NUCLEAR REGULATORY COMMISSION ISSUANCES

May 1995

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 Decisions on 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.

U.S. NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

**Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson**

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

In the Matter of

Docket Nos. 50-321
50-366
50-424
50-425
(10 C.F.R. § 2.206)

GEORGIA POWER COMPANY, *et al.*
(Hatch Nuclear Plant, Units 1 and 2;
Vogtle Electric Generating Plant,
Units 1 and 2)

May 11, 1995*

The Commission clarifies that nothing in its earlier decision, CLI-93-15, 38 NRC 1 (1993), purported to prohibit the Staff from taking further action on the pending Vogtle and Hatch transfer amendments. In CLI-93-15, the Commission vacated a Partial Director's Decision under 10 C.F.R. § 2.206 and instructed the Staff to defer resolving the section 2.206 petition pending the outcome of the Vogtle transfer proceeding.

MEMORANDUM

In a letter to the Commission dated April 6, 1995, Georgia Power Company requests us to authorize the NRC Staff to complete its review and issue license

*Re-served May 12, 1995.

amendments transferring operational authority for the Vogtle and Hatch power reactors from Georgia Power to Southern Nuclear Operating Company. The Vogtle transfer is the subject of an ongoing adjudicatory proceeding. Georgia Power is concerned that the NRC Staff may "misconstrue" a prior Commission decision involving Vogtle, CLI-93-15, "as instructing the staff to defer issuance of a final 'no significant hazards [consideration]' determination until after the Licensing Board issues its decision in the amendment proceeding."

In CLI-93-15, we vacated a Partial Director's Decision under 10 C.F.R. § 2.206 and instructed the Staff to defer resolving the section 2.206 petition pending the outcome of the Vogtle transfer proceeding. 38 NRC 1 (1993). We ruled that "in view of the overlap and similarity of some issues between the section 2.206 petition and the transfer proceeding . . . , the Staff's final determination of the common issues should take into account the Licensing Board's findings and the outcome of the transfer proceeding." 38 NRC at 3. We reasoned that deferring consideration of these issues is consistent with the Commission's longstanding policy "discourag[ing] use of section 2.206 procedures as an avenue for deciding matters that are under consideration in a pending adjudication." 38 NRC at 2.

Our decision in CLI-93-15 was brief and addressed no other issues. Contrary to the concern expressed by Georgia Power in its April 6 letter, nothing in CLI-93-15 purported to prohibit the Staff from taking further action on the pending Vogtle and Hatch transfer amendments.

We intimate no judgment on whether it would be lawful or appropriate at this stage of the proceeding for the Staff to make a finding of no significant hazards consideration which would then enable it to issue the amendments. We simply observe that the Staff is not precluded by our ruling in CLI-93-15 from taking any lawful action with respect to them.

For the Commission¹

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of May 1995.

¹ Commissioner Jackson did not participate in this matter.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. IA-94-011
(ASLBP No. 94-696-05-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement in
NRC-Licensed Activities)

May 31, 1995

In this proceeding concerning an NRC Staff enforcement order prohibiting the involvement of Dr. James E. Bauer in NRC-licensed activities, the Licensing Board denies (1) the portion of an NRC Staff prediscovery dispositive motion relating to the parties' Joint Issue 1, which was initially considered in LBP-94-40, 40 NRC 323, 332-33 (1994), and (2) the Staff's petition for reconsideration of the Board's ruling in LBP-94-40, 40 NRC at 337, concerning Bauer Issue 8, albeit with an additional modification of that issue.

RULES OF PRACTICE: SUMMARY DISPOSITION

Summary disposition is appropriate only when it has been shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)

With respect to a summary disposition motion, the moving party “bears the burden of showing the absence of a genuine issue as to any material fact.” *Id.* (footnote omitted). Further, in assessing the showing made by the motion’s proponent, the presiding officer is required to “view the record in the light most favorable to the party opposing such a motion.” *Id.* (footnote omitted). In doing so, however, if the presiding officer finds that the proponent has failed to make the required showing, then the presiding officer “must deny the motion — even if the opposing party chooses not to respond or its response is inadequate.” *Id.* (footnote omitted).

LICENSE: CONSTRUCTION OF TERMS

In construing the meaning of the terms of a license, it is most useful to look to the principles that govern the construction of another written instrument — the contract. *Cf. Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 603-05 (1st Cir. 1991) (regarding standard of review to apply in interpreting terms of agency permit, court will treat the instrument like a contract).

LICENSE: CONSTRUCTION OF TERMS (AMBIGUITY; USING EXTRINSIC MATERIALS)

It is a well-established rule that if the terms of a writing are plain and unambiguous, there is no room for construction, because the only purpose of judicial construction is to remove doubt and uncertainty. *See* 17A Am. Jur. 2d *Contracts* § 337, at 342 (1991). Further, if the language of the instrument is unambiguous, its meaning should be determined without reference to extrinsic materials. *See id.* at 343-44.

**RULES OF PRACTICE: SUMMARY DISPOSITION
(CONSTRUCTION OF LICENSE TERMS)**

LICENSE: CONSTRUCTION OF TERMS (AMBIGUITY; SUMMARY DISPOSITION)

The preliminary inquiry in seeking to construe the terms of a written instrument is to determine whether ambiguity exists, which is a question of law that can be resolved through summary disposition. *See* 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2730.1, at 279 (2d ed. 1983). On the other hand, if it is determined that ambiguity exists that can be resolved

only through an inquiry into the state of mind of the parties to the instrument, then genuine issues of material fact generally will exist that make summary disposition inappropriate. *See id.* at 265-66.

LICENSE CONDITIONS: CONSTRUCTION OF TERMS ("BASED ON")

Language in a license condition stating that the license is "based on" the statements and representations in a license application is not the equivalent of a declaration that the application is "incorporated by reference into" the license. As one court has pointed out in interpreting the interchangeable term "based upon," a "straightforward textual exegesis" leads to the conclusion that this term means "derived from" or "use[d] as a basis for." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 130 L. Ed. 2d 278 (1994). To say that the license is derived from the application is not the same as saying that the application and its terms are incorporated into the license so as effectively to be made provisions of the license.

LICENSE CONDITIONS: DEFINITION

A license "condition" either imposes a specific qualification on the standard terms of the license or creates particular duties or requirements for the licensee beyond those specified under the standard terms of the license.

LICENSE: CONSTRUCTION OF TERMS (AMBIGUITY; USE OF EXTRINSIC MATERIALS)

Even if there is no facial ambiguity in the terms of a license, in interpreting the meaning of those terms it may be appropriate to look to an extrinsic source such as agency regulations based upon the general rule of construction that in drafting an instrument the parties are presumed to have in mind all the existing legal directives relating to the instrument, or the subject matter thereof. *See* 17A Am. Jur. 2d *Contracts* § 381, at 402-03 (1991).

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

A party contesting a Staff enforcement order is free to propose any legal or factual issues it wants to litigate, at least so long as that issue bears some relationship to the bases set forth in support of the order by tending to establish, either alone or with other issues, that some explicit or implicit legal or factual predicate to the order should not be sustained. *See* LBP-94-40, 40 NRC at 336 n.7.

MEMORANDUM AND ORDER

(Dispositive Motion-Related Rulings)

In LBP-94-40, 40 NRC 323 (1994), we made various rulings regarding prediscovery dispositive motions filed by petitioner James E. Bauer, M.D., and the NRC Staff relating to several issues specified by the parties in this enforcement order litigation. Currently pending before the Board are (1) party responses to additional questions we posed in LBP-94-40 regarding the Staff's request for summary disposition of Joint Issue 1, and (2) a December 19, 1994 Staff motion requesting reconsideration of our ruling modifying Bauer Issue 8. For the reasons detailed below, we deny both the Staff's request for summary disposition of Joint Issue 1 and its motion for reconsideration regarding Bauer Issue 8.

I. JOINT ISSUE 1

A. Background

As a preface to our rulings in LBP-94-40, we described in some detail both the circumstances surrounding the May 10, 1994 enforcement order that Dr. Bauer contests in this proceeding and the substance of the parties' motions requesting dispositive rulings on some issues designated by one or both of the litigants. *See* 40 NRC at 326-28. As was noted there, one basis cited by the Staff for its May 1994 order precluding Dr. Bauer from having any involvement in NRC-licensed activities for five years is his alleged use of a strontium-90 source for purposes not permitted under the applicable NRC license. Specifically, the Staff alleges that as the radiation safety officer and sole authorized user on a byproduct materials license permitting the Indiana Regional Cancer Center (IRCC) to use a strontium-90 source to treat specified medical conditions, Dr. Bauer violated the terms of this license by treating superficial skin lesions with the source. In Joint Issue 1, the parties posit the issue whether the use of the strontium-90 source for skin treatments is a violation of the IRCC license.

In its July 29, 1994 motion for summary disposition, in requesting a ruling in its favor on Joint Issue 1 the Staff asserted there are no disputed material issues of fact regarding this issue. As the basis for this claim, the Staff relied upon section nine of the IRCC license entitled "Authorized Use," which contains the statement that the licensed source is "[f]or use in Atlantic Research Corporation Model B1 Medical Eye Applicator for treatment of superficial eye conditions." Further, according to the Staff, the license does not provide for any other authorized use. *See* NRC Staff Motion for Summary Disposition and NRC Staff Motion for Dismissal (July 29, 1994) at 5. These undisputed facts, it asserted, compel

the conclusion that under the IRCC license the strontium-90 source can be used only for treating superficial eye conditions.

Dr. Bauer countered that there are material factual issues in dispute. He asserted that the license does not limit authorized uses to those set forth in section nine. As evidence of this, he pointed to section thirteen of the license, which is under the general heading of "CONDITIONS" and states "[t]his license is based on the licensee's statements and representations listed below: A. Application dated March 28, 1988." According to Dr. Bauer, because paragraph six of IRCC's March 1988 application states that the purpose for which licensed material will be used is "[t]reatment of superficial tissues of the eye and skin," the declaration in section thirteen of the license results in the application's statement of purpose being completely incorporated into the license. *See* Response to NRC Staff Motion for Summary Disposition and NRC Staff Motion for Dismissal (Aug. 29, 1994) at 2 & n.1.

In LBP-94-40, 40 NRC at 332-33, in reviewing the parties' arguments we found they had not discussed the applicability and impact of a possibly relevant provision of the agency's rules of procedure — 10 C.F.R. § 2.103(b). Section 2.103(b) provides that in instances when the Staff determines a materials license application does not meet statutory or regulatory requirements, it may issue a notice of denial or proposed denial that informs the applicant of the reasons for the Staff's action and offers an opportunity for a hearing on the denial or proposed denial. Because of the potential impact of this provision on our resolution of the Staff's dispositive motion, we asked that both parties address (1) whether IRCC had the right to receive notice that the Staff had denied its application for skin treatment authority and that it was entitled to a hearing on such a Staff determination; (2) if IRCC was entitled to such notice, whether and how the Staff provided that notice; and (3) if IRCC was entitled to such notice and the Staff did not provide it, whether the failure to provide notice has any impact on the Staff's assertion that IRCC's license did not provide authority for skin treatments.

In its January 6, 1995 response to these questions, the Staff states that because the strontium-90 license issued to IRCC only granted that portion of its request concerning the treatment of eye conditions, with respect to skin treatments IRCC's application "was, in effect, denied." NRC Staff's Response to Board's Questions (Jan. 6, 1995) at 3 [hereinafter Staff Questions Response]. The Staff also concedes that "IRCC should have been provided the notice described in section 2.103(b)," but was not. *Id.* at 3-4. Nonetheless, according to the Staff the failure to provide notice pursuant to this procedural regulation has no impact on its assertion that IRCC's license did not provide substantive authority to undertake skin treatments.

The Staff contends the license clearly shows that treatments are limited to superficial eye conditions. Also relevant, the Staff declares, is the April 25, 1988

cover letter accompanying the license that advised IRCC to review its license carefully to ensure it understood all the conditions imposed and to notify the NRC's regional office if there were any errors in the license or questions about its terms. The Staff further asserts that any failure to follow the requirements of section 2.103(b) could not create any presumption that the Staff granted IRCC's request for skin treatment authorization. The Staff maintains such a presumption would constitute granting the license by default, which is prohibited by 10 C.F.R. § 30.33(b) that mandates a materials license can be issued only upon deciding that an application meets the requirements of the Atomic Energy Act and Commission regulations. *See Staff Questions Response at 4-5.*

Finally, the Staff declares that the only impact of a failure to provide the notice and hearing opportunity mandated by section 2.103(b) is to toll the time for IRCC to request a hearing on the denial until the Staff issues the notice. The Staff nonetheless states that under the circumstances here IRCC could not request further relief because (1) the terms of the license clearly put IRCC on actual notice that the Staff had denied its application for skin condition treatment, and (2) in accordance with the recent settlement of a related case, *see Indiana Regional Cancer Center*, LBP-94-36, 40 NRC 283 (1994), IRCC has requested termination of its strontium-90 license.¹ *See Staff Questions Response at 6-7.*

In his February 3, 1995 response to the Board's questions, Dr. Bauer argues that because the Staff failed to provide the notice of denial referred to in section 2.103(b), the only conclusion is that the Staff approved IRCC's strontium-90 application in toto, including IRCC's request for authorization to provide superficial skin treatments. Further, Dr. Bauer dismisses the Staff assertion that he and IRCC were on notice of the denial as improperly forcing them to "engage in a 'guessing game'" about the extent of the licensed authority the Staff granted them. Dr. James E. Bauer's February 3, 1995 Response to the Board's Questions (Feb. 3, 1995) at 6-8.

Subsequently, Dr. Bauer petitioned to supplement his response. *See* Dr. James Bauer's March 2, 1995 Petition for Permission to File Supplemental Response to the Board's Questions (Mar. 2, 1995). In that supplement, he declares that various documents relating to agency policies and procedures regarding section 2.103(b) produced by the Staff in response to a January 9, 1995 Freedom of Information Act (FOIA) request make it clear that it is mandatory that the Staff provide notice of the denial of a materials license application. He concludes that by failing to follow this substantive directive, the Staff effectively granted the license that IRCC applied for, including IRCC's request for skin treatment authority. *See* Dr. James E. Bauer's March 2, 1995 Supplemental Response to the Board's Questions (Mar. 2, 1995) at 4-8. For its part, the Staff does

¹The implication in the Staff's response is that the same reasons would preclude Dr. Bauer from obtaining adjudicatory review of the Staff's denial decision.

not oppose Dr. Bauer's request to file the supplement, but maintains that the materials he refers to do not add anything substantive to the parties' responses to the Board's questions.² See NRC Staff Response to Dr. Bauer's Petition to File Supplemental Response (Mar. 21, 1995) at 1-2.

B. Analysis

As it has often been stated, summary disposition is appropriate only when it has been shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). It is also apparent that the moving party "bears the burden of showing the absence of a genuine issue as to any material fact." *Id.* (footnote omitted). Further, in assessing the showing made by the motion's proponent, we are required to "view the record in the light most favorable to the party opposing such a motion." *Id.* (footnote omitted). In doing so, however, if we find that the proponent has failed to make the required showing, then we "must deny the motion — even if the opposing party chooses not to respond or its response is inadequate." *Id.* (footnote omitted).

As was noted above, as the moving party the Staff calls upon us to find that there are no material facts at issue and that it is entitled to a decision as a matter of law on the question whether the treatment of skin conditions violates the terms of IRCC's strontium-90 license. As is also noted above, as support for its position on this issue, the Staff relies upon the terms of the license, in particular section nine, that it declares establish no material facts are in dispute regarding the question of IRCC's (and Dr. Bauer's) lack of authority to provide skin treatments so that the Staff is entitled to a decision in its favor as a matter of law on that question.

To rule on the Staff's request, it is apparent we must interpret the terms of the IRCC strontium-90 license. As guidance in undertaking this task, we find it most useful to look to the principles that govern the construction of another written instrument — the contract. Cf. *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 603-05 (1st Cir. 1991) (regarding standard of review to apply in interpreting terms of agency permit, court will treat the instrument like a contract). It is, of course, a well-established rule that if the terms of a writing are plain and unambiguous, there is no room for construction, because the only purpose of judicial construction is to remove doubt and uncertainty. See 17A Am. Jur. 2d *Contracts* § 337, at 342 (1991) [hereinafter Am. Jur. 2d *Contracts*].

²There being no opposition, we grant Dr. Bauer's March 2, 1995 request to supplement his response to the Board's questions.

Further, if the language of the instrument is unambiguous, its meaning should be determined without reference to extrinsic materials. *See id.* at 343-44.

The preliminary inquiry regarding such a written instrument thus is to determine whether ambiguity exists, which is a question of law that can be resolved through summary disposition. *See* 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2730.1, at 279 (2d ed. 1983). On the other hand, if it is determined that ambiguity exists that can be resolved only through an inquiry into the state of mind of the parties to the instrument, then genuine issues of material fact generally will exist that make summary disposition inappropriate. *See id.* at 265-66.

Using these guidelines, we come first to the Staff position that the language of the license is unambiguous in establishing that the Staff did not give IRCC the authority to conduct skin treatments with its strontium-90 source. The Staff is correct that license section nine, under the heading of "Authorized use," refers only to strontium-90 source use for the treatment of superficial eye conditions.³ If this were all the license said, there would be no possible ambiguity.

There is, however, the language in section thirteen that Dr. Bauer contends provides cause for additional scrutiny. This section, which is under the general heading "CONDITIONS," states that the license is "based on" the statements and representations contained in the IRCC application, which includes a specific request for authority to provide skin treatments. Dr. Bauer insists that we can reasonably read this section as an expression of Staff intent to incorporate the terms of the IRCC application into the license, including the request for authority to provide skin treatments.

We are unable to conclude that the "based on" language used in section thirteen is the equivalent of "incorporated by reference into," which is the meaning that Dr. Bauer would give the term. Rather, as one court has pointed out in interpreting the interchangeable term "based upon," a "straightforward textual exegesis" leads to the conclusion that this term means "derived from" or "use[d] as a basis for." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 130 L. Ed. 2d 278 (1994). To say that the license is derived from the application is not the same as saying that the application and its terms are incorporated into the license so as effectively to be made provisions of the license.

We thus are unable to accept Dr. Bauer's interpretation of this provision or to conclude that the language of the license concerning the appropriate use

³ Similarly, section 12 of the license, which falls under the general heading of "CONDITIONS" and the subheading "Material and Use," contains the statement "Strontium 90 sealed sources for treatment of superficial eye conditions."

of the strontium-90 source is ambiguous.⁴ As a consequence, under the rules of contract construction to which we look, because there is no ambiguity in the written instrument, our inquiry should be over without further inquiry into extrinsic materials. *See* Am. Jur. 2d *Contracts* § 337, at 343-44.

Nevertheless, in the context of this regulatory proceeding, we conclude that it is appropriate to refer to one extrinsic matter — 10 C.F.R. § 2.103(b). We look to this extrinsic source based upon the general rule of construction that in drafting an instrument the parties are presumed to have in mind all the existing legal directives relating to the instrument, or the subject matter thereof. *See* Am. Jur. 2d *Contracts* § 381, at 402-03. Dealing as it does with the Staff denial of a materials license application, this section must have been a relevant consideration for the Staff as the issuer of the IRCC license. Moreover, based on the Staff's answers to our questions regarding this provision, its applicability to the IRCC application appears highly relevant to the important question of the Staff's intent concerning the license.⁵

The Staff's response to our questions regarding section 2.103(b) certainly suggests, although does not explicitly state, that the intent of the particular Staff personnel who were involved in issuing the IRCC license was to deny IRCC's request for skin treatment authority. At the same time, the Staff recognizes that pursuant to section 2.103(b), such an intent "should have" manifested itself as a notice of denial. Staff Questions Response at 3. In the face of this acknowledgment, we can only conclude that the Staff's action in not providing the notice under this regulation reasonably engenders a question about the intent of those who issued the license. And, as we noted earlier, *see supra* p. 330, if an inquiry into the state of mind of one of the parties to an instrument is needed, a material issue of fact exists that renders summary disposition inappropriate.

Consequently, we deny the Staff's request for summary disposition regarding Joint Issue 1. In doing so, however, we do not preclude either party from again seeking summary disposition on this issue once any appropriate discovery has been conducted.

⁴ Given our conclusion that section 13 does not incorporate the IRCC application by reference as Dr. Bauer maintains, it seems only appropriate to consider exactly what the language of that section does. As a license "condition," this section should either impose a specific qualification on the standard terms of the license or create particular duties or requirements for the licensee beyond those specified under the standard terms of the license. In this instance, the standard terms of the license provide that the license is issued "in reliance on statements and representations heretofore made by the licensee." Staff Dispositive Motion, Attach. 1. By providing in addition that the license is "based on" the statements and representations in the IRCC March 1988 application, section 13 apparently has the effect of limiting the scope of the Staff's reliance in granting the application to that particular document. This, of course, would have the additional effect of limiting the scope of the licensee representations that could be actionable in initiating an enforcement proceeding relative to the grant of the IRCC license.

⁵ Because we have before us only the Staff's dispositive motion on Joint Issue 1, we are not in a procedural posture to resolve Dr. Bauer's assertion that the Staff's failure to provide notice under 10 C.F.R. § 2.103(b) compels a legal finding in his favor on that issue.

II. RECONSIDERATION REQUEST

A. Background

In LBP-94-40, 40 NRC at 337, we also ruled on the Staff's request to dismiss Bauer Issues 48 and 49. As we observed there, those issues presented the general questions whether the provisions of 10 C.F.R. Part 35, Subpart G, apply to the use of iridium-192 as a remote afterloader sealed source in high dose rate (HDR) brachytherapy treatments and, if so, whether the specific survey requirements of the provisions of Subpart G — in particular 10 C.F.R. § 35.404(a) — apply to such treatments.⁶ Although noting that we had dismissed similar issues in the related *Oncology Services Corp.* proceeding because they were better stated in other issues, we found that dismissal in this proceeding was not appropriate given that not all those other issues were included here. We decided that the better course in this proceeding was to combine the essential elements of these issues with Bauer Issue 8, which the Staff had not sought to dismiss.⁷ Bauer Issue 8, which asked whether any of the applicable survey requirements of Subpart G control the "reasonableness" standard of 10 C.F.R. § 20.201(b)(2),⁸ was revised as follows:

8. Regarding the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans ("HDR"):
 - a. Is 10 C.F.R. Part 35, Subpart G, including the specific survey requirement in section 35.404(a), applicable?
 - b. As a matter of law, does fulfilling any of the applicable survey requirements in 10 C.F.R. Part 35, Subpart G, control and/or satisfy the reasonableness standard in 10 C.F.R. § 20.201?

⁶ Dr. Bauer set forth those issues as follows:

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

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

Joint Prehearing Report (June 24, 1994) at 6 [hereinafter Prehearing Report].

⁷ As originally proposed, Bauer Issue 8 asked "[w]hether fulfillment of any applicable survey requirement of 10 C.F.R. Part 35, Subpart G, as a matter of law, either controls and/or satisfies the reasonableness standard set forth in 10 C.F.R. § 20.201?" Prehearing Report at 2.

⁸ At the time of the November 1992 incident that is the subject of the portion of the Staff's May 1994 order pertinent to Bauer Issue 8, 10 C.F.R. § 20.201, entitled "Surveys," provided in subsection (b) that "[e]ach licensee shall make or cause to be made such surveys as (1) may be necessary for the licensee to comply with the regulations in this part, and (2) are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present." With the revision of 10 C.F.R. Part 20 in 1994, section 20.201 was replaced by an analogous provision now found in 10 C.F.R. § 20.1501. See LBP-94-40, 40 NRC at 335 n.6.

40 NRC at 339. Further, because the revision of this issue was at our instigation, we suggested that the parties could seek reconsideration of our determination. *See id.* at 337 n.9.

In a December 19, 1994 petition, the Staff asks that we reconsider this modification of Bauer Issue 8 in part. The Staff states that it has no objection to subpart b of that issue as an expression of the "section 35.404(a) compliance" issue. It does, however, protest that subpart a of Bauer Issue 8 regarding the general applicability of 10 C.F.R. Part 35, Subpart G, to this proceeding should be dismissed as irrelevant. This is so, the Staff maintains, because even if the response to Bauer Issue 8, subpart a, is "yes," Dr. Bauer would not be entitled to any relief given that the May 1994 enforcement order at issue did not allege he violated Part 35, Subpart G. *See* NRC Staff's Petition for Partial Reconsideration (Dec. 19, 1994) at 4-5.

In his January 4, 1995 response, Dr. Bauer contends that Staff's objection to subpart a of Bauer Issue 8 is inconsistent with the statement of charges against him as outlined in the May 1994 enforcement order. Dr. Bauer notes that in the order the Staff claims he failed to conduct an appropriate survey under 10 C.F.R. § 20.201 during a purported brachytherapy remote afterloader misadministration incident in November 1992. To address this Staff claim, he asserts that it is necessary that he be able to make a showing under both subparts of Bauer Issue 8. According to Dr. Bauer, a determination under Bauer Issue 8, subpart b, about whether any of the applicable Subpart G survey requirements, including section 35.404(a), satisfies the reasonableness standard in section 20.201(b)(2) is "almost meaningless" without a determination under Bauer Issue 8, subpart a, about whether Subpart G is applicable to brachytherapy remote afterloader HDR treatments. *See* Answer in Opposition to NRC Staff's Petition for Partial Reconsideration (Jan. 4, 1995) at 6-9 [hereinafter *Bauer Reconsideration Answer*].

Responding to the parties' filings, in a memorandum and order issued January 17, 1995, we noted the possible merit of Dr. Bauer's point about the necessity of a determination on Bauer Issue 8, subpart a, given that section 35.404(a) was a part of Part 35, Subpart G, at the time of the misadministration incident. Accordingly, we gave the Staff an additional opportunity to address Dr. Bauer's assertions regarding the relevance of subpart a, to which Dr. Bauer could submit a reply. *See* Memorandum and Order (Permitting Additional Filings on Staff Petition for Partial Reconsideration) (Jan. 17, 1995) at 3-4 (unpublished). In its response to the Board's order, the Staff declares that Bauer Issue 8, subpart a, is irrelevant because a determination about whether a particular survey regulation would satisfy section 20.201(b) does not require a demonstration that the regulation is applicable to the medical procedure being performed with licensed material. According to the Staff, to show compliance with section 20.201(b), Dr. Bauer need only demonstrate that he performed the survey described in

the particular regulation, such as section 35.404(a), and that this survey was reasonable under the circumstances within the meaning of section 20.201(b)(2). See NRC Staff's Response to Board Order Dated January 17, 1995 (Jan. 24, 1995) at 3-8.

In his reply, Dr. Bauer continues to maintain that the Staff's attempt to dismiss Bauer Issue 8, subpart a, is wholly misplaced. According to Dr. Bauer, subpart b of Bauer Issue 8 that the Staff accepts simply asks for an answer to the question "If Dr. Bauer has satisfied the NRC's survey requirements that apply to HDR, has he, *as a matter of law*, acted reasonably under section 20.201?" Dr. James Bauer's Response to the NRC Staff's Response to Board's Order Dated January 17, 1995 (Jan. 31, 1995) at 5 (emphasis in original). To answer this question, he asserts, one must know what survey requirements apply to HDR brachytherapy, which is precisely the answer Bauer Issue 8, subpart a, is intended to provide. He suggests that Staff's continued attempt to avoid the question posed by Bauer Issue 8, subpart a, is a result of its misplaced attempt to introduce an element of subjective "reasonableness" into the discussion of subpart b, which he finds total inapposite given that the issue by its very terms seeks a determination "as a matter of law." Dr. Bauer concludes by stating that through Bauer Issue 8 what he intends to prove is that by having complied with the specific prevailing NRC regulations applicable to HDR brachytherapy, as a matter of law, he behaved reasonably under 10 C.F.R. § 20.201. See *id.* at 6-9.

B. Analysis

A party contesting a Staff enforcement order is free to propose any legal or factual issue it wants to litigate, at least so long as that issue bears some relationship to the bases set forth in support of the order by tending to establish, either alone or with other issues, that some explicit or implicit legal or factual predicate for the order should not be sustained. See LBP-94-40, 40 NRC at 336 n.7. To begin the process of defining and resolving the matters for litigation in this proceeding, we mandated that the initial joint prehearing report include a statement of central issues. The parties' dispositive motions regarding some of those issues are an important step in the ongoing process of issue denotation and resolution.

As for Bauer Issue 8, the Staff's reconsideration motion and the subsequent filings by both parties have helped give the Board a clearer picture of the parameters of what we have already recognized is an important matter for Dr. Bauer — the question of "section 35.404(a) compliance."⁹ One thing that has emerged

⁹ As part of his response to the Staff's reconsideration request, Dr. Bauer contends the Staff failed to meet the standards governing reconsideration under 10 C.F.R. § 2.771(b) by merely repeating, without new information, arguments it previously made rather than elaborating upon or refining arguments previously advanced. See Bauer

from the parties' recent filings is that they are working from fundamentally different premises in defining what this matter entails. The Staff's position is that in proving overall compliance with the section 20.201(b)(2) requirement that a licensee must make such surveys as are "reasonable under the circumstances," licensee compliance with any particular NRC regulatory provision is merely a factor that is to be weighed along with the other "relevant" circumstances involved. As Dr. Bauer correctly points out, under Staff's analysis there is a subjective factor in each section 20.201(b)(2) determination because a "reasonableness" finding always depends on weighing all the relevant circumstances, which may include any pertinent regulatory compliance or noncompliance. Dr. Bauer, on the other hand, maintains that if he has complied with the agency's regulatory provisions "applicable" to HDR brachytherapy treatment surveys, including section 35.404(a), as a matter of law he is entitled to a determination that he has satisfied the section 20.201(b)(2) standard of "reasonable under the circumstances." For him, actions that do not involve a violation of the applicable regulatory standards must be "reasonable" per se under section 20.201(b)(2). As such, a ruling on which regulations are "applicable" is relevant to his legal theory.

In resolving this matter, we must first make clear our understanding of several terms used by the parties. As we discern it, in referring to regulatory provisions as "applicable," Dr. Bauer is describing those regulations that the agency intends to govern the conduct of a certain type of activity. In this instance, the activity in question is the conduct of surveys relating to the use of iridium-192 in a brachytherapy remote afterloader to provide HDR treatments. On the other hand, the Staff's reference to "relevant" regulatory requirements encompasses both those provisions that are and are not "applicable," as Dr. Bauer would define them. According to the Staff, a regulation need not be "applicable" to the licensed activity in question to be "relevant" to the reasonableness determination under section 20.201(b). Essentially, in making such a reasonableness determination under the Staff's analysis, an otherwise inapplicable standard may in fact be relevant under the circumstances so as to be worthy of consideration in the balancing process that is to be used to arrive at that determination.

With these definitions in mind, for purposes of resolving this matter we will assume that the Staff's interpretation of section 20.201(b)(2) is correct, i.e., that there is a subjective factor in each section 20.201(b)(2) determination because a "reasonableness" finding always depends on weighing all the relevant circumstances. In doing so, we also assume that the Staff is correct that any

Reconsideration Answer at 4-5. Although the substance of the Staff's motion makes this a close question, because it was the Board's own action in reformulating Bauer Issue 8 that precipitated the motion, we are inclined to afford the Staff somewhat more latitude in this instance.

pertinent regulatory compliance or noncompliance is relevant to such a finding, regardless of whether the regulation is "applicable" under Dr. Bauer's definition of that term. Yet, even accepting the Staff's arguments about the nature of the finding under section 20.201(b), the fact that a regulation is "applicable" to the licensed activity involved would, in the absence of information to the contrary, establish that it is among the relevant circumstances that should be considered in making a reasonableness determination. As a result, we cannot say that the question of "applicability" posed by subpart a of Bauer Issue 8 is totally irrelevant to this proceeding even under the Staff's analysis of what is entailed in making a "reasonableness" finding under section 20.201(b).

Accordingly, we deny the Staff's motion that we reconsider our ruling in LBP-94-40 amending Bauer Issue 8 and delete subpart a. Nonetheless, based on the parties' filings and the language of Bauer Issue 8, subpart b, which refers only to "applicable survey requirements," we conclude that an additional modification of Bauer Issue 8, subpart a, is appropriate to make it clear that the focus of any "applicability" determination should be the survey provisions of 10 C.F.R. Part 35, Subpart G.¹⁰

III. CONCLUSION

Because we conclude there are material factual issues in dispute regarding the Staff's intent in issuing the IRCC license authorizing the possession and use of strontium-90, we deny the Staff's request for summary disposition of Joint Issue 1. We also deny the Staff's petition for reconsideration of our prior addition of subpart a to Bauer Issue 8. We do so because we conclude that, even under the Staff's interpretation of 10 C.F.R. § 20.201(b), the question of a regulation's "applicability" to the licensed activity at issue has some relevance to the "reasonableness" determination that must be made under that section. Finally, we find that, consistent with the parties' filings and the language of Bauer Issue 8, subpart b, an additional modification of Bauer Issue 8, subpart a, is warranted to narrow consideration of any "applicability" issues to the survey requirements in 10 C.F.R. Part 35, Subpart G.

For the foregoing reasons, it is this thirty-first day of May 1995, ORDERED, that

¹⁰ We also note that in this decision we need not and do not address whether, as Dr. Bauer asserts, an affirmative answer to the "applicability" question in Bauer Issue 8, subpart a, along with a finding that there has been compliance with the "applicable" regulation or regulations must, as a matter of law, result in a determination of "reasonableness" under 10 C.F.R. § 20.201(b)(2).

1. The portion of the Staff's July 29, 1994 motion for summary disposition requesting a ruling in its favor on Joint Issue 1 is *denied*.
2. Dr. Bauer's March 2, 1995 petition to supplement his response to the Board's questions posed in LBP-94-40 is *granted*.
3. The Staff's December 19, 1994 petition for reconsideration of our ruling in LBP-94-40 modifying Bauer Issue 8 by adding subpart a is *denied*.
4. Subpart a of Dr. Bauer Issue 8 is further *amended* to read as follows:
 8. Regarding the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans ("HDR"):
 - a. Are any of the specific survey requirements in 10 C.F.R. Part 35, Subpart G, including the specific survey requirement in section 35.404(a), applicable?
 - b. As a matter of law, does fulfilling any of the applicable survey requirements in 10 C.F.R. Part 35, Subpart G, control or satisfy the reasonableness standard of 10 C.F.R. § 20.201?

THE ATOMIC SAFETY
AND LICENSING BOARD¹¹

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 31, 1995

¹¹ Copies of this memorandum and order are being sent this date to counsel for Dr. Bauer by facsimile transmission and to Staff counsel by E-mail transmission through the agency's wide area network system.

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-335

50-389

50-250

50-251

FLORIDA POWER AND LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4; and
St. Lucie Nuclear Power Plant,
Units 1 and 2)

May 11, 1995

The Director of the Office of Enforcement has denied petitions filed by Thomas J. Saporito, Jr., requesting that the NRC: (1) submit an *amicus curiae* brief to the Department of Labor regarding his claim that Florida Power & Light Co. (FP&L) retaliated against him for engaging in protected activities; (2) institute a show-cause hearing to modify, suspend, or revoke FP&L's licenses to operate Turkey Point; (3) institute a show-cause proceeding to order the FP&L to provide him with a "make whole" remedy; (4) take escalated enforcement action against FP&L and certain FP&L employees for engaging in retaliation; (5) conduct an investigation of FP&L to determine the involvement of each and every individual in the discrimination against him, and report the results to the Department of Justice; and (6) conduct an investigation to determine if the overall work environment at Turkey Point and St. Lucie nuclear stations is free from hostility and encourages employees to freely and confidentially contact the NRC without going through the normal chain of command. The reasons for the denial are fully set forth in the Decision.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On March 7, 1994, Thomas J. Saporito, Jr. (Petitioner), filed a request for enforcement action pursuant to 10 C.F.R. § 2.206 (Petition). The Petition requested that the NRC: (1) submit an *amicus curiae* brief to the Department of Labor (DOL) regarding his complaints numbered 89-ERA-007 and 89-ERA-017 concerning the Petitioner's claim that Florida Power & Light Company (FP&L or Licensee) retaliated against him for engaging in protected activity during his employment at Turkey Point Nuclear Generating Plant in violation of 10 C.F.R. § 50.7; (2) institute a show-cause proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke Florida Power & Light Company's licenses authorizing the operation of Turkey Point; and (3) institute a show-cause proceeding pursuant to section 2.202 and order the Licensee to provide the Petitioner with a "make whole" remedy, including but not limited to, immediate reinstatement to his previous position, back wages and front pay with interest, compensatory damages for pain and suffering, and a posting requirement to offset any "chilling effect" Petitioner's discharge may have had on other employees at the Turkey Point and St. Lucie stations.

On March 13, 1994, Petitioner supplemented the Petition, reiterating the three requests noted in the preceding paragraph and providing additional information.

On April 7, 1994, Petitioner again supplemented the Petition providing additional information, including a chronology of events that relate to his request for action against FP&L. Petitioner also described what he believes should be the content of the *amicus curiae* brief to DOL, including the fact that a licensee employee can go directly to NRC with safety concerns, that NRC instructed Petitioner not to divulge his safety concerns to FP&L, that Petitioner's conduct in refusing to disclose his safety concerns to the Licensee should not be considered insubordinate, and that FP&L engaged in illegal conduct when its Vice President interrogated Petitioner about his safety concerns.

On June 12, 1994, Petitioner supplemented the Petition a third time with additional arguments responding to FP&L's response to his petition and stated that the discrimination is a continuing violation.

On June 7, 1994, Petitioner filed another request for enforcement action against FP&L and certain of its employees pursuant to section 2.206. The June 7, 1994 Petition incorporated much of the material and arguments of the Petition originally submitted on March 7, 1994, and requested, in addition to a reiteration of the request for a show-cause proceeding already requested in the March 7 Petition, that: (1) NRC take escalated enforcement action against FP&L and certain FP&L employees for violating NRC requirements under section 50.7 in

retaliating against Petitioner for his having engaged in protected activities during his employment at Turkey Point in 1988; (2) NRC conduct an investigation of FP&L to determine the involvement of each and every individual FP&L employee in the discrimination against Petitioner and forward the results of that investigation to the Department of Justice; and (3) NRC conduct an investigation to determine if the overall work environment at Turkey Point and St. Lucie nuclear stations is free from hostility and encourages employees to freely and confidentially contact the NRC with perceived safety concerns or to bypass the FP&L chain of command in raising those concerns to the NRC without first apprising FP&L management of the safety concerns.

On June 28, 1994, Petitioner supplemented his June 7 Petition with a document entitled "Complainant's Answer in Opposition to Respondent FPL's [FP&L's] Motion to File Brief Dated June 20, 1994." This supplement described the activities in the DOL deliberative process relative to Petitioner's complaints filed with that agency, restated Petitioner's request for escalated enforcement action against the Licensee, but did not otherwise provide any additional requests for action.

On June 30, 1994, Petitioner again supplemented his June 7 Petition to describe discussions that he had with the NRC Office of Investigations regarding the alleged chilling effect at FP&L facilities that was created as a direct result of his termination. Petitioner concluded the supplement by requesting an NRC investigation into whether a chilling effect exists at FP&L facilities.

II. BACKGROUND

As a basis for his March 7, 1994 request, as supplemented, Petitioner noted that since it is NRC's policy to defer enforcement action until the Department of Labor (DOL) Administrative Law Judge (ALJ) has issued a decision, and since the ALJ issued a decision in Petitioner's cases in June 1989,¹ the NRC could now "take action as requested above against . . . Florida Power & Light Company." Furthermore, Petitioner stated that the incidents and adverse actions establish a *prima facie* case of hostile work environment and that the NRC cannot tolerate a hostile work environment at Turkey Point. Petitioner also stated that "[l]icensee employees have been dissuaded from raising safety issues . . . to the NRC because of FPL's [FP&L's] continuing retaliation against employees who do so." Petitioner asserts that FP&L's "interrogations of Petitioner about

¹ In a Recommended Decision and Order (RD&O) issued on June 30, 1989, the DOL ALJ found that Petitioner failed to establish a *prima facie* case of discrimination and recommended dismissal of Petitioner's complaint. This RD&O was reversed and remanded in a decision issued by the Secretary of Labor on June 3, 1994. On July 22, 1994, Respondent FP&L filed a motion for reconsideration which was denied by the Secretary of Labor on February 16, 1995.

his protected activity in 1988 were illegal conduct under the law and NRC regulations under Title 10 of the *Code of Federal Regulations*."

As supplemented by the June 7, 1994 request, Petitioner's basis for requesting the enforcement action includes a reference to the Secretary of Labor's order on June 3, 1994, remanding Petitioner's DOL complaints to the ALJ for reconsideration.

III. DISCUSSION

Petitioner requested that the NRC submit an *amicus curiae* brief with the Department of Labor "regarding issues of fact in DOL Case Nos. 89-ERA-7/17 . . . concerning the Licensee's retaliatory conduct towards Petitioner during Petitioner's period of employment at Licensee's Turkey Point nuclear station in 1988 as a direct or indirect result of Petitioner having engaged in 'protected activity' under 10 C.F.R. 50.7." The Petitioner requested that the *amicus curiae* brief make clear that the NRC instructed Petitioner *not* to divulge his concerns to FP&L² and that Petitioner's conduct should not be considered insubordinate.

It should be noted that, under the Atomic Energy Act of 1954 and NRC regulatory provisions, the primary responsibility for protecting the public health and safety in the operation of a nuclear facility lies with the licensee who is authorized to possess and use the facility. Consequently, licensees must be alert at all times to potential safety problems and should make diligent efforts to discover and resolve such problems when there are indications that they may exist. Thus, it may at times be difficult to balance the licensee's obligation to uncover and correct safety problems with a licensee employee's right to bypass the chain of command and take safety concerns directly to the NRC.

The Secretary of Labor issued a decision on June 3, 1994, in which he held that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provision of the Energy Reorganization Act of 1974." Consequently, the

²The Petitioner was not instructed *not* to divulge his concerns to FP&L. On December 6, 1988, the Petitioner contacted the Region II Senior Allegation Coordinator and asked if the NRC wanted him to provide a copy of his allegation material to the Licensee. The Petitioner was asked by the Senior Allegation Coordinator if he wanted to provide the material and the Petitioner responded that he had lost all confidence that the Licensee would resolve his concerns. The Petitioner further stated that he wanted to cooperate with the NRC and that if the NRC wanted him to provide a copy of the material to the Licensee he would do so.

On December 7, 1988, after consulting with Region II management, the Senior Allegation Coordinator attempted to contact the Petitioner to answer his question as to whether the NRC wanted him to provide his material to the Licensee. The Senior Allegation Coordinator spoke with the Petitioner's wife because the Petitioner was not available. The Senior Allegation Coordinator informed the Petitioner's wife that a review of the material indicated there was some information that the NRC would not provide to the Licensee. The Petitioner's wife was asked to inform the Petitioner that he did not have to provide a copy of his material to the Licensee if he did not want to, but that he was free to do so if he so desired.

Secretary ruled against FP&L for taking adverse action against the Petitioner for refusing to reveal his safety concerns to management.

On August 25, 1994, the NRC Chairman wrote to the Secretary of Labor expressing concern with the breadth of the ruling in that decision, noting that in certain circumstances employees have a duty to inform their employers of matters that could bear on public and worker health and safety.³ The Secretary treated the letter as an *amicus* brief for the purpose of deciding a motion for reconsideration. The motion was denied on February 16, 1995. Because the Secretary ruled in favor of Petitioner on the issue of whether FP&L could legitimately take adverse action against him because of his refusal to report safety concerns to management, the request for an *amicus* brief addressing the factual circumstances surrounding that incident is denied.

The Petitioner also requested that the *amicus curiae* brief include a statement that FP&L engaged in illegal conduct by interrogating Petitioner. NRC cannot conclude that FP&L's inquiry of Petitioner on his safety concerns, in and of itself, is illegal. As previously mentioned, licensees have a responsibility — indeed an obligation — to pursue and resolve safety problems and an employee's public announcement, as in this case, that there are significant safety problems that must be addressed should cause any reasonable licensee to make efforts to discover, address, and resolve such concerns. Questioning an employee who has publicly stated that there are safety problems, in and of itself, would not be illegal; however, the Secretary of Labor has ruled that actions taken against the employee can constitute a violation of section 211 of the Energy Reorganization Act if the alleged said that he intended to report his concerns to the NRC. In the particular circumstances of this case, and noting that the ALJ is once again reviewing the facts and will make a recommendation to the Secretary of Labor regarding whether the Licensee had nondiscriminatory reasons for terminating Petitioner, the NRC does not at this time conclude that FP&L's questioning of the Petitioner in an attempt to discover Petitioner's safety concerns was a violation; therefore, this portion of the request is denied.

The Petitioner requested that the NRC initiate a show-cause proceeding pursuant to section 2.202 to modify, suspend, or revoke FP&L licenses authorizing the operation of Turkey Point; however, he did not specifically address the

³ The NRC published a draft statement of policy in the *Federal Register* titled "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation." This draft policy reiterated NRC's position that "except in limited fact-specific instances, advising the Commission of safety information would not absolve an employee of his or her duty also to inform the employer of matters that could bear on public, including worker, health and safety. Examples of those exceptions would include situations in which the employee had a reasonable expectation that he or she may be subject to retaliation for raising an issue to his or her employer even if an alternative internal process is used, situations where the licensee has threatened adverse action for identifying noncompliances or other safety concerns, and circumstances in which the employee believes that supervisors and management may have engaged in wrongdoing and that raising the matter internally could result in a cover-up or destruction of evidence." (60 Fed. Reg. 7592)

basis for this request in his Petition. Absent a specific description of the basis, therefore, the NRC assumes that Petitioner is requesting this action due to the Licensee's alleged discrimination and creation of a chilling effect in terminating Petitioner's employment. The NRC is aware that the Secretary of Labor has remanded the Petitioner's complaints to the ALJ, reversing in part the ALJ's finding that the Petitioner's acts were not protected activity and finding that FP&L violated the Energy Reorganization Act when it discharged Petitioner for his refusal to reveal his safety concerns to the Licensee. However, the Secretary directed the ALJ to "review the record . . . and submit a new recommendation . . . on whether FP&L would have discharged [Petitioner] for the unprotected aspects of his conduct." Therefore, the June 3, 1994 order does not constitute a final decision by the Secretary of Labor in this case, since the Secretary has asked the ALJ to consider whether the Licensee might have had additional, nondiscriminatory reasons for discharging the Petitioner. The Petitioner's basis for requesting enforcement action, i.e., the ALJ's RD&O (which did not find discrimination) and the Secretary's order (which remanded the case to the ALJ to determine whether there were nondiscriminatory reasons for the termination) is insufficient to justify enforcement action at this time. Until the ALJ issues a revised recommendation on remand, there is insufficient basis to initiate a show-cause proceeding or take other enforcement action requested by the Petitioner here, including actions against specific FP&L employees. Therefore, this portion of the request is denied. The NRC will monitor the DOL proceeding on remand to the ALJ and determine, based on further DOL findings and rulings in these cases, whether enforcement action against the Licensee is warranted.⁴

With respect to Petitioner's request that NRC initiate a show-cause proceeding to, among other things, require his immediate reinstatement, back pay, and compensatory damages, the Energy Reorganization Act (ERA) provides authority to the Department of Labor to order that such personal remedies be provided to individuals discriminated against for engaging in protected activities. The ERA does not extend this authority to the NRC. Remedies such as reinstatement, back pay, and compensatory damages to the individual must result from the DOL process and not an NRC show-cause proceeding. Accordingly, this portion of Petitioner's request is denied.

As noted above, the request for enforcement action against the Licensee is denied pending a finding by the ALJ as to whether discrimination occurred. Therefore, for the same reasons stated above, the Petitioner's request that NRC take escalated enforcement action against certain FP&L employees for violating NRC requirements is denied.

⁴In view of my determination that there is not a sufficient basis for enforcement action against the licensee at this time, the Petitioner's claim that the Licensee's action against him is a continuing violation need not be considered here.

With respect to the Petitioner's request that the NRC initiate an investigation to determine the extent to which FP&L employees were involved in the discrimination against the Petitioner, the NRC intends to await the outcome of the DOL proceeding to determine whether an additional investigation by the NRC is warranted. Therefore, this portion of the request, as well as Petitioner's request that the results of such investigation be forwarded to the Department of Justice, are denied.

The Petitioner also requested that the NRC investigate whether the overall work environment at Turkey Point and St. Lucie nuclear stations is free from hostility and that the station employees feel free to report safety concerns to the Licensee or NRC. The NRC inspected the Turkey Point and St. Lucie Nuclear Safety Speakout Program for handling employee nuclear safety concerns in September and October 1993 (NRC Inspection Report Nos. 50-250/93-23, 50-251/93-23, 50-335/93-21, 50-389/93-21). Also, the NRC continuously monitors complaints filed by employees at the licensees' facilities across the nation to determine whether the complaints filed with, and substantiated by, the DOL warrant some action by the NRC. The NRC inspection results and the history of discrimination complaints at the Florida Power & Light Company's Turkey Point and St. Lucie nuclear stations do not warrant additional action by the NRC at this time. Therefore, this portion of the request is denied.

IV. CONCLUSION

As explained above, the Petitioner has not raised any issues that would warrant the requested actions. Therefore, the Petitions filed on March 7 and June 7, 1994, as supplemented by letters dated March 13, April 7, June 12, June 28, and June 30, 1994, are denied. The Staff will continue to monitor the case pending before the Department of Labor.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 11th day of May 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

ALL LICENSEES

May 25, 1995

The Director of the Office of Enforcement has denied a petition filed by Thomas J. Saporito, Jr., requesting that the NRC issue a generic letter of instruction to all licensees requiring them to review station operating procedures in order to ascertain whether the procedures contain any restrictions that would prevent or dissuade a licensee employee from bringing perceived safety concerns directly to the NRC without following the normal chain of command. In the petition, he also requested that each licensee be required to report to the Commission, under oath or affirmation, that the review has been completed, that its employees are free to bring concerns to the NRC without following the normal chain of command, and that this information has been communicated to all of its employees. The reasons for the denial are fully set forth in the Decision.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On March 8, 1995, Thomas J. Saporito, Jr. (Petitioner), filed a request for action pursuant to 10 C.F.R. § 2.206. Specifically, Petitioner requested that NRC issue a generic letter of instruction to all licensees requiring them to review their station operating procedures to determine whether those procedures include any restrictions that would prevent or dissuade a licensee employee from bringing perceived safety concerns directly to the NRC without following the normal chain of command. The petition requests that each licensee be required to

report to the Commission, under oath or affirmation, that the review has been completed, that its employees are free to bring concerns to the NRC without following the normal chain of command, and that this information has been communicated to all of its employees.

II. BACKGROUND

As a basis for his request, Petitioner cites the decision by the Secretary of Labor on June 3, 1994, *Saporito v. Florida Power & Light Co.*, 89-ERA-007 and 89-ERA-017, in which the Secretary concluded, in part, that “[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the ‘chain of command’ to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provision of the Energy Reorganization Act of 1974, as amended.”¹ Slip op. at 1.

III. DISCUSSION

Petitioner cites the Secretary’s June 3 decision as support for Petitioner’s contention that “[a]ny licensee policy or procedure preventing or dissuading employees from bypassing the normal ‘chain of command’ at a licensee’s station and *directly* contacting the NRC to report perceived safety concerns is illegal . . . and fosters an inherent ‘CHILLING EFFECT’ . . . in violation of NRC requirements.” The NRC addressed this issue on August 25, 1994, when the NRC Chairman wrote a letter to the Secretary of Labor which noted with concern the fact that the Secretary’s broad statement, upon which Petitioner relies, could be applied, without qualification, outside the context of the particular facts involved in that case. The Chairman stated that the licensees, not the NRC, are in the best position to deal promptly and effectively with concerns raised by employees and that except in limited fact-specific instances, advising the Commission of safety information would not absolve an employee of his or her duty also to inform the employer of matters that could bear on public and worker health and safety.

In his February 16, 1995 Order, denying reconsideration of the June 3 decision, the Secretary said that it would not be accurate to interpret his June 3 decision as providing an employee an “absolute right” to refuse to report safety concerns to the plant operator (slip op. at 2-3). Rather, the Secretary stated that

¹ While finding that the discharge of an employee for refusing to reveal his safety concerns to a licensee could be a violation of the Energy Reorganization Act, the Secretary of Labor did not reach a final decision as to whether the Licensee in Petitioner’s case may have had other, legitimate, reasons to terminate Petitioner, but remanded the case to the Administrative Law Judge to review the record and submit a new recommendation on that issue.

the employee's right to bring information directly to the NRC and his duty to inform management of safety concerns "are independent and do not conflict" (slip op. at 3). These statements clearly indicate that whether a refusal to provide information to management is protected must be determined on a case-by-case basis.

Furthermore, the Petitioner has offered no evidence to suggest that there is widespread discrimination against employees who bypass the chain of command and report their concerns directly to the NRC. The NRC requires, in 10 C.F.R. § 19.11(c), that all licensees and applicants for a specific license post NRC Form 3, "Notice to Employees," which describes employee rights and protections. In addition, 10 C.F.R. § 50.7 and associated regulations were amended in 1990² to prohibit agreements and/or conditions of employment that would restrict, prohibit, or otherwise discourage employees from engaging in protected activity. These measures appear to be sufficient to: (1) alert employees in the nuclear industry that they may take their concerns to the NRC, and (2) alert licensees that they may not take adverse action for an employee's exercising the right to take concerns directly to the NRC. Without Petitioner establishing a factual basis to doubt the effectiveness of these measures, and without the NRC possessing independent evidence to reach such a conclusion on its own, the NRC cannot conclude that there is a sufficient cause to issue a generic letter as requested by the Petitioner.

IV. CONCLUSION

As explained above, the Petitioner has not established sufficient basis to require the requested actions. Therefore, the petition filed on March 8, 1995, is denied.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute final action of the Commission

² In a recent decision, the Secretary of Labor cited the 1990 amendments to section 50.7 as effectively prohibiting any terms or conditions of employment that would prohibit, restrict, or otherwise discourage an employee from, among other things, providing information to the NRC. *John DelCore v. W.J. Barney Corp.*, 89-ERA-038, slip op. at 8-9 (Apr. 19, 1995). The Secretary emphasized that such attempts at restricting an employee "are not now prevalent in the nuclear industry due to [the] intervening regulation." Slip op. at 2.

25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 25th day of May 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. 50-295
50-304

COMMONWEALTH EDISON COMPANY
(Zion Nuclear Power Station,
Units 1 and 2)

May 26, 1995

The Director of the Office of Nuclear Reactor Regulation denies a petition submitted pursuant to 10 C.F.R. § 2.206 by Robert K. Rutherford and forty-three other security guards at the Zion Nuclear Power Station (Petitioners) requesting action with regard to the Zion Nuclear Power Station, Units 1 and 2, of the Commonwealth Edison Company (ComEd or Licensee). Petitioners requested that the Nuclear Regulatory Commission (NRC) rethink and withdraw its approval of the October 7, 1994 revisions to the Zion security plan, and demand greater justification from both the Licensee and its security contractor concerning the proposal to reduce the number of armed guards and the defense of the Zion facility. Petitioners also requested that the manning and positioning of armed guards be reconsidered and increased to a more sound defensive position. The petition is denied because Petitioners raised no substantial safety concern regarding the revised security plan for the Zion facility.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated November 3, 1994, Mr. Robert K. Rutherford and forty-three other security guards at the Zion Nuclear Power Station (Petitioners) requested that the Nuclear Regulatory Commission (NRC) rethink and withdraw its approval of the October 7, 1994 revisions to the Zion Nuclear Power

Station security plan, and demand greater justification from both Commonwealth Edison Company (ComEd or Licensee) and its security contractor concerning the proposal to reduce the number of armed guards and the defense of the Zion Nuclear Power Station. Petitioners also requested that the manning and positioning of armed guards be reconsidered and increased to a more sound defensive position.

As the bases for these requests, Petitioners allege that (1) the revised Response Team Member (RTM) plan degrades actual plant security to the point of folly; (2) the proposed qualifications for the RTM plan are causing employee turnover, undue stress, labor problems, and inconsistency in plant defense; (3) monetary considerations should not take priority over plant defense and administrative jobs should not replace front-line security guards; (4) the total disarming of the owner-controlled areas and protected areas is highly detrimental to plant defense and public safety; and (5) modern armaments and increased hostility among the general public as well as potential terrorist threats from either domestic and/or international sources have not abated. In addition, a copy of the same petition was sent to United States Senator Paul Simon of Illinois, who referred it to the Department of Energy (DOE). The DOE forwarded the copy of the petition to the NRC. On this copy of the petition, a handwritten note stated the following: "Low level waste is now being stored in the owner controlled area with no security patrols except a casual tour once per eight hour shift."

By letter dated December 22, 1994, the NRC acknowledged receipt of the petition and indicated that the NRC Staff would take action within a reasonable time. Commonwealth Edison Company responded to the petition by letter dated February 27, 1995. Petitioners replied to the ComEd response by letter dated February 28, 1995, supplementing the petition with further detail.

The Licensee's letter briefly described the revision to the security plan contained in its October 7, 1994 letter and explained that although the total number of guards on site will be decreased, the number of armed response personnel at Zion Station has not been changed and will continue to exceed the minimum requirements of 10 C.F.R. § 73.55(h)(3). The Licensee's February 27, 1995 letter also stated that certain administrative functions such as those performed by x-ray and metal detector machine operators, security badge issue personnel, and personnel search will be performed by watchmen. It went on to say that four of the six ComEd nuclear sites implemented the RTM plan in 1994, another implemented it in January 1995, and Zion is scheduled for implementation in June 1995. In addition to this general description of the revision to the security plan, the letter addressed each point in the petition.

For the reasons discussed below, I have concluded that the Petitioners have not raised any substantial safety concern, and I, therefore, deny the petition.

II. BACKGROUND

The Licensee's original security plan, submitted in a letter dated November 18, 1977, and supplemented in letters dated May 26, 1978, and June 25, 1978, included an armed response commitment. The NRC Staff reviewed the security plan against the general performance requirements of 10 C.F.R. § 73.55(a) and the specific requirements of 10 C.F.R. § 73.55(b) through (h). In particular, the NRC Staff concluded that the physical security organization met the requirements of 10 C.F.R. § 73.55(b)(1) regarding the written agreement with the security contractor and the requirements of 10 C.F.R. § 73.55(b)(2) regarding the onsite presence of a full-time member of the security organization with the authority to direct physical protection activities of the security organization. Based on a review, principally of the size of the site, the location of the vital areas, and the response capability of the local law enforcement agencies, the NRC Staff also concluded that the security plan met the response requirements of 10 C.F.R. § 73.55(h). In particular, the number of guards in the plan substantially exceeded the requirements of section 73.55(h)(3) concerning the minimum number of guards on site. As defined in 10 C.F.R. § 73.2, a guard is a uniformed individual armed with a firearm. A watchman is an individual, not necessarily uniformed or armed with a firearm, who provides protection for a plant in the course of performing other duties, and armed response personnel are persons who are uniformed, whose primary duty in the event of attempted radiological sabotage shall be to respond, armed and equipped, to prevent or delay such actions. The NRC Staff concluded that Zion facility's security plan was satisfactory and that it was adequate to protect the Zion facility from threats, thefts, and radiological sabotage directed from within or outside the facility. Consequently, the NRC Staff issued a Security Plan Evaluation Report (SPER), dated March 14, 1979, which concluded that upon full implementation, the security plan would meet the general performance requirements of section 73.55(a) and the specific requirements of section 73.55(b) through (h), and that the security plan would ensure that the health and safety of the public would not be endangered from threats, thefts, and radiological sabotage directed at the Zion facility.

By letter dated October 7, 1994, ComEd submitted a revision to the security plan for Zion Station pursuant to 10 C.F.R. § 50.54(p), which allows licensees to make changes to their security plans without prior NRC approval, provided the changes do not reduce the effectiveness of the plan. The October 7, 1994 revision included use of watchmen in positions that formerly used guards. The revision reduced the total number of guards on site, but did not change the number of armed response personnel. In its October 7, 1994 submittal, the Licensee stated that the revision did not reduce the effectiveness of the plan.

III. DISCUSSION

A. Plant Security

Petitioners contend that the revised RTM security plan degrades actual plant security "to the point of folly." Petitioners' supplemental letter of February 28, 1995, requests that the NRC guarantee that ComEd will not reduce the number of armed responders to five.

The total number of guards immediately available at a nuclear power plant to fulfill NRC response requirements shall nominally be ten, unless specifically required otherwise on a case-by-case basis by the Commission; however, this number may not in any case be reduced to less than five guards. 10 C.F.R. § 73.55(h)(3).

Although the October 7, 1994 revision to the security plan will reduce the total number of guards on site, the number of armed response personnel at the Zion facility will not change and will continue to exceed the minimum number of armed response personnel required by section 73.55(h)(3). The regulations address the use of both guards and watchmen in a security force. Historically, most licensees have used a combination of the two because there are certain job assignments that do not require use of a guard, i.e., central alarm station and secondary alarm station operator, personnel escorts in the protected and vital areas, x-ray and metal detector machine operators, security badge issue personnel, and personnel searchers. In the past, ComEd far exceeded the guard requirement, having guards even where they were not required by regulations. The NRC Staff has reviewed the revised RTM security plan and concluded that it provides sufficient site security, is not inimical to the common defense and security, and that protection of the public health and safety does not require the Licensee to increase the number of its armed response personnel or guards beyond the levels reflected in the revised plan. Moreover, the NRC Staff concluded that the revisions are acceptable and would not decrease the effectiveness of the security plan.

In view of the above, Petitioners have not raised a substantial safety concern regarding the reduction in the number of armed security personnel.

B. Effects of the Proposed Revision to the Zion Nuclear Power Station Security Plan on Employees and Plant Defense

Petitioners contend that the new qualifications for armed guard positions in the revised security plan will cause employee turnover, undue stress, labor problems, and inconsistency in plant defense.

Petitioners state in their February 28, 1995 supplemental letter that inconsistencies exist in that: unarmed personnel (watchmen and inspectors) are

permitted to respond to intrusion alarms although they have had no physical agility testing; unarmed personnel escort vehicles into a door zone which has direct containment access, although the NRC has directed that armed personnel be placed at Vertical Pipe Chase doors to prevent such access; and unarmed personnel intermingle with armed personnel at the main gate, which could be disastrous in the event of a firearms exchange.

NRC regulations only require that unarmed personnel such as watchmen shall have no physical weaknesses or abnormalities that would adversely affect their performance of assigned security job duties, 10 C.F.R. Part 73, Appendix B, Criterion I.B.1.a, and do not specify which type of security officer should respond to intrusion alarms. The regulations also only require that vehicles be escorted in the protected and vital areas, 10 C.F.R. § 73.55(d)(4), and do not specify whether the escort must be an armed or unarmed officer. Moreover, NRC regulations do not require control of vital area doors and barriers by an armed security officer. Finally, there is no prohibition of both armed and unarmed personnel occupying access control facilities; in fact it is a common practice at many sites. It should be noted that 10 C.F.R. Part 73 is "performance oriented," with the specific implementation left to the licensee in the site-specific security plan. The details of the specific commitments depend on the specific site factors. As noted below, the NRC Staff review of the Zion security plan concluded that Zion meets the requirements of section 73.55(b) through (h).

In February 1994, NRC inspectors identified security force morale as poor due to continuing personnel layoffs to reduce security force shift manning levels to the minimum required to meet security plan commitments. NRC Inspection Report No. 50-295/94005 and 50-304/94005, dated March 22, 1994. In April 1994, the NRC Staff conducted another physical security inspection and concluded that overall security performance was good. In addition, the NRC Staff noted that morale had improved, due to better communication with security staff members during the backshifts following key personnel changes in the contract security management organization. However, the NRC Staff was concerned that continued high overtime hours worked by the security force had the potential to negatively affect performance. Security force staffing levels were sufficient to meet security plan commitments, but were strained to support unplanned maintenance work. NRC Inspection Report No. 50-295/94011 and 50-304/94011, dated May 25, 1994. The NRC Staff continues to monitor the performance of the security staff through security inspections, and the continued inspections by its resident inspector staff.

During an NRC Staff inspection of the Zion facility in October and November 1994, tactical response drills were conducted in which the security force demonstrated a high level of proficiency. NRC Inspection Report No. 50-295/94021 and 50-304/94021, dated December 12, 1994. The other five ComEd sites have already implemented their version of the October 7, 1994 security plan

revision. An NRC inspection at LaSalle County Station in July 1994 did not find any inconsistencies in plant defense or adverse effects of the revised RTM plan on plant physical protection and safety. The NRC Staff found that ComEd has continued to meet its armed response personnel commitments to the NRC. NRC Inspection Report Nos. 50-295/94005 and 50-304/94005, dated March 22, 1994; 50-295/94011 and 50-304/94011, dated May 25, 1994; 50-295/94021 and 50-304/94021, dated December 12, 1994. Accordingly, there is no reason to expect that implementation of the revised security plan at the Zion facility will result in inconsistencies in plant defense or adverse effects on plant physical protection and safety.

The October 7, 1994 revision to the security plan provided for an improved selection process that would result in the most qualified personnel performing armed responder duties. The revised selection criteria are higher objective standards for proficiency in firearms, physical agility, and knowledge of the security plan. It is ComEd's plan that security guards who cannot meet the new criteria to be an RTM member will be reassigned to the administrative duties of watchmen. Although such a reassignment could conceivably cause morale problems and turnover for such individuals, use of a process reasonably designed to select the guards who are best qualified for armed response personnel duties is in the best interest of the common defense and security and the public health and safety.

In view of the above, the Petitioners have not raised a substantial safety concern regarding security force morale or inconsistencies in plant security.

C. Monetary Considerations and Administrative Jobs

Petitioners assert that monetary considerations should not take priority over plant defense, and administrative jobs should not replace frontline security guards.

Regardless of any anticipated Licensee savings or increased expenses that might be associated with the October 7, 1994 revision to the Licensee's security plan, the NRC Staff must review the revised plan for compliance with section 73.55. In particular, the NRC Staff considered whether the Licensee's onsite physical protection system and security organization include the capabilities to meet the requirements of section 73.55(b) through (h). As explained in Section III.A above, the NRC Staff concluded that the October 7, 1994 security plan revision to reduce the number of guards does not violate section 73.55. Moreover, after review of the October 7, 1994 revisions to the security plan, the NRC Staff found that the revisions are acceptable and would not decrease the effectiveness of the security plan.

For the reasons stated above, Petitioners have not raised a substantial safety concern regarding the reduction in the number of guards at the Zion facility.

D. Disarming of Owner-Controlled and Protected Areas

Petitioners assert that the total disarming of the owner-controlled area and the protected area is highly detrimental to plant defense and public safety.

Contrary to Petitioners' assertions, the Zion facility has not been totally disarmed. As explained above, at Section II.A, the Zion security plan meets NRC requirements for armed personnel. The Commission's regulations do not require any guards in the owner-controlled area. Security of the station is centered around protecting selected vital equipment situated within the protected area. *See* 10 C.F.R. § 73.55.

Prior to initial plant licensing, the NRC Staff evaluated the Licensee's security plan to ensure that it met the general performance objective and requirements of section 73.55(a) and that it implemented the more prescriptive requirements of section 73.55(b) through (h). In addition, the NRC Staff observed drills to ensure that the Licensee could effectively implement its security plan; in particular, to ensure that the security force could successfully perform the requirements of 10 C.F.R. § 73.55(h)(4), which are to determine the existence of a threat, assess the extent of the threat, take immediate concurrent measures to neutralize the threat by requiring responding guards to interpose themselves between vital areas and any adversary attempting entry for the purpose of radiological sabotage and inform local law enforcement agencies of the threat and request assistance. When a licensee submits a revision to its security plan, the NRC Staff evaluates it to ensure that the same general performance objective and requirements of section 73.55(a) and the more prescriptive requirements of section 73.55(b) through (h) are being met and implemented. Periodically, the NRC Staff also continues to observe tactical response drills to ensure that the Licensee remains capable of effectively implementing its security plan by demonstrating threat response as required by section 73.55(h)(4).

The Staff evaluated the Licensee's October 7, 1994 revision to the physical security plan and found that it met the requirements of section 73.55. Although Zion has not implemented the new RTM plan, an NRC inspection at LaSalle County Station (which has implemented the new RTM plan) in July 1994 did not find any inconsistencies in plant defense or adverse impacts on plant physical protection and safety.

Based on the above, the Petitioners have not raised a substantial safety concern regarding security of the owner-controlled areas and the protected area.

E. Potential Threats

Petitioners assert that modern armaments and increased hostility among the general public as well as potential terrorist threats from either domestic and/or international sources have not abated.

NRC regulations establish a framework for security plans with respect to such matters as terrorist attacks against licensed nuclear power plants. 10 C.F.R. Part 73. As explained above, although the October 7, 1994 revision to the Zion security plan will result in a reduced number of armed guards, the number of armed response personnel will not decline and the Licensee continues to meet the specific requirements of section 73.55(h)(3) with respect to the number of armed response personnel. In addition, NRC regulations require that in designing safeguards systems, licensees shall use the design-basis threats contained in the regulations, including those for the type of radiological sabotage referred to by Petitioners. 10 C.F.R. § 73.1(a)(1). On a daily basis, the Staff evaluates threat-related information to ensure that the design-basis threat statements in the regulations remain a valid basis for safeguards system design. On a semi-annual basis, the results of this Staff review are formally documented and forwarded to the Commission. To date, no credible threat to licensed facilities has been identified that would warrant a modification to the design-basis threat statements in the regulations. After review of the October 7, 1994 revision to the Zion facility security plan, the NRC Staff concludes that the revised security plan does not decrease the effectiveness of the plan in protecting the facility against design-basis threats and that the revised plan meets the requirements of 10 C.F.R. Part 73.

In view of the above, the Petitioners have not raised a substantial safety concern regarding sabotage or theft of special nuclear material at the Zion facility.

F. Manning and Positioning of Armed Guards

Petitioners asked that both manning and positioning of armed guards be reconsidered and increased back to a more sound defensive posture.

Specifically, Petitioners state in their February 28, 1995 supplemental letter that, in regard to the protected area, mobile patrols, armed posts, and armed positions have been reduced, and that there should be at least one continuous armed mobile patrol. Petitioners also state, with regard to the owner-controlled area, that at least one patrol should be made each 24 hours, and that a minimum of five armed guards per unit and two armed guards dedicated to the main gate are necessary, but that ten armed guards per unit (consisting of two protected-area patrols and/or sector guards) are optimum. Additionally, Petitioners state that there is a post for unarmed personnel in the vehicle search area, although the NRC has directed that at least one armed officer be present at an alternate gate entry.

There is no regulatory requirement to have (1) an armed guard at an entry gate to the protected area, (2) any security activities in the owner-controlled area outside the protected area, or (3) mobile patrols in the protected area.

While checking the protected area is required, 10 C.F.R. § 73.55(c)(4), the type of personnel and patrol frequency are not specified in the regulations, but are detailed in the site physical security plan. All changes to the Zion plan are reviewed against the requirements of the regulations and site-specific needs. The NRC inspects against the commitments contained in the approved plan to verify that the plan remains effective and that the Licensee continues to fulfill its commitments. Based on NRC Staff review of the Zion security plan and its associated revisions, and upon onsite verification of Zion's commitments, Zion continues to meet the performance objectives of section 73.55(a) and its commitments under its security plan.

As explained above, although the October 7, 1994 revision to the Zion security plan will result in a reduced number of armed guards, the number of armed response personnel will not decline and the Licensee continues to meet the specific requirements of section 73.55(h)(3) with respect to the number of armed response personnel. In regard to the positioning of armed response personnel, NRC regulations require that licensees establish a safeguards contingency plan which requires armed response personnel to interpose themselves between vital areas and material access areas such that armed response personnel can prevent entry for the purpose of radiological sabotage. 10 C.F.R. § 73.55(h)(4)(iii)(A). If revisions to a licensee's security plan meet the requirements of section 73.55, the NRC Staff concludes that the revisions are consistent with 10 C.F.R. § 50.54(p) and that they will not decrease the effectiveness of the safeguards plan. In this case, the NRC Staff concluded that the October 7, 1994 revision to the Zion security plan met the requirements of section 73.55 and did not result in decreased effectiveness of the plan.

In view of the above, the Petitioners have not raised a substantial safety concern regarding manning and positioning of armed guards at Zion Station.

G. Additional Concern Noted on a Copy of the Petition Sent to Senator Simon

Petitioners appended an additional concern that low-level waste is now being stored in the owner-controlled area with no security patrols except a casual tour once per 8-hour shift, on a copy of the petition addressed to United States Senator Paul Simon of Illinois. Senator Simon referred the concern to the DOE, and DOE subsequently forwarded it to the NRC. Petitioners' supplemental letter of February 28, 1995, asserts that the interim radwaste storage facility is worthy of one full 24-hour patrol and alarmed, continuous surveillance equipment, such as a camera.

Storage and control of NRC-licensed material are governed, in pertinent part, by 10 C.F.R. § 20.1801 of Subpart I to 10 C.F.R. Part 20, which requires licensees to secure from unauthorized removal or unauthorized access licensed

materials that are stored in controlled or unrestricted areas. The security requirements of Part 73 do not apply to the storage of low-level waste. Zion Station maintains an interim radwaste storage facility (IRSF) for licensed material on site, within the owner-controlled area to which general access is not permitted. The IRSF is locked, key access is controlled, and once in each 8-hour shift the IRSF is patrolled by a security officer. The Staff finds that the IRSF at the Zion facility is in compliance with section 20.1801.

For the reasons stated above, Petitioners have not raised a substantial safety concern regarding security of low-level waste in the owner-controlled area at the Zion facility.

IV. CONCLUSION

The institution of a proceeding in response to a request for action under section 2.206 is appropriate only when substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine what action, if any, is warranted in response to the matters raised by Petitioners. Each of the claims or allegations by Petitioners has been reviewed, and I conclude that, for the reasons discussed above, Petitioners have raised no substantial safety concern regarding the revised security plan for the Zion facility. Petitioners' requests that the NRC withdraw its approval of the changes to the security plan and that the NRC require an increase in the number of, or a change in the positioning of, armed guards at the Zion Nuclear Power Station, are denied. Petitioners' request that the NRC demand greater justification for the proposal to reduce the number of armed guards and the defense of the Zion Nuclear Power Station is denied. Since the NRC has agreed with the Licensee that the changes to Zion's security plan do not decrease the effectiveness of the plan, per section 50.54(p), NRC approval to implement the changes to Zion's security plan is not required.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by section 2.206(c), this Decision will constitute the final action of the

Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 26th day of May 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-389-A

FLORIDA POWER AND LIGHT
COMPANY

(St. Lucie Nuclear Power Plant,
Unit 2)

May 26, 1995

The Director, Office of Nuclear Reactor Regulation, denies a petition dated July 2, 1993, filed by the Florida Municipal Power Agency (FMPA), which requested, *inter alia*, that the NRC (1) declare that Florida Power & Light Company (FPL) is obligated to provide network transmission among geographically separated sections of FMPA without imposing multiple charges for transmission among multiple delivery points; (2) issue a notice of violation of that obligation; (3) order FPL to file with the Federal Energy Regulatory Commission a rate schedule that provides for transmission in a manner that complies with the antitrust conditions which are a part of the St. Lucie Plant, Unit 2 license. The reasons for the denial are fully set forth in the Director's Decision.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

The Florida Municipal Power Agency (FMPA), in a petition dated July 2, 1993, requested the Executive Director for Operations of the Nuclear Regulatory Commission (NRC or Commission) to take enforcement action against the Florida Power & Light Company (FPL) for allegedly violating the antitrust license conditions applicable to the captioned nuclear unit. The petition was referred to the Director, Office of Nuclear Reactor Regulation, for response.

FMPA requested that the NRC (1) declare that FPL is obligated to provide network transmission among geographically separated sections of FMPA without imposing multiple charges for transmission among multiple delivery points; (2) issue a Notice of Violation of that obligation; (3) impose a requirement by order directing FPL to file with the Federal Energy Regulatory Commission (FERC) a rate schedule that provides for transmission in a manner that complies with the antitrust conditions that are a part of the St. Lucie Plant, Unit 2 (St. Lucie); (4) take other such action as may be proper, including proposed imposition of civil monetary penalties; and (5) publish notice of the petition including when the NRC expects to decide whether to take action in response to the petition.

FMPA specifically alleged that the antitrust license conditions for St. Lucie require FPL to provide transmission of power over its system among the various sections of FMPA's system on a network basis without imposing multiple charges for transmission among multiple FMPA receipt and delivery points. FMPA alleged that FPL has refused to provide such network transmission and as a result, is in violation of the St. Lucie antitrust license conditions.

FMPA's section 2.206 petition centers on FPL's alleged continued refusal to provide network transmission service over its system. The issue of whether FPL is required to provide network transmission either under the St. Lucie antitrust license conditions or as a result of a filed request for transmission service before the FERC, was resolved by the issuance of a final order by the FERC in a related proceeding on May 11, 1994. The FERC order directs FPL to provide network transmission service to FMPA. Consequently, the issues that were raised by FMPA in its section 2.206 petition that pertain to issues under the NRC's jurisdictional purview, i.e., whether FPL was required to offer FMPA network transmission service, have been resolved. The unresolved issues pertaining to FMPA's request for network transmission service are rate-related issues, and are currently being negotiated by FMPA and FPL under a FERC order. For these reasons, I am denying FMPA's section 2.206 request for an enforcement action against FPL.

II. BACKGROUND

During the antitrust review of St. Lucie conducted by the Atomic Energy Commission (AEC, predecessor of the NRC) staff and the staff of the Department of Justice (DOJ or Department), the Department, by letter dated November 14, 1973, advised the AEC staff that FPL appeared to be engaged in activity that was inconsistent with the antitrust laws, i.e., principally refusing to (1) wheel, (2) interconnect with other power entities, and (3) grant access to the St. Lucie nuclear facility. During settlement discussions between FPL, AEC staff and DOJ staff, FPL was asked to clarify what its corporate policies were on access

to its transmission facilities as well as participation in St. Lucie. By letter dated February 25, 1974, the AEC staff forwarded a set of license conditions to FPL that, if agreed upon by FPL, would obviate the need for an antitrust hearing in the St. Lucie construction permit antitrust review. The license conditions required FPL to offer several cooperative and municipal electric power systems various coordination services as well as the opportunity to purchase ownership in St. Lucie. On February 26, 1974, FPL agreed to adopt the proposed set of license conditions. However, several years thereafter, a group of Florida municipalities was permitted to intervene. Eventually, a settlement agreement reached in 1980 resulted in a 1981 license amendment adding antitrust license conditions to the St. Lucie construction permit. Subsequently, pursuant to section 105c of the Atomic Energy Act of 1954, as amended, the Staff conducted an operating license review of FPL's competitive activities which was completed in September of 1982. The Staff found no significant changes in FPL's activities since the completion of the construction permit review.

Subsequent to the issuance of the St. Lucie amendment adding the antitrust license conditions in 1981, FMPA alleged that FPL, on several occasions, refused to provide transmission services over its network among the various sections of FMPA without imposing multiple charges for transmission among multiple FMPA receipt and delivery points.¹ FMPA characterized this type of service as "network transmission service" as opposed to point-to-point transmission service. In 1982, FPL entered into settlement agreements with various Florida municipalities (the predecessor to FMPA²) and, according to FMPA, the settlement agreements refined and built upon the St. Lucie antitrust license conditions. In 1989, FMPA and FPL began negotiating for transmission network service. The negotiations were unsuccessful and in December 1991, FMPA filed suit against FPL in (Florida) state court alleging breach of contract. FPL removed the case to federal court, Middle District of Florida, in January 1992. FMPA alleged that FPL refused to supply network transmission service, per the transmission agreements negotiated as a result of the NRC licensing proceeding, and sought injunctive relief and damages.

On July 2, 1993, FMPA filed a complaint with the FERC in an outstanding electric rate case involving FPL (EL93-51-000). FMPA asked the FERC to find that certain access limitations of existing transmission service agreements between FMPA and FPL were unjust, discriminatory, and unreasonable under

¹ Specifically, license condition No. X(a) that requires FPL to "transmit power . . . (2) between two or among more than two neighboring entities, or sections of a neighboring entity's system which are geographically separated. . . ."

² Several cities combined in 1978 to form FMPA, a joint action agency. Under Florida law, The Joint Power Act, entities have the right to join with other electric utilities in order to jointly finance, acquire, construct, manage, operate, or own an electric power project. These rights were extended to local governmental entities with the enactment of the Interlocal Cooperation Act in 1978.

the Federal Power Act. The complaint asked the FERC to direct FPL to provide network transmission service.³ FMPA also filed a petition before the NRC on July 2, 1993, alleging that FPL was in violation of its St. Lucie antitrust license conditions requiring FPL to provide network transmission service and requested that the NRC enforce the St. Lucie antitrust license conditions and require FPL to offer network transmission service to FMPA.

On October 28, 1993, FERC issued a proposed order in the FMPA network transmission case (65 FERC ¶61,125) granting FMPA's request to order FPL to provide network transmission service. The FERC found that by ordering network transmission, the public interest would be served, fully consistent with its mandate under the Federal Power Act. As a result of the FERC proposed order, on December 16, 1993, the U.S. District Court for the Middle District of Florida issued a "Memorandum Decision and Order" in which the Court stated that the FERC's proposed order resolved the issues presented in the District Court. As a result, FMPA's request for damages was denied based upon the "filed rate doctrine" which empowers the FERC to rule on wholesale rate matters. The Court dismissed the case.

During a 60-day negotiating period set by the FERC following the proposed order, FMPA and FPL were unable to reach an agreement on the terms and conditions for a filed network transmission rate schedule. In the first quarter of 1994,

both parties filed briefs and supporting materials setting forth their respective positions. On May 11, 1994, the FERC issued a "Final Order" in Docket No. TX93-4-000, 67 FERC ¶61,167 (May 11, 1994), *reh'g pending*. In the Final Order, the FERC approved FPL's proposed load ratio approach to the pricing of network transmission with the crucial additional requirement, proposed by FMPA, that FMPA receive credit for transmission facilities owned by FMPA or its members that will be used, along with FPL transmission facilities, to integrate FMPA's loads and resources. 67 FERC at pages 61,481-2. Both FPL and FMPA sought rehearing of certain aspects of the Final Order, and those requests for rehearing remain pending.⁴

The FERC's Final Order, dated May 11, 1994 (67 FERC ¶61,167), directed FPL to offer network transmission service along with the necessary rates, terms, and conditions required to make this service a power supply option for FMPA.

³ FMPA defines network transmission service as "a transmission arrangement that would enable [FMPA] to distribute a given quantity of transmission network usage among various delivery points, without paying multiple monthly or yearly transmission charges." FMPA Complaint before the FERC at 25.

⁴ Letter dated December 5, 1994, from Robert A. Jablon and Bonnie S. Blair of Spiegel & McDiarmid to Anthony T. Gody, Chief, Inspection Program Branch, Office of Nuclear Reactor Regulation at 2 [FMPA Letter].

III. DISCUSSION

Institutional and competitive pressures have been building over the past decade within the electric bulk power services market to open up the life-line of the industry, i.e., transmission, by lowering existing entry barriers to transmission access that would allow a more efficient distribution of scarce resources and ultimately, cheaper power to those in need and willing to pay for an efficient power supply. With the passage of the Energy Policy Act of 1992 (EPAct), the institutional reorganization that has been gathering momentum in the electric power industry for several years, developed an inertia unseen in the industry in this country since the emergence of large vertically integrated electric holding companies in the 1920s and 1930s. After much public debate leading up to passage of EPAct, the feature included in the act that has been most influential in reshaping the character of the electric utility industry is section 211. Section 211 empowers the FERC to order transmission access to promote competition where to do so would be in the public interest — this public policy change represents a dramatic change from the competition-neutral policy intended by the Public Utilities Regulatory Policies Act of 1978 (PURPA). Smaller, transmission-dependent power systems have long argued that PURPA has not gone far enough in opening up the tightly knit nature of large generation and transmission systems and have lobbied Congress for several years to amend PURPA and empower the FERC to order transmission access or "wheeling." The Staff believes that the formation of FMPPA and the goals imposed upon this joint action agency by its members mirror the changes that have taken place and continue to take place in the electric bulk power market during the past 10-15 years.

Since the late 1970s, several cities in Florida have sought greater access to FPL's transmission grid. Typically, these cities own their electric distribution systems and in some instances, generate a portion of their own power supply requirements. In order to seek out the most cost-efficient source of power supply, these cities need meaningful access to transmission facilities, i.e., usually the local, large, fully integrated electric utility system serving in the relevant geographic area — in this instance, FPL.

During the construction permit review of the St. Lucie facility, the antitrust staffs of the Department of Justice and the Atomic Energy Commission identified instances where FPL's market dominance in generation and transmission in the state of Florida was allegedly used to restrict the competitive options of smaller power systems in the state. FPL did not offer the cities and their successor organization, FMPPA, the type of transmission access that would allow FMPPA to successfully compete for sales or purchases of wholesale power in the state

of Florida or other potential markets in neighboring states.⁵ The Staff identified this market conduct by FPL during the licensing review of the St. Lucie facility. Subsequently, the Department of Justice and NRC staffs recommended that a set of license conditions, designed to prevent FPL from abusing its market dominance, be made a part of the St. Lucie operating license.

The Florida municipalities, in the 1970s and early 1980s, and FMPA since the early 1980s, have sought a type of transmission access, termed "network transmission service," that would, according to FMPA, provide for a more level playing field in the Florida bulk power services market. FMPA's quest for competitive power supply options should not be inhibited by power systems that have considerable market power and abuse their market power in a manner that diminishes economic efficiency in the market place. I agree with FMPA's assessment that its planned integrated dispatch operation (IDO) project, or a project similar to it, "represents the logical next step in FMPA's development" as a competing bulk power entity in the state of Florida represents a plausible next step in its development as a power supply system. As the petition states:

Integrating and coordinating its resources has been an important long-term FMPA goal. FMPA has previously sought to establish a Florida-wide power pool and, failing that, a FMPA-FPL power pool, but those efforts were rebuffed by FPL. The IDO project would establish an integrated dispatch and operations pool of certain FMPA members, thereby permitting substantially more economic and efficient use of their existing resources and planning for more economic future resources.⁶

The antitrust license conditions developed in the St. Lucie proceeding were intended to resolve the alleged anticompetitive situation that would be maintained if an unconditioned license for St. Lucie, Unit 2 had been issued without conditions. The license conditions were designed to promote the efficient allocation of energy resources in the state of Florida and perhaps service areas in adjoining states. The Staff concluded that the manner in which FPL charged

⁵ "Applicant's control over the transmission network in its area has given it the power to grant or deny access to coordination — and thereby access to the benefits of large-scale, low-cost, baseload nuclear generation — to neighboring smaller systems. There have been some allegations that Applicant may have used this power to deny coordinating benefits to smaller systems or to take the predominant share of the benefits of such coordination as has been entered into." Department of Justice Letter [hereinafter, "Advice Letter"] dated November 14, 1973, from Bruce B. Wilson, Acting Assistant Attorney General, Department of Justice to Howard K. Shapar, Assistant General Counsel, Atomic Energy Commission at 3-4. The Advice Letter continued, "Our antitrust review led us to the following conclusions: (1) Applicant is the dominant electric utility in Florida and because of its ownership of transmission, has the power to grant or deny other systems in its area the access to coordination — and thus the nuclear power — needed to compete in bulk power supply and retail distribution markets; (2) there is some indication Applicant's dominance may have been enhanced through conduct inhibiting the competitive opportunities of the smaller systems in its area; and (3) construction and operation of St. Lucie No. 2, and the sale of power therefrom to meet Applicant's load growth and compete with the smaller systems in its area could create or maintain a situation inconsistent with the antitrust laws if access to nuclear generation were denied those smaller systems." Advice Letter at 6-7.

⁶ FMPA Section 2.206 Petition to the NRC Staff, dated July 2, 1993, at 8.

multiple transmission fees for transfer of blocks of power over its transmission system was potentially anticompetitive and, consequently, helped design license conditions that would preclude FPL from abusing its market power in the Florida bulk power services market.

There are similarities between the instant matter and a merger case reviewed by the Staff in the early 1990s, although the letter did not involve a request for an enforcement action. A brief comparison of the two matters should provide additional insight into how I reached my decision herein. In the early 1990s, the Staff reviewed the competitive implications of the merger between Public Service Company of New Hampshire (Seabrook Nuclear Station licensee) and Northeast Utilities (i.e., the NU/PSNH merger). The merger was also reviewed for competitive implications by the FERC pursuant to section 203 of the Federal Power Act and the Securities and Exchange Commission (SEC) pursuant to section 10(b)(1) of the Public Utilities Holding Company Act.

As in the instant case, the NU/PSNH merger was reviewed for competitive implications by different regulatory agencies with different standards of review and areas of regulatory oversight. In its review of the NU/PSNH merger, the Staff followed the hearings conducted by the FERC very closely and made its no "significant change" finding based largely upon the testimony and resultant premerger conditions imposed on the merging parties by the FERC. The Staff determined that the potential anticompetitive implications of the NU/PSNH merger were adequately mitigated by the FERC conditions. The SEC, which was required to determine whether the merger would lead toward undue concentration of control over public utility companies and thereby be detrimental to the public interest, initially approved the merger but in a subsequent order indicated that the pertinent competitive issues were under the jurisdiction of the FERC and therefore made its final approval contingent upon FERC also approving the merger.

Intervenors at the SEC appealed the SEC decision to the Court of Appeals for the District of Columbia Circuit claiming that the SEC had abdicated its antitrust responsibility by deferring its ultimate decision to the FERC. The Court ruled that the SEC did not abdicate its statutory duty to find on the competitive issues attendant to the proposed acquisition because the SEC indicated in its order that the intervenors had the opportunity to "rescind or further condition its [the merger's] approval" before the SEC if they disagreed with the ultimate FERC ruling. The Court indicated that the SEC, in order to ensure coordination of their orders in a parallel review, conditioned its approval of the acquisition upon the FERC's final order approving the merger. The Court stated that,

Although the SEC may not rely upon the FERC's concurrent jurisdiction over an acquisition as a reason to shirk its own statutory mandate to determine the anticompetitive effect of that transaction, see, e.g., *Municipal Elec. Ass'n*, 413 F.2d at 1059-60, it does not follow that

the SEC must pretend that it is the only agency addressing the issue when it is not; that would only lead it to conduct a wasteful, duplicative proceeding. Rather, when the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may "watchfully defer[]" to the proceedings held before — and the result reached by — that other agency. *Wisconsin's Environmental Decade v. SEC*, 882 F.2d 523, 527 (D.C. Cir. 1989).⁷

The NRC Staff, prior to the Court of Appeals' decision, indicated that it was aware of the FERC proceeding and the FERC decision; however, the NRC did not *defer* to the FERC decision.

The Staff continues to employ the concept of "watchful deference" espoused by the Court and has determined that the FERC Order in the rate case involving FMPA and FPL addressed and adequately responded to the concerns contained in FMPA's Section 2.206 petition to the NRC. The FERC ordered FPL to provide FMPA network transmission service in its order dated May 11, 1994 — FMPA's primary concern expressed in its section 2.206 petition. FMPA continues to argue that it is not taking network transmission service from FPL. It is apparent from the ongoing discussions between FPL and FMPA and the continuing rate case proceeding at the FERC that there are issues outstanding between the two parties that need to be resolved before FMPA begins taking network transmission service from FPL. However, it is also apparent that the remaining outstanding issues are rate-related issues within the jurisdiction of the FERC, not the NRC.

IV. CONCLUSION

I have concluded that FERC's Order requiring FPL to provide network transmission service to FMPA and the subsequent ongoing rate proceeding before the FERC, adequately address and resolve the concerns raised in FMPA's Section 2.206 petition and request for action by the NRC. As a result of the

⁷ *City of Holyoke Gas & Electric Department v. SEC*, 972 F.2d 358, 363 (D.C. Cir. 1992).

foregoing, I have determined that no proceeding should be instituted and no further regulatory action by the NRC is required.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 26th day of May 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. 50-213

50-245

50-336

50-423

(License Nos. DPR-61

DPR-21

DPR-65

NPF-49)

NORTHEAST UTILITIES

(Haddam Neck Plant and

Millstone Nuclear Power Station,

Units 1, 2, and 3)

May 31, 1995

The Director of the Office of Nuclear Reactor Regulation has denied the petition filed by Mr. Ronald Gavensky requesting that the licenses of the Haddam Neck Plant and the Millstone Nuclear Power Station, Units 1, 2, and 3, be temporarily revoked based on Petitioner's allegations. Petitioner raised numerous concerns regarding receipt inspection activities by Northeast Utilities (NU) at these facilities. After a review of Petitioner's concerns, the Director concluded that no substantial health and safety issues were raised regarding these facilities that would require initiation of formal enforcement action.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On March 3, 1994, Mr. Ronald Gavensky (Petitioner) filed a petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206.

In the petition, the Petitioner, a Northeast Utilities (NU) quality control receipt inspector raised concerns regarding receipt inspection activities by NU at the Haddam Neck Plant and the Millstone Nuclear Power Station.¹

The Petitioner alleged violations of 10 C.F.R. Part 50, Appendix B, by NU in the receipt inspection area. He alleged that parts represented as having been inspected and accepted for use were in fact deficient; that adequate training, skilled personnel, and necessary tools were not available to perform adequate receipt inspections; and that he had observed unethical and incorrect methods of receipt inspection, and that he had sought to identify quality problems within his own department, along with recommendations and solutions, but had not been permitted to do so. Finally, the Petitioner accused NU of "whitewashing" his concerns. Specifically, the Petitioner alleged that on two occasions NU's management had hired investigators to investigate concerns he had raised only to conclude that there were no problems. The Petitioner requested that the "license of Northeast Utilities" be temporarily revoked until after the NRC investigates his allegations.

On May 9, 1994, I informed the Petitioner that the petition had been referred to my office for preparation of a Director's Decision. I further informed the Petitioner that his issues were not considered immediate safety concerns and, therefore, did not warrant immediate shutdown of the Haddam Neck Plant and Millstone Nuclear Power Station, Units 1, 2, and 3. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the specific concerns raised in the petition. By letter dated November 28, 1994, following a telephone conversation with the Petitioner of November 15, 1994, this office provided him portions of NRC Inspection Reports that relate to his concerns and a copy of a Brookhaven National Laboratory Associated Universities, Inc. report of an evaluation of thirty bolts chosen at random from the Millstone Warehouse in November 1993. This office also provided the Petitioner status reports of the Director's Decision concerning his petition pursuant to 10 C.F.R. § 2.206 of March 3, 1994, by letters dated February 23, and May 9, 1995.

NU voluntarily submitted a response to the NRC on July 26, 1994 (NU Response), regarding the issues raised in the petition. The Petitioner voluntarily submitted a response dated August 16, 1994, regarding the issues raised in the NU Response. Based on a review of the issues raised by Petitioner as discussed below, I have concluded that no substantial health and safety issues have been raised that would require the initiation of formal enforcement action.

¹ Northeast Nuclear Energy Company (Millstone licensee), an electric operating subsidiary of Northeast Utilities (NU), holds licenses for the operation of Millstone Nuclear Power Station, Units 1, 2, and 3. The Connecticut Yankee Atomic Power Company (Haddam Neck licensee), an electric operating company owned in part by NU, holds the license for the Haddam Neck Plant. Reference in the petition to the "license of Northeast Utilities" refers to the licenses of the Haddam Neck Plant and Millstone Nuclear Power Station, Units 1, 2, and 3.

II. DISCUSSION

In the petition, the Petitioner raised numerous concerns regarding receipt inspection activities by NU at the Haddam Neck Plant and Millstone Nuclear Power Station, Units 1, 2, and 3. The issues raised in the petition are summarized and evaluated below.

A. Adequacy of the NU Receipt Inspection Program

The Petitioner alleged that NU did not have skilled personnel or the necessary tools or equipment to perform adequate receipt inspection until 1990 for the Haddam Neck Plant and could not have had a properly executed receipt inspection department until 1989 for the Millstone Nuclear Power Station, Units 1, 2, and 3. He alleged that at the present time there are only two skilled mechanical receipt inspectors at the Millstone Nuclear Power Station. Also, all current receipt inspectors are qualified at Level 2 to ANSI/ASME Standard N45.2.6-1972. However, most lacked the actual experience in mechanical receipt inspection required by the standard to which NU is committed.

The Petitioner alleged that, when he was first employed by NU 16 years ago, he found parts still packed in the original containers unopened but green-tagged (acceptable for use). He also found cracked parts, bent parts, mismatched parts, all of which were green tagged, and many bad parts accepted for use by the architect-engineer, Stone and Webster Engineering Corporation (SWEC), and wrongly installed.

The Petitioner also claimed that he had observed unethical and incorrect methods of receipt inspection and that he was prevented from raising quality problems either by his supervisor or the Director of Quality.

Most of the specific concerns raised by the Petitioner appear to relate to NU procurement activities before 1990. At that time, NU, as indicated in the NU response to the petition, maintained an approved-suppliers list and relied heavily, like most utilities, on vendor audits and certifications to ensure the adequacy of procured parts. Because of extensive use of an approved-suppliers list, NU stated that its internal programs, including elements for ensuring independently the quality of procured parts, were not relied on to the same extent as they are now. NU considered this approach appropriate at the time, given the number of vendors who maintained 10 C.F.R. Part 50, Appendix B quality assurance programs.

As the number of vendors maintaining Appendix B programs declined and the instances of counterfeit and fraudulent products increased, the nuclear industry, including NU, found it necessary to develop more sophisticated internal programs to qualify commercial-grade parts procured for nuclear safety-related applications. Generic Letter 89-02, "Actions to Improve the Detection of Coun-

terfeit and Fraudulently Marketed Products," dated March 21, 1989, describes these emerging procurement issues. To address these issues, Generic Letter 89-02 conditionally endorsed Electric Power Research Institute (EPRI) Report NP-5652, "Guideline for the Utilization of Commercial Grade Items in Nuclear Safety Related Applications (NCIG-07)," dated June 1988. On June 28, 1990, the Nuclear Management and Resources Council (NUMARC) board of directors directed licensees to adhere to the guidance in EPRI Report NP-5652 and to review and strengthen their procurement programs in accordance with specific guidance in NUMARC 90-13, "Nuclear Procurement Program Improvements." The procurement programs for the Haddam Neck Plant and Millstone Units 1, 2, and 3 were significantly upgraded in response to Generic Letter 89-02 and the NUMARC initiatives.

In February 1989, the vendor interface and procurement programs at Haddam Neck were inspected (*see* NRC Inspection 50-213/89-200 dated May 25, 1989) as part of an initial group of thirteen team inspections conducted by the NRC to evaluate licensee procurement and commercial-grade dedication programs. That inspection identified several deficiencies including weaknesses in the procurement and dedication of commercial-grade items for safety-related applications at the Haddam Neck Plant.

Upgraded procurement programs have been implemented at the Haddam Neck Plant and Millstone Nuclear Power Station, Units 1, 2, and 3. The programs at the Millstone units were inspected by the NRC (NRC Inspection Reports 50-245/91-201, 50-336/91-201, and 50-423/92-201, dated November 5, 1991). The upgraded program at the Haddam Neck Plant, while not inspected by the NRC in the level of detail as Millstone, was reviewed in part during the resolution of the identified deficiencies from NRC Inspection 89-200 as well as the 1990 Maintenance Team Inspection. The inspection at Millstone found that, before June 1987, commercial-grade items were purchased and receipt-inspected with acceptance criteria primarily based on verification of the correct part number. Between 1988 and 1990, NU upgraded its procedures to upgrade its procurement inspection services. The NRC assessment team noted that NU had made a significant effort to strengthen the commercial-grade dedication program and that its overall program description was generally consistent with the dedication approaches described in EPRI Report NP 5652. The team found that receipt inspection capabilities at Millstone Nuclear Power Station, Units 1, 2, and 3 had undergone several improvements. The Millstone Nuclear Power Station receipt inspectors had a new enclosed facility. The facility's equipment was being enhanced and included micrometers, gage blocks, a metal sorter, a shadow graph, and a variety of electronic devices. The improved receipt inspection facility and improved testing and inspection equipment had enhanced the capability of the receipt inspection process to detect misrepresented parts, equipment, and material. The procurement inspection services consisted of twelve inspectors

and one supervisor. The receipt inspectors were certified under requirements established by procedures. The assessment team identified several procedural weaknesses and implementation weaknesses involving the improper identification of design criteria, safety function(s), critical characteristics, and methods for verifying the critical characteristics. The assessment team found strengths and potential strengths in such areas as receipt inspection testing capabilities at the Metallurgy Laboratory Facilities in Berlin, Connecticut, and at the Millstone Nuclear Power Station site, self-assessments of the commercial-grade dedication program, the 4-day procurement and commercial-grade dedication training course, the review project of previous commercial-grade inspections at Millstone Nuclear Power Station and the general consistency of the program with the dedication approaches of EPRI NP-5652. In addition, the quality, attitude, and dedication of the Licensee's personnel were evident. The team concluded that, with appropriate modifications to address the weaknesses, the program, if properly implemented, would provide adequate control over the commercial-grade procurement process.

Additional inspections of the procurement programs for the Haddam Neck Plant and Millstone Units 1, 2, and 3 have been conducted by the NRC (NRC Inspection Reports 50-423/92-11 dated May 30, 1992, 50-213/92-14 dated August 12, 1992, 50-423/92-24 dated January 12, 1993, 50-423/93-26 dated January 14, 1994, and 50-336/94-21 dated August 31, 1994). In 1992, after its inspection of the Haddam Neck Plant, the NRC Staff concluded that adequate measures were in place to ensure that the level of quality of procured items was commensurate with their safety-related application. In 1993, the NRC Staff reported that NU's receipt inspection program at Millstone Nuclear Power Station, Units 1, 2, and 3 was deliberate, controlled, and consistent in the choice of attributes required to be inspected and the documentation of results. After its inspection of NU's procurement program late in 1993, the NRC Staff found no significant safety issues. In 1994, the NRC Staff reported in NRC Inspection Report 50-336/94-21 that NU's procurement inspection services inspections were performed by personnel certified under NU's Quality Services Department Procedures QSD 1.08, "Department Indoctrination, Training and Qualification," and QSD 2.08, "Selection, Training, Qualification and Certification of Inspection, Examination and Testing Personnel." The Quality Department Inspector Training Program served as the basis of the training required for certification. The program emphasized technical knowledge, skill development, and problem solving. The procurement inspection personnel were well trained, with ten of twelve inspectors certified to a Level 2 in at least two disciplines. In addition, refresher training was provided to maintain proficiency and certification of personnel. Also in 1994 (NRC Inspection Report 50-336/94-21), the NRC Staff reported that NU's procurement inspection services maintained an inventory of over 500 tools for measuring and testing and that appropriate inspectors were trained and certified in the use of

these tools. Such tools are typical of many nuclear power plants' inventory. NU also stocked some exceptional tools such as an optical comparitor shadow-graph, an Ames hardness tester, and an alloy analyzer. In summary, during these post-1990 inspections, the NRC Staff noted procurement program upgrades and found no significant safety issues in the procurement area.

B. Quality of Fasteners Installed at Northeast Utilities Facilities

Petitioner has an extensive background in the area of receipt inspection of fasteners of NU nuclear facilities and has raised a number of specific concerns regarding the quality of fasteners. The focus of the NRC evaluation of the Petitioner's concerns is receipt inspection of fasteners and assurance that fasteners will perform their intended function. NU acknowledged in its response of July 26, 1994, the Petitioner's efforts in raising and aggressively pursuing valid issues. NU acknowledged that, in March 1992, the Petitioner had issued six nonconformance reports (NCRs) based on his visual inspection of various surplus fasteners procured in 1983 for use at Millstone Unit 3. Later, he issued an additional NCR, citing potential programmatic deficiencies by SWEC, concerning procurement of various other materials installed at Millstone Unit 3.

The concerns of the Petitioner were verified in NRC Inspection Report 50-423/92-11 dated May 30, 1992. In the report, the Staff noted that an inspection in 1992 by NU of six of the forty-three items obtained from SWEC stock that were designated for transfer to the Millstone Nuclear Power Station stores resulted in an initial rejection of all six items. An item was defined as all of a specific type of bolt or fastener material, e.g., 600 $\frac{3}{16}$ " $\times$ 4 $\frac{1}{2}$ " bolts were classified as one item. Six NCR reports were written concerning these findings and indicated that all of the material constituting the six items was scrapped.

Also, the Staff noted that thirty-two of forty-eight items that had been transferred from SWEC stock and introduced into Millstone Nuclear Power Station stores in 1990 were receipt-inspected and green-tagged without proper dedication. These items were considered acceptable for use as safety-related material for installation in the three Millstone Units 1, 2, and 3. An NCR report was written concerning this finding. Further, NU identified work orders indicating that fastener material (bolts, nuts, washers) from the thirty-two items had been used in Millstone Units 1, 2, and 3 during the previous 2 years. The bolts were used principally in the mounting of electrical components (relays, terminal boards, etc.), fans, ventilation housing, and cable trays. The materials were also used on various safety-related systems, such as Millstone Unit 1 reactor protection system bypass switches, Millstone Unit 2 containment air recirculation fans, and Millstone Unit 3 shutdown margin monitor.

In NRC Inspection Report 50-423/92-11, the Staff noted that NU had tested six bolts from the lots of the thirty-two items and had found that the

chemical properties and tests to determine tensile properties were acceptable. A Corrective Action Request (CAR) that was initiated on April 27, 1992, as a result of the NCRs, indicated that these six bolts were the poorest appearing bolts of the lots. Thus, NU determined that the bolts were functionally acceptable. In NRC Inspection Report 50-423/92-16 dated September 3, 1992, the Staff reported that, as a result of its questions about whether the six tested fasteners adequately represented the population of fasteners installed, NU tested an additional thirty fasteners randomly selected from the warehouse and one sample chosen by the NRC Staff that had linear indications running from the body into the head of the fastener. NU determined that all the fasteners met specification requirements for material and mechanical properties. The NRC Staff raised a second concern, that is, that the sample did not represent all the fasteners because all the manufacturers were not represented. NU then took another sample of thirty fasteners from each of three manufacturers. The testing of these bolts showed that all the fasteners, except for one cap screw, were acceptable. The one cap screw had a tensile strength of only 121.3 ksi rather than the specified strength of 125 ksi. However, the cap screw did have an acceptable yield strength. The Licensee performed a statistical analysis on the results of the testing and determined that the probability of an installed bolt from the thirty-two items failing to perform its safety function is extremely small (in the order of 1 chance in 345,000). The NRC Staff concluded in NRC Inspection Report 50-423/92-24 dated January 12, 1993, that the results for all the fasteners tested except one were acceptable and that the nonconforming conditions, including some visual deficiencies, would not have impaired the capability of the fasteners to perform their functions, and that NU's current inspection program was deliberate and controlled.

NU initially indicated that the remaining fasteners transferred from SWEC to the Millstone Nuclear Power Station stores would be scrapped. However, it did install some of the fasteners in the units after performing additional inspections and dedicating the fasteners before they were installed.

Finally, a random sample of thirty bolts of various sizes was taken from the Millstone Nuclear Power Station warehouse bins during November 1993 for laboratory tests. They were tested by the Brookhaven National Laboratory Associated Universities, Inc., and twenty-six of the thirty met specification requirements for chemical, mechanical, and dimensional properties. Four bolts did not pass the thread fit inspection with a "Go" gage. However, the discrepancies would not have prevented the bolts from performing their function. (*See Letter dated May 2, 1994, from Brookhaven National Laboratory Associated Universities, Inc., to Mr. James A. Davis, NRC, which is available in the NRC's Public Document Room.*) In summary, on the basis of the extensive tests of samples of fasteners taken from the warehouse bins, the NRC Staff concludes that materials in the bins are acceptable for use.

The possibility of nonconforming fasteners already installed in safety-related applications was addressed in an NU letter to the NRC Staff dated September 22, 1994. NU concluded that this issue did not warrant action for the Haddam Neck Plant and Millstone Units 1, 2, and 3. NU indicated that periodic testing and inspection are performed on installed fastener components. Further, safety-related plant equipment is periodically tested to ensure that fasteners have not degraded. Piping systems and valves are pressure-tested periodically and fasteners are visually inspected. Other components, such as pumps, are tested and key fasteners are checked for tightness and degradation. These inspections ensure that components remain fastened. Loose components, when found, are evaluated for generic implications, such as installation errors or defective materials, and are repaired or replaced as necessary. Plant walkdowns are performed in accessible areas at least three times a day by trained individuals able to identify abnormal conditions. Components that have degraded because of fastener problems are more likely to leak initially than suffer a catastrophic failure and are, therefore, likely to be identified and repaired. In addition, the NRC Staff notes that fastener installations typically provide for large safety margins in application. Also, fastener inspection continues through the installation phase and nonconforming conditions, particularly visual defects, are likely to be identified and corrected. On the basis of these considerations, the NRC Staff concludes that the possibility of installed nonconforming fasteners is not a significant safety issue.

C. Alleged "Whitewashing" of Petitioner's Concerns

The Petitioner alleged that the procurement inspection services supervisor and his manager had performed perfunctory investigations into his concerns related to the adequacy of NU's receipt inspection program and the Millstone Unit 3 construction.

The first investigation was one commissioned by the NU Nuclear Safety Concerns Program (NSCP) and was performed between May 18 and May 29, 1992, by an independent review team (IRT) composed of outside consultants. The IRT investigated five areas of concern identified by the Petitioner. These areas included NU's control and oversight of the SWEC Quality Assurance Program, NU control of vendor activities, adequacy of NU receipt inspection program in the areas of training and adequacy of tools, adequacy of the NCR process in the receipt inspection area, and adequacy of the transfer of materials with respect to "visual damage" inspection. In addition, the IRT interviewed the Petitioner and most, if not all, of the members of the Procurement Inspection Services Department.

In NRC Inspection Report 50-423/92-16 dated September 3, 1992, the NRC Staff presented the results of its review of the first investigation. The Staff

found that the IRT review was cursory in nature in two areas and that the IRT had not supported its conclusions in these areas. Specifically, (1) the IRT had not reviewed, in detail, the SWEC lower tier procedures and procurement documents pertaining to the fasteners transferred from SWEC to the Millstone Nuclear Power Station stores, and (2) the IRT concluded that NU's oversight of SWEC's quality assurance program was satisfactory without determining how the nonconforming fasteners were accepted and placed in stock and whether a programmatic problem existed that allowed the acceptance of the discrepant fasteners.

The NRC Staff made an additional observation regarding the IRT review of the concern regarding guidance for inspecting for visual damage. The concern submitted by the Petitioner to the NSCP was the lack of guidance for performing inspections for visual damage during receipt inspection. On the basis of its review, the IRT concluded that damage would be identified. However, the examples chosen to support the claim that instruction was given on identifying visual damage were examples for inservice inspection, not receipt inspection. The Quality Services Director committed to review the definition of visual damage and revise it as necessary for use in receipt inspection.

Although the IRT report may have been cursory in two areas, it was comprehensive in the other areas investigated: the Combustion Engineering reactor head studs inspection, the A&G Engineering Inc. bolting, the tools available for use, and the training received by those performing receipt inspection. In addition, the IRT conducted a substantial number of interviews to support the investigation. During its inspection regarding the adequacy of the IRT report, the NRC Staff could find no information that suggested a deliberate effort on the part of NU to color the results of the investigation. "Whitewash" implies a deliberate act to conceal a fault or defect in an effort to exonerate or give the appearance of soundness. Although the NRC Staff found that the IRT investigation and report were not complete in two areas and in regard to the definition of "visual damage," the NRC did not find evidence of a deliberate effort on the part of NU to conceal a defect or falsify records. Thus the NRC does not consider the IRT report as a "whitewash."

NRC Inspection Report 50-423/92-24, dated January 12, 1993, discusses the second investigation. This investigation evolved as a result of the NRC inspection findings on the IRT report concerning the effectiveness of NU's and SWEC's receipt inspection programs. It also was a result of a CAR initiated on April 27, 1992, as a result of several NCRs issued by the Petitioner. The CAR was initiated because a significant amount of bolting material had been transferred from SWEC quality assurance stock to NU and green-tagged without proper receipt inspection and because there was a question about the SWEC receipt inspection program. NU initiated the CAR to resolve these concerns. The purpose of the CAR was to provide reasonable assurance that,

under SWEC's quality assurance program for Category I, non-engineered items, nonconforming items were identified and were prevented from being installed at Millstone Unit 3. To accomplish this, NU reviewed SWEC's program for establishing purchase order and receipt inspections requirements. NU concluded that appropriate procedures existed to ensure the quality of Category I, non-engineered items. To review the implementation of the procedures, NU reviewed approximately 4500 receipt inspection reports (RIRs) and selected for detailed review 1000 that identified nonconforming conditions. From this review, NU concluded in closeout documents that SWEC's program was effective in ensuring the quality of Category I items.

The NRC Staff reviewed a sample of RIRs and identified a small number of fasteners that were not inspected for specific attributes, such as the fabrication attribute or coating/preservatives, as required by Quality Assurance Directive (QAD) 7.7, "Receiving Inspection — General." With the exception of these discrepant bolts, there were no other accepted non-engineered items that have subsequently been found to be nonconforming. Therefore, it appeared that the SWEC's receipt inspection program had been effective.

The Staff did note that NU had closed the CAR without adequately justifying that SWEC receipt inspections had been conducted in accordance with quality assurance program requirements. The Licensee's review of these concerns identified that SWEC inspections for non-engineered items relied heavily on the experience of the inspector and did not strictly follow QAD 7.7. Specifically, the receipt inspector would decide what needed to be inspected by review of procurement documents. The inspector conducted the inspections and documented the results on a generic checklist. Therefore, any required attribute could have been inspected and documented in another attribute of the inspector's choice.

Considering the extensive effort by NU to resolve this issue and in spite of the deficiencies noted during the NRC inspection, the NRC Staff could find no information that suggested a deliberate effort on the part of NU to conceal a defect or falsify records. Thus, the NRC Staff does not consider the closeout of the CAR as a "whitewash."

III. CONCLUSION

The institution of proceeding pursuant to 10 C.F.R. § 2.206 is appropriate only if substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that

has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner, or other enforcement action, is warranted.

On the basis of the above assessment, I have concluded that no substantial health and safety issues have been raised regarding the Haddam Neck Plant and Millstone Nuclear Power Station, Units 1, 2, and 3 that would require initiation of formal enforcement action. In particular, safety issues related to the Petitioner's allegations concerning discrepant fasteners were resolved by either removing those fasteners from stores or determining that they were functionally adequate. Therefore, no enforcement action is being taken in this matter.

Although the concerns raised did not warrant the action requested in the petition, the Petitioner's initiative has led to improvements in the procurement receipt inspection program for the Haddam Neck Plant and the Millstone Nuclear Power Station.

Current inspection plans call for continued NRC inspection effort in this programmatic area for the Haddam Neck Plant and Millstone Units 1, 2, and 3 to ensure compliance with current requirements.

The Petitioner's request for action pursuant to section 2.206 is denied. As provided in 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. This Decision will constitute the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of May 1995.