NUCLEAR REGULATORY COMMISSION ISSUANCES

May 1996

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NUCLEAR REGULATORY COMMISSION ISSUANCES

May 1996

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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.

U.S. NUCLEAR REGULATORY COMMISSION

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CONTENTS

Issuances of the Atomic Safety and Licensing Boards

EASTERN TESTING AND INSPECTION, INC.

Dockets 030-05373-EA, 030-32163-EA (ASLBP No. 96-714-02-EA)
(EA 96-085) (Order Suspending Byproduct Material License
Nos. 29-09814-01 and 29-09814-02)

MEMORANDUM AND ORDER, LBP-96-9, May 10, 1996 211

GEORGIA INSTITUTE OF TECHNOLOGY

(Georgia Tech Research Reactor, Atlanta, Georgia)
Docket 50-160-Ren (ASLBP No. 95-704-01-Ren) (Renewal of Facility
License No. R-97)

MEMORANDUM AND ORDER, LBP-96-10, May 16, 1996 231

Atomic Safety and Licensing Boards Issuances

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James P. Gleason, * *Deputy Chief Administrative Judge (Executive)*
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bothwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Richard F. Foster

In the Matter of

Docket Nos. 030-05373-EA
030-32163-EA
(ASLBP No. 96-714-02-EA)
(EA 96-085)
(Order Suspending Byproduct
Material License Nos.
29-09814-01 and 29-09814-02)

EASTERN TESTING AND
INSPECTION, INC.

May 10, 1996

Ruling on a Licensee request to rescind an NRC Staff determination to make immediately effective an enforcement order suspending two Licensee byproduct materials licenses, the Licensing Board denies the Licensee's motion, concluding that for certain bases in the order, the Staff had met its burden under 10 C.F.R. § 2.202(c)(2)(i) to establish by "adequate evidence" that (1) those charges are not based on "mere suspicion, unfounded allegations, or error," and (2) there is a need to make the order effective immediately.

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS
REVIEW (BURDEN OF GOING FORWARD; BURDEN OF PROOF)**

**RULES OF PRACTICE: BURDEN OF GOING FORWARD
(IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT
ORDERS); BURDEN OF PROOF (IMMEDIATE EFFECTIVENESS
REVIEW FOR ENFORCEMENT ORDERS); IMMEDIATE
EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS
(BURDEN OF GOING FORWARD; BURDEN OF PROOF)**

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. See 55 Fed Reg. 27,645, 27,646 (1990). See also *St. Joseph Radiology Associates, Inc. (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic)*, LBP-92-34, 36 NRC 317, 321-22 (1992).

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS
REVIEW (CORROBORATING ALLEGATIONS OF UNRELIABLE
SOURCE)**

**RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW
FOR ENFORCEMENT ORDERS (CORROBORATING ALLEGATIONS
OF UNRELIABLE SOURCE)**

When the character and veracity of the source for a Staff allegation are in doubt, a presiding officer will be unable to credit the source's information as sufficiently reliable to provide "adequate evidence" for that allegation absent sufficient independent corroborating information.

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS
REVIEW (CORROBORATING ALLEGATIONS OF UNRELIABLE
SOURCE)**

**RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW
FOR ENFORCEMENT ORDERS (CORROBORATING ALLEGATIONS
OF UNRELIABLE SOURCE)**

In considering whether there is probable cause for an arrest, courts have held that information supplied by an identified ordinary citizen witness may

be presumed reliable. See, e.g., *McKinney v. George*, 556 F. Supp. 645, 648 (N.D. Ill. 1983) (citing cases), *aff'd*, 726 F.2d 1183 (7th Cir. 1984). In determining whether there is "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i) to support the immediate effectiveness of an enforcement order, applying this presumption to a witness who is corroborating a family member's allegations may be inappropriate because that relationship creates a possible bias that also brings the corroborating witness' reliability into substantial question.

REGULATIONS: INTERPRETATION (10 C.F.R. § 30.10(a), (c))

Under 10 C.F.R. § 30.10(c)(2), an intentional act that a person knows causes a violation of a licensee procedure is considered "deliberate misconduct" actionable under section 30.10(a)(1). As a consequence, an assertion that a person who created a document containing false information did not intend to mislead the agency (or did not actually mislead the agency) appears irrelevant. Instead, the focus is on whether the person's action was a knowing violation of a licensee procedure that could have resulted in a regulatory violation by the submission to the agency of materially incomplete or inaccurate information. See 56 Fed. Reg. 40,664, 40,670 (1991) (stating that "[f]or situations that do not actually result in a violation by a licensee, anyone with the requisite knowledge who engages in deliberate misconduct as defined in the rule has the requisite intent to act in a manner that falls within the NRC's area of regulatory concern. The fact that the action may have been intercepted or corrected prior to the occurrence of an actual violation has no bearing on whether, from a health and safety standpoint, that person should be involved in nuclear activities.").

ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS REVIEW (RELIABILITY OF AGENCY INSPECTOR'S OBSERVATIONS)

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS (RELIABILITY OF AGENCY INSPECTOR'S OBSERVATIONS)

Absent a showing that provides some reasonable cause to believe that, because of bias or mistake, an agency inspector cannot be considered a credible observer, inspector's direct personal observations should be credited in considering whether allegations based on those observations are supported by "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i). This is based on the accepted presumption that a government officer can be expected faithfully to execute his or her official duties. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS
REVIEW (NEED FOR IMMEDIATE EFFECTIVENESS)**

**RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW
FOR ENFORCEMENT ORDERS (NEED FOR IMMEDIATE
EFFECTIVENESS)**

Under 10 C.F.R. §2.202(c)(2)(i), to support an immediate effectiveness determination for an enforcement order, besides showing that the bases for the order are supported by "adequate evidence," the Staff must show there is a need for immediate effectiveness that is supported by "adequate evidence." That need can be established by showing either that the alleged violations or the conduct supporting the violations is willful or that the public health, safety, or interest requires immediate effectiveness.

MEMORANDUM AND ORDER

(Denying Licensee Motion to Set Aside Immediate Effectiveness)

By a March 29, 1996 enforcement order effective on the date of issuance, the NRC Staff suspended two byproduct material licenses held by Eastern Testing and Inspection, Inc. (ETI). See 61 Fed. Reg. 15,836 (1996). In a letter dated April 1, 1996, as supplemented on April 19, 1996, ETI requests that we set aside the Staff's immediate effectiveness determination.¹ See Letter from H. Soni, ETI President, and J. Badiali, ETI Radiation Safety Officer (RSO), to J. Lieberman, Director, NRC Office of Enforcement (Apr. 1, 1996); Letter from Daniel F. Stenger and Robert E. Helfrich, Winston and Strawn, to the Licensing Board (Apr. 19, 1996) [hereinafter ETI Supplement]. In responsive filings dated April 8, 1996, and April 25, 1996, the Staff opposes ETI's immediate effectiveness rescission motion. See NRC Staff's Response to Request to Set Aside Immediate Effectiveness of Order Suspending Licenses (Apr. 8, 1996) [hereinafter Staff Response]; NRC Staff's Response to Supplemental Information in Support of Licensee's Request to Set Aside Immediate Effectiveness of Order Suspending Licenses (Apr. 25, 1996) [hereinafter Staff Supplement Response]. Thereafter, on April 30, 1996, the Board conducted an oral argument to provide an opportunity for the parties to further explain their positions on ETI's request

¹ Besides requesting that the Staff's immediate effectiveness determination be set aside, on April 16, 1996, ETI filed a timely demand for a hearing on the merits of the Staff's March 29, 1996 license suspension order. See [ETI's] Demand for a Hearing on Order Suspending Licenses (Apr. 16, 1996) at 7. Further, in accordance with 10 C.F.R. §2.202(b), ETI later submitted a written answer responding to the allegations in the Staff's order. See [ETI's] Answer to Order Suspending Licenses (Effective Immediately) (May 2, 1996).

and for the Board to obtain clarification regarding the information submitted by the parties. See Tr. at 1-127.

For the reasons set forth below, we deny ETT's request to set aside the immediate effectiveness of the Staff's suspension order.

L. BACKGROUND

A. Regulatory Scheme for Immediately Effective Enforcement Orders

Section 2.202(a)(5) of 10 C.F.R. declares that an enforcement order instituting a proceeding to modify, suspend, or revoke a license will state "the effective date of the order." That subsection also provides that if there is a finding, with stated reasons, that "the public health, safety, or interest so requires" or if the regulatory violation or conduct that causes the enforcement order to be issued is "willful," the order may be made immediately effective. Further, if an enforcement order is made immediately effective, under section 2.202(c)(2)(i) the licensee or other person to whom the order was issued may move to set aside the immediate effectiveness on the ground that the order, including the need for immediate effectiveness, "is not based on adequate evidence but on mere suspicion, unfounded allegations, or error." Section 2.202(c)(2)(i) also provides that a motion challenging an immediate effectiveness determination must "state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on."

The Commission adopted the immediate effectiveness provisions of section 2.202 in their present form in a 1992 rulemaking. See 57 Fed. Reg. 20,194 (1992). In adopting the "adequate evidence" test — as opposed to a "preponderance of the evidence" standard suggested by some commenters on the rule — the Commission described the adequate evidence test as follows:

The test may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but must be more than uncorroborated suspicion or accusation. "Probable cause is deemed to exist where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." Thus, in the context of the rule, adequate evidence is deemed to exist when 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.

57 Fed. Reg. at 20,196 (quoting *United States v. Hill*, 500 F.2d 315, 317 (5th Cir. 1974)) (citation omitted).

The movant challenging the Staff's order bears the burden of going forward to demonstrate that the order, and the Staff's determination that making the order immediately effective is necessary, are not supported by "adequate evidence," but the Staff has the ultimate burden of persuasion on whether this standard has been met. See Tr. at 69. See also *St. Joseph Radiology Associates, Inc.* (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic), LBP-92-34, 36 NRC 317, 321-22 (1992).

B. Immediately Effective Suspension of ETI's Licenses

Under Byproduct Material License No. 29-09814-01 (the radiography license), ETI is authorized to possess and use iridium-192 and cobalt-60 in a compatible radiographic exposure device for performing industrial radiography. ETI also holds Byproduct Material License No. 29-09814-02 (the portable gauge license), which authorizes it to possess and use cesium-137 and americium-241 in specified portable gauges. The Staff's March 29 order suspending ETI's authority under both these licenses also requires that (1) all activities involving licensed materials be halted (except for prenoticed transfers of materials to authorized recipients); (2) all NRC-licensed materials be placed in locked storage; (3) no other NRC-licensed materials be received by ETI; and (4) all ETI records of licensed activities be maintained in their original form without alteration or removal. See 61 Fed. Reg. at 15,838.

In its March 29 order, the Staff provides several bases for its suspension action and its determination to make that suspension immediately effective. Citing an NRC Office of Investigations (OI) investigation of ETI, the Staff asserts as an initial basis (which we will refer to as Basis A) that with respect to the radiography license:

(1) In violation of 10 C.F.R. §§ 30.9, 30.10, ETI President Himat Soni deliberately caused ETI to create an inaccurate record by signing a June 16, 1996 radiographer's card certifying that an employee, Mr. David Bhatt, met applicable requirements and was authorized to perform Level I radiographer duties per ETI procedures despite being told by Mr. Bhatt that he had received substantially less than the forty hours of formal classroom training required under ETI Radiation Safety Procedure (RSP) No. RS-1, incorporated by reference in Condition 17 of the ETI radiography license.

(2) In violation of sections 30.9 and 30.10, ETI RSO Joseph Badali deliberately caused ETI to create an inaccurate record of Mr. Bhatt's June 20, 1996 radiation safety examination for assistant radiographer by providing Mr. Bhatt with examination answers.

(3) In violation of sections 30.9 and 30.10, the ETI RSO deliberately caused ETI to create an inaccurate record of Mr. Bhatt's training by signing a June 20, 1995 document falsely representing that the RSO had given Mr. Bhatt an oral exam as part of a practical exam.

(4) In violation of 10 C.F.R. § 34.31, ETI deliberately directed Mr. Bhatt, an unqualified and untrained employee, to perform radiography between June 15 and July 26, 1995.

(5) In violation of 10 CFR § 34.27, ETI personnel failed to complete utilization records on ninety-seven occasions between January 1, 1994, and August 31, 1995, and

(6) On September 29, 1995, ETI president Himat Soni threatened Mr. Bhatt with physical harm because he believed Mr. Bhatt may have cooperated with an NRC investigation and/or inspection of ETI.

See 61 Fed. Reg. at 15,836. Further, based on May 1994 and July and August 1995 inspections at ETI's Thorofare, New Jersey facility and at a temporary job site in Deepwater, New Jersey, the Staff maintains that the following additional violations of the radiography license were identified (which we will refer to as Basis B)

(1) In violation of 10 CFR § 34.31(b) and RSP No. RS-1, Revision 4, incorporated by reference in Condition 17 of the radiography license, ETI provided significantly less than forty hours of formal classroom instruction to Mr. Bhatt, who acted as a radiographer's assistant during June and July 1995.

(2) In violation of 10 CFR § 20.2102(a)(2), ETI failed to maintain radiation program content and implementation audit records for 1994 and 1995.

(3) In violation of 10 CFR § 34.33(a) and RSP No. ETI-1, Revision G, incorporated by reference in Condition 17 of the radiography license, ETI failed to "rezero" pocket dosimeters before the start of each work shift on eight specified dates between April 1994 and August 1995.

(4) In violation of 10 CFR § 34.24, ETI failed on three specified dates in January and August 1995 to use survey meters calibrated within three months and to maintain survey meter calibration records.

(5) In violation of 10 CFR § 20.2106(c), during June and July 1995 ETI failed to maintain complete dosimetry records that included the names, social security numbers, and birth dates of individuals.

(6) In violation of RSP No. ETI-1, Revision G, incorporated by reference in Condition 17 of the radiography license, between June 1994 and August 1995, ETI personnel failed to complete utilization logs and return completed utilization logs to the RSO.

(7) In violation of RSP No. ETI-1, Revision G, incorporated by reference in Condition 17 of the radiography license, on August 23, 1995, ETI personnel failed to perform physical radiation surveys to ensure readings to roped-off boundaries did not exceed two millirems in an hour.

(8) In violation of 10 CFR § 34.43(b), on August 23, 1995, while making radiographic exposures ETI personnel failed to perform a survey after each exposure to determine that the sealed source was returned to its shielded position.

(9) In violation of 10 CFR § 71.5(a) and 49 CFR § 177.817(a), on July 12, 1995, ETI personnel failed to complete a shipping paper prior to transporting licensed material outside the licensee's facility.

(10) In violation of 10 CFR § 71.5(a) and 49 CFR § 172.403, on July 12, 1995, ETI personnel failed to identify the activity or transport index on the "RADIOACTIVE" label

attached to a package containing licensed material that was transported outside the licensee's facility; and

(11) In violation of 10 C.F.R. § 71.5(a) and 49 C.F.R. § 177.842(d), on August 23, 1995, ETI personnel failed to block and brace packages containing licensed material that were transported outside the licensee's facility.

See id. at 15,836-37.

A third basis for the Staff's order (which we will refer to as Basis C) purportedly flows from a March 14, 1996 safety requirement compliance followup inspection regarding the radiography license. The Staff declares that this inspection revealed a deliberate Licensee falsification of radiographer examination documents. As evidence of such falsification, the Staff alleges that (1) a radiographer's purported responses to the twenty-two questions on the January 16, 1996 examination given during an eight-hour annual refresher training course at the ETI facility were identical to those of ETI's President, while other individual's responses were markedly different, and (2) an ETI invoice and work order for that date indicated the radiographer worked from 6:00 a.m. to 2:00 p.m. at a job site some 3 hours drive from the ETI facility where the course and test were given. *See id.* at 15,837.

Finally, as a basis for the March 29 order (which we will refer to as Basis D) the Staff references the Licensee's supposedly poor enforcement history. This includes (1) civil penalties of \$6500 and \$5000 in 1987 and 1992, respectively, the latter of which was based on some admitted violations that were found to be in a careless disregard for NRC requirements, and thus willful; and (2) a 1994 notice of violation that is repetitive of the current allegation in Basis A(4) that an unqualified employee was directed to perform radiography. *See id.* at 15,837 & nn.1-4.

In its March 29 order, after outlining these bases, the Staff declares that ETI "has violated numerous NRC requirements, some willfully, and has failed to take appropriate actions to prevent the recurrence of past violations." *Id.* at 15,837. Further, while noting the importance of Commission reliance on licensees to provide complete and accurate licensee information, to comply with NRC requirements, and to refrain from conduct that could impede agency safety inspections or investigations, the Staff further states that ETI President Soni and RSO Badiali have demonstrated "an unwillingness to comply with NRC requirements" and that the actions of ETI and its senior employees "have raised serious doubts as to whether the Licensee and its employees can be relied upon in the future to comply with NRC requirements and to maintain complete and accurate records of licensed activities." *Id.* The Staff thus concludes that it lacks the requisite reasonable assurance that ETI's current operations under both its radiography and portable gauge licenses can be conducted in compliance with agency requirements and that health and safety of the public,

including ETI's employees, can be protected. This, the Staff asserts, requires that ETI's radiography and portable gauge licenses be suspended, pending further investigation, and that the significance of the alleged violations and willfulness of the purported conduct require that the suspension (and the accompanying terms) be made effective immediately. *See id.* at 15,837-38.

II. ANALYSIS

The parties have placed a great deal of information and a variety of factual and legal disputes before the Board relative to ETI's April 1, 1996 request to set aside the immediate effectiveness of the Staff's March 29, 1996 license suspension order. Nonetheless, the resolution of ETI's request does not require that we delve into most of that information or definitively resolve all those controversies. During the April 30 oral argument, in response to a Board question about the "crux" of the Staff's concerns about ETI that led the Staff to suspend ETI's radiography and portable gauge licenses, counsel indicated that the Staff's central concern was with the "willful violations regarding the training of individuals who will be going out into the public, and performing radiography with sources." Tr. at 99. Also mentioned by counsel as important to the Staff's immediate effectiveness determination was the purported physical threat to Mr. Bhatt because of his cooperation with NRC investigators and the "failure [of ETI employees] to survey certain boundary areas." Tr. at 99-100.

After reviewing the corresponding bases set forth in the March 29 order relating to (1) deliberate, training-related violations — Bases A(1)-(4) and C; (2) the threat to Mr. Bhatt — Basis A(6); and (3) the failure to perform job site surveys — Bases B(7)-(8), we conclude we are unable to sustain a "probable cause" finding relative to Bases A(2)-(4) and A(6). We do find, however, with respect to Bases A(1), B(7)-(8), and C, that the Staff has provided "adequate evidence" to support its allegations and the need for immediate effectiveness of its suspension order relative to those allegations.

A. Bases A(2)-(4), (6)

Regarding the allegations of deliberate misconduct set forth in Bases A(2)-(4) and (6), ETI has denied that any wrongdoing took place. *See* ETI Supplement, Affidavit of Himat J. Soni in Support of [ETI's] Request of April 1, 1996 to Set Aside Immediate Effectiveness of Order Suspending Licenses (Apr. 18, 1996) at 6, 8 [hereinafter Soni Affidavit]; *id.* Affidavit of Joseph Badiali in Support of [ETI's] Request of April 1, 1996 to Set Aside Immediate Effectiveness of Order Suspending Licenses (Apr. 18, 1996) at 2-3 [hereinafter Badiali Affidavit]. As

presented by the Staff, the central evidentiary support for these bases is the testimony of David Bhatt.

As the record now stands, however, Mr. Bhatt's reliability is in considerable doubt. In their affidavits, ETI President Soni and RSO Badiali state that Mr. Bhatt was fired from his position with the company for an apparent act of dishonesty. See ETI Supplement, Soni Affidavit at 7; *id.* Badiali Affidavit at 3-4. The affidavit of ETI employee Matthew Varroni, who worked with Mr. Bhatt on several occasions, also describes the circumstances surrounding Mr. Bhatt's dismissal and indicates Mr. Bhatt was involved in other questionable conduct that would cast doubt on his character and veracity. See *id.* Statement of Matthew Varroni (Apr. 18, 1996) at 1-3 (describing circumstances relating to alleged misuse and theft of client property by Mr. Bhatt).

For its part, the Staff has presented nothing from Mr. Bhatt or any other source that refutes ETI's description of the circumstances surrounding his dismissal and other questionable activities. This raises serious questions about Mr. Bhatt's reliability both in terms of his general trustworthiness and his specific motivation to fabricate information regarding ETI. Consequently, we find we are unable to credit Mr. Bhatt's testimony as sufficiently reliable to provide "adequate evidence" for these allegations absent sufficient independent corroborating information.

The Staff, however, has failed to provide such information. The allegations in Bases A(3) and (4) that Mr. Bhatt did not take an oral exam and engaged in radiographic operations for which he was not properly qualified and trained are, by the Staff's own admission, essentially based on the testimony of Mr. Bhatt. See Tr. at 78-80.² Regarding Basis A(2), to establish there is adequate evidence for the allegation that RSO Badiali provided examination answers to Mr. Bhatt, as support for Mr. Bhatt's statement that Mr. Badiali helped him at the time he took the exam the Staff has presented the statement of an inspector indicating that one blank answer on the exam apparently was filled in after Mr. Bhatt left ETI. See Tr. at 74. During the oral argument, however, Staff counsel was able to represent with respect to the exam only that "some answers appeared to be written in ink, some were written in pencil . . . answers were erased, and crossed out" and "there might be some different handwriting." Tr. at 74-75, 76. This does not provide any tangible link to actions by RSO Badiali that are sufficient to corroborate Mr. Bhatt's statements that Staff asserts support its

² For Basis A(4), the Staff does refer to documentation that shows Mr. Bhatt was at certain job sites on days he stated he was there. See Tr. at 80. Standing alone, evidence that he was at a particular job site is hardly adequate to corroborate his statements on the critical issue of whether he undertook radiographic operations he was not permitted to perform while at the job site.

allegation regarding Mr. Badiali's purported improper activities while Mr. Bhatt was taking the exam.³

Concerning Basis A(6), the testimony of other witnesses could provide sufficient corroboration to Mr. Bhatt's account of the events on September 29, 1995, when during a community cultural function Mr. Soni allegedly threatened him for cooperating with NRC investigators. The Staff does proffer additional witnesses — whom Staff counsel identified as Mr. Bhatt's wife and cousin — albeit without providing any detail regarding the nature or extent of their knowledge about the alleged incident. See Tr. at 88; Staff Response, Exh. 3, at 4 [hereinafter *Teator Affidavit*].

Courts have recognized in the context of considering whether there is probable cause for an arrest that information supplied by an identified ordinary citizen witness may be presumed reliable. See, e.g., *McKinney v. George*, 556 F. Supp. 645, 648 (N.D. Ill. 1983) (citing cases), *aff'd*, 726 F.2d 1183 (7th Cir. 1984). The corroborating witnesses offered by Staff do not fall into this category, however. Because they are members of Mr. Bhatt's family, by reason of that relationship they also have a possible bias that brings their reliability into substantial question as well.⁴ Therefore, based on the information now before us, we find that those witnesses are not sufficient to corroborate Mr. Bhatt's account of events on September 29, 1995.

Because the record in its current state fails to provide sufficient information for us to conclude that the testimony of Mr. Bhatt has the degree of reliability the Commission has decreed must be present, see 57 Fed. Reg. at 20,197 (section 2.202(c)(2)(i) review process is designed to safeguard against Staff immediate effectiveness decisions based on "unreliable evidence"), we also are unable to find that Bases A(2)-(4) and (6) are supported by "adequate evidence" so as to support immediate effectiveness.

B. Basis A(X1)

We turn next to Basis A(1), which is the Staff allegation that ETI violated 10 C.F.R. §§ 30.9, 30.10,⁵ when ETI president Soni gave Mr. Bhatt a card

³ Because the Board was never given this document by the parties, we are unable to make any independent assessment in this regard.

⁴ The Staff also suggests that corroboration comes from the fact that Mr. Bhatt swore out a criminal complaint against Mr. Soni concerning the alleged threat and ultimately entered into a mutual "pay away" settlement agreement with Mr. Soni through a community dispute resolution program. See Tr. at 87-88. In our view, whatever weight might be given to Mr. Bhatt's criminal complaint is counterbalanced by the consensual nature of the settlement, which apparently did not involve any resolution of the merits of Mr. Bhatt's complaint.

⁵ As it is pertinent to the Staff's allegations under this basis, section 30.9(a) of 10 C.F.R. provides:

Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

(Continued)

identifying him as a Radiographer Level I. As described in the affidavits that accompanied the Staff's April 8, 1996 response and other supporting information supplied by counsel,⁶ the card was issued to Mr. Bhatt on June 16, 1995, the day after he began work at ETI. On the card, which was signed by Mr. Soni, is a handwritten inscription certifying that Mr. Bhatt is a Radiographer Level I per ETI procedures and meets the applicable American Society for Nondestructive Testing SNT-TC-1A requirements. See Staff Response, Teator Affidavit at 2; Tr. at 71. See also Tr. at 24. Mr. Bhatt apparently retained this card throughout his six-week employment with ETI, which ended on July 27, 1995, and was expected by ETI to provide it as identification. See Tr. at 19, 21.

Concerning Basis A(1), in his affidavit, ETI president Soni indicates that Mr. Bhatt was hired mainly to work at a Brooklyn, New York job site. Mr. Soni admits that Mr. Bhatt was supplied with a card, but declares the card was intended only to give him job site identification, as is required by the New York State Department of Labor. According to Mr. Soni, the card was not a deliberate attempt to qualify or authorize Mr. Bhatt to perform radiography before he was properly trained. The only thing the card may have shown, Mr. Soni declares, is that Mr. Bhatt would perform the duties of a trainee or radiographer's assistant, although under appropriate supervision. See ETI Supplement, Soni Affidavit at 4-5. In addition, at the oral argument ETI counsel suggested that any problem with the card may have arisen because RSO Badiali was not present at the time the card was issued because of the recent death of his son. See Tr. at 20.

In support of its allegations in this basis, the Staff relies on the affidavit of OI Investigator Jeffrey A. Teator supplied with its April 8, 1996 response. Mr. Teator states that this charge is based on (1) interviews with Mr. Bhatt, who stated that he did not receive 40 hours of classroom training and told ETI president Soni of this fact; (2) an NRC inspector's determination, based on an interview with Mr. Bhatt, that he was not knowledgeable about radiation safety or ETI's operating or emergency procedures; and (3) statements by Mr. Soni

Under 10 CFR §30.10(a), which is cited by the Staff as the other regulation ETI violates under Basis A(1), a licensee or licensee employee may not

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC

Further, subsection (c) of this section provides

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional action or omission that the person knows

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor

⁶ Neither party supplied the Board with a copy of the card

and RSO Badiali that the employee was a trainee who never used radiography equipment. *See* Staff Response, Teator Affidavit at 2.

ETI procedures make it clear that a certification card is to be issued only after an individual has fulfilled the applicable training and experience requirements. *See* Board Memorandum (Party Submissions in Response to Board Request at Oral Argument) (May 1, 1996), Attach. 2, at 8 (ETI Procedure No. CP-101, Rev. 9 (Mar. 12, 1990)) [hereinafter Board Memorandum]. To be a Radiographer's Assistant, one must have a minimum of 40 hours of "formal classroom training" and 3 months of "on-the-job training," while the higher-level Radiographer must have a minimum of 40 hours of "formal classroom training" and 9 months of "on-the-job training" as a Radiographer's Assistant. *Id.* Attach. 3, at 50-51 (ETI RSP No. RS-1, Rev. 4 (Mar. 14, 1994)). *See also id.* Attach. 2, at 11-12. Under these provisions, it seems apparent that Mr. Bhatt did not have sufficient training or experience to qualify as a Radiographer or even a lower-level Radiographer's Assistant at the time the card was issued or, apparently, anytime thereafter.⁷

Pointing to this deficiency, the Staff maintains that issuance of the card to Mr. Bhatt violated sections 30.9 and 30.10 because (1) the information in the card is incomplete or inaccurate by reason of the fact that a person who examined the card at any time during Mr. Bhatt's employment, including an NRC or agreement state official, clearly could have misapprehended his level of training and experience; and (2) such incorrect information about an individual's training and experience level would be information that (a) is incomplete or inaccurate in some respect material to the agency within the meaning of section 30.10(a)(2) and (b) would not be complete in all material respects as is required by section 30.9(a). *See* Tr. at 72-74. ETI, on the other hand, maintains all this is irrelevant because there was no NRC regulatory requirement that ETI employees carry such a card and, in any event, there has been no showing of "scienter" by establishing any deliberate attempt by ETI to violate any regulatory requirement. *See* Tr. 14-15, 21-22.

ETI is correct that there apparently is no NRC regulation that requires ETI to prepare certification cards for its employees. Yet, as we have noted above,

⁷ The record before us does not make entirely clear the correlation between a radiographer's assistant and a radiographer, as defined in the agency's regulations, 10 C.F.R. § 34.2, and the three radiographer certification levels set forth in ETI's qualification and certification procedures, *see* Board Memorandum, Attach. 2, at 3. Nonetheless, Mr. Bhatt apparently was never able to meet the requirements to be a radiographer or a radiographer's assistant under either NRC regulations or ETI procedures during his tenure at ETI. *See* Letter from Daniel F. Stenger and Robert E. Helfrich, Winston and Strawn, to the Licensing Board at 1 (May 7, 1996).

With regard to Mr. Bhatt's training, ETI has provided the Board with a copy of a document entitled "Statement of Educational Background Nondestructive Examination Training and Certification in Accordance with ASNT-TC-1A & ETI CP Procedures" on which Mr. Badiali allegedly recorded that Mr. Bhatt received 40 hours of "classroom" training in radiation safety in accordance with ETI and NRC specifications. *See* Board Memorandum, Attach. 1. *See also* Tr. at 113-14. To what degree this instruction would have fulfilled the training requirements for a radiographer's assistant is unclear, however, because ETI appears to be under the impression that on-the-job training can be credited toward fulfilling the license-imposed requirements for "formal classroom training," a proposition that is not self-evident. Compare Tr. at 55, 112 with Board Memorandum, Attach. 3, at 50.

ETI's own procedures indicate that radiographer certification cards are to be issued only to those who have fulfilled the applicable requirements. Under section 30.10(c)(2) an intentional act that the person knows causes a violation of a licensee procedure is considered "deliberate misconduct" actionable under section 30.10(a)(1). As a consequence, ETI's contention that Mr. Soni did not intend to mislead the agency (or did not actually mislead the agency) appears irrelevant. Instead, the focus is on whether his action was a knowing violation of ETI's procedure that could have resulted in a regulatory violation by the submission to the agency of materially incomplete or inaccurate information.² See 56 Fed. Reg. 40,664, 40,670 (1991) (stating that "[f]or situations that do not actually result in a violation by a licensee, anyone with the requisite knowledge who engages in deliberate misconduct as defined in the rule has the requisite intent to act in a manner that falls within the NRC's area of regulatory concern. The fact that the action may have been intercepted or corrected prior to the occurrence of an actual violation has no bearing on whether, from a health and safety standpoint, that person should be involved in nuclear activities.").

Because ETI has not presented any evidence suggesting that Mr. Soni was not aware of ETI's own procedures regarding such certifications, it appears that his action in signing and issuing the card would, in fact, amount to a deliberate contravention of one or both of the regulations cited. Thus, based on the record and the arguments before us, we find the Staff's position relative to Basis (A)(1) is supported by "adequate evidence."

C. Bases (B)(7)-(8)

Bases B(7)-(8) involve allegations of a failure of ETI personnel on August 23, 1995, to conduct proper surveys during radiographic operations to ensure that (1) readings at roped-off boundaries did not exceed levels mandated by ETI procedures, and (2) a sealed source had been returned to its shielded position as required by 10 C.F.R. § 34.43(b). The support for these purported violations is the personal observations of an NRC inspector. See Staff Response, Exh. 4, at 5 [hereinafter *Costello Affidavit*]; Tr. at 105. ETI responds that its own investigation indicates there were no such violations by the team involved, which included ETI president Soni and ETI employee Matthew Varroni. See ETI Supplement, *Badiali Affidavit* at 5-6. Indeed, ETI asserts its employees at the site were aware that NRC inspectors were watching them. See Tr. at 106.

² At this juncture, we have been presented with nothing that would lead us to quarrel with the proposition that a certification card containing false information regarding an individual's training and experience to perform radiographic operations (1) would not be considered "complete and accurate in all material respects" within the meaning of section 30.9, and (2) would be "incomplete or inaccurate in some respect material to the NRC" as defined in section 30.10(a)(2).

For present purposes, the resolution of this dispute over what occurred on August 23, 1995, turns on an assessment of whether the Staff's evidence is "unreliable." 57 Fed. Reg. at 20,197. The allegations are based on the direct personal observations of an NRC inspection official. Other than a declaration flatly denying the allegations, which clearly would serve ETI's interests, ETI has not provided us with any reasonable cause to believe that, because of bias or mistake, the government official involved cannot be considered a credible observer.⁹ Absent such a showing, we conclude that Bases A(7)-(8) are supported by "adequate evidence."

D. Basis C

We come finally to Basis C, which concerns the test given to ETI Radiographer's Assistant Ram Lubhaya on January 16, 1996, as part of a course being conducted that same day by RSO Badiali. Based on the parties' submissions, it appears that their dispute over this allegation is not so much what happened as the significance of the events that transpired.

After performing soil compaction testing in Queens, New York, under ETI's portable gauge license during the morning of January 16, that afternoon Mr. Lubhaya returned to ETI's New Jersey facility to attend the refresher course being conducted by RSO Badiali. See ETI Supplement, Affidavit of Ram Lubhaya (Apr. 12, 1996); Tr. at 48. He also took a twenty-two-question examination. His answers, the Staff alleges and the Licensee apparently admits, are essentially identical to those found on the examination of ETI president Soni. See Staff Response, Costello Affidavit at 6; ETI Supplement, Soni Affidavit at 10. See also Tr. at 49.

Under applicable ETI procedures, annually all radiographers and radiographer's assistants must "receive an eight (8) hour refresher course in Radiation Safety Training from the [RSO] or his designated representative" and "[u]pon completion of this training all personnel will be administered a written examination with a minimum passing grade of 80% required." Board Memorandum,

⁹ In its April 25 response to ETI's April 19 supplement, quoting the statement of considerations for the proposed rule that was later adopted as section 2.202, the Staff declares that in considering a challenge to an immediate effectiveness determination a presiding officer "must view the evidence presented in a light most favorable to the Staff and resolve all inferences in the Staff's favor." Staff Supplement Response at 5 (quoting 55 Fed. Reg. 27,645, 27,646 (1990)). ETI challenges this assertion, declaring that statements in the Office of General Counsel analysis paper that accompanied the final rule suggest that this presumption was rejected in favor of a standard that allows the presiding officer to evaluate and balance the entire body of the evidence without giving a particular preference to either party's information. See Tr. at 8-13 (citing Memorandum from William C. Parker, General Counsel, to the NRC Commissioners, SECY-92-089, at 7 (Mar. 16, 1992)). In ruling that for purposes of deciding an immediate effectiveness challenge, absent evidence of bias or mistake an NRC inspector's direct personnel observations should be treated as reliable, we need not decide whether the Staff's "inference" standard is acceptable. Our ruling here is founded on the accepted presumption that a government officer can be expected faithfully to execute his or her official duties. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

Attach. 3, at 51. In his April 18 affidavit, Mr. Soni states that the January 16 training was "an annual radiation safety lecture" and that "[a] refresher test was administered after the lecture and discussion." ETI Supplement, Soni Affidavit at 10. See also *id.* Badiali Affidavit at 7 (states that Mr. Lubhaya "attended the radiation safety refresher training on January 16, 1996 and took a test"); *id.* Lubhaya Affidavit at 1 (declares that on January 16, 1996 "I attended Radiation Safety Refresher and took a test."). Mr. Soni also notes that "[d]uring the course of refresher instruction" he observed Mr. Lubhaya having difficulty in understanding the discussion. *Id.* Soni Affidavit at 10. This caused him to explain the test material in detail to Mr. Lubhaya in his native Hindi, an action he suggests explains the similarity in their answers. See *id.* The Staff also maintains that RSO Badiali told an NRC inspector that the January 16 training was the annual 8-hour refresher course. See Tr. at 90. See also Staff Response, Costello Affidavit at 7.

At the April 30 oral argument, however, ETI counsel and Mr. Soni (in an unsworn statement) declared for the first time that the January 16 examination was designed for an experienced radiographer. Further, they asserted that for Mr. Lubhaya, the January 16 examination was no more than a practice exam from which he gained nothing. See Tr. at 49-52.

ETI's attempt to establish that the Staff's allegation in Basis C is "unfounded" is not compelling. For example, ETI's suggestion that Mr. Lubhaya had nothing to gain by taking the January 16 test is an overstatement. By passing the test, Mr. Lubhaya would have fulfilled the annual refresher training requirement and would have relieved ETI from having to provide him any additional refresher training for another year.¹⁰ Also untoward is the shifting nature of ETI's explanation about the scope and nature of the January 16 training/exam. As the Staff counsel noted during the oral argument, while an annual refresher course and an exam are required for ETI radiographers and radiographer's assistants, the requirement does not distinguish between radiographers and radiographer's assistants in terms of the level of the training or the exam that is to be given. See Tr. at 91-92.

All this leads us to conclude that the Staff's allegation that the circumstances surrounding Mr. Lubhaya's examination denote a deliberate violation of sections 30.9 and 30.10 is supported by "adequate evidence" in accordance with section 2.202(c)(2)(i).

¹⁰ Of course, this assumes Mr. Lubhaya also took the appropriate amount of refresher training before the exam, which he apparently did not. See Board Memorandum, Attach. 3, at 51.

E. Need for Immediate Effectiveness of the Radiography and Portable Gauge License Suspensions

As was noted earlier, to support an immediate effectiveness determination, besides showing that bases for the order are supported by adequate evidence, the Staff must show there is a need for immediate effectiveness that is supported by adequate evidence. That need can be established by showing either that the alleged violations or the conduct supporting the violations is willful or that the public health, safety, or interest requires immediate effectiveness.

Regarding the suspension of ETI's radiography license, taken together the Staff's "crux" allegations that we have found are supported by adequate evidence also demonstrate a need for immediate effectiveness in accordance with this standard. As we have already explained, there is adequate evidence to support Staff's claim that Bases A(1) and C involve deliberate, i.e., willful, regulatory violations within the meaning of section 2.202(a)(5). As to Bases B(7)-(8), while the Staff had not sought to label these violations as willful, they have asserted that they involve a potential for serious injury to the public health and safety. As was noted in several of the affidavits accompanying the Staff's response, industrial radiography involves the use of high-activity sources that can cause high radiation doses if mishandled. Further, the failure to perform a survey after each exposure to ensure that a sealed source has been returned to its shielded position, as is alleged in Basis B(8), has the potential for causing a significant radiation exposure to individuals using the exposure device and to members of the public. See Staff Response, Costello Affidavit at 7; *id.* Exh. 5, at 2 (Affidavit of James Lieberman in Support of NRC Staff's Response to Request to Set Aside Immediate Effectiveness of Order Suspending Licenses). We find this sufficient to meet the Staff's burden relative to ETI's radiography license.

With respect to ETI's portable gauge license, ETI asserts that the weak sources used in the gauges create only a very minor possibility that activities under this license will have any impact on the public health and safety, thereby establishing there is no effective support for immediate suspension of this license. See ETI Supplement at 2; Tr. at 62-64. During the oral argument, Staff counsel disagreed, contending that the nature of the training violations in this instance support the need for immediate effectiveness. See Tr. at 94-95.

Bases C and A(1) are sufficient to establish the need for immediate effectiveness of the suspension of ETI's portable gauge license. Basis C questions the adequacy of training for Mr. Lubhaya, who just before taking the January 16, 1996 refresher course and exam was doing soil compaction gauge work under ETI's portable gauge license. Basis A(1) raises concerns about the circumstances under which Mr. Bhatt was being trained. As the Staff observed, there is a greater possibility that untrained or improperly trained personnel will

lose such a source, which then could result in exposures in excess of 10 C.F.R. Part 20 limitations and an increased likelihood of cancer development. See Staff Response, Costello Affidavit at 2; Tr. at 94-95.

Thus, we find that considering Bases A(1) and (C) together, the Staff has provided sufficient reliable information to establish "adequate evidence" to support the public health and safety need for immediate suspension of ETI's portable gauge license.

III. CONCLUSION

Under 10 C.F.R. § 2.202(c)(2)(i), in the face of a licensee challenge we are to uphold a Staff immediate effectiveness determination if the order, and the Staff's determination that it should be made immediately effective, are supported by "adequate evidence." In this instance, looking to those allegations identified by the Staff as central to immediate effectiveness for its March 29, 1996 license suspension order, we find that with respect to Bases A(1), B(7)-(8), and C, the Staff has met its burden to establish by "adequate evidence" that (1) those charges are not based on "mere suspicion, unfounded allegations, or error," and (2) there is a need to make the order effective immediately.

For the foregoing reasons, it is, this tenth day of May 1996, ORDERED that:

1. ETI's April 1, 1996 request to set aside the immediate effectiveness of the Staff's March 29, 1996 order suspending ETI Byproduct Material License Nos. 29-09814-01 and 29-09814-02 is *denied*.

2. In accordance with 10 C.F.R. § 2.202(c)(2)(i), this order upholding immediate effectiveness is final agency action.¹¹

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Richard F. Foster
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 10, 1996

ADDITIONAL VIEWS OF BOLLWERK, J.

I write separately to express my concern about an apparent procedural limitation that exists under current regulations on a presiding officer's ability to clarify the information supplied by the parties during a challenge to an NRC Staff immediate effectiveness determination. Based on my experience in this proceeding, that limitation does not appear to serve the immediate effectiveness review process particularly well.

The statement of considerations supporting the final rule adopting 10 C.F.R. § 2.202 with its immediate effectiveness provisions indicates that after receiving the parties' written submissions the Board may conduct an "oral argument" if it wishes to gain additional insight or information regarding the parties' positions supporting or opposing an immediate effectiveness challenge. 57 Fed. Reg. 20,194, 20,196 (1992). Nonetheless, as with a criminal preliminary hearing, which is cited in the final rule in conjunction with the proper application of the "adequate evidence" standard, or a civil temporary restraining order or preliminary injunction proceeding, there undoubtedly are instances when convening a limited evidentiary hearing to ensure that the record is fully

¹¹ Copies of this memorandum and order have been sent this date to counsel for ETI by facsimile transmission and to Staff counsel by E-Mail transmission through the agency's wide area network.

developed is useful. Arguably one of those instances would be when, as here, there are significant questions regarding the reliability of a central witness.

Through the ongoing National Performance Review and other agency initiatives, the adjudicatory procedures in 10 C.F.R. Part 2 are likely to come under scrutiny in the near future. I would urge that as part of any such review, consideration be given to clarifying the authority of a presiding officer to hold an evidentiary hearing when a licensee or other person subject to an enforcement order challenges a Staff immediate effectiveness decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bachhofer, Chairman
Dr. Jerry R. Kilne
Dr. Peter S. Lam

In the Matter of

Docket No. 50-160-Ren
(ASLBP No. 95-704-01-Ren)
(Renewal of Facility
License No. R-97)

GEORGIA INSTITUTE OF
TECHNOLOGY
(Georgia Tech Research Reactor,
Atlanta, Georgia)

May 16, 1996

In a Memorandum and Order setting forth rulings of the Atomic Safety and Licensing Board during a telephone conference call on May 15, 1996, the Licensing Board granted (with one limited exception) the NRC Staff's motion to exclude the prepared testimony of Ms. Glenna Carroll, the Intervenor's representative. The Board determined that Ms. Carroll lacked personal knowledge of the matters in the testimony (with one exception), as well as expertise to discuss matters in her testimony (which for the most part had been derived from documentary evidence). The Board concluded in this regard that the underlying documents themselves were the "best evidence" of what they stated. The Board ruled that the Intervenor could seek to introduce the underlying documents to the extent relevant and that the testimony could be entered into the record as an opening statement of position.

The Licensing Board also denied Georgia Tech's motion to bar Ms. Carroll as a witness for any purpose but granted Georgia Tech's motion to exclude Ms.

Carroll's prepared testimony to the same extent as it had excluded this testimony in response to the Staff motion.

RULES OF PRACTICE: PREPARED TESTIMONY

Prepared testimony may be struck where the witness lacks personal knowledge of the matters in the testimony and lacks expertise to interpret facts contained therein.

MEMORANDUM AND ORDER **(Telephone Conference Call, 5/15/96)**

On Wednesday afternoon, May 15, 1996, the Atomic Safety and Licensing Board conducted a telephone conference call with the parties to this proceeding. The call was transcribed (Tr. 915-62). Participating, in addition to the Licensing Board members, were Alfred Evans, Jr., Esq., for Georgia Institute of Technology (Georgia Tech), Ms. Glenn Carroll, for Georgians Against Nuclear Energy (GANE), and Sherwin E. Turk, Esq. and Colleen Woodhead, Esq., for the NRC Staff.

Primary topic of the call was the Staff's Motion *In Limine* to Exclude the Testimony of Glenn Carroll, dated May 10, 1996. The Board and all parties had received this motion. Georgia Tech advised that it was in the process of preparing and would file by fax (later that afternoon) a motion to bar the appearance and to strike the testimony of Ms. Glenn Carroll. (The motion was in fact filed by fax and received by the Board today, May 16, 1996.) The primary basis of Georgia Tech's motion was the alleged failure of Ms. Carroll to comply with previous Board orders concerning the filing of prepared testimony, as well as the lack of expertise of Ms. Carroll to sponsor the testimony in question.

After some discussion, the Board determined that it would exclude the prepared testimony of Ms. Carroll (with the limited exception of the statements concerning a videotape of a program on FOX-TV (see p. 233) GANE wishes to introduce into evidence). The Board stated that it was prepared to grant the Staff's motion (with the one limited exception) but would permit Ms. Carroll to read the testimony into the record as an opening statement. Although her opening statement would not have evidentiary status, it would be useful to alert the Board and parties to the points GANE wishes to raise.

The basis for this ruling was Ms. Carroll's lack of expertise together with her lack of personal knowledge of the events relied on (except with respect to GANE's preparation of a copy of the FOX-TV tape). Most of the testimony (which had initially been prepared as a discovery response) consisted of a

recitation of historical events, derived from specified reports. The Board believes the "best evidence" of what the reports say is the reports themselves, and we indicated that Ms. Carroll could seek to introduce the documents on which she was relying for her testimony through other witnesses — appearing either on behalf of GANE or through the other parties.

The single exception to our overall ruling was our determination that Ms. Carroll could testify as a witness concerning a videotape she had prepared and was seeking to introduce. The Board rejected the Staff's claim of lack of relevance of the tape. The Board also indicated it would consider issuing a subpoena for a FOX-TV representative if questions were raised as to the manner of preparation, contents, completeness, or authenticity of such tape.

The Board notes that, in support of its motion to bar the appearance of Ms. Carroll as a witness, Georgia Tech asserts that the "most appropriate" format for prefiled written testimony is "manifestly the traditional question and answer approach which courts routinely require." No such requirement appears either in NRC rules or in orders that we have issued. Those rules instead require only that testimony be "relevant, material, and reliable." 10 C.F.R. § 2.743(c).

Ms. Carroll raised a question as to the possible modification of the hearing schedule that we previously had approved (*see* Third Prehearing Conference Order, LBP-96-8, 43 NRC 178 (1996)). Ms. A.R. Long, the Staff member who is to testify for GANE, had travel plans that would make her unavailable on May 24, 1996, the date for which she previously was scheduled. The Board indicated that, at the outset of the hearing on May 20, 1996, the Board would revisit the witness schedule to the extent necessary. (The Board had no objection to the suggested alternate date for Ms. Long, Tuesday, May 21, 1996.)

Accordingly, for the foregoing reasons, the Staff's motion to exclude the testimony of Ms. Glenn Carroll is *granted*. Georgia Tech's motion to bar Ms. Glenn Carroll's appearance as a witness is *denied*. To the extent that Georgia Tech seeks to exclude GANE's testimony for lack of expertise (parallel to the Staff's motion), Georgia Tech's motion is likewise *granted*. GANE will be permitted to read the substance of its testimony (except for portions not relevant

to the proceeding, such as claims with respect to Cobalt-60 and x-ray machines)
into the record as an opening statement.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
May 16, 1996