27 NRC at 25. In OSC’s case, because the order has been relaxed, the exact extent of the financial burden on the Licensee at this time is unclear. OSC has always been permitted to treat patients on a good-cause basis. Additionally, the suspension has been rescinded entirely as it pertains to two facilities. Of significant import is that these two facilities were

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5 The Staff petitioned the Commission for a stay of the Licensing Board’s order in Finlay. In a March 17, 1988 unpublished order, the Commission stayed for 30 days the effectiveness of the Licensing Board’s decision only after the Department of Justice filed a request for a stay of only 30 additional days.
the only facilities at which the Licensee had requested to treat patients on a
good-cause basis.

6. Balancing of the Competing Factors

On balance, the Commission finds that the Board’s stay of discovery is
reasonable. We acknowledge that the stay will adversely affect the Licensee’s
interest to some extent. However, there has been little, if any, specification of
financial or other consequences of the suspension. The absence of any particular
showing of financial burden or detriment to patient care, coupled with the Staff’s
rescission of the order at two OSC facilities, indicates that OSC has suffered only
moderate, if not minimal, harm to its interests. Without a more particularized
showing of harm, OSC’s argument that the stay affects its interests does not tip
the scale in OSC’s favor. Therefore, we agree with the Licensing Board that
the Staff has established good cause by demonstrating an overriding government
interest in protecting the integrity of its investigation.

Despite the Licensee’s assertions otherwise, our decision is not contrary to
the Court found “little or no state interest, and the state ha[d] suggested none, in
an appreciable delay in going forward with a full hearing.” 443 U.S. at 67. In
contrast, in this case the Staff has demonstrated a strong interest in support of
staying the proceeding and we have found that the risk of erroneous deprivation
is reduced. Moreover, the Licensing Board is closely monitoring the status of
the NRC investigations to ensure that due diligence is being exercised to bring
the investigations to a close. See LBP-93-10, 37 NRC at 467.

Additionally, the Licensing Board is pursuing resolution of matters that do not
depend on discovery. Pursuant to the Board’s direction in LBP-93-6, the parties
have filed pleadings outlining their positions with respect to central issues for
litigation, issues amenable to summary disposition, and the status of settlement
discussions. The Licensing Board, in an effort to dispose of any issues amenable
to summary disposition, issued an order on July 15, 1993, requesting further
party filings on controverted issues.

VI. CONCLUSION

For the reasons stated in this order, OSC’s request for reversal is denied
and, accordingly, the Licensing Board’s order, LBP-93-10, is affirmed. The
Licensing Board’s order LBP-93-6, to the extent indicated, is vacated as moot.
It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1993.

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Commissioner Remick was not present for the affirmation of this Order, if he had been present, he would have approved it.
In the Matter of Docket Nos. 50-275-OLA-2
50-323-OLA-2
(CONSTRUCTION PERIOD RECOVERY)

PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2) August 19, 1993

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 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).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

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.
MEMORANDUM AND ORDER

The Commission is declining review of an interlocutory discovery order that the Atomic Safety and Licensing Board had referred to us in accordance with 10 C.F.R. § 2.730(f). See LBP-93-13, 38 NRC 11 (1993). In the referred ruling the Licensing Board had ordered Pacific Gas and Electric Company, the Applicant in this amendment proceeding, to make available to the San Luis Obispo Mothers for Peace, the Intervenor, a document prepared by the Institute for Nuclear Power Operations (INPO) that the Applicant claimed was confidential and privileged. The Licensing Board had found that the document was relevant to one of the Intervenor's discovery requests and, therefore, should be disclosed. The Licensing Board, however, permitted disclosure to the Intervenor subject to a protective order that would prohibit further public dissemination of the document or its contents. As the Applicant had urged, the Licensing Board referred its ruling to the Commission and stayed the effect of its order pending Commission review.

Upon receipt of the Licensing Board's referral of its ruling in LBP-93-13, we set a schedule for briefs from the parties. Counsel for the Applicant later informed the Commission in a July 22 filing that the Applicant had decided to disclose the INPO document to the Intervenor if agreement could be reached on an appropriate protective order, and counsel moved for a deferral of the briefing on LBP-93-13. In a July 23 order, the Commission granted the motion in part and deferred briefing until August 3 in the event agreement on a protective order could not be reached.

As a result of further discussions among the parties and a telephone conference with the Licensing Board on July 29, agreement on a protective order has been reached and the Licensing Board has issued a protective order reflecting that agreement. Accordingly, the Applicant's counsel informed the Secretary on August 3, 1993, that the Applicant would not be filing a brief on LBP-93-10 and suggested that the Licensing Board's referral was now moot.

When LBP-93-13 was issued, the controversy over the disclosure of the INPO document seemed to fall within the narrow class of interlocutory orders for which Commission review might be appropriate. However, the Applicant's subsequent agreement to disclose the INPO document and the Licensing Board's entry of a protective order satisfactory to the parties indicate that our review is unnecessary to resolve any immediate controversy. Accordingly, in the absence

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2 See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), 113 AB-327, 3 NRC 408, 411 (1976)
of any present circumstance suggesting that interlocutory review is appropriate under 10 C.F.R. § 2.786(g), we decline review of the referred ruling.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland, this 19th day of August 1993.

3 Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.
Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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

Members

Dr. George C. Anderson Dr. James P. Gleason* Dr. Kenneth A. McCollom
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Dr. Harry Foreman Dr. Emmeth A. Lubke Dr. George F. Tidey
Dr. Richard F. Foster Morton B. Margulies* Sheldon J. Wolfe

*Permanent panel members
In the Matter of Docket Nos. 50-275-OLA-2
   50-323-OLA-2
   (ASLBP No. 92-669-03-OLA-2)
   (Construction Period Recovery)
   (Facility Operating Licenses
   No. DPR-80 and DPR-82)

PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2) August 13, 1993

In response to a request by Intervenors 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 Intervenors.
MEMORANDUM AND ORDER  
(Telephone Conference Call, 8/13/93)  

On July 15, 1993, the NRC Staff prepared Board Notification 93-18 and transmitted it to the Board and parties. (Board members received their copies on July 23, 1993.) The Board Notification stated that the NRC Office of Investigation had investigated an unsigned and anonymous letter from two engineers stating that a high-ranking PG&E employee had put pressure on a PG&E licensing engineer to alter fire logs with respect to Contention V (implementation of Thermo-Lag compensatory measures). The Notification stated that OI had interviewed the named licensing engineer, who denied receiving any such instructions from PG&E or that any fire logs had been altered. OI then determined that there was no need for further inquiry.

On August 11, 1993, the San Luis Obispo Mothers for Peace (MFP) filed a motion to conduct further discovery on this question and to postpone the hearing on Contention V pending completion of such discovery. On August 12, 1993, PG&E and the NRC Staff each filed faxed responses, opposing the request for further discovery. Both viewed the request as creating a new contention without good cause, and each noted that the PG&E custodian of the records was to be a witness and that he could be cross-examined concerning any possible falsification. The Staff noted that the manner in which OI conducts investigations was not a proper subject for inquiry in this proceeding.

On August 13, 1993, the Board conducted a telephone conference call involving all parties. Under discussion was whether the integrity of the NRC hearing process was being compromised absent some further inquiry into the circumstances, particularly identification of the "various meetings in a public forum" at which the directions allegedly were given.

The Board finds that the incident in question is clearly relevant to MFP Contention V. The Board further finds low probative value to anonymous, uncorroborated allegations. The Board also recognizes the privacy considerations attendant to unsupported allegations against company officials and with respect to whistleblowers, as well as the integrity of the hearing process considerations necessary to be protected in a licensing-board proceeding. To this end, we view cross-examination of the custodian of the records as a first step, and will permit that to take place (as suggested by PG&E and the Staff). In addition, however, we direct that the unsigned letter — sanitized to remove all names of individuals — be also provided to MFP (either by PG&E or the Staff), to assist it in its cross-examination. Following cross-examination, the Board will determine whether further discovery may be necessary or whether the allegations should be disregarded.

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IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 13, 1993
The Director of the Office of Nuclear Material Safety and Safeguards denies a Petition filed by the Maryland State 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.
DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

1. INTRODUCTION

By letter dated December 21, 1992 (Petition), the Maryland Safe Energy Coalition (Petitioner) requested that the Nuclear Regulatory Commission (NRC) institute a proceeding pursuant to 10 C.F.R. § 2.202, with regard to the Independent Spent Fuel Storage Installation (ISFSI) at the Calvert Cliffs Nuclear Power Plant (CCNPP). The Petitioner requests that NRC: (1) halt the transfer of nuclear waste from the spent fuel pool at the CCNPP to the ISFSI, until certain alleged safety problems have been fully investigated and solved; (2) conduct hearings for further rulemaking and regulation of nuclear waste storage at the plant; and (3) deny a Certificate of Compliance and suspend the license issued to the Baltimore Gas & Electric Company (BG&E or Licensee) for dry cask storage of spent fuel until the concerns set forth in the Petition are addressed by NRC and BG&E. Subsequent to the Petitioner’s request, NRC’s Executive Director for Operations and the Director, Office of Nuclear Material Safety and Safeguards, received letters from individuals supporting the request by the Petitioner. In addition, the Petitioner, by letter dated February 10, 1993, enclosed fifty questions and requested answers from BG&E and NRC.

The Petitioner asserts as the basis for these requests that several relevant omissions from past NRC hearings, expert testimony, and rulings may seriously impact the safe operation of dry cask storage of spent fuel at CCNPP. In addition, the Petitioner asserts that new information allegedly proves the inadequacy of NRC’s and BG&E’s evaluations of this spent fuel storage, to wit, that the Cove Point Natural Gas Plant, which is expected to resume operation in 1993, is a potential danger to safe storage that has not been analyzed. Failure to analyze it is an alleged violation of NRC procedure (see section III.1, below). The Petitioner also alleges that safety problems related to the ISFSI at the Calvert Cliffs Plant exist regarding the following matters: the thermal limits of passively cooled concrete vaults may be exceeded if the air convection ports become blocked, which could also damage the fuel in the canisters, increase the temperature of the canister beyond the design limits, or increase embrittlement (see section III.2, below); NRC has failed to require radiation limitations at the air inlets and outlets or to require inspection for canister embrittlement, corrosion or leakage, or internal canister monitoring (see section III.3, below); NRC is allowing fuel with “pinhole leaks” to be transferred to the dry casks without limits in quantity (see section III.4, below); if the thermal limits of the concrete in the ISFSI are exceeded and the concrete cracks, the canisters may become irretrievable (see section III.5, below); and dry cask storage has not been adequately tested (see section III.6, below).
The Petition has been referred to me for a decision. For the reasons given below, I have concluded that the Petitioner’s requests should be denied.

II. BACKGROUND

On December 21, 1989, BG&E applied to NRC for a materials license under 10 C.F.R. Part 72, Subpart B, to allow spent fuel storage in an ISFSI to be located at the CCNPP site. The ISFSI employs the Pacific Nuclear Fuel Services, Inc. (PNFS, formerly NUTECH) NUHOMS-24P concrete module and steel canister dry storage system. The ISFSI would consist of up to 120 modules on concrete pads. In connection with the license application, BG&E submitted a Safety Analysis Report (SAR) and an Environmental Report (ER). Subsequently, on February 9, 1990, NRC, by Notice in the Federal Register titled "Baltimore Gas & Electric Co., Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing,"! notified the public of receipt of that application and of the opportunity for a public hearing on the application. In response to the Notice, the State of Maryland asked for a hearing, and a Licensing Board was convened. No petition for leave to intervene in the proposed licensing action was received from any other party within the deadline specified in the Federal Register.

Intervention was withdrawn when agreement among the State, BG&E, and the NRC was reached. In essence, the agreement stated that the State of Maryland would be kept completely informed by all parties in regard to all correspondence, reports, documents, and meetings during the licensing review process, that a method of airing the State’s concerns would be established, and that BG&E would consult with and allow the State to review and qualify a radiological monitoring program for the ISFSI. When the State of Maryland subsequently elected to withdraw from the proceeding, the Licensing Board terminated the proceeding.2 On March 22, 1991, the NRC Staff completed its environmental review of BG&E’s proposed licensing action, in accordance with 10 C.F.R. Part 51, and issued an Environmental Assessment (EA) and Finding of No Significant Impact for the Calvert Cliffs ISFSI at the CCNPP.3 Subsequently, the Staff completed its safety review, and a Staff report titled “Safety Evaluation Report for the Baltimore Gas and Electric Company’s Safety Analysis Report for an Independent Spent Fuel Storage Installation” was completed in November 1992. Materials License SNM-2505 was issued to BG&E on November 25, 1992, and the Staff provided public notice of the action in the Federal Register.4

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1 55 Fed. Reg. 4742 (Feb. 9, 1990)
2 LHR-90-13, 31 NRC 456 (1990)
III. DISCUSSION

The Petitioner’s three specific requests involve issues related to rulemaking on dry cask storage, as well as specific issues related to the BG&E ISFSI license. In Petitioner’s February 10, 1993 letter, Petitioner also enclosed fifty questions to which it is seeking answers from BG&E and NRC, and it indicated that it intends to discuss these questions at the requested rulemaking hearings.

Materials License SNM-2505, issued to BG&E, is a specific license for an ISFSI, pursuant to 10 C.F.R. Part 72, Subpart B. This licensing action does not fall under the general license provision of 10 C.F.R. Part 72, Subpart K, and, therefore, no rulemaking or Certificate of Compliance is required to approve the NUHOMS-24P cask design. In NRC’s acknowledgment letter to the Petitioner, dated February 24, 1993, the Staff informed the Petitioner that its request for further rulemaking and regulation of dry cask storage was a request to modify a rule and that the Petitioner should follow the provisions of 10 C.F.R. § 2.802 if it seeks rulemaking. Therefore, this Decision addresses the specific issues expressed by the Petitioner in relation to BG&E’s Part 72 license. The NRC Staff has also considered the similar concerns raised in those of the Petitioner’s fifty questions that related to the licensing of BG&E’s ISFSI. Those specific allegations are discussed directly in this Decision.

1. Danger from Cove Point LNG Plant Has Not Been Analyzed

Petitioner alleges that the Cove Point Natural Gas Plant, which it alleges is expected to resume operation in 1993, is a potential danger to safe storage that

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5 Subsequently, on June 23, 1993, the Petitioner filed a petition for rulemaking to modify specific identified provisions of 10 C.F.R. Part 72. That petition is currently under consideration by the Staff. Also, by letter to the Director, NMM, dated July 26, 1993, Petitioner sought to have its rulemaking petition treated as an addendum to this 10 C.F.R. § 2.206 petition. The Staff has reviewed the July 26, 1993 letter and has determined that the requested action is appropriately part of the rulemaking petition, rather than this section 2.206 petition. One aspect of the letter, which requests continuous radiation monitors at the ISFSI exit cooling vents, could be interpreted as a reassertion of a point already raised in the section 2.206 petition and addressed in this Decision. Other than that aspect, all of the other matters raised in the letter are appropriately addressed in a rulemaking context. To the extent that the letter can be read to request a reopening of the CCNPP ISFSI licensing action, no adequate basis is provided for such action. The matters raised in the rulemaking petition, including the July 26, 1993 letter, will be fully considered by the Staff in the rulemaking, and the issuance of this Decision does not in any way prejudice the Petitioner’s right and consideration of its request for rulemaking.

6 Although the Petitioner asserts that several relevant omissions from past NRC hearings, expert testimony, and rulings may seriously impact the safe operation of dry cask storage of spent fuel at Calvert Cliffs, it did not provide any citations to past hearings, expert testimony, or rulings related to health and safety issues. This would appear to be a reference to a rulemaking proceeding since the Calvert Cliffs ISFSI proceeding never went beyond a very preliminary stage, namely a ruling that the State of Maryland had established standing to intervene. See LBP-90-13 supra note 2. Accordingly, the NRC Staff considered this very generalized assertion of an inadequacy in a rulemaking record to be a matter that the Petitioner could pursue in accordance with 10 C.F.R. § 3.802, if it so elected, and did not consider the assertion further in this Decision.
has not been analyzed, and failure to analyze it is a violation of NRC procedure (see related Question No. 27 in Petitioner's letter dated February 10, 1993).

On August 13, 1976, when NRC issued an operating license for Unit 2 of the CCNPP, NRC imposed a license condition requiring submittal of a license amendment application with a supporting hazard analysis 60 days prior to the operation of the Cove Point Natural Gas Plant. In 1978, before granting the amendment, the NRC Staff, in its license amendment action, had conducted a detailed analysis of the potential risks from that plant to the CCNPP. Based on the Staff's review, it was concluded that the likelihood of an LNG accident in the vicinity of CCNPP causing a significant radioactivity release is acceptably low, that such an accident does not involve a significant hazard consideration, and that there is reasonable assurance that the health and safety of the public will not be endangered by the effects of an LNG accident on CCNPP. For precaution, at that time, the Staff required, as a license condition, a contingency plan to ensure appropriate prudent action in the event of an LNG accident.

When the Cove Point Natural Gas Plant ceased operation in 1980, BG&E then requested the deletion of some of the license conditions, which NRC subsequently granted. The Licensee committed that if the Cove Point Plant resumed operation, the Licensee would submit an updated hazard analysis report, with proposed actions and mitigating measures (if any are deemed necessary or advisable), to NRC, 60 days before the Cove Point Plant resumed operation. This updated information would allow the NRC Staff to evaluate any changed circumstances with respect to the operation of Cove Point Plant and any significant differences in accident consideration. NRC could then impose appropriate action or mitigating measures, such as those earlier conditions imposed when the Cove Point Plant was in operation in 1978, to ensure protection of the public health and safety in the event of accident.

The past Cove Point Plant analysis for the CCNPP is applicable to the ISFSI. The ISFSI horizontal storage module (HSM) reinforced concrete system is designed for severe wind, tornado missile, and pressure loadings as specified in NRC Regulatory Guide 1.76, which is the same regulatory guide currently used for nuclear power plants. Because of the NUHOMS storage system's robust design and construction, it has inherent resistance to blast pressure, and, therefore, the threat to nuclear safety from a potential natural gas explosion is expected to be negligible. In the NRC Staff's Environmental Assessment (EA) for the Calvert Cliffs ISFSI, the Staff evaluated a variety of accidents and concluded that a hypothetical bounding case accident would result in a release

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of radioactivity from the ISFSI facility from a dry shielded canister (DSC) leakage. The Staff postulated and analyzed a worst-case DSC leakage accident and concluded that the radiation dose to the general public is negligible, and that there is no significant impact to the offsite environment. The severity of the Cove Point Plant's potential hazard to the ISFSI is much less than the worst-case accident for the ISFSI, since the NRC Staff does not expect any release of radioactivity from the ISFSI facility from potential accidents related to operation of the Cove Point Plant.

The Cove Point Natural Gas Plant is expected to be reopened no sooner than December 1994, and NRC understands that BG&E will be notified at least 12 months before its startup. In addition, a joint study between BG&E and the Maryland Department of Natural Resources (DNR) was conducted to evaluate the risks associated with the Cove Point Plant planned resumed operation, thereby updating the study conducted at the time of Cove Point’s maiden operation in 1978. The study concluded that the resumption of operation of the Cove Point Plant would not represent an unacceptable risk to the ISFSI, nor the power plant itself.9 (By letter dated June 7, 1993, BG&E has submitted updated information on this study to NRC, and the new information, along with information submitted to the Director, NMSS, by the Petitioner in a letter dated July 27, 1993, is currently under review by the NRC Staff.)

2. Danger from Blockage of Air Convection Ports

The Petitioner contends that the thermal limits of passively cooled concrete vaults may be exceeded if the air convection ports become blocked, which could also damage the fuel in the canisters, increase the temperature of the canister beyond the design limits for the concrete vault, or increase embrittlement of the canister (see related Questions No. 24, 28, and 29 in Petitioner's letter dated February 10, 1993).

In NRC's Safety Evaluation Report (SER) (see section 2.2.6.2 of SER), the NRC Staff conducted an evaluation and concluded that for the HSM inlet and outlet blocked accident, the peak fuel cladding temperature would be significantly less than the acceptance criterion, and the peak concrete temperature would also be acceptable. The accident scenario conservatively assumed full blockage of all air inlets and outlets. For this specific cask and system design, no damage of fuel cladding or degradation of shielding function is anticipated in the event of air inlet and outlet blockage for a period less than 48 hours. Consequently, the Licensee is required by license condition to conduct a surveillance program to inspect the air inlets and outlets once every 24 hours, to

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9 Letter from Torrey C. Brown (Maryland Department of Natural Resources) to Mr. Richard Ochs (Petitioner), dated January 26, 1993
ensure that they do not become plugged. If the air inlets and outlets are plugged, they are required to be cleared; and if the screen is damaged, it is required to be replaced.

In NRC's EA (see section 6.2.2t), the Staff analyzed an accident involving the blockage of air inlets and outlets and found that there are no offsite dose consequences as a result of this postulated accident. The Petitioner's concerns do not raise significant health and safety issues to members of the general public. In addition, the Licensee's occupational and environmental monitoring program will further ensure the protection of the health and safety of workers and the general public. Therefore, the Staff considers that the Petitioner's concerns have been adequately addressed in the EA and SER.

3. No Requirements for Radiation Limits, Inspection, and Monitoring

Petitioner alleges that the NRC has failed to require radiation limitations at the air inlets and outlets, which are the points of greatest potential radiological risk, or to require inspection for canister embrittlement, corrosion, or leakage, or internal canister monitoring (see related Question No. 40 in Petitioner's letter dated February 10, 1993).

In the ISFSI license specifications, NRC has imposed contact dose rate limits at the HSM walls and door (20 millirem per hour (mrem/hr) at the HSM walls and 100 mrem/hr at the access door) to ensure that worker's doses are below the limits that are specified 10 C.F.R. Part 20. The air inlets and outlets of the HSM are localized areas compared with the overall HSM surfaces. The surface dose rates at the air inlet and outlet locations are less representative than dose rates at the HSM walls and door for assessing the effect on the direct radiation levels to individuals located beyond the controlled area. Further, NRC requires that the overall radiation dose to a member of the general public from the CCNPP's operation be below the U.S. Environmental Protection Agency's Environmental Radiation Standards for fuel cycle facilities — i.e., 25 mrem/yr (0.25 milli-Sievert per year (mSv/yr)) to the whole body and 75 mrem/yr (0.25 mSv/yr) to the thyroid, from the plant's routine operation. When workers are in the vicinity of loaded HSMs, radiation levels at the air inlets and outlets would be measured, in accordance with the Licensee's radiation protection program, to ensure that worker exposures are within the requirements of Part 20. These are the radiation limits imposed to ensure worker safety and the protection of the general public. Radiation limits at the air inlets and outlets, as suggested by the Petitioner, are not needed.

Before the DSC is installed in the HSM system, the Licensee will inspect and check the DSC vacuum system, helium backfill pressure, helium leak rate of primary seal, and DSC surface contamination, and will perform DSC dye penetrant test of closure welds. After the DSC is installed in the HSM, the
Licensee will measure the air temperatures and surface dose rates on the HSM to determine that all design criteria are met. Because the DSC is made of stainless steel, it is not subject to corrosion or embrittlement; therefore, the DSC will not deteriorate under normal conditions. The NUHOMS-24 system is designed to last much longer than the period of the ISFSI license. During operation, the Licensee will have to demonstrate compliance with Part 20 worker dose limits, as well as dose limits for the general public. The Staff concludes that daily inspections to observe abnormalities occurring in the system, and the current radiological environmental monitoring program, are adequate to determine when corrective actions must be taken to maintain safe storage conditions. The Petitioner’s proposed requirements to inspect for canister embrittlement and corrosion leakage, or to perform internal canister monitoring would involve periodically removing the DSC or inserting a device into the canister for measurement. These inspections are not necessary to ensure safe operation of the ISFSI and are not warranted. In addition, to perform some of these measurements, or to remove the DSC out of the HSM, could result in a potential increase of the worker’s occupational exposures or accident probabilities.

5. Allowing “Pinhole Leaks” Fuel in Dry Cask

The Petitioner alleges that NRC is allowing fuel with "pinhole leaks" to be transferred to the dry casks, without limits in quantity (see related Questions No. 31, 32, 33, and 34 in Petitioner's letter dated February 10, 1993).

As stated in the Part 72 license issued to BG&E, § 3.1.1, at 3/4 l-1 of the fuel technical specification, fuel assemblies known or suspected to have structural defects sufficiently severe to adversely affect fuel handling and transfer capability shall not be loaded into the DSC for storage. The required fuel specification is directed at avoiding structural defects, or cladding degradation, that could lead to gross rupture of the fuel, and could pose operational safety problems in the later handling of the fuel, during its removal from storage for further processing or disposal. The NRC Staff does not consider the “pinhole leaks” significant within the context of storage in the ISFSI, since the fuel will still be confined in the cladding, and will be contained and sealed in the DSC. Under normal operations of the ISFSI, leakage is not expected to occur, since the design and the double-seal welding of the DSC covers are checked and tested to provide structural integrity throughout the interim storage period. In practice, the percentage of spent fuel having "pinhole-leaks" is very small, and radioactive

gas, such as Kr-85, will be contained once the fuel is sealed in the DSC. During the storage period in the ISFSI, it is not expected that gas will leak out of the DSC. However, the Licensee is still required to maintain ISFSI operations in compliance with the environmental dose limits for public health protection, as specified in 10 C.F.R. § 72.104. The gas can be vacuumed during retrieval, to minimize occupational exposure.

6. Thermal Limits for the Concrete in the ISFSI Could Be Exceeded

The Petitioner alleges that if the thermal limits for the concrete in the ISFSI are exceeded and the concrete cracks or moves, the canisters may become irretrievable (see related Question No. 23 in Petitioner's letter dated February 10, 1993).

As discussed in item 2 on thermal limits, the thermal limits of the concrete in the ISFSI will not be exceeded under normal or accident conditions, such as the blockage of the air inlets and outlets. With the daily surveillance program, it is unlikely that this full blockage would occur and would be unnoticed by the inspector. Concrete exposed to accident temperatures would be expected to begin a slow degradation process resulting in some loss of its strength, but would not fail so that a DSC could not be retrieved. The required surveillance program will further ensure the safe operation of dry fuel storage.

7. Dry Cask Storage Has Not Been Tested and Should Require Stringent Regulation

The Petitioner is concerned that dry cask storage has not been tested over the length of time of the 20-year license. The Petitioner asserts that, given so many uncertainties, this new procedure can only be called experimental and, as such, requires most stringent and conservative regulation.

Irradiated reactor fuel has been handled under dry conditions since the mid-1940's when irradiated fuel examinations began in hot cells. Light-water reactor fuel has been examined dry in hot cells since approximately 1960. Some of these fuels have been stored continuously in hot cells under dry conditions for approximately two decades. Experience with storage of spent fuel in dry casks is extensive. The United States has extensive experience in the licensing and safe operation of ISFSIs. At the beginning of 1993, five site-specific licenses for dry cask storage had been issued. They include: Virginia Electric and Power's Surry Station, issued July 2, 1986; Carolina Power and Light's (CP&L) H.B. Robinson Steam Electric Plant, issued August 13, 1986; Duke Power's Oconee Nuclear Station, issued January 29, 1990; Public Service Company of Colorado's Fort St. Vrain Nuclear Generating Station, issued November 4, 1991;
and BG&E's Calvert Cliffs Nuclear Power Plant, issued November 25, 1992. All have commenced operation and loaded fuel with the exception of BG&E. Two hundred and fifty-two assemblies are in storage at Surry, 56 assemblies are in storage at H.B. Robinson, 528 assemblies are in storage at Oconee, and 1482 fuel elements are in storage at Fort St. Vrain.

For the specific Calvert Cliffs ISFSI system (i.e., the NUHOMS system), the topical report (see note 10) submitted by NUTECH, Inc., had been evaluated thoroughly by the NRC Staff, and the Staff issued a letter of approval, with an SER, on April 21, 1989. The Staff reviewed the various safety features, such as criticality, structural, thermal, and shielding aspects of the design, under normal and accident conditions. In the Staff's safety evaluation, conservative approaches or assumptions were used in case of uncertainties, to ensure safety protection of workers and the general public. The Staff concluded that the NUHOMS system can be used to safely store spent fuel assemblies. At present, the system or similar systems are used at the Oconee ISFSI and the H.B. Robinson ISFSI. The safety features of the system have been reviewed thoroughly and documented. The design criteria on each of these safety features have to be demonstrated by testing and surveillance during or prior to the installation and operation of the system. Because of the passive design of the NUHOMS system, the long-term integrity of these safety features will be maintained once the system is properly installed. The Licensee's daily inspection program and radiological environmental monitoring program will further ensure the safe operation of the facility. Since the safety features of the NUHOMS system have been tested and evaluated, there is ample margin of safety for its operation for the period of interim storage of spent fuel at the Calvert Cliffs site. The Staff disagrees with Petitioner's characterization that dry cask storage and, particularly, the NUHOMS system is "experimental," based on the Staff’s review and the operational history of the systems currently in operation.

CONCLUSION

For the reasons discussed above, there is no basis for taking the actions requested by the Petitioner. The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CL1-75-8, 2 NRC 173, 175 (1975); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that I have applied to the concerns raised by the Petitioner in this Decision to determine whether action is warranted. As provided by 10
C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review.

FOR THE NUCLEAR REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material
Safety and Safeguards

Dated at Rockville, Maryland, this 16th day of August 1993.