NUCLEAR REGULATORY COMMISSION ISSUANCES

April 1995

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NUCLEAR REGULATORY COMMISSION ISSUANCES

April 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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MASTER

COMMISSIONERS

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

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**

In the Matter of

Docket No. IA-94-011

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

April 5, 1995

The Commission denies a petition filed by Dr. James E. Bauer seeking interlocutory Commission review of the Atomic Safety and Licensing Board's December 9, 1994 Memorandum and Order, LBP-94-40, 40 NRC 323 (1994). That order denied Dr. Bauer's request to eliminate certain of the bases upon which the Staff relied in its May 10, 1994 enforcement order imposing several restrictions on Dr. Bauer.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Interlocutory review of Atomic Safety and Licensing Board decisions is disfavored.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The standards set out in 10 C.F.R. § 2.786(g)(1) and (2) — a showing of either "irreparable impact" or a "pervasive or unusual" effect on a proceeding's "basic structure" — reflect the limited circumstances when interlocutory review may be appropriate.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

A legal error, standing alone, does not alter the basic structure of an ongoing proceeding and therefore does not justify interlocutory review. Such errors can be raised on appeal after a final licensing board decision.

MEMORANDUM AND ORDER

The Commission has before it a petition filed by Dr. James E. Bauer seeking interlocutory Commission review of the Atomic Safety and Licensing Board's December 9, 1994 Memorandum and Order, LBP-94-40, 40 NRC 323 (1994). That order denied Dr. Bauer's request to eliminate certain of the bases upon which the Staff relied in its May 10, 1994 enforcement order imposing several restrictions on Dr. Bauer, including a prohibition on conducting any NRC-licensed activity for a period of 5 years.

Dr. Bauer argues that the allegations on which the Staff relied cannot, as a matter of law, form the basis for a Staff enforcement order because of their unlitigated, hearsay nature and their lack of connection to other NRC-licensed activities from which Dr. Bauer has been prohibited. The Nuclear Regulatory Commission Staff opposes grant of the petition for interlocutory review. We deny the petition.¹

As the Commission has repeatedly held, interlocutory review of Licensing Board decisions is disfavored. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994) (*Vogtle*); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994) (*Rancho Seco*). The standards set out in 10 C.F.R. § 2.786(g)(1) and (2) — a showing of either "irreparable impact" or a "pervasive or unusual" effect on a proceeding's "basic structure" — reflect the limited circumstances when interlocutory review may be appropriate.

Dr. Bauer does not claim "irreparable impact." He argues only that the Board's refusal to dismiss the Staff's enforcement allegations was erroneous as a legal matter and affected the proceeding's "basic structure." But it is not at all clear that the Licensing Board erred in allowing the NRC Staff the opportunity to substantiate its allegations at a hearing. The Commission need not, in any event, step in now to correct the Licensing Board's legal errors, if any. A legal

¹ Also before us is Dr. Bauer's petition for permission to file a reply to the NRC Staff's response in opposition to granting interlocutory review. Dr. Bauer attached the reply itself to his petition. The NRC Staff opposes grant of this petition. The Staff does not argue, nor do we find, prejudice to the Staff in granting Dr. Bauer's request to file a reply. Nor do we see any other reason to deny the request to reply. We therefore allow the filing of the reply. We have considered it, along with the petition for interlocutory review, in ruling on whether to grant interlocutory review.

error, standing alone, does not alter the basic structure of an ongoing proceeding and therefore does not justify interlocutory Commission review. *See Vogtle*, 40 NRC at 321-22; *Rancho Seco*, 40 NRC at 93-94. Such errors can be raised on appeal after a final Licensing Board decision.²

We intimate no definitive judgment on the soundness of the Licensing Board's decision or on the ultimate merits of this case. Our decision today stems from our unwillingness to entertain interlocutory appeals except in extraordinary situations.

CONCLUSION

For these reasons, Dr. Bauer's petition to file a reply to the Staff's opposition to his petition for review is granted. His petition for interlocutory review is denied.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of April 1995.

² We also note that Dr. Bauer could have challenged the immediate effectiveness of the Staff's enforcement order on the ground that the order is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. *See* 10 C.F.R. § 2.202(c)(2)(i). Had he done so, and had his challenge been successful, he could have been relieved of the prohibitions of which he complains at least until termination of the hearing.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 70-364-ML-Ren

**BABCOCK AND WILCOX
COMPANY**

(Pennsylvania Nuclear Service Operations,
Parks Township, Pennsylvania)

April 26, 1995

Intervenors filed a Petition for Review of the Presiding Officer's Initial Decision (LBP-95-1, 41 NRC 1 (1995)) addressing the application of Babcock & Wilcox for a renewal of its Special Nuclear Materials License No. SNM-414 for its facility in Parks Township, Pennsylvania. The Commission concludes that the Petition for Review fails to raise any substantial question justifying Commission review as required under the agency's controlling procedural regulations. The Commission therefore denies the Intervenors' Petition for Review.

ORDER

The Intervenors (Citizens' Action for a Safe Environment and Kiski Valley Coalition to Save our Children) have filed a Petition for Review of the Presiding Officer's Initial Decision (LBP-95-1, 41 NRC 1 (1995)) addressing the application of Babcock & Wilcox (B&W or Licensee) for a renewal of their Special Nuclear Materials License No. SNM-414 for their facility in Parks Township, Pennsylvania. Staff and B&W oppose the Intervenors' Petition for Review. Upon consideration of these pleadings and the underlying record in this proceeding, the Commission concludes that the Petition for Review fails to raise any substantial question justifying Commission review as required under

10 C.F.R. § 2.786(b)(4), *incorporated into Subpart L in 10 C.F.R. § 2.1253*. The Commission therefore denies the Intervenor's Petition for Review.

BACKGROUND

Pursuant to License No. SNM-414, B&W uses radioactive materials in its Parks Township facility. Under this license, B&W's principal activities at the facility are the decontamination, repair, maintenance, and testing of equipment and components contaminated with radioactive materials; the volume reduction of low-level radioactive waste; the decontamination of onsite facilities formerly used for plutonium and uranium processing; and the management of an inactive, onsite burial area.

The Intervenor's sought and received a hearing where they opposed B&W's application. The Presiding Officer, in granting their hearing request, accepted one broad area of concern which he also defined to include four subareas of concern.¹ After conducting an informal hearing pursuant to Subpart L of the Commission's procedural regulations, the Presiding Officer issued an Initial Decision (LBP-95-1) in which he considered and rejected all of the Intervenor's arguments regarding B&W's license renewal application. In short, the Presiding Officer found that radioactivity levels at onsite facility measuring points were consistently below even the most conservatively applied maximum permissible concentrations permitted under the Commission's regulations and that no reportable releases in excess of NRC regulatory limits occurred in the period 1976 through 1993. He also found that B&W could be expected to keep exposure rates to members of the general public at very low levels. Based on these findings, he concluded that the licensee is fully qualified to maintain radioactive effluent releases within regulatory limits so that the public health and safety and the environment are not threatened.

¹ *Broad area of concern:*

Whether there has been, and under a license renewal whether there will be, offsite radiation from the Parks Township facility which threatens the health and safety of the nearby population and threatens radiological contamination of nearby residential, agricultural and business property.

Included subareas of concern:

1. Whether the housekeeping practices (drums, containers, etc.) at the Parks Township facility threaten the offsite release of radiation through water, dust, and air pathways.
2. Whether B&W management practices as manifested by the management of the Apollo facility threaten offsite releases of radiation from the Parks Township facility.
3. Whether transportation of wastes between Parks and Apollo has radiologically contaminated offsite properties.
4. Whether the location of the Parks Township facility waste dump over a mined-out area threatens, through subsidence, the integrity of the dump, and whether the mined-out area creates a threat of offsite release of radiation through a water-migration pathway.

LBP-94-12, 39 NRC 215, 222-23 (1994).

PETITION FOR REVIEW

The Intervenors, in their Petition for Review, raise four contentions.² First, they challenge the Presiding Officer's conclusions that "B&W has demonstrated that it has an excellent record of compliance with NRC requirements" and that "taking into account . . . previous effluents from the Parks Township facility, . . . [the] activities under a renewed license will be conducted in a manner consistent with regulatory requirements that protect health and safety and minimize danger to life and property." Petition at 2, *quoting* LBP-95-1, slip op. at 73 and 72-73 [41 NRC at 36], respectively. Second, they broadly challenge the Presiding Officer's conclusion regarding their failure to demonstrate that "there has been [or] . . . will be . . . offsite radiation from the Parks Township facility which threatens the health and safety of the nearby population and threatens radiological contamination of nearby residential, agricultural and business property" (the "broad area of concern," *supra* note 1).

Third, the Intervenors take issue with the statement in the Initial Decision that "[t]he Assessment of Mine Subsidence . . . concludes that conditions at the SLDF [Shallow Land Disposal Facility — one of the facilities within B&W's Parks Township facility] are not conducive to the development of sinkhole-type subsidence in . . . the . . . long term." Petition at 2, *quoting* LBP-95-1, slip op. at 62 [41 NRC at 31]. Fourth, the Intervenors assert generally that it would be in the public interest to defer the issuance of the license renewal pending the collection and review of data from an EIS addressing the decommissioning of the SLDF. Petition at 5.

DISCUSSION

To merit Commission consideration, a Petition for Review must raise at least one of the following kinds of substantial questions justifying Commission review:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or

²The Intervenors also proffer numerous subarguments and related questions. However, given the failure of the four principal arguments to satisfy the conditions set forth in 10 C.F.R. § 2.786(b)(4), we need not discuss these subsidiary matters.

- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4), *incorporated into Subpart L in 10 C.F.R. § 2.1253.*

The Intervenor's arguments fall into three of these categories: fact, law, and public interest. We have reviewed the record in this proceeding and are convinced that the Presiding Officer's Initial Decision considered the Intervenor's concerns thoughtfully and fairly. The Presiding Officer referred some of them to the NRC Staff for further technical review under 10 C.F.R. § 2.206. We see no obvious factual error, novel legal question, or important policy issue requiring an adjudicatory review by the Commission.

We find no substantial evidence to support the factual contentions proffered in the Intervenor's Petition for Review. We therefore conclude that those arguments fail to demonstrate any clear error in the Presiding Officer's findings of fact. 10 C.F.R. § 2.786(b)(4)(i).

Similarly, we find no obvious errors in any of the Presiding Officer's legal conclusions challenged by the Intervenor. Consequently, the Intervenor has not raised "a substantial and important question of law" pursuant to 10 C.F.R. § 2.786(b)(4)(iii). Nor are any of his legal conclusions "without governing precedent or . . . a departure from or contrary to established law." Therefore, the Intervenor's arguments do not fall within the parameters of 10 C.F.R. § 2.786(b)(4)(ii).

Finally, we see no public interest to be served by deferring the issuance of the license renewal pending the collection and review of data from an EIS unrelated to the instant proceeding. (The EIS in question involves the decommissioning of the SLDF and is unrelated to the license renewal application.)

For all these reasons, we conclude that the Intervenor has not satisfied their burden to raise questions that are sufficiently substantial to justify Commission review under 10 C.F.R. § 2.786(b)(4).

We note, however, that our denial of review does not preclude all NRC consideration of the arguments presented by the Intervenor in this proceeding. For instance, the Presiding Officer referred thirteen sections of the Intervenor's Written Presentation to the Commission's Executive Director for Operations, for appropriate disposition under 10 C.F.R. § 2.206. LBP-95-1 at 7-11, 63-72. Although the Staff recently concluded that ten of these concerns failed to satisfy the requirements of section 2.206 (i.e., a request must "specify the action requested and set forth the facts that constitute the basis for the request"), the Staff nevertheless agreed to look further into the remaining three

concerns. 60 Fed. Reg. 13,478 (Mar. 13, 1995).³ Moreover, some of the Intervenor's contentions may be more appropriately decided at a future time in a decommissioning context.

Finally, we note that the Intervenor asserts, for the first time in their Petition for Review, that the "latest readings" of concentration levels of uranium in ash samples taken from the Kiski Valley Water Pollution Control Authority's lagoon "include samples of approx[imately] 460 picocuries per gram." Petition at 1. The Intervenor, however, have provided no evidentiary support for their late-filed assertion regarding the 460-picocurie/gram readings, nor have they shown whether such readings are representative of the samples taken from the lagoon, nor have they shown why they could not have raised this matter earlier in this case. We therefore decline to consider it in the context of this proceeding. However, the Intervenor are free to raise this issue with the NRC Staff, and to provide supporting documentation.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

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

³ Although the Staff's notice in the *Federal Register* identified only twelve areas of concern, the Presiding Officer indicated that one of these also included a thirteenth area of concern. LBP-95-1 at 65. The thirteenth area is one of those which the NRC Staff has not yet addressed.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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James P. Gleason, * *Deputy Chief Administrative Judge (Executive)*
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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUEL CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

April 18, 1995

The Licensing Board grants a motion for a protective order limiting the use of the protected information to those individuals participating in the litigation and for the purposes of the litigation only.

**RULES OF PRACTICE: DISCOVERY (PROTECTIVE ORDERS);
INTERPRETATION**

The Commission's regulation concerning protective orders is patterned after Rule 26(c) of the Federal Rules of Civil Procedure, and we look to decisions interpreting the federal rule for guidance. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

RULES OF PRACTICE: DISCOVERY (PROTECTIVE ORDERS)

"In providing authority to permit discovery of confidential information only in a designated way . . . with few exceptions, the protection granted parties or persons against the disclosure of trade secrets and confidential business information restricts the use of such information to those engaged in the proceeding." Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 72, 73 (1983); see also cases cited, 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2043 n.29; as an example of such limitation, see Administrative Conference of the United States, *Manual for Administrative Law Judges* 192 (Form 19-d).

RULES OF PRACTICE: DISCOVERY (PROTECTIVE ORDERS)

"[E]xceptions recognized for extrajudicial releases of protected information are generally in circumstances where either a statute or an agency's rules and regulations specifically provide for the disclosure of information obtained by it." See, e.g., *Resolution Trust Corp. v. KPMG Peat Marwick*, 779 F. Supp. 2 (D.D.C. 1991).

RULES OF PRACTICE: DISCOVERY (PROTECTIVE ORDERS)

The availability of management directives in the NRC's Public Document offices does not place those who do business with the NRC on notice of the Agency's policies and practices regarding the use of protected discovery information.

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

It cannot be successfully maintained that the Staff, as one litigant in a proceeding, in the absence of statutory or regulatory authority directing otherwise, can perform with different responsibilities than other litigants. It must operate and conform to the same standards as apply to other parties. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479, 484 (1985).

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

In the absence of regulatory authority or some policy direction by the Commission, the Staff must be bound by the terms of a Board protective order.

RULES OF PRACTICE: DISCOVERY (PROTECTIVE ORDERS); RESPONSIBILITIES OF PARTIES

It has been stated that the "Commission and its adjudicatory boards have always proceeded on the assumption that the terms of all protective orders will be scrupulously observed by everyone who acquires confidential information under such an order." *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979).

MEMORANDUM AND ORDER (Ruling on Motion for Protective Order)

On December 2, 1994, the Sequoyah Fuels Corporation (SFC) filed a motion requesting a protective order that, except for a single paragraph concerning the disclosing of confidential information to certain specified offices, is agreeable to all parties.¹ The order contemplates controlling the disclosure and use of confidential business information and records as protected discovery material under 10 C.F.R. § 2.740(c). The controversy over the contested paragraph, numbered 7, relates to the possible disclosure of confidential material by the Staff to NRC offices who are not involved in the development or litigation of this proceeding.²

The paragraph proposed by SFC and supported by its parent organization General Atomics (GA) reads as follows:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order without first obtaining either the consent of the party whose Protective Discovery Material is being disclosed or the approval of the Licensing Board.

The paragraph proposed by the Staff, Native Americans for a Clean Environment (NACE), and the Cherokee Nation reads:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from disclosing such to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff, but such NRC Staff shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order. Notwithstanding any other provision contained in this Protective Order,

¹ Motion for Protective Order (Dec. 2, 1994)

² *Id.* at 3-4.

the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff may use or refer such Protected Discovery Materials as is appropriate in the legitimate exercise of their respective duties.

DISCUSSION

As recommended by the foregoing, SFC proposes that protected discovery materials be disclosed only to individuals engaged in the litigation unless the consent of the producing party or the Board is obtained.³ The Staff contends this limitation impedes the ability of the Staff to provide information to the Executive Director for Operations (EDO), the Agency's senior staff official whose responsibilities include supervising and coordinating the operational activities of all Staff offices, and "could restrict the flow of information" to the Agency's Office of Investigations (OI) and Office of Inspector General (OIG). These offices, it is asserted, have a "vital role" in assuring public health and safety and protection against fraud, abuse, and wrongdoing.

The Staff claims further that the Agency's management directives impose a duty on NRC employees to report allegations of licensee or contractor wrongdoing. The Staff, accordingly, asserts an independent responsibility to report information of any wrongdoing obtained through the materials transmitted in the protective order to the NRC offices indicated, and asserts that it would be inappropriate to obtain the consent of a party, or the Board, prior to the communication of any protected information.⁴ The supervisory or investigative functions of these offices are delineated in 10 C.F.R. Part 1, §§ 1.13, 1.31, and 1.36. SFC proposes that if the Staff is concerned about obtaining the contributing party's consent to transmitting any protected information to the offices indicated, it would not object to the Staff proceeding *ex parte* to the Board.⁵

In sum, SFC requests the protection of the Board against a claimed unilateral power in the Staff to independently distribute confidential discovery material to individuals not engaged in the present litigation.⁶ And the Staff contends the Board lacks jurisdiction to direct the Staff in the performance of its regulatory responsibilities, or to supervise the manner in which Agency employees refer information to OI or OIG for possible investigation.⁷ The Staff argues, with the Board's jurisdiction being limited, it cannot interfere with NRC employees'

³ *Id.*

⁴ Staff Response to SFC Motion for Protective Order at 3-9 & n.8

⁵ SFC Reply to Staff Response to Motion for Protective Order at 3.

⁶ SFC concedes that protected material can be provided the EDO in the exercise of his supervisory role on this litigation. See SFC Reply to Staff Response to Motion for Protective Order at 2; see also Tr. 132-33.

⁷ Staff Response to SFC Motion for Protective Order at 9.

responsibility to communicate matters involving health, safety, or wrongdoing to the offices indicated.⁸

In oral argument, the Staff acknowledges that a "tension" exists between the Board's responsibilities to control discovery and the Agency's policy "governing the Staff." Tr. 171. However, it contends such tension must be resolved in favor of the Staff whose responsibility "overrides the delegation to the Board . . . to oversee discovery." Tr. 175. SFC argues the Staff is only entitled to confidential information as a party to this proceeding and under 10 C.F.R. § 2.740(c) that information, in NRC's litigative processes, requires the Licensing Board's protection against inappropriate releases. Tr. 165-66.

Since NRC case history reveals no precedents concerning the proposed use of protected information for nonlitigative purposes, the Staff and SFC were questioned during oral argument on whether the matter should be referred to the Commission for policy direction or whether a change in the regulations authorizing the transfer should be sought. Neither the Staff nor parties believes such action necessary, contending the Board has the authority to resolve the issue before us. Tr. 149-53, 190-91.

Questions were also raised by the Board on the standard to be used to evaluate the appropriateness of the Staff submitting protected materials concerning wrongdoing to supervisory or investigative offices, and GA opined the test should be the "reasonableness" of the Staff's justification. Tr. 137-40. NACE expressed a concern over the Board's having to consider an issue of wrongdoing "totally unrelated" to the decommissioning matter before the Board (Tr. 211-12); and the Staff persists that the Board's maintaining jurisdiction over this issue would be tantamount to directing or supervising the work of the Staff.⁹ The Staff questions whether time delays could impact an investigation adversely if allegations of wrongdoing had to be presented first for Licensing Board approval. However, assurances of the ability of a Board to respond rapidly in such circumstances did not alter the Staff's basic position that no discretion is permitted on reporting such allegations or wrongdoing activity to supervisory or investigative offices. Tr. 196-97, 209-11.

The parties are further in disagreement concerning provisions dealing with requests for protected discovery information under the Freedom of Information Act (FOIA).¹⁰ The parties diverge on whether the Board has authority to resolve disputes over the exemption of protected information under the provisions of the

⁸ Staff Answers to Board Questions (Mar. 3, 1995).

⁹ Staff Response to SFC Motion for Protective Order at 7-9; Tr. 191-92. The Staff indicates a willingness to notify the Board, *ex parte* and *in camera*, that a referral of protective information has been made. See Staff Supplement to Oral Argument Regarding Motion for Protective Order at 3 n.6.

¹⁰ See Stipulated Motion for Protective Order (Feb. 3, 1995); Staff Response to GA's Stipulated Supplemental Motion for Protective Order (Feb. 24, 1995); GA Motion for Leave to Reply (Mar. 2, 1995); Staff Response to GA Motion for Leave to Reply (Mar. 6, 1995).

Act. All parties in the proceeding, except the Staff, support GA's supplemental motion to add a new paragraph 6 to the Protective Order. The motion proposes that employees of NRC's Assistant General Counsel for Administration; the Office of Nuclear Material Safety & Safeguards, Program Management, Policy Development & Analysis Staff; and the Office of Administration, Division of Freedom of Information and Publication Services review protected discovery information for the purpose of determining whether exemptions under the statute apply to requests for protected materials.¹¹ If determined to be not exempt, the party producing such materials would have the right to apply for a Board determination and to argue before the Board that such materials are not Agency records subject to the Act.¹² The Staff contends the Licensing Board has no jurisdiction to consider FOIA requests of protected discovery information since the Agency has established different procedures for handling such matters.¹³

DECISION

With the Staff basically alleging an exemption from the controlled information provisions of a protective order, we are confronted here by an issue of first impression.¹⁴ This position is in conflict with the provisions of 10 C.F.R. § 2.740(c) wherein the Licensing Board is authorized to issue orders to protect against discovery disclosures of a party's trade secrets, confidential research, development, or commercial information or to require that disclosures of such information be made in a designated way.

The Commission's regulation concerning protective orders is patterned after Rule 26(c) of the Federal Rules of Civil Procedure, and we look to decisions interpreting the federal rule for guidance.¹⁵ This is useful where, as here, there is a dearth of NRC decisions on the matter before us.¹⁶

¹¹ For purposes of clarity, we have inserted herein several ministerial changes requested by GA to its Stipulated Supplemental Motion for Protective Order of February 3, 1995. Although the Staff objected to a motion by GA for leave to reply to the Staff response to GA's Supplemental Motion, the Board grants the motion in the interest of obtaining full information on the parties' views concerning the applicability of the Freedom of Information Act to this proceeding.

¹² Stipulated Supplemental Motion for Protective Order at 1-2.

¹³ The Staff, citing *General Electric Co. v. NRC*, 750 F.2d 1394 (1984), alleges the Agency is free to disclose protected information even if the Board should rule otherwise. The factual setting there, however, is different than the discovery phase in the case before us. See Staff Response to GA's Stipulated Supplemental Motion for Protective Order (Feb. 24, 1995) and GA Motion for Leave to Reply (Mar. 2, 1995).

¹⁴ The Staff submitted evidence of a prior effort to have a protective order amended for the referral of information to NRC investigative offices. However, no guidance is provided herein since the Licensing Board never acted on the motion. See Staff Supplement to Oral Argument Regarding Motion for Protective Order at 2-3.

¹⁵ *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

¹⁶ The Appeal Board approved a protective order restricted to the parties in the proceeding in *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28-29 (1979). Although the decision sheds some light on the claimed inviolability of the Staff's role in protective orders, the Staff alleges

(Continued)

Discovery procedures contemplate parties in an adjudicative proceeding making full disclosure of all information relevant to the subject matter of a case as a means of eliminating surprise and efficiently expediting the disposition of litigation. The process enables parties to obtain complete knowledge of the issues and facts involved in litigation.¹⁷ It is recognized that the discovery process is not unfettered, however, and has "ultimate and necessary boundaries."¹⁸ One such limitation is the provision for protective orders which highlights the tribunal's authority to control the discovery process and circumscribe the invasion of inquiries into what otherwise are the private and confidential business domains of party litigants.¹⁹

In providing authority to permit discovery of confidential information only in a designated way, it has been noted that, with few exceptions, the protection granted parties or persons against the disclosure of trade secrets and confidential business information restricts the use of such information to those engaged in the proceeding.²⁰ Protective order information has been held to be reachable by a grand jury subpoena,²¹ but a review of federal court decisions suggests that the exceptions recognized for extrajudicial releases of protected information are generally in circumstances where either a statute or an agency's rules and regulations specifically provide for the disclosure of information obtained by it.²² A leading case prohibiting other uses of information obtained by protective orders and restricting utilization to the litigation for which it was obtained is *Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 654 P.2d 673 (1982). Upholding a protective order, even though a prior restraint on publishing information obtained in a discovery process, the court noted that by "allowing liberal discovery, with inquiries into matters which would not necessarily be introduced or admissible at trial, [courts] were permitting invasions of a litigant's private domain and were rightly concerned" about protection against abuse of the discovery process.²³ In sustaining the state court's decision, the U.S. Supreme Court referred to the Court's broad discretion to decide the appropriateness of a protective order and

the decision has little precedential value since it was decided prior to the establishment of the OI, OIG, and the Agency's Management Directives relied upon here. See Staff Supplement to Oral Argument Regarding Motion for Protective Order at 3-4.

¹⁷ 4 James W. Moore et al., *Moore's Federal Practice* ¶26.02 (1994).

¹⁸ *Hickman v. Taylor*, 329 U.S. 495, 505-07 (1947).

¹⁹ 8 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2036 (1970).

²⁰ Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 72, 73 (1983); see also cases cited, 8 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2043 n.29 (1970); as an example of such limitation, see Administrative Conference of the United States, *Manual for Administrative Law Judges* 192 (Form 19-d).

²¹ *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988), cert. denied, 487 U.S. 1240 (1989).

²² See, e.g., *Resolution Trust Corp. v. KPMG Peat Marwick*, 779 F. Supp. 2 (D.D.C. 1991).

²³ *Rhinehart*, 98 Wash. 2d at 242.

to weigh fairly the interests of the parties affected by discovery.²⁴ Although a protective order for securing the confidentiality of trade information has issued, the Court always has the discretion to subsequently modify the order, assuming an adequate showing of good cause.²⁵ As a matter of practice, lawyers and judges assume litigants use material obtained through discovery only for preparation for litigation even where the Court has not entered a protective order. It has been pointed out, in this connection, that discovery is essentially a private affair.²⁶ And discovery has been denied where the purpose of a discovery request was to gather information for use in proceedings other than a pending suit.²⁷ It has been pointed out that courts should not sanction and encourage the use of private litigants' devices (i.e., discovery) as reinforcements for federal prosecutors, whether civil or criminal.²⁸ And it has been recognized that a demand for sensitive documents can be made "not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party, regardless of the merits of the suit, to settle it in order not to have to disclose sensitive documents."²⁹

In the present case, the parties are attempting to resolve future discovery difficulties by an "umbrella" protective order designed to accommodate in advance all requests for confidential information. As noted in the *Manual for Complex Litigation*, such orders "expedite the flow of discovery material while affording protection against unwarranted disclosures."³⁰ The Staff is not obligated to enter into such a prearranged protective order but its participation is a recognition that its execution will be in the Agency's best interests, as well as other party litigants.³¹ Alternatively, it could have opted to wait and challenge denials of requests for confidential information requested in the ordinary course of the discovery process. A prearranged protective order, however, is frequently seen as an efficient method of obtaining the information a case requires since the resolution of disputed confidentiality issues under the good-cause standard in the regulations is frequently a time-consuming process.³²

²⁴ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Although the circumstances of this case involved first amendment rights, the decision has general applicability. See also *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

²⁵ *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989); see also *In re Agent Orange: Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), cert. denied, 484 U.S. 953 (1987).

²⁶ See 8 Charles A. Wright et al., *Federal Practice and Procedure* 2d (1970), 1994 Supplement § 2043; see also Marcus, *The Discovery Confidentiality Controversy*, U. Ill. L. Rev. 457, 458 (1991).

²⁷ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978).

²⁸ *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976).

²⁹ *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1495 (7th Cir. 1983).

³⁰ *Manual for Complex Litigation* 2d, § 21.431 (1985).

³¹ The Staff recognizes that a protective order is "desirable in this case . . ." and will "facilitate the discovery process, . . . conserve time and . . . streamline the process." Staff Response to SFC Motion for Protective Order at 1; and Staff Reply to GA Brief in Support of Motion for Protective Order at 7-8.

³² Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 23 (1983).

On delineating the respective supervisory, administrative, or investigative responsibilities of the EDO, and the Directors of the OI and OIG offices, the Staff asserts that restricting its ability to communicate wrongdoing though privileged information violates the Commission's policy on the free flow of communications, interferes with the Agency's ability to ensure public health and safety and protect against fraud, abuse, and wrongdoing.³³ This appears to the Board as an exaggerated claim which implicitly argues the basic responsibilities of the NRC offices would be threatened by not having discovery information available to it. In its operations, the agency can make a variety of demands for information from licensees (10 C.F.R. § 2.204), as it has in the past with this Licensee, and the investigatory powers of OI and OIG are extensive enough that they can hardly be considered as hampered by the inability to receive protected discovery information. As has been pointed out, "the government as investigator has awesome powers, not lightly to be enhanced or supplemented by implication."³⁴ It is our conclusion that if the Staff's position has validity, no basic reason exists for it ever to be a party to a protective agreement.³⁵ SFC does concede that the EDO's supervisory responsibilities are involved in all NRC litigation and to the extent of any involvement in this proceeding, that office is entitled to the privileged information discussed herein. *See* Tr. 132-33.

A more serious challenge is presented by the Staff's claim that a protective order represents an interference with its responsibilities as directed by the NRC. The management directives claimed by the Staff as obligating it to report all matters of possible wrongdoing, irrespective of their genesis, to OI or the OIG, would, if interpreted any other way than the Staff claims, "be inconsistent with the objective of the Agency's Management Directive."³⁶ The Staff's position is untenable for several reasons. Management directives are required to be adopted by all federal departments and agencies and as formulated are an internal management system for communicating an agency's "policies, objectives, responsibilities, authorities, requirements, guidance, and information to employees."³⁷ (Emphasis supplied). Directive 1.1(041) indicates that the directive applies to and must be followed by "all NRC . . . employees." Volume 8 of the 14 volumes of the management directives concerns Licensee Oversight Programs, and 8.8, or Chapter NRC-0517 and Appendices I-III of that volume, which is cited by the Staff as support for its position herein, deals with the

³³ Staff Response to SFC Motion for Protective Order at 37.

³⁴ *GAF Corp.*, *supra* note 28, 415 F. Supp. at 132.

³⁵ The Staff argues that a protective order is not necessary to bind the Staff due to the provisions of 10 C.F.R. § 2.790 and 18 U.S.C. § 1905, but it has agreed to be voluntarily subject to a protective order and waive requiring determinations under the regulations in order to conserve time and streamline the process. *See* Staff Reply to GA Brief in Support of Motion for Protective Order at 7-8. *See also* Tr. 171-73.

³⁶ Staff Answers to Board Questions at 2; *see also* Tr. 171-72.

³⁷ NRC Management Directives System Directive, Policy 1.1-01.

Management of Allegations and defines "the policy and procedures for the proper receipt, processing, control, and disposition of allegations received for resolution by NRC offices that concern NRC-regulated activities."³⁸ The chapter cited involves the handling of allegations of wrongdoing by Office Directors and Regional Administrators and the Agency's Office of Investigations. The management directive makes no reference, as the Staff concedes, to allegations of wrongdoing based on protected confidential information solicited through the discovery process and excludes from its definition of allegation "matters being handled by more formal processes such as . . . hearing boards"³⁹ Although the Staff's conclusion that this exclusion only involves matters "related to the issues in the proceeding" is debatable,⁴⁰ the Commission could have stated that the definition of allegations covers information received from whatever source, including protective orders, had it intended to do so.

The issue before us, however, is whether the Agency's Management Directives can be equated with regulatory requirements and thus avoid having to meet the procedural rulemaking requirements of noticing rulemaking in the *Federal Register*, soliciting public comments, and publishing final regulations.⁴¹ We do not believe, and do not concur in, the Staff's judgment that the availability of management directives in the Agency's Public Document offices places those who do business with the NRC on notice of the Agency's policies and practices.⁴² Even if a contrary judgment were to be made, a reading of the management directive cited by the Staff (8.8) provides no information that privileged discovery material is embraced within its terms. Although it can be presumed that the Staff's position is based on the supposition that wrongdoing might be deduced from protected discovery information (Tr. 208-11), there is no evidence of wrongdoing in this case, nor hint of how evidence of such derived from protected discovery material transforms itself into allegations, as contemplated by the management directive cited.

Weighing the conflicting interests of the parties in the proposed protective order, it appears to the Board in a final analysis that to permit the Staff to ignore the confidential status of protected information erodes the foundation of protective orders as authorized by the rules. There is nothing in the regulations of this Agency that authorizes the exercise of such a power, and if that authority appears necessary to the responsible functioning of the NRC, the Commission can direct a rule be publicly proposed for adoption. It also needs pointing out that the Staff's proposed version of paragraph 7 goes much

³⁸ Staff Answers to Board Questions (Mar. 3, 1995).

³⁹ NRC-0517-043.

⁴⁰ Staff Answers to Board Questions at 3.

⁴¹ See 10 C.F.R. § 2.804.

⁴² See Staff Answers to Board Questions at 4 n.3.

beyond the premise of allegations of wrongdoing. By its terms, there is no requirement of any investigatory purpose to trigger the Staff's authority to release protected information. The Staff would be entitled to release any and all protected information to the offices indicated without having to meet any criteria of wrongdoing. With no restraints, such an unbalanced authority provides an opportunity for one litigant in a proceeding to vitiate the protection of confidential information in a way the discovery process never contemplated.

It cannot be successfully maintained that the Staff, as one litigant in a proceeding, in the absence of statutory or regulatory authority directing otherwise, can perform with different responsibilities than other litigants. It must operate and conform to the same standards as apply to other parties.⁴³ Related to the substance of the Staff's argument here, it has been stated that a protective order should be enforced against a third party, including the (federal) government, and that absent some extraordinary circumstance or compelling need, a protective order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation.⁴⁴

Sustaining a lower court's upholding of stipulations of confidentiality for witnesses' testimony against the federal government, the Court of Appeals stated:

These [the government's] arguments ignore a more significant counterbalancing factor — the vital function of a protective order issued under Rule 26(c), F.R. Civ. P., which is to "secure the just, speedy and inexpensive determination" of civil disputes, Rule 1, F.R. Civ. P., by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice. Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the government for investigatory purposes in disregard of those orders.^[45]

In a case⁴⁶ involving the U.S. Environmental Protection Agency, and similar in its factual setting to the one before us, the Court affirmed the use of the trial court's discretion restricting the agency's use of protected discovery information for investigative purposes. The decision was based, in part, on the lack of

⁴³ *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-801, 21 NRC 479, 484 (1985).

⁴⁴ *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (1979).

⁴⁵ *Id.* at 295-96.

⁴⁶ *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

statutory authority for the use of discovery information in the conduct of the Agency's investigatory function.

We do not conclude that the uncovering of possible evidence of wrongdoing through the discovery of protected information may not, on occasion, present a problem for the NRC. However, in the absence of regulatory authority or some policy direction by the Commission, the Staff must be bound by the terms of the order contemplated here. It has been stated that the "Commission and its adjudicatory boards have always proceeded on the assumption that the terms of all protective orders will be scrupulously observed by everyone who acquires confidential information under such an order."⁴⁷ We do not state, if the Staff (or the Board itself) became aware of information involving immediate threats to health and safety, that an obligation does not exist to report such information to responsible NRC officials, irrespective of the source of such information. This obligation is always present. Here, we emphasize the difference between evidence that may lead to allegations of wrongdoing and information on existing dangers to the public's health or safety.

However, the Staff, having no authority to use protected information for nonlitigative purposes, confronts us with another dilemma inasmuch as the ruling leaves a proposed protective order not consensual and agreeable to all parties. The Board has several options: First, not to grant a protective order in its present form on the basis that an essential element of good cause has not been adequately shown as is otherwise required by the regulations.⁴⁸ The parties would then have to proceed *seriatim* pursuant to the regulations governing the obtaining of protected information, 10 C.F.R. §§ 2.740(c) and 2.790. This ruling would, however, further delay this proceeding and leave the parties in a posture they wanted to avoid. And even though that result rests with the parties whose motions are before us, we would not be responsibly conducting our charge to take action to avoid delay.⁴⁹ We are concerned about the pace of this adjudication and that that ruling, requiring the observance of good cause and other procedural requirements of the regulations, would consume further argument and unnecessary time.

The second option would be to refer this matter in its entirety to the Commission. However, the Board's role is to decide disputed issues and it is that responsibility we meet by rendering a decision on the disputed issue before us. We are not called upon either to declare some Commission policy askew or to establish some policy matter the Commission should embrace. The Board is called upon to issue a protective order, the terms of which are

⁴⁷ *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979).

⁴⁸ See 10 C.F.R. § 2.740(c).

⁴⁹ See 10 C.F.R. § 2.718.

tailored to prevent possible misuse of proprietary information. This act is well within the jurisdiction of the Board and the parties agree that it is within the Board's competence to settle disputes concerning the terms of the protective order without the intervention of the Commission. Unlike the Staff which has as its function differing roles — administration, enforcement, and regulation — the Board's role is exclusively adjudicatory in nature. At this juncture, a largely undefined Commission policy which the Staff claims places restraints on its ability to abide by the terms of the protective order does not, nor should not, prevent the Board from acting in its narrow adjudicatory role. If the Staff chooses, for reasons it has outlined, to go against the terms of the protective order after it has issued, it can apply to the Commission for such guidance or relief.

The third option, and the one adopted herein, is to determine that support for the protected order, with the paragraph 7 version as requested by GA, has been adequately substantiated. There has been no issue here of the need for a protective order and, except for that paragraph, all parties support it. The material described here, over which SFC expresses a concern about inadvertent releases,⁵⁰ is entitled to protection as privileged or confidential information. A formal procedure is included in the proposed order controlling accessibility by those involved in the litigation, and an opportunity for parties to challenge the *bona fides* of protected material is available. A provision is included in the order (paragraph 12) providing for Board review where objections are made to the designation of material as protected discovery material and the Board also reserves herein, *infra*, the right to review the status of protected discovery material introduced into the record prior to the close of this proceeding. And finally, a procedure is provided for assuring the Staff of a Board review, *ex parte* and *in camera*, of that protected material it represents as constituting wrongdoing and requiring the consideration of the offices designated. We do not agree that the Board review constitutes, in any degree, a directing or supervising of the Staff in the conduct of its responsibilities.⁵¹ While there is admittedly tension created by the different roles the Staff and the Board must play, the Board simply is exercising its authority to supervise the discovery procedure, as required by NRC's Rules of Practice in 10 C.F.R. § 2.740(c). To require the Staff to abide by the same rules as other parties may act as a restraint, but the regulations provide the stricture, not the Board. We do agree there should be no requirement in the proposed order for the Staff to request consent from the party producing protected discovery materials and we strike that provision from paragraph 7 of the order. In light of the foregoing, and weighing the respective interests of the parties in this proceeding, we find the case for the protective order requested is

⁵⁰ Tr. 136, 217.

⁵¹ See Staff Response to SFC Motion for Protective Order at 7-9.

adequately supported and SFC's motion, with the amendments hereafter noted, is granted. In the event that the parties desire to pursue additional discussions regarding the provisions of this order, they are of course free to do so and the Board would entertain a motion to modify its provisions if agreeable to all parties.

We have reviewed the positions set forth by GA and the Staff concerning a procedure for handling any future FOIA requests of protected discovery information. GA recommends that the Licensing Board, having authority over the discovery procedures, should be the final arbiter of releases of protected material sought by FOIA requests. The Staff contends that since the Agency has established its own procedure, pursuant to the requirements of the Act itself⁵² for considering such requests, the Board has no jurisdiction over the subject matter. It is the Board's judgment that this issue is premature and, accordingly, we issue no pronouncement with respect to it at present. Consideration of this matter requires a thorough review of the Agency's FOIA procedure, a resolution of its applicability to discovered protective materials and determinations on "the responsible office," "agency records," and "exemptions" set forth in 10 C.F.R. Part 9, Subpart A, of the regulations. These issues are not only complex and would require additional argument by the parties, but may not be necessary to decide at all. The Board will make a determination of any such FOIA issues at the time of their appearance and the Staff and other parties are directed to bring any FOIA request to the Board's attention promptly.

There are several additional matters associated with SFC's proposed protective order that require attention and concerning which there appears to be no controversy. First, the changes recommended by the Staff dealing with agency contractors who might have access to protected material are granted, as such persons should be required to execute affidavits of nondisclosure. Accordingly, revisions to paragraphs 3 and 5 in the protective order are made as follows:

Paragraph 3. In subparagraph "a," strike out everything after "case" in line 8 and insert the following in a new subparagraph:

- b. Persons, such as accountants, consultants, and economists, who are not regular employees of the NRC, and are assisting in the preparation of this case, or giving testimony in this case, whether the testimony is oral or written for purposes of a deposition, interrogatory or hearing, and have a need to know. These persons are subject to a contractual obligation of non-disclosure with the NRC.

Paragraphs previously designated as b, c, d, and e will be redesignated c, d, e, and f, respectively.

⁵² 5 U.S.C. § 552; see also Executive Order 12,600, 52 Fed. Reg. 23,781 (1987).

Paragraph 5. In line 3, substitute the designation "3(f)" for the designation "3(e)."

In addition, in paragraph 10, on page 8, lines 14-15, delete the words "to the Licensing Board or." This makes clear that protected material is to be returned to the party producing it and not the Board at the termination of the proceeding.

In order to ensure the proper handling of protected discovery material and the Board's authority in providing *in camera* treatment for such material, delete the language of paragraph 11 and substitute the following in its place:

11. Use of any Protected Discovery Materials by any party in any written or oral testimony, exhibit, brief, or other submission in this proceeding shall be subject to the following conditions:

a. Absent disclosure consent by the party whose Protected Discovery Material is being used, such Material shall be filed and served in a sealed envelope or other appropriate receptacle labeled to signify it is sealed pursuant to this Protective Order.

b. The Licensing Board, as the final arbiter of the decisionmaking process herein, retains the right to review the status of Protected Material prior to the close of the record in this proceeding. In any such review, the Licensing Board may require the party whose Protected Material is being used to submit information in support of a claim for protection from disclosure, and may afford other parties the opportunity to make submissions supporting or opposing a claim for protection.

c. Absent consent by the party whose Protected Material is being used or any disclosure determination pursuant to 11.b, Protected Discovery Material subject to this paragraph shall be afforded *in camera* treatment in this proceeding.

ORDER

A. The motion for a protective order submitted by Sequoyah Fuels Corporation, with the amendments indicated herein, is granted.

B. IT IS HEREBY ORDERED that all parties to this proceeding, counsel thereto, and the individuals and entities specified herein, are subject to the following terms and conditions:

1. This Protective Order governs the disclosure and use of the following categories of "discovery material" (documents, answers to interrogatories, and answers to requests for admissions obtained in this proceeding through the discovery provisions of Part 2 of the Commission's Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, and any information which would reveal protected matters in those documents, answers to interrogatories, and answers to requests for admissions):

a. documents submitted by Sequoyah Fuels Corporation ("SFC") and/or General Atomics ("GA") which the Commission has previously determined or determines should be withheld from public disclosure pursuant to 10 C.F.R. § 2.790;

- b. any discovery material produced in this proceeding and designated by any of the parties as "protected" as described below; and
- c. any discovery material that would reveal protected material referred to in clauses (a) and (b) above.

For purposes of this Protective Order, the foregoing shall be collectively referred to as "Protected Discovery Material."

2. If a party responding to a discovery request believes that any material produced or disclosed in response to such request:

- a. is entitled to protection as privileged or confidential information, or
- b. contains information that constitutes Protected Discovery Material provided by another party or which would reveal Protected Discovery Material, such party shall segregate such material from other portions of the response to the discovery request and shall designate such material as Protected Discovery Material by stamping or otherwise marking it with the legend:

PROTECTED: Subject to Protective Order
in Docket No. 40-8027-EA

3. Disclosure of Protected Discovery Material shall be made only to the following persons:

- a. NRC Staff counsel and their supervisors, who are subject to and governed by the nondisclosure regulations at 10 C.F.R. § 2.790 and/or 10 C.F.R. §§ 9.17 and 9.25 and are assisting in the preparation of this case; NRC Staff who are subject to and governed by the nondisclosure requirements of 10 C.F.R. § 2.790 and/or 10 C.F.R. §§ 9.17 and 9.25 and are assisting in the preparation of this case;
- b. Persons, such as accountants, consultants, and economists, who are not regular employees of the NRC, and are assisting in the preparation of this case, or giving testimony in this case, whether the testimony is oral or written for purposes of a deposition, interrogatory, or hearing, and have a need to know. These persons are subject to a contractual obligation of nondisclosure with the NRC.
- c. All counsel of record and in-house counsel of GA, SFC, NACE, or the Cherokee Nation, who are assisting in the preparation of this case, and their secretaries and legal assistants who are assisting in the preparation of this case;
- d. Officers and Directors of GA, SFC, NACE, or the Cherokee Nation, who are assisting in the preparation of this case;
- e. Employees of GA, SFC, NACE, or the Cherokee Nation and persons, such as accountants, consultants, and economists, who are assisting in preparation of this case; provided that such employee

or other person has been specifically designated to receive Protected Discovery Material by written agreement of the party that is producing or did produce the Protected Discovery Material or by Order of the Atomic Safety and Licensing Board ("Licensing Board");

f. Any person from whom testimony is taken or to be taken in this matter by GA, SFC, NACE, or the Cherokee Nation, whether the testimony is oral or written, for purposes of a deposition, interrogatory, or hearing; provided that such person has been specifically designated to receive Protected Discovery Material by prior written agreement of the party who is producing or did produce the Protected Discovery Material or by Order of the Licensing Board.

4. Prior to the disclosure of Protected Discovery Material to any person identified in clause 3(a), such person shall be informed by NRC Staff counsel of the terms of this order and reminded of the nondisclosure requirements of 10 C.F.R. § 2.790 and 10 C.F.R. §§ 9.17 and 9.25.

5. Prior to the disclosure of Protected Discovery Material to any person identified in clauses 3(b) through 3(f), such person shall execute an affidavit in the form appended hereto, as Enclosure 1 to this Order, and such affidavit shall be served upon the parties to this proceeding.

6. Any person authorized to receive access to Protected Discovery Material under this Protective Order shall not disclose, orally or in writing, any Protected Discovery Material to any person other than those persons authorized to receive it under this Protective Order. Furthermore, no disclosure shall be made other than for purposes directly related to this proceeding and the hearing to be held in conjunction with this matter.

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order without first obtaining the approval of the Licensing Board.

8. The restrictions on dissemination of Protected Discovery Material set forth in this Protective Order shall not apply to any party's nonpublic dissemination at its discretion of documents or materials that contain or would reveal only its own Protected Discovery Material and that neither contain nor would reveal protected material for which another party is entitled to protected status.

9. The restrictions on dissemination of Protected Discovery Material set forth in this Protective Order shall not apply to any party's public dissemination at its discretion of documents or materials that contain or would reveal only its own Protected Discovery Material and that neither contain nor would reveal protected material for which another party is entitled to

protected status. Once a party has publicly disclosed or disseminated its own Protected Discovery Material pursuant to this paragraph, the disclosed or disseminated material shall be deemed disclosed for all parties and for all purposes, and said materials shall no longer be subject to this Protective Order or remain confidential.

10. Parties granted access to Protected Discovery Material under the terms of this Protective Order shall take all necessary and prudent steps, including limiting the numbers of copies made, to prevent disclosure of the Protected Discovery Material, including any documents, notes, compilations, summaries, or other documents incorporating the materials or their content. The Protected Discovery Material cannot be revealed, transmitted, or communicated to any person who is not described in Paragraph 3, above. Each person given access to the Protected Discovery Material shall segregate all such material, keep it secure, refrain from disclosing it in any manner to persons not essential to the preparation and completion of this matter, and shall keep it confidential, and take all steps reasonably required to ensure that persons to whom counsel has permitted access for trial preparation maintain such confidentiality, except as provided for by this Protective Order or other order of the Licensing Board. In addition to limiting the number of copies of protected documents that are made, each party shall maintain a log of each copy of a protected document that is made, identifying the document(s) copied and the person(s) given custodial responsibility for the copied documents. A copy of this log shall be provided to each party at the conclusion of the proceeding, including any reviews or appeals, and at any prior time upon the request of a party. Furthermore, persons granted access to the Protected Discovery Material shall, upon completion of this proceeding, including any reviews or appeals, return all Protected Discovery Materials, other than those that have been made part of the record or have otherwise been relied upon by a party, to counsel for the party producing said material for disposition. All other Protected Discovery Material shall be maintained and secured so as to prevent unauthorized access or disclosure.

11. Use of any Protected Discovery Materials by any party in any written or oral testimony, exhibit, brief, or other submission in this proceeding shall be subject to the following conditions:

a. Absent disclosure consent by the party whose Protected Discovery Material is being used, such Material shall be filed and served in a sealed envelope or other appropriate receptacle labeled to signify it is sealed pursuant to this Protective Order.

b. The Licensing Board, as the final arbiter of the decisionmaking process herein, retains the right to review the status of Protected Material prior to the close of the record in this proceeding. In

any such review, the Licensing Board may require the party whose Protected Material is being used to submit information in support of a claim for protection from disclosure, and may afford other parties the opportunity to make submissions supporting or opposing a claim for protection.

c. Absent consent by the party whose Protected Material is being used or any disclosure determination pursuant to 11.b, Protected Discovery Material subject to this paragraph shall be afforded *in camera* treatment in this proceeding.

12. Any party may object to the designation of material as Protected Discovery Material. Such objections shall be made by a letter to the party claiming protection, which letter shall identify the material to which the objection is addressed and the grounds for the objection. Such correspondence shall be treated as Protected Discovery Material. Prior to any further proceedings, the objecting party shall have the burden of consulting with the party claiming protection. If the dispute is not resolved through consultation, the objecting party may apply to the Board for a ruling that the material sought to be protected is not entitled to such status and protection. In the event of a dispute concerning the designation of Protected Discovery Material, the material designated as protected shall be treated as such under this Protective Order until the Board orders to the contrary.

13. This Order is without prejudice to the right of any party to seek further or additional protection of any discovery material, including an order that certain discovery not be had.

14. Neither the taking of any action in accordance with the provisions of this Order, nor the failure to object thereto, shall be construed as a waiver of any claim or defense in this action. Moreover, the failure to designate material in accordance with the provisions of this Order, or the failure to object to such designation at any given time, shall not preclude the later filing of a motion seeking to obtain such designation or challenging the propriety thereof. The entry of this Protective Order shall not be construed as a waiver of any right to object to the furnishing of information in response to discovery and shall not relieve any party of the obligation of producing information in the course of discovery.

15. The inadvertent production of any privileged or work product material shall not be deemed a waiver or impairment of any claim of privilege or protection, including but not limited to, the attorney-client privilege and the protection afforded to work product materials. Upon receiving notice from the producing party that materials, including copies of summaries thereof, have been inadvertently produced, all such materials shall be returned to the producing party within five (5) days of receipt of such notice.

16. Any allegations of abuse or violation of this Protective Order will be referred to the Licensing Board for any action it deems appropriate.

C. The parties are directed to resume the discovery process on receipt of this Order and the Board's intention is to have the process completed by July 31, 1995.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chariman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Judge Bollwerk concurs in part and dissents in part in this decision. His separate views follow.

Bollwerk, J., concurring in part and dissenting in part:

I find the bulk of the protective order issued by the Board unobjectionable, including the NRC staff-proposed modifications to paragraphs three and five and the Board-initiated changes to paragraphs ten and eleven. I do, however, have two basic disagreements with the majority's determination to accept the Sequoyah Fuels Corporation and General Atomics (SFC/GA) version of paragraph seven of the order. This provision mandates Board review and approval of any determination by staff personnel litigating this proceeding that protected SFC/GA proprietary discovery material should be given to staff investigative or enforcement personnel. My objections to paragraph seven, which are both substantive and procedural, flow from the same source — my concern about the degree to which this provision interposes the Board into investigative and enforcement activities delegated to the staff by the Commission.

My procedural problem is with the majority's decision to act in the first instance to adopt either the SFC/GA or the staff/intervenor version of paragraph seven. Without a doubt, deciding issues properly presented by the parties in an adjudication is one of the paramount duties of a judicial officer. Here, however, choosing between the competing versions of paragraph seven implicates a significant question about the authority of this Board to involve itself in de-

terminations regarding the initiation and prosecution of agency investigations and enforcement actions. Because this provision presents such an important issue regarding the extent of the Board's authority in an area that traditionally has been considered within the delegated purview of the staff and because the Commission is the ultimate repository of both the investigative/enforcement power and the judicial authority that are implicated here, in this instance certification of the parties dispute to the Commission is warranted. *See* 10 C.F.R. §§ 2.718(i), 2.786(g); *see also infra* note 4; *cf. RTC v. Thornton*, 798 F. Supp. 1, 4 (D.D.C. 1992) (once agency issued practice guidelines permitting intra-agency sharing of subpoenaed materials, it became entitled to share those materials internally without notice to document supplier). *But see New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280 (1978) (denying request to certify question to Commission regarding Licensing Board's authority to suspend staff review of operating license application).

Notwithstanding my preference to place the matter directly into the hands of the Commission without a Board decision, because the majority has chosen to act on paragraph seven, I outline my disagreement with the substance of their determination as well. Fundamentally, my concern is with the Board's incursion into a regulatory area in which it has no authority or expertise.

My disagreement with the majority's position rests on three basic precepts. The first is that the authority given this agency to initiate and pursue investigations and enforcement actions regarding violations of the Atomic Energy Act (AEA) and agency regulations resides with the NRC staff.¹ The executive power to investigate and then undertake an enforcement action regarding licensees and others involved in regulated activities was given by the Congress to the Commission as the agency head. *See* AEA § 161c, 42 U.S.C. § 2201(c). In turn, this investigative/enforcement authority has been delegated by the Commission (with some oversight constraints) to various staff personnel and offices, in particular the Executive Director for Operations (EDO), the Office of Investigations, and the Office of Enforcement.² *See* 10 C.F.R. §§ 1.31(b), 1.32, 1.36(a). *See also* AEA § 161n, 42 U.S.C. § 2201(n); NRC Management Directive 8.8, chap. 0517-032 to -035; *id.* app. 0517, pt. III. Thus, the NRC staff has the principal responsibility within the agency for initiating and conducting investigations and enforcement actions.

¹ In using the term "enforcement action," I refer to those proceedings instituted by the staff under 10 C.F.R. Part 2, Subpart B, against a licensee or anyone else subject to the agency's jurisdiction.

² NRC "staff personnel" generally are considered to be in those offices reporting to the EDO. *See* 10 C.F.R. § 1.31(b). The Office of the Inspector General (OIG) does not report to the EDO, *see id.* § 1.12, but does have responsibility for investigating agency programs and employees, *see* 5 U.S.C. app. § 2(1), which sometimes can involve investigating the activities of licensees and others engaged in licensed activities. In light of OIG's investigative role, my comments regarding the dissemination of information by staff litigators to staff investigative/enforcement personnel apply equally to the disclosure of information to OIG officials.

My second premise is that any staff personnel, including those involved in an agency adjudication,³ who become aware of evidence indicating that licensees or others involved in regulated activities are contravening statutory or regulatory requirements are under a duty to bring that information to the attention of those particular staff officials who exercise the Commission-delegated responsibility to initiate and carry out agency investigations and enforcement actions regarding wrongdoing. See NRC Management Directive 8.8, chap. 0517-052.⁴ See also Pub. L. No. 96-303, 94 Stat. 855 (1980) (federal employees should uphold the Constitution, laws, and regulations of the United States and all governments therein and never be a party to their evasion); 5 C.F.R. § 2635.101(b)(11) (all federal employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities); NRC Management Directive Handbook 7.4(A) (allegations of wrongdoing regarding conduct of NRC employees or contractors should be reported to Office of Inspector General). As a consequence, in reviewing a particular discovery document, if a member of the staff litigating this case comes across information that evidences a violation or potential violation of any statutory or regulatory requirement, that individual is under a duty to disclose that information to appropriate staff investigative or enforcement personnel.

My final premise is that oversight of ongoing staff activities concerning the initiation or prosecution of investigations and enforcement actions generally is not a matter within the Commission-delegated jurisdiction or the expertise of a presiding officer adjudicating a challenge to a completed staff enforcement action. Previously, in overturning an Appeal Board order that required the staff to perform a management capability assessment as part of the staff's future review of a reactor operating license application, the Commission declared that a presiding officer's delegated authority to conduct adjudications does not include the authority to "direct the staff in performance of [its] administrative functions." *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2,

³ As members of a Commission-level office, see 10 C.F.R. § 1.23, attorneys with the Office of the General Counsel (OGC) who act as counsel in agency licensing and enforcement adjudications technically are not "staff" personnel. Nonetheless, as staff representatives, for present purposes I consider them within the designation of "staff personnel."

⁴ The majority finds this management directive irrelevant because it makes no specific reference to the exact situation now before the Board. Given the subject matter involved it is not wholly apparent to me why this lack of a specific directive is controlling. See *infra* note 5. In any event, given the majority's apparent recognition that the Commission can provide staff litigators with the authority to provide protected materials to staff investigation/enforcement personnel without Board involvement, see Majority Opinion at 262, this concern about a lack of clear Commission direction seemingly supports my suggestion that the paragraph seven matter be certified to the Commission for its consideration and resolution.

The majority also finds this management directive unpersuasive because it is not a regulation. Judicial authority suggests, however, that in determining how an agency allocates responsibility for internal handling of documents produced pursuant to legal process, agency policy guidelines can provide the necessary direction. See *Thornton*, 798 F. Supp. at 4 (issuance of internal practice guidelines entitles agency to share subpoenaed material internally pursuant to guidelines).

3, and 4), CLI-80-12, 11 NRC 514, 516 (1980). See also *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-553, 10 NRC 12, 13-14 (1978) (Appeal Board would not review staff determination to accord higher priority to recent Three Mile Island accident notwithstanding fact that resulting reduced allocation of manpower to adjudicatory proceeding would delay scheduled staff filing); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979) (staff license application docketing and review activities are not under supervision of Licensing Board); *New England Power Co.*, LBP-78-9, 7 NRC at 279-80 (denying request that a Licensing Board suspend the staff's review of operating license application).⁵ Nothing presented by SFC/GA suggests that the Commission intended that the staff's vital investigative and enforcement responsibilities should be treated differently.⁶

Besides this lack of Board authority, it also seems apparent that the determination SFC/GA paragraph seven requires is one that a Board's experience and expertise makes it ill-equipped to make. To be sure, in exercising the authority granted by the Commission to adjudicate challenges to an enforcement action, the presiding officer must assess the propriety of any staff investigative or enforcement activities to determine whether the bases specified as supporting a contested enforcement action are factually and legally sound and are sufficient to support the remedy sought or the sanction imposed.⁷ See *Oncology Services Corp.*, LBP-94-2, 39 NRC 11, 25 (1994). This is not the judgment that SFC/GA paragraph seven involves, however.

⁵ I note that in these Appeal Board and Licensing Board decisions, there is no citation to a particular regulation or internal manual as a source of the staff's administrative authority; it is simply acknowledged that the staff has that prerogative. It is not clear to me why, even in the absence of a specific directive, the duty of any staff member to report suspected wrongdoing to the proper staff investigative/enforcement authorities is not equally apparent.

⁶ I am unable to find that the Appeal Board's decision in *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-555, 10 NRC 23 (1979), which is referenced by the majority, is precedent for adopting the SFC/GA version of paragraph seven. In *North Anna*, in granting a protective order for proprietary information, the Appeal Board stated that "[n]o disclosure of the [assertedly] proprietary information described above shall be made outside the United States Nuclear Regulatory Commission or to anyone within the Commission who is not taking an active part in the review of such information." *Id.* at 29. The import of this language for disclosure of discovery material to staff investigative/enforcement personnel is somewhat ambiguous, see Tr. at 192, particularly because the "active review" of such information could involve investigative/enforcement personnel. I would require a much clearer statement of judicial intent to consider this decision a binding precedent here.

⁷ As the presiding officer responsible for the conduct of an adjudication, a Board does have authority for overseeing the introduction of investigative/enforcement information into the proceeding, through discovery or otherwise. See *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 104 (D.C. Cir. 1977) (allowing agency investigative staff to provide information to staff litigators without notice and opportunity to object by other parties would negate authority and responsibility of Administrative Law Judge over adjudicatory process). This instance, however, presents the opposite situation, i.e., what is the authority of the presiding officer to oversee the dissemination of potential investigative/enforcement material to other agency staff operating outside the adjudicatory proceeding.

Under the SFC/GA version of paragraph seven, in determining whether staff litigators may disclose particular proprietary information to agency investigative/enforcement personnel, the Board apparently is to apply a standard of "reasonableness," i.e., is it reasonable to permit staff litigators to turn the information over. *See* Tr. at 137-39. The Board does make "reasonableness" determinations in ruling on other information disclosure requests. For example, in assessing the propriety of a request for an adjudicative subpoena, the Board must make a "reasonableness" judgment about the relevance of the subpoena as measured against the party contentions or staff charges at issue in the proceeding. *See FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979). Its determination under SFC/GA paragraph seven is fundamentally different. Besides requiring that the Board assess whether the information the staff would disclose is reasonably relevant to some purported wrongdoing, if the Board is to fulfill SFC/GA's supposed aim of preventing staff misuse of the material, *see infra* pp. 276-77, the Board necessarily must also judge whether the staff's concern about purported wrongdoing is itself "reasonable." This, in turn, involves the Board in determining whether an agency investigation or enforcement action should be initiated or pursued, an executive judgment wholly outside the range of the adjudicatory experience and expertise of the Board.

In contrast to what I find are these compelling reasons for the Board to keep out of this area of staff responsibility, the principal arguments put forth by SFC/GA in support of Board intervention are wholly unconvincing. First, they assert that the Board's intervention in the staff's investigative/enforcement process will minimize access to their confidential commercial information that, in turn, will minimize the possibility of inadvertent or otherwise improper disclosure. *See* Tr. at 137, 217. This argument carries little weight here, however, given the staff personnel to whom the disclosure would be made. By the very nature of their duties, those in the investigative and enforcement offices in the agency have the most experience in handling "confidential" information. These officials are, in fact, the agency personnel most likely to ensure that it remains confidential. If, as the staff's proposed version of paragraph seven provided, investigative/enforcement personnel are advised of the confidential commercial nature of the information, I have no difficulty in concluding that they have the training and experience to see it is not improperly disseminated.

The other argument of SFC/GA is that the Board's intervention is necessary to ensure the integrity of the adjudicatory process. According to SFC/GA, by invoking their right to challenge the staff's enforcement order in the agency's adjudicatory process, and then complying with the agency's discovery rules by turning over information relevant to this adjudication, they should not be subjected to the possibility that the private commercial information they disclose will be used for a purpose having nothing to do with the proceeding, i.e., as support for some collateral agency investigation or enforcement action. *See*

[SFC] Reply to NRC Staff's Response to Motion for Protective Order (Jan. 6, 1995) at 3 [hereinafter SFC Reply].

Implicit in this SFC/GA assertion is the suggestion that the Board's review of staff information disclosures is necessary to ensure that the staff does not abuse its investigative/enforcement authority.⁸ Such speculation about possible staff abuse, however, flies in the face of the usual presumption that government officials will properly discharge their official duties. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Moreover, in asserting that the administrative adjudicatory process under which the information is obtained somehow mandates a limitation on its use in the investigative/enforcement process, SFC/GA fundamentally misconstrue the nature of the regulatory environment in which this proceeding takes place.

As the court noted in *Harris v. Amoco Production Co.*, one of the authorities relied upon by the majority here:

"Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts."

768 F.2d 669, 671 (5th Cir. 1985) (quoting *FCC v. National Broadcasting Co.*, 319 U.S. 239, 248 (1943) (Frankfurter, J., dissenting)), *cert. denied*, 475 U.S. 1011 (1986). What this guidance suggests is that one who appears in a court proceeding and one who participates in an agency adjudication should have very different expectations about the extent to which their private interests are to be served in that proceeding.

The *Harris* case makes clear that because the enforcement of private rights predominates in a court proceeding, a private litigant should reasonably expect that protected material disclosed to agency personnel as part of the discovery process will be subject to judicial scrutiny prior to any further disclosure to agency investigators. See *id.* at 684-85. In contrast, a private party in an adjudication before an agency whose cardinal duty in all its proceedings, adjudicatory and otherwise, is to protect the public interest, should not reasonably expect that, in the absence of some relevant claim of privilege,⁹

⁸ Consistent with the sort of investigative/enforcement "abuse" protection they apparently seek for their proprietary information, SFC/GA might ask that the Board also protect nonproprietary information from disclosure to staff investigative/enforcement personnel. See Tr. at 217-19. Compare *Anderson*, 631 F.2d at 747-48. Given the generally public nature of nonprivileged discovery information, their failure to do so is understandable as a practical matter.

⁹ Although the purported concern of SFC/GA is with the disclosure of propriety information that could cause financial harm, with their version of paragraph seven they seek to protect the information from being used to

(Continued)

it will be able to delay or otherwise impede agency personnel charged with upholding that public interest from informing authorized agency investigation/enforcement personnel about evidence of regulatory wrongdoing.¹⁰ The protection claimed by SFC/GA simply is not appropriate in the context of this regulatory agency proceeding.

Ultimately, the best the Board can do to address the SFC/GA concern about possible staff "misuse" of their proprietary discovery information is to do what has been done in other instances when staff activities with some bearing on an adjudication nevertheless are outside of the presiding officer's sphere of authority — see that the Commission, which is the body with ultimate supervisory responsibility for the staff, is informed of the staff's actions. See *St. Lucie*, ALAB-533, 10 NRC at 14. Accordingly, I would modify paragraph seven to provide that when staff litigators find it necessary to disclose confidential discovery information obtained in this proceeding to staff investigative/enforcement officials, they must simultaneously inform the Commission of their action.¹¹ The Commission could then take whatever action it deems appropriate to oversee the use of that information in the staff's investigative/enforcement process. I find this approach, which is entirely within the Board's delegated authority as the presiding officer in this adjudication, would provide a suitable accommodation of the competing public and private interests involved here.

initiate or pursue an investigation or enforcement action relating to wrongdoing. Of course, the usual way to protect incriminating material is to assert a self-incrimination privilege; however, here the corporate nature of the records likely to be involved means that such a privilege probably cannot be invoked by SFC/GA. See 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2259a, at 353 & n.1 (McNaughton rev. 1961) (citing, among others, *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906)). Any attempt by SFC/GA to use paragraph seven to assert an otherwise unavailable privilege clearly is not appropriate.

¹⁰ Because the staff also has the responsibility to use information about wrongdoing to make criminal referrals to the United States Department of Justice (DOJ), as appropriate, see 10 C.F.R. § 1.36(c), also troubling is the degree to which the SFC/GA provision would interpose the Board into staff's relationship with DOJ. Compare *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1384-87 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980).

This is not the only question about the extent of appropriate Board interposition that arises with the adoption of SFC/GA paragraph seven. Paragraph seven states that staff litigators are prohibited from disclosing protected discovery materials. Unanswered is the question of the degree to which staff litigators, without turning over the actual documents, are prohibited from informing staff investigative/enforcement personnel about the existence of such materials and their concern that those materials evidence wrongdoing that warrants further investigation. For instance, does the seeming concern about staff "misuse" of the materials go so far as to permit the Board to prohibit staff litigators from giving investigative/enforcement personnel a list of document titles when such a listing would not result in the disclosure of any propriety information? Such a list presumably would aid investigators materially in obtaining the materials by a 10 C.F.R. § 2.204 demand for information or through an administrative subpoena, the alternative document retrieval avenues referenced by the majority. Having started down the proverbial "slippery slope" with the adoption of SFC/GA paragraph seven, it is not apparent to me where the Board's supervision of ongoing staff investigative/enforcement activities ends.

¹¹ Consistent with the SFC/GA admission that presentations to the Board under their version of paragraph seven could be *in camera* and *ex parte* to avoid prejudicing an investigation, see SFC Reply at 3 n.1; Tr. at 139, I would afford similar confidentiality for staff document dissemination filings with the Commission.

ENCLOSURE 1

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 40-8027-EA
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

AFFIDAVIT OF NON-DISCLOSURE

I, _____, give this affidavit in support of my access to the protected discovery material that is subject to the Protective Order issued by the Atomic Safety and Licensing Board ("Licensing Board") on _____ in the above-captioned proceeding.

1. I am _____. My affiliation is _____.
2. I represent to the Licensing Board that I have read the Protective Order issued in this proceeding and will comply in all respects with its terms and conditions with respect to protected material produced in connection therewith. I will not disclose any protected discovery material, either orally or in writing, to any individual other than those individuals admitted under the Protective Order by the Licensing Board.
3. I acknowledge that any violation of the terms of the Protective Order may result in the imposition of sanctions as the Licensing Board deems appropriate, including but not limited to referral of the violation to appropriate bar associations and other disciplinary bodies. I further acknowledge that a party

whose protected discovery material is improperly disclosed shall be entitled to all remedies under law or equity.

(Name)

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me this ____ day of ____, 199

Notary Public

My Commission expires: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

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

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

April 26, 1995

In a proceeding involving the proposed renewal of a facility operating license for a research reactor, an Atomic Safety and Licensing Board determines that a Petitioner for intervention possesses standing and has proffered two acceptable contentions. The Board accordingly grants the Petitioner's petition for leave to intervene and request for a hearing.

RULES OF PRACTICE: STANDING

The Commission has long applied contemporary judicial concepts of standing to determine whether a petitioner for intervention has a sufficient interest in a proceeding to be permitted to intervene as a matter of right.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

To establish standing, a petitioner must show that the subject matter of the hearing will cause him or her injury in fact and that the injury is arguably within the zone of interests protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act, as amended.

RULES OF PRACTICE: STANDING (GROUP)

A group or organization may establish its standing through the interests of its members. To do so, a group must demonstrate that at least one member who personally has standing wishes the group to represent him or her. Signature of a petition by a ranking official who has personal standing is sufficient for standing purposes.

RULES OF PRACTICE: STANDING (GROUP)

When a group bases its standing on the membership of an individual, the individual need not have been a member on the date the original petition for leave to intervene was filed but only as of the date the supplemental petition for intervention must be filed. The Rules permit amendment until that date without prior approval of the Licensing Board and there is no definition of the scope or subject matter of such amendments.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing, a Licensing Board must accept as true all material allegations of an intervention petition and must construe the petition in favor of the petitioner, notwithstanding contrary interpretations by other parties.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

Living or working within a specified distance of a site (with variations of distance depending upon the nature of the nuclear facility or activity), or even passing by the entrance to a site twice a week for recreational purposes, is enough to presume injury in fact. Such facts may be sufficient for standing purposes even though they might be insufficient to found a valid contention.

OPERATING LICENSE HEARINGS: ISSUES FOR CONSIDERATION

The adequacy of an applicant's physical security system is a permissible issue in an operating license renewal proceeding.

RULES OF PRACTICE: ADJUDICATIONS INVOLVING MILITARY OR FOREIGN AFFAIRS FUNCTIONS

Although 10 C.F.R. § 50.13 provides that applicants need not provide design features or other measures to protect against attacks or destructive acts, including sabotage, by an enemy of the United States, it does not preclude intervenors from challenging whether security systems satisfy governing security requirements, set forth in 10 C.F.R. Part 73.

RULES OF PRACTICE: SECURITY PLANS

Admission of a contention involving a security plan does not transform the security plan into a public document. Licensing boards may adopt appropriate protective measures to preclude public release of information concerning such a plan.

SECURITY PLAN: DESIGN-BASIS THREATS

The applicable design-basis threats against which an applicant must protect appear in 10 C.F.R. § 73.1, to the extent referenced in sections applicable to particular types of reactors. The design-basis threat for research reactors includes "radiological sabotage."

SECURITY PLAN: SPECIAL CIRCUMSTANCES

The security plan for certain research reactors, insofar as it protects against radiological sabotage, may be modified to account for special circumstances. 10 C.F.R. § 73.60(f).

RULES OF PRACTICE: LITIGABILITY OF ISSUES

Serious violations or other incidents may form the basis for a contention challenging the adequacy of management of a facility.

RULES OF PRACTICE: CONTENTION, ADMISSIBILITY OF

Where there is no local public document room in an area near a facility, and where a petitioner for intervention unsuccessfully seeks information from a local NRC office, a licensing board may judge the adequacy of a proposed contention on the basis of available information.

RULES OF PRACTICE: CONTENTION, ADMISSIBILITY OF

A petitioner's imprecise reading of a reference document, or typographical errors in that document, cannot serve to generate an issue suitable for litigation.

RULES OF PRACTICE: CONTENTION, ADMISSIBILITY OF

NRC's review of regulations governing a particular issue does not serve as a basis for a particular contention concerning that issue. Nor does a petitioner's differing opinion as to what applicable regulations should (but do not) require.

RULES OF PRACTICE: CONTENTION, ADMISSIBILITY OF

A petitioner is obligated to provide the analyses and supporting evidence showing why its bases support its contention. A licensing board may not make factual inferences on a petitioner's behalf.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Research reactors, Security plan, Management.

PREHEARING CONFERENCE ORDER

(Ruling on Standing and Contentions)

This proceeding concerns the proposed renewal of the facility operating license for the Georgia Tech Research Reactor (GTRR), located on the campus of the Georgia Institute of Technology in Atlanta, Georgia. Pending before us is the petition for leave to intervene filed by Georgians Against Nuclear Energy (GANE). The petition is opposed by the Georgia Institute of Technology (Applicant) and by the NRC Staff.

The background for this proceeding is set forth in our Memorandum and Order (Intervention Petition), dated November 23, 1994 (unpublished) (hereinafter

11/23/94 M&O). In that order, we provided for GANE to file an amended petition for leave to intervene (as authorized by section 2.714(a)(3) of the Rules of Practice) by December 30, 1994. GANE did so.

In examining GANE's amended petition, which delineated the basis for GANE's standing and also set forth GANE's proposed contentions, we noticed what appeared to be a technical or ministerial mistake in GANE's statement of standing. Specifically, GANE attached the affidavits of forty-four individuals who stated that they wished to be represented by GANE, set forth the addresses of each of them, including the distance from the reactor site, and in some cases how they believed operation of the reactor would affect them. None of the affidavits indicated, however, whether the individual was a member of GANE. Because the basis for standing being relied upon by GANE was the standing of individual members (a permissible method for an organization to establish its standing), we instituted a telephone conference call to determine whether any of the forty-four listed individuals were in fact GANE members.

During the telephone call, GANE identified several of the listed individuals as members of GANE. We authorized GANE to file a supplemental amended petition by Friday, January 13, 1995, to permit it to identify at least one of the listed individuals who was a member of GANE. We also extended the time within which the Applicant and Staff might respond to GANE's amended supplemental petition. Finally, we scheduled the initial prehearing conference for January 31–February 2, 1995, in Atlanta, Georgia. Memorandum and Order (Telephone Conference Call, 1/10/95), dated January 11, 1995 (unpublished).¹ On January 13, 1995, GANE timely filed a supplemental amended petition setting forth the name of one of the forty-four individuals identified in the December 30, 1994 amended petition (Mr. Robert Johnson) who was a member of GANE.

On January 25, 1995, both the Applicant and the NRC Staff filed responses to GANE's amended petition, each opposing intervention on the bases of both lack of standing and lack of an admissible contention.² We considered GANE's standing and each of its contentions at the prehearing conference held on January 31, 1995–February 2, 1995.³

¹ On January 12, 1995, we issued a Notice of Prehearing Conference, published at 60 Fed. Reg. 3885 (Jan. 19, 1995). That Notice provided for oral limited appearance statements to be heard on Wednesday morning, February 1, 1995. The Board heard such statements at that time.

² Georgia Institute of Technology's Opposition to Petition for Leave to Intervene Filed by Georgians Against Nuclear Energy, dated January 25, 1995 [Applicant's Response]; NRC Staff's Response to Amended Petition for Leave to Intervene and Supplement Thereto Filed by Georgians Against Nuclear Energy, dated January 25, 1995 [NRC Staff Response].

³ Transcript references to the prehearing conference (pp. 1-419) will be set forth as Tr. _____. Limited appearance statements are separately numbered (LA Tr. 1-76).

For reasons set forth below, we find both that GANE has established its standing to participate and has set forth two admissible contentions. We are thus admitting GANE as a party and issuing a Notice of Hearing.

A. Standing

The Commission has long applied "contemporary judicial concepts" of standing to determine whether a petitioner for intervention has "a sufficient interest in a proceeding to be permitted to intervene as a matter of right." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). As we observed in our 11/23/94 M&O (at 3-4), to establish standing a petitioner must show that "the subject matter of the proceeding will cause an 'injury in fact' to the petitioner and that the injury is arguably within the 'zone of interests' protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act, as amended." We also observed that a group or organization such as GANE may, *inter alia*, establish its standing through the interests of its members. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979). GANE here seeks to establish its standing in that manner.

Furthermore, in determining standing, we must "accept as true all material allegations of the [petition], and must construe the [petition] in favor of the [petitioner]." *Warth v. Seldin*, *supra*, 422 U.S. at 501; *Kelley v. Selin*, 42 F.3d 1501, 1507-08 (6th Cir. 1995). As set forth above, GANE on January 13, 1995, submitted the affidavit of Robert Johnson, who stated that he is a member in good standing of GANE and that he desires GANE to represent him and his interests in the proceeding. His earlier affidavit submitted with the December 30, 1994 amended petition stated that he worked "about one-half mile" from the reactor, that he believed his "life and health" were jeopardized by continuing operation of the reactor, and that in the event of a release of radiation from the facility his "personal health would suffer serious consequences." He also stated that he had read GANE's initial petition and that, if GANE's petition were upheld, "there is a reduced likelihood of serious accident" at the reactor, that the "reactor will be safer" and that "I am less likely to suffer injury from it."

To establish standing through the interests of its members, a group must demonstrate that at least one of its members who wishes the group to represent him or her personally has standing to intervene. The Applicant and Staff advance widely disparate reasons why, in their view, GANE should not be permitted to base its standing on the standing of Mr. Johnson. None of those reasons appears to us to be well founded.

To start with the Applicant, it takes the position that the GTRR is "inherently safe" and that even the worst credible accident would have no effects beyond a small radius on the Georgia Tech campus (Applicant's Response at 2-3). It recognizes that Mr. Johnson resides more than 4 miles from the GTRR site (based on his GANE membership form, which accompanied GANE's January 13, 1995 filing) and that he works about one-half mile from the site (the basis upon which GANE relies for standing). The Applicant first "denies" that an office location (as distinguished from a residence) can serve as a foundation for standing (*id.* at 5) although at the prehearing conference it withdrew that claim (Tr. 13-14).⁴

As for whether a person working at a distance one-half mile from the facility could be affected, the Applicant claims that, based on its Safety Analysis Report (SAR), no "dangerous emissions" from GTRR would extend more than 100 meters from the facility (Tr. 14). It would preclude standing based on presumptive effects similar to those underlying the 50-mile presumption for power reactors.

However, it appears that Argon-41 would be released through the reactor stack during routine operations (Tr. 16, 20-21, 260) and, even though permitted under applicable regulations, could extend at least one-half mile from the site. In addition, other noble gases could be dispersed under accident scenarios (Tr. 20-23). Those effects are enough for standing purposes, even though they might be insufficient to found a valid contention. *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); *Kelly v. Selin*, *supra*, 42 F.3d at 1509 (petitioners who own land in "close proximity" to proposed site for dry-cask spent fuel storage have asserted a "personal stake in the outcome of the litigation by virtue of their ownership and use of their property for residential and leisure pursuits"). For these reasons, we conclude that Mr. Johnson works close enough to the GTRR to be presumed to be affected by operation of the facility.

The Staff focuses its opposition to GANE's standing on its belief that Mr. Johnson did not become a member of GANE in sufficient time for GANE to found its standing on his membership. This belief is premised upon a membership card for Mr. Johnson submitted along with his affidavit of membership and dated December 21, 1994. The Staff takes the position that, when an organization bases its standing on representation of a member, the individual must have been a member at the time the original petition was filed — here, October 26, 1994 — absent a showing of good cause for late filing. *See Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-

⁴ Given holdings that merely passing by the entrance to a site twice a week for recreational purposes is enough to provide injury in fact, *see Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40 (1990), the Applicant's initial position was clearly erroneous.

79-7, 9 NRC 330, 335 (1979). There is, however, authority to the contrary. See *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

We believe that membership on the date of the amended petition is sufficient for establishing standing. The Rules permit amendment of a petition to intervene until that date "without prior approval" of the Board, and there is no definition of the scope or subject matter of such amendments. Supplying the name of an affected member is a permissible amendment. Contrary to the Staff's position (Tr. 31-32), the Notice of Opportunity for Hearing does no more than recite the ultimate standing requirements. It does not specify when that standing must be perfected.

We need not, however, base our standing conclusion solely on the scope of amendments to a petition for leave to intervene that are permissible under the Rules. For, at the prehearing conference, GANE stressed that Mr. Johnson had become a member long before the December 21, 1994 date on his certificate submitted with his membership affidavit. We (as well as the parties) examined GANE's bylaws, which indicate that a person can be a member by accepting the organization's stated goals and participating in its activities, including voting at meetings. He or she need not file a formal registration.

GANE submitted meeting minutes (ff. Tr. 196) which indicated that Mr. Johnson attended and participated in meetings on November 3 and December 1, 1994; GANE advised that Mr. Johnson voted on various matters at those meetings (Tr. 196, 201). GANE further noted that Mr. Johnson in 1992 had participated in a GANE lobbying effort, that he received the GANE newsletter from 1992 to mid-1994 (although because of job demands was unable to participate in other GANE activities), that on August 4, 1994, he participated in a GANE activity, including a major letter-writing campaign, and that he attended a GANE public forum on September 18, 1994, and stated that at that time he committed himself to GANE and considered himself a GANE member. GANE further advised that Mr. Johnson had attempted to attend a meeting in early October 1994, but was prevented by logistical reasons from doing so. Tr. 197-98.

The Staff and Applicant attempt to characterize Mr. Johnson's activities prior to November as mere support for the organization and not membership (Tr. 11, 198-200). Given the deference we must accord to a petitioner's representations concerning its standing, we regard GANE's own description of its membership, and the circumstance that it regarded Mr. Johnson a GANE member as of September 17, 1994, as more persuasive. We find that Mr. Johnson was a GANE member prior to October 26, 1994, and that, whether the initial filing

date or the date of the amended petition is controlling, his membership provides a proper foundation for GANE's representational standing in this proceeding.⁵

In sum, we agree with the Appeal Board's conclusion that "[i]t is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities." *South Texas*, ALAB-549, *supra*, 9 NRC at 649. We accordingly find that GANE has standing and proceed to consider the issues it seeks to raise.

B. Contentions

We will first consider the two contentions that we find admissible and then turn to the others.

1. Contention 5: Security

a. General Description

GANE's fifth contention challenges the physical security of the reactor, in particular during the period of the Olympic Games scheduled for Atlanta during the summer of 1996. It claims that reactor security is "grossly inadequate" inasmuch as the reactor building "may be accessed directly from the outside," no personnel are "assigned to the building outside of normal business hours," and that essentially the entire system "consists of a chain-link fence with some barbed wire on top." GANE claims that wire cutters would be "sufficient to breach the fence." It goes on to assert that the roof is "nothing but 7/16" thick steel sheet-metal" (based on the SAR) that would "easily be breached by a rocket-launcher or hand-thrown grenade."

GANE next delineates the planned 1996 Olympic Games in Atlanta as a "specific situation which has historically attracted terrorist activity and threats." It poses the potential refueling of the reactor with "bomb-grade" uranium fuel during this period of time as a "tempting target for terrorists." It elaborates upon the threat as not only a tempting target for theft of "bomb-grade or hazardous materials" but as a "target for a World Trade Center-type bombing which would not only injure residents and visitors to Atlanta but also create an international

⁵ In addition, we note that GANE's standing could also be founded on Ms. Glenn Carroll's standing. Ms. Carroll has been an officer and member of GANE prior to her filing of GANE's petition on October 26. She stated that she routinely passes by the reactor "a couple of times a day" (Tr. 35), thus affording her personal standing to intervene. It is "enough for standing purposes that the petition had been signed by a ranking official of the organization who [herself] had the requisite personal interest to support an intervention petition." *Duke Power Co. (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station)*, ALAB-528, 9 NRC 146, 151 (1979). On this basis as well, GANE has demonstrated its standing.

diplomatic disaster for the United States." At the prehearing conference, it cited the example of the UCLA research reactor that was voluntarily shut down during the 1984 Olympic Games that were held in Los Angeles (Tr. 176).⁶

b. Applicant and Staff Positions

The Applicant opposes this contention essentially because it believes, based on 10 C.F.R. § 50.13, that reactor security is not a proper subject for a licensing proceeding. It states that the security system has been approved by NRC and that preventing terrorism is the responsibility of the United States Government, working with appropriate local authorities. It concludes that it would be "grossly inappropriate to disclose the security plan for the GTRR to the public in this proceeding." (Applicant's Response at 16, emphasis supplied).

The Staff also views this contention as an issue inappropriate for litigation. It states that, in challenging the sufficiency of Georgia Tech's security plan, it was incumbent upon GANE to indicate that the facility fails to comply with applicable regulations. Nor, according to the Staff, has GANE sought to address the sufficiency of the security plan. (The Staff recognizes that the security plan is not available for public inspection but comments that at no time did GANE seek access to that plan.) Further, the Staff faults GANE for failing to indicate whether its concern over terrorists and rocket or grenade attacks are threats that the Applicant is required to consider.

c. Request for Additional Information

Following the prehearing conference, we requested the Staff (and, alternatively, GANE) to provide us a copy of a letter from a former Georgia Tech officer (Dr. Robert M. Boyd) to NRC, dated December 3, 1993, that had been referenced by a person in an oral limited appearance statement. Memorandum and Order (Request for Additional Information on Security Contention), dated March 3, 1995 (unpublished). From its description during the limited appearance presentation (LA Tr. 47), the letter appeared relevant to GANE's proposed security contention and called for upgraded security at the GTRR during the 1996 Olympic Games. Both the Staff and GANE sent us (and other parties) copies of this letter, which had been submitted to NRC in response to a notice of proposed rulemaking concerning reactor security (but not applicable to research reactors). In addition, we requested the comments of all parties on 10 C.F.R.

⁶ A letter from UCLA to the Licensing Board in its renewal proceeding (Docket No. 50-142), dated March 20, 1984, indicated that the reactor was currently shut down for repairs and was to remain shut down until after the summer Olympic Games. The letter also stated that UCLA's plans for security also included the placing of barricades to restrict vehicle access to the reactor building and the posting of armed guards at the facility during the period of the Games. Such measures were not required by the NRC.

§ 73.60(f) and whether that section would permit enhanced security during the period of the Olympic Games. All parties responded.

In its March 20, 1995 response, the Applicant focused only on this case and opined that nothing in the Commission's rules or case law (including 10 C.F.R. § 73.60(f)) suggests that Contention 5 should be admitted in this proceeding. It noted that the section was adopted only 2 years ago and produced no case law and garnered no comment when proposed. It pointed out that the Commission, in the preamble to its adoption of this section, indicated that some nonpower licensees had already implemented additional measures against sabotage. It stated that Georgia Tech was one of those licensees that had taken these voluntary steps. It offered to permit the Licensing Board to peruse the security plan at its request to demonstrate that it is sufficient to meet NRC regulations. But it went on to opine that, since the plan already included the voluntary measures mentioned above, and because other federal law-enforcement agencies (such as the FBI) are responsible for security at the Olympic Games, it would be inappropriate under 10 C.F.R. § 50.13 to permit consideration of terrorism in its security plan.

The Staff recognizes that 10 C.F.R. § 73.60(f) on its face would permit modification or enhancement of a security plan to take account of changed circumstances or particular events at a particular site involving radiological sabotage, to the extent that the Commission, and this Board as its delegee, deemed such action appropriate. The Staff does not believe that the 1996 Olympic Games constitute a changed circumstance or event that would warrant "alternate or additional" security measures at GTRR to protect against radiological sabotage, or that GANE has presented additional information, through its Contention 5 as supplemented by Dr. Boyd's views, to warrant consideration of enhancement of the security plan.⁷

GANE, of course, takes a contrary view. It believes that security requirements for a reactor must be considered on a "case-by-case, or site-specific" basis. It also maintains that "attaining a secure facility" is the criterion that must be met. GANE 3/20/95 Response.

d. Board Evaluation

(i) We begin our evaluation by putting to rest the Applicant's claim (based on 10 C.F.R. § 50.13) that security is an inappropriate subject for a licensing hearing but rather is the responsibility of governmental authority. That section was promulgated in 1967 and indicates that applicants need not provide design

⁷ The Staff opines that, were we to admit Contention 5, it could only be as a *sua sponte* issue, subject to requirements for such issues. Staff's 3/20/95 Response at 5 n.4. We disagree. GANE presented this issue, and we are admitting it as a GANE issue.

features or other measures to protect against attacks or destructive acts, including sabotage, by an "enemy of the United States." Specifically, it was intended to exempt reactors from having to be constructed to withstand a missile attack from Cuba. 59 Fed. Reg. 38,889, 38,993 (Aug. 1, 1994).

Although that may once have precluded intervenors from raising security issues, as early as 1973 the Commission took steps to establish physical protection requirements of plants and materials that licensees would have to meet. 38 Fed. Reg. 30,537 (Nov. 6, 1973); *see also* 42 Fed. Reg. 10,836 (Feb. 24, 1977). Intervenors are permitted to raise questions as to whether an applicant satisfies governing security requirements, set forth in 10 C.F.R. Part 73. Indeed, in past cases, the Commission has explicitly recognized that intervenors may play a role in assessing the effectiveness of reactor security systems. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974).

Section 50.13 of 10 C.F.R. is still on the books, but it only applies insofar as precluding intervenors from raising potential threats that exceed the design-basis threats against which the Commission obligates licensees to protect. 10 C.F.R. § 73.1(a). As the Commission has observed, "[t]here is a significant difference in the practicality of defending against a missile attack and constructing [a particular type of barrier]." 59 Fed. Reg. 38,889, 38,893 (Aug. 1, 1994).

Beyond that, we reject the Applicant's claim that admission of this contention would transform the security plan into a public document. According to the Applicant, that plan is currently classified at an "L" or "Confidential" level (Tr. 213). In admitting this contention, we are requiring GANE to identify those of its representatives whom it desires to advance this contention and, subject to Board approval, have access to the security plan. Those persons will have to obtain security clearance or access authorization. Further appropriate protective provisions will govern all aspects of the hearing process. *See* 10 C.F.R. § 2.900 *et seq.*

(ii) As acknowledged by the Staff (Tr. 171), the applicable design-basis threats against which the Applicant must protect appear in 10 C.F.R. § 73.1, but only to the extent that they are referenced in sections applicable to particular types of reactors — for research reactors, 10 C.F.R. §§ 73.60, 73.67, and Part 73, Appendix C. This design basis is written in terms of power reactors but does not exclude research reactors, except to the extent specifically provided (e.g., vehicle barriers). The design-basis threat includes "radiological sabotage," of the type GANE seeks to consider under this contention. 10 C.F.R. § 73.1(a)(1),

referenced in 10 C.F.R. §§ 73.60(e) and (f) and Part 73, Appendix C.⁸ Of the threats posed by GANE's contention, several are clearly encompassed by the governing regulatory design basis. Specifically, wire-cutters and hand-thrown grenades are clearly covered. Contrary to the Applicant's claim, a "terrorist" is defined as "an advocate or practioner of terror as a means of coercion"⁹ and is thus not necessarily an "enemy of the United States," or similar person, within the meaning of 10 C.F.R. § 50.13.

Of the threats set forth by GANE, the "World Trade Center-type bombing" is clearly excluded to the extent it envisions a vehicular bomb threat, by virtue of the specific exemption of that type of threat from the design basis for research reactors, set forth at 10 C.F.R. §§ 73.1(a), 73.1(a)(1)(i)(E) and 73.1(a)(1)(iii). (To the extent the World Trade Center reference may envision a hand-held explosive threat to the reactor, that would be within the design basis.) In addition, the theft or diversion of special nuclear material (SNM), as asserted by GANE, is also not within the design basis, as only "formula quantities" would be included. 10 C.F.R. §§ 73.1(a)(2) and 73.2. GTRR does not appear to possess formula quantities of SNM. SAR, Table 2.1, at 7.

(iii) Turning to the activities covered by the contention itself, both the Applicant and Staff misperceive their major thrust. Although GANE to some extent questions the adequacy of ongoing security, its major assertion is that security is not adequate for the period in which the Olympic Games are to be held in Atlanta — indeed, on the Georgia Tech campus. In other words, GANE is not asserting (at least primarily) that the security plan currently does not comply with regulations. It is asserting that, because of defined special circumstances, the plan should be enhanced for a designated period of time. For that reason, GANE's failure to set forth examples of how the existing plan fails to comply with regulations, as the Staff would require, is of no moment. It is not even relevant.

At the prehearing conference, the Board pointedly inquired whether there was regulatory authority to modify a security plan to account for special circumstances. The Staff, in particular, indicated there was no such authority (*see, e.g.*, Tr. 180, 182, 185). The regulations, however, provide otherwise. *See* 10 C.F.R. § 73.60(f), which reads:

(f) In addition to the fixed-site requirements set forth in this section and in § 73.67, the Commission may require, depending on the individual facility and site conditions, any alternate or additional measures deemed necessary to protect against radiological sabotage at nonpower reactors licensed to operate at or above a power level of 2 megawatts thermal.

⁸ The explicit exclusion of research reactors from specified portions of the design-basis threat suggests that the remainder of the threat is applicable to research reactors. The manner in which research reactors must meet the threat differs from the manner that power reactors must meet the threat.

⁹ *Webster's Third New International Dictionary* 2361 (1986).

The regulations also include performance objectives, the performance capabilities that sites must meet and fixed site physical protection systems which sites must utilize to satisfy the objectives and capabilities. For power reactors, these requirements appear in 10 C.F.R. §§ 73.20, 73.45, and 73.46 and include such measures as armed guards and various barriers. Requirements for protection against radiological sabotage appear in 10 C.F.R. § 73.55. Those measures are not required, however, for research reactors. *See also* 10 C.F.R. § 73.6.

(iv) As set forth earlier, subsequent to the prehearing conference, we obtained the parties' views of the effect of 10 C.F.R. § 73.60(f). At the same time, both the NRC Staff and GANE provided us a copy of a letter from Dr. Robert M. Boyd, former Radiological Safety Officer at Georgia Tech, concerning potential security problems at GTRR during the Olympic Games.

Dr. Boyd's opinion appears to lend some credence to GANE's perception of security deficiencies for the Olympic Games. However, several years ago, the Commission made a statement that appears not to have endorsed his views. As emphasized by both the Applicant and Staff, in response to Dr. Boyd's letter (which was transmitted to NRC with respect to a rulemaking applicable to power reactors but not research reactors) the Commission stated:

Comment. One comment [from Dr. Boyd] recommended that, in light of the upcoming 1996 Olympics, all reactor fuel, heavy water, and kilocuries of Co and Cs be removed immediately from the Georgia Tech campus.

Response. While research reactors do not fall within the scope of this rulemaking, the Commission notes that its threat assessment activities are performed on a continuing basis, in close liaison with the intelligence community. Should the level of domestic threat change at any time, appropriate action will be taken by the NRC. Specifically, the Atlanta Field Office of the FBI has established liaison with all Federal agencies in Georgia, including the NRC, relative to the Olympics. The FBI is the lead law enforcement agency in charge of the Olympics and, to date, has not indicated that there is any threat to NRC-licensed facilities or materials relative to the Olympics.

Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889, 38,896 (Aug. 1, 1994).

(v) We conclude that GANE has advanced a sufficient basis to meet the pleading requirements of 10 C.F.R. § 2.714 and to cause us to determine that the 1996 Olympic Games constitutes a special circumstance that would bring 10 C.F.R. § 73.60(f) into play. Its reliance in effect on the terror incident that in fact occurred at the 1972 Munich Olympic Games, together with references to UCLA's experience at the 1984 Olympic Games, constitutes "facts" which support the contention, within the meaning of 10 C.F.R. § 2.714(b)(2)(ii). Coupled with the opinion of Dr. Boyd, they are sufficient to support an admissible contention. The Commission's previously expressed view on Dr. Boyd's observation was in a context that suggests that we are not precluded

from determining the 1996 Olympics to be a special circumstance, given an adequate basis for such an inference. In that connection, we take official notice (*see* 10 C.F.R. § 2.743(i)) of the recent occurrence of other random terrorist incidents directed at public facilities that buttress this conclusion. *See National Surety Corp. v. First National Bank in Indiana*, 106 F. Supp. 302, 304 (W.D. Pa. 1952); *Rank v. Krug*, 90 F. Supp. 773, 781 (S.D. Cal. 1950).

In evaluating the adequacy of GANE's basis, we also recognize that GANE has had no access to the security plan, because of its security classification. Contrary to the Staff's position, GANE also could not obtain such access prior to being admitted as a party and asserting a contention such as this one — for it would have to have a "need to know" prior to being granted any security clearance that would enable it to peruse the plan. *See, e.g.*, 10 C.F.R. §§ 25.15(b), 25.17(a), 25.35. Thus, GANE's assertion, *inter alia*, that there are no guards present on a 24-hour basis must not only be presumed to be accurate but also to suggest an option (armed guards) that represents what actually was voluntarily followed by UCLA at the 1984 Olympic Games. Shutdown of the reactor during the Olympic Games, as also occurred at UCLA in 1984 and as sought by GANE here, may also be an available option, given what actually took place at UCLA (even though not at the behest of NRC). Thus, GANE has presented information that demonstrates a genuine dispute with the Applicant, within the meaning of 10 C.F.R. § 2.714(b)(iii).

In sum, we are basing our conclusion accepting this contention on GANE's having provided as adequate a basis as might be expected, given security classification requirements. For contention purposes, it has set forth a special circumstance that permits us to consider the need for enhanced measures under 10 C.F.R. § 73.60(f). (Dr. Kline dissents from our admission of this contention. His opinion appears at pp. 309-12, *supra*.)

2. Contention 9: Management Problems

GANE's ninth contention asserts that management problems at the GTRR are so great that public safety cannot be ensured. GANE states that safety concerns at the reactor are the "sole responsibility" of the Director (citing the SAR). GANE claims that this Director was the one who withheld information from the NRC about a serious 1987 accident, that the NRC was advised of this accident by the safety officer at the time, who was later demoted and left the GTRR operation claiming harassment. GANE Amended Petition at 10. (In a communication dated March 14, 1995, supplying us and the parties a copy of the same letter as the Staff provided in conjunction with Contention 5, *supra*, at 13, GANE identified the former radiation safety officer as Dr. Robert M. Boyd.)

GANE alleges that, since that incident, management was restructured to give the Director increased authority, including increased authority over the Manager

of the Office of Radiation Safety. Although conceding that the safety officer "has a line to higher-ups than the director," GANE claims that he/she works for the Director on a day-to-day basis and the threat of reprisal would be a "huge incentive" against defying the Director. GANE Amended Petition at 10.

GANE adds that the Nuclear Safety Committee has theoretical oversight of GTRR operations but is flawed in having "no concern with health issues." Citing the SAR, GANE claims that the Office of Radiation Safety Manager is sought for knowledge of law more than health physics. *Id.*

The Applicant asserts that the charge that safety concerns are the "sole responsibility" of the Director is without merit. It claims there is an emergency organization in place and a Nuclear Safeguards Committee comprised of twelve independent experts who review and approve all safety matters. The Applicant states that the 1987 incident referenced by GANE was investigated by the NRC, considered thoroughly in Federal Court, and is a closed matter. It adds that the current organizational structure for the GTRR has been approved by the NRC. Applicant's Response at 18-19.

The Staff notes that, as GANE concedes, other individuals and safety organizations and committees associated with the facility have the ability to report safety problems to persons with higher authority than the Director. It adds that GANE has not shown any reason to believe that the Director was responsible for reprisals against the individual who reported the 1987 incident, that other safety problems have not been reported, or that the Licensee's safety organizations and committees would fail to take appropriate action in the event a safety problem were discovered. The Staff concludes that the contention lacks the requisite foundation. Staff Response at 28.

At the prehearing conference, GANE clarified its response by indicating that its sources of information concerning the 1987 incident were both newspaper articles (Tr. 339) and various NRC reports — Enforcement Action 88-32, Inspection Report 50-160/87-08, and Office of Investigations Report 2-88-003 (Tr. 365). Those reports indicate the existence of severe management problems during 1987-88, reflected by the involuntary dismissal of two GTRR employees for reporting safety information to NRC. (Those employees were apparently later reinstated by the University, but to positions outside the GTRR. OI Report 2-88-003.) The reports also ascribe certain of the problems to the then-Director of the GTRR, who also serves as the current Director. Further, the SAR (cited by GANE) indicates that the Director will have significant operational public health and safety responsibilities under a renewed license. SAR Fig. 6.1 at 157.

In evaluating GANE's arguments, the Board agrees that the other officers or committees referenced by the Applicant and Staff appear to exercise oversight or audit-type functions, as claimed by GANE (Tr. 349), rather than day-to-day operational functions. The SAR upon which GANE relies appears to place the

most significant of the operational responsibilities, if not the "sole" responsibility as alleged by GANE, on the Director.

The Staff, in particular, acknowledges the seriousness of the 1987-88 incident (Tr. 374, 377, 378, 384-85) but maintains that GANE has not demonstrated any recent managerial deficiencies. The Staff claims that the earlier managerial problems have been corrected, at least to its satisfaction, more than 6 years ago (Tr. 373). It asserts that, although some minor deficiencies may have been uncovered, nothing approaching the seriousness of the 1987-88 incident has occurred since that time (Tr. 377-78). The Applicant claims that "the problem has been fixed, and there's no allegation that the problem has either not been fixed satisfactorily or that it has recurred" (Tr. 382). Absent demonstration of more recent managerial deficiencies — a pattern of conduct, or at least an event in recent history giving reason to believe that the GTRR is not being operated safely or that it would not be operated safely in the future — the Staff finds insufficient foundation for the contention (Tr. 373-74, 377).

A series of violations or other incidents, even where they rise to a level no higher than a level IV, has been recognized as sufficient to form the basis for a contention challenging the implementation of a reactor's maintenance and surveillance program and, through that vehicle, the managerial sufficiency of various corporate officers and officials. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 19-20 (1993). Here, the 1987-88 incident relied on by GANE is a severity level III (Tr. 378) — more serious than those advanced in *Diablo Canyon*. Furthermore, GANE has never previously had an opportunity to contest in an adjudicative proceeding the acceptance by the Staff of the current Director. As for other, more recent incidents, GANE took steps to obtain that information but was unsuccessful.

Had GANE had more information available to it, it may well have been able to buttress this contention in greater detail. One of the premises emphasized by the Commission in its rule change in 1989 (which raised the threshold for the admission of contentions) was the Commission's expressed desire to require petitioners to become familiar with, and read, the documents relevant to the proceeding that were available prior to seeking intervention. Underlying that premise was the assumption that documents concerning the proceeding would be readily available locally. As stated by the Commission in the Statement of Considerations for the revised intervention rule:

Several months before contentions are filed, the applicant will have filed an application with the Commission, accompanied by multi-volume safety and environmental reports. These documents are available for public inspection and copying in the Commission's headquarters and local public document rooms.

. . . the license application *should include sufficient information* to form a basis for contentions

54 Fed. Reg. 33,168, 33,170-71 (Aug. 11, 1989) [emphasis supplied].

Reflecting the lack of any local public document room (LPDR) in or near Atlanta, the NRC in its notices concerning the availability of information for this proceeding referred only to the NRC public document room in Washington, D.C. It is unreasonable, however, to expect a *pro se* petitioner such as GANE to travel to Washington, D.C., to obtain adequate information to formulate a successful contention.

As an alternative, GANE contacted the NRC Region II Atlanta office to request copies of reports from 1987 to the present. GANE was provided only one document — that referencing the 1987-88 incident (Tr. 330, 334, 368, 372) upon which GANE relies in its contention. (It does not appear that Region II intentionally withheld documents, but it undoubtedly interpreted very narrowly the description of the reports requested — i.e., accidents or investigations. Tr. 330, 379, 386.) What GANE should have sought were Inspection Reports for the period in question (1988-94) — such as the 1994 report (IR 50-160/94-01) supplied by the Staff in another context, upon which GANE now seeks to rely (Tr. 329, 336, 338). If there had been a LPDR in the Atlanta area, GANE would have been able to peruse the chronological GTRR file (which in any event is part of NRC's NUDOCS system, that also is not present for public access in the Atlanta area but is present in most, if not all, LPDRs).¹⁰

It turned out from the prehearing conference that Georgia Tech itself maintains complete files on campus that are available for public examination, as long as formal requests are filed (Tr. 39-44, 332-34). Those files, however, were not referenced in NRC's Notice of Opportunity for Hearing — undoubtedly because NRC does not maintain them or, indeed, even supervise their completeness or availability. That being so, and given the premise of NRC's procedural rules as being based on the availability of adequate information, we find that GANE lacked sufficient local access to information to formulate its contention in greater detail beyond the information it has supplied concerning the 1987-88 incident.¹¹

As detailed later, however, that information is a sufficient basis for a contention in this proceeding.

¹⁰ Upon inquiry from the Board, the Staff asserted that LPDRs are established for power reactors but not generally for research reactors (Tr. 48). The Board notes, however, that an LPDR was established in 1980 for the renewal of the license for the UCLA Research Reactor, at a library in Los Angeles, California, and that it was kept open until February 11, 1994. 59 Fed. Reg. 4121 (Jan. 28, 1994).

¹¹ GANE has been put on the distribution list of the Office of Nuclear Reactor Regulation (NRR) in Region II (Tr. 41), but that Office does not generate the inspection reports that would support this kind of contention. GANE also examined the SAR as a predicate for its contentions, including this one, but much of the information bearing upon a contention such as this was not and would not be included in the SAR.

We note the seriousness of the 1987-88 incident and its implications with respect to current management — based on the identical person being Director both then and now. That the Staff is satisfied with the resolution of the incident and has closed it does not preclude another party from taking issue with the adequacy of management at the GTRR, when this appears to be the first occasion where an interested member of the public could have sought to adjudicate this matter. We find that, in these circumstances, GANE has presented an adequate basis to admit this contention, and we are accordingly doing so.

We note, however, that in order to prevail, GANE will have to demonstrate that, *inter alia*, substantial management deficiencies persist.¹² We assume that GANE will utilize discovery to attain examples of recent incidents, if any, that bear on management capability and also may utilize experts with managerial experience.

3. *Contention 1: General Safety Deficiencies*

Turning next to the proposed contentions that we find do not meet the Commission's contention requirements, GANE's first contention states that "the GTRR is generally unsafe." As its basis, GANE first contrasts a statement on page 1 of the SAR to the effect that "no safety problems have been encountered" with examples of four alleged incidents that assertedly have occurred throughout the operating life of the reactor, from 1972 to 1987. (The latest of these incidents is the 1987-88 incident discussed under Contention 9, the others occurred earlier.) GANE also incorporates from another contention asserted deficiencies in environmental monitoring. Finally, it cites certain alleged deficiencies in the SAR, both by way of asserted omissions and incorrect statements. Amended Petition at 3.

GANE interprets the SAR claim of "no safety problems" to be inconsistent with the facts and as supporting evidence for its view that the entire SAR is unreliable. Tr. 58. As further basis for that view, GANE asserts that the SAR fails to state the core inventory of radionuclides and fails to discuss core melt scenarios that involve breach of containment. Additionally, GANE asserts that the SAR states an incorrect half-life for I-131 and considers Xe-137 and Kr-90 but erroneously ignores their respective daughter products, Cs-137 and Sr-90.

The Applicant and Staff each oppose admission of Contention 1. The Applicant bases its opposition in large part upon factual rebuttal of GANE's assertions. However, consideration of the factual merits of the contention is premature at this stage. The Staff opposes admission on grounds that GANE

¹² It is not clear from our record whether Dr. Boyd was one of the two persons dismissed in 1987 — we have not been provided their names — or whether the alleged demotion and later resignation of Dr. Boyd constitutes another instance of potential mismanagement.

has not stated an adequate basis for its contention or that it otherwise has not presented issues suitable for litigation.

The Board concludes that the four events involving radiological contamination cited by GANE are not a sufficient basis to support an assertion that the reactor operation might be unsafe during the future licensing period being sought by Georgia Tech. The events cited by GANE occurred during the period from 1972 to 1987. GANE has neither presented recent safety information nor a technical basis or expert opinion suggesting how these old incidents relate to current safety or the safety of future operation. (We note, however, that we are permitting the 1987-88 incident — apparently the most serious of those cited, as well as the most recent — to be examined under Contention 9, which we are admitting.)

We also reject for lack of basis GANE's assertion that the four incidents demonstrate that Georgia Tech made an inconsistent claim in the SAR, at 1. In context, it is clear the cited SAR statement refers specifically to fuel performance and engineered safety systems and not generally to all past incidents associated with reactor operation. No basis is presented for showing that the statement is false with respect to the functions cited. A petitioner's imprecise reading of a reference document cannot serve to generate an issue suitable for litigation.

Petitioners have not proffered a basis or expert opinion supporting their assertion that the SAR is deficient because of data omissions or errors in the text. GANE's opinion is that topics such as core inventory of radionuclides, an additional core melt scenario, and accident dose analyses that specifically cite Cs-137 and Sr-90 should have been discussed in the SAR, but it presents no expert opinion or analysis of why that is so. GANE's desires cannot be admitted for litigation, however, without some threshold technical basis showing safety significance or some other reason why these topics must be included in the SAR.

Similarly, typographical errors in the SAR of the type cited by GANE for the half life of Iodine 137 (1.93 hours instead of 193 hours) may be well founded but are unsuitable for litigation absent some demonstration of a dispute with the Applicant or a showing suggesting that the erroneous number was improperly relied upon in an essential analysis. Indeed, the Applicant states that it has issued a revised version of the SAR with the typographical errors corrected. Tr. 64-65.¹³

For all of the foregoing reasons, the Board finds GANE Contention 1 not admissible in this proceeding.

¹³ The Board has not received or examined the revised version of the SAR. In response to our inquiry, however, the Board was advised that no substantive changes were made but only typographical corrections (Tr. 64-65).

4. *Contention 2: Containment Integrity*

GANE contends that the GTRR containment shell is unable to prevent the escape of radioactive material to the environment. It cites numerous assertions as bases for its contention:

1. The containment shell is designed to leak $\frac{1}{2}$ percent per day while the SAR describes the shell as relatively leak tight.
2. State of Georgia measurements show a dose rate of 700 mr per year around the reactor site.
3. A criticality accident followed by fuel melt and a steam explosion could occur leading to release of millions of curies of radiation, grave health threats to nearby persons, and billions of dollars worth of property damage.
4. In an accident the reactor building would leak 10,000 curies per day because of its design basis leak rate even if it were not breached by a steam explosion.
5. The containment building can be breached in a steam explosion because the top of the building consists only of a $\frac{7}{16}$ " steel roof. Moreover a rocket or grenade launched from outside containment would breach the building.
6. The containment building has many doors, electrical penetrations, ventilators, a smoke stack, and a pipe tunnel beneath the reactor, all of which could serve as pathways for escape of radiation in an accident. High doses would be encountered in the pipe tunnel which would endanger emergency workers who enter.

GANE contends that Georgia Tech's refusal to consider a core melt scenario with steam explosion and release of millions of curies of radiation to the environment demonstrates that it has a deficient understanding of reactor operation. Other alleged inaccurate scenarios in the SAR are said to include a radiological dispersion analysis that fails to consider the effects of thunderstorms and tornados and skin dose analyses that fail to consider the simultaneous inhalation dose. GANE asserts that rapid withdrawal or hang up of control rods or flow blockage are unanalyzed scenarios that could lead to a criticality accident.

Finally, GANE asserts that 400,000 curies of Cobalt-60 stored in a pool shielded by 18 feet of water could become unshielded if a steam explosion in the reactor breached the pool. This event is said to yield 480 million Roentgen per hour exposure to emergency personnel.

Both the Applicant and the NRC Staff oppose admission of this contention. The Applicant responded that the issues raised by GANE have been comprehensively addressed in the SAR. Much of the Applicant's response addresses the merits of GANE's contention prematurely and we are unable to consider it at this stage. According to the Applicant, the steam explosion scenario is considered not credible. The 700 mrem/year measured at the site boundary emanated from a storage facility on site that is under State license and is not part of this

renewal application. Similarly, the Cobalt-60 stored under water on site is under State license and also is not a part of this application for license renewal.

The NRC Staff opposes admission of this contention because it assertedly does not comply with 10 C.F.R. § 2.714(b)(2)(ii) and (iii). These sections require that GANE provide a statement of facts or expert opinion that support the contention and sufficient information to demonstrate the existence of a genuine dispute with the Applicant on a material issue of law or fact. GANE assertedly has not done so but instead provides only its own unsupported opinions. The Staff believes that GANE's concerns about the 700 mrem/yr dose measurement by the Georgia Environmental Protection Division (EPD) lacks specificity with respect to time and place and present-day radiation levels. The Staff further states that GANE asserts that the Applicant's dose projections for design-basis accidents constitute unacceptable risk but does not cite any violation of NRC regulations. According to the Staff, GANE's concern for rocket or grenade penetration of the 7/16-inch steel roof of the reactor building fails to take account of the protective function of the concrete biological shield around the reactor inside containment. Finally, the Staff claims that GANE's concern for workers entering the pipe tunnel for cooling water hookup in an emergency does not take account of information in the SAR that discloses that there is shielding in the pipe tunnel and that the emergency water hookup is not located in the tunnel but in a lab building outside containment.

The Board rejects this contention for the following reasons. GANE is primarily concerned that the Applicant omitted an important accident scenario from the SAR wherein the fuel melts, a steam explosion and breach of containment occur, and millions of curies of radiation are released to the environment with consequent widespread health effects and property damage. The Board finds no technical basis in references or expert opinion supporting GANE's view that this is a possible accident scenario. The Board was unable to elicit such basis from GANE at the prehearing conference (Tr. 81-85). The Board finds that the accident scenario proffered by GANE lacks the technical basis necessary for the admission of a contention as specified in 10 C.F.R. § 2.714(b)(2). Accordingly, we deny admission of GANE's accident scenario, together with all of the alleged consequences of such a scenario.

GANE's assertion that the containment building will leak 10,000 curies per day in the wake of an accident where containment is not breached is similarly lacking in basis. Although GANE cites the SAR accurately for the maximum design-basis leak rate of containment, it cites an inaccessible person of unknown credentials to support the assertion of 10,000 curies per day leakage (Tr. 90-93). This is an inadequate basis for a contention.

GANE's assertion that State of Georgia dose measurements in the vicinity of the reactor were 700 mrem/yr lacks sufficient specificity for admission as a contention. GANE provides no information establishing whether the reactor

is the source of the radiation, whether the source is under jurisdiction of the State or the NRC, whether the dose currently exists, or whether there has been a violation of NRC regulations. Additionally, there is no dispute of material fact because neither the Applicant nor the Staff contests the existence or accuracy of the cited dose rate.

GANE's concerns for exposure of reactor personnel to radiation from 400,000 curies of Co-60 is derived from its accident scenario involving a steam explosion and breach of containment, which we earlier found inadmissible for lack of technical basis. In this case, a steam explosion is postulated to breach the storage pool causing a loss of water which shields the Co-60. Because it is dependent on a postulated steam explosion, this concern suffers from the same deficiency of technical basis as the excluded accident scenario. Moreover, the Co-60 is regulated by the State of Georgia under its authority as an agreement State and is not under the jurisdiction of the NRC. The Co-60 has no role in GTRR operations and is not a part of the renewal application. We could consider the Co-60 in this proceeding if there were a sufficient basis to suggest an effect on reactor safety; however we find no such basis here.

The Board finds that Contention 2 lacks the technical basis required by 10 C.F.R. § 2.714(b)(2) and it is not admitted.

5. Contention 3: Contamination of Sewer System

GANE contends that the GTRR is contaminating the City of Atlanta sewer system, by releasing radioactive material to the sewers of Atlanta. As basis for this allegation, it cites sewer contamination it says occurred in Albuquerque, New Mexico, and Cleveland, Ohio. It also asserts that NRC has revised its regulations governing sewage disposal of radionuclides because of its discovery of radionuclide accumulation in sewers, and that NRC ordered Georgia Tech to perform a study of radiation levels in the sewer serving the reactor which was never done.

The Applicant and the Staff oppose admission of this contention. The Applicant relies prematurely on factual rebuttal while the Staff asserts that GANE has provided inadequate basis for the contention.

The Board concludes that GANE has not provided a sufficient technical or legal basis for its contention. It does not assert a violation by GTRR of any NRC regulation governing sewage disposal of radioactive material. Nor does it cite any basis in documents or expert opinion for its belief that GTRR has discharged insoluble radioactivity that is accumulating in the sewers. A finding of radiation in the sewers of other cities has no bearing on events occurring in Atlanta. Nor is NRC's review of its regulations governing discharge of radioactivity to the sewers an adequate basis for this contention. *See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC*

59, 85-86 (1985); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981). Finally, GANE has presented an inadequate basis for its assertion that the NRC ordered GTRR to perform a study of the sewers which was never done.¹⁴ For all of the foregoing reasons, Contention 3 is not admitted.

6. Contention 4: *Unstable Geologic Conditions*

GANE contends that the GTRR site is unsafe because it suffers from unstable geologic conditions. GANE asserts that an underground water flume directly below the reactor could create a sinkhole that would undermine the reactor foundation. Danger to the reactor foundation is also said to arise from the possible collapse of an old 6-foot pipe tunnel that runs beneath the reactor. GANE alleges that the reactor foundation is sited atop the Wahoo Creek formation which it says is not solid bedrock, contrary to the assumption of reactor management. It further alleges that the reactor building has visible water damage and cracking caused by structural stress from a shifting foundation, that the SAR gives an inadequate description of the underlying geologic structures, that the local water table is only 11 feet beneath the surface in some places, and that the reactor building and parking lot are in a low-lying area that experiences regular flooding and dampness.

GANE advances as bases for its concerns that a sinkhole appeared adjacent to the reactor building 20 years ago; a sewer line collapsed $\frac{1}{4}$ mile from the reactor building killing two persons in 1993; and that the reactor foundation is a slabby, viscous, muddy, medium-grained muscovite plagioclase gneiss which tends to break across oblique planes. It cites *Alternatives 9/93* (later shown to be 1/94), a Geologic Survey Bulletin, and the SAR as bases for its concerns for the geologic foundation.

The Applicant opposes admission of this contention on the grounds that it is without merit. The NRC Staff opposes admission on the ground that the contention is comprised of GANE's personal opinion but that GANE has not met its burden to make a showing by analysis or expert opinion that a genuine dispute with the Applicant exists on these matters.

The Board concludes that the Staff's analysis is correct. There is no evidence presented showing that there has been a sinkhole adjacent to the reactor and it cannot now be determined on this record that such an event occurred. No analysis or expert opinion is provided to suggest that there is a threat to public health and safety arising from a pipe tunnel under the reactor or from the

¹⁴ GANE cited *Alternatives 9/93* as basis for its assertion of NRC-ordered studies. Upon inquiry, the cited article did not appear to support the assertion. Tr. 139-42. Later it was revealed that the correct reference was *Alternatives 1/94*. Tr. 160-62.

geologic foundation of the reactor. The collapse of a sewer tunnel elsewhere in Atlanta is not an adequate basis for inferring that a threat to public health and safety exists at the reactor. The materiality to public health and safety of a groundwater table 11 feet below the surface or flooding in the reactor parking lot has not been provided and is not self-evident. GANE would have us infer a public health threat from the existence and description of these structures and circumstances. However, it is the petitioner who is obligated to provide the analyses and expert opinion showing why its bases support its contention. It has not done so and the Board may not make factual inferences on petitioner's behalf. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991). For all of the foregoing reasons, this contention is not admitted.

7. Contention 6: Adequacy of Monitoring

GANE contends that the GTRR is unsafe to the public because it has not been and is not now being monitored adequately. GANE asserts as basis for its contention that Georgia's EPD has responsibility for monitoring around the GTRR. It asserts that EPD has performed no air monitoring; many isotopes are unmonitored; there has been no offsite monitoring; EPD has exercised diminishing oversight over the years; it has failed to publish annual reports since 1989; water monitoring has not been performed since 1980; and all TLD data from 1979 to 1985 were erroneous and had to be corrected. Strontium-90 and Cs-137 are assertedly not monitored. The regulatory authority is not clear to the regulators themselves and leaves a regulatory void with serious harm to the public. Finally, Petitioners assert that the Georgia EPD has a conflict of interest as a regulator, arising from the fact that EPD is a customer of GTRR.

The Board rejects all of the foregoing assertions at the outset because they allege performance deficiencies by an agency of the State of Georgia that are beyond our jurisdiction to consider. The State of Georgia conducts environmental monitoring in the vicinity of the GTRR in coordination with Georgia Tech. However, the Applicant is required to conduct its own monitoring (SAR at 97-102; ER ¶4.7) and nothing in the record of which we are aware would indicate that it does not do so. Grant of the proposed GTRR license is not dependent upon the monitoring performance of an agency of the State.

GANE further asserts that students monitor Ar-41 in air only once per year in the vicinity of GTRR. GANE's opinion is that the following statements in the SAR are untrue: that gas is monitored as it leaves the building; AR-41 is the only notable isotope emitted and this is validated by environmental monitoring; there have been 30 years of safe operation of the reactor; and long-term effects of license renewal on the environment will be insignificant. Finally, GANE is concerned that long-term contamination has already occurred in the environment.

The Applicant and the Staff oppose this contention on the grounds that GANE has not provided bases for its assertions.

The Board finds that: GANE's assertion about student monitoring is not in dispute, is immaterial to license renewal, and is the result of imprecise reading of the SAR by GANE (Tr. 259-62). Grant of the proposed license is not dependent upon radiological monitoring done by students. The Board finds that GANE has supplied nothing whatever as bases for its claim that statements about environmental monitoring by the Applicant in the SAR are untrue. For all of the foregoing reasons, Contention 6 is not admitted.

8. Contention 7: Emergency Response Plan

GANE contends that the GTRR is not safe because it does not have an adequate emergency response plan. It asserts that: the emergency response plan is uncoordinated and unknown to local and state authorities; that Georgia Tech has never held a campus-wide evacuation drill; that the emergency command center would be unworkable in the event of a core-melt accident because of its location inside the facility; that 10,000 curies per day would escape to the environment due to core melt; that radiation releases would range further than 100 meters of the EPZ; and that Georgia Tech is negligent in not planning for a large release.

Both the Applicant and the Staff oppose admission of this contention. The Staff asserts that GANE has provided no technical support for its bases or that it asserts matters that are not required by regulations.

The Board finds that Contention 7 must be rejected for failure to provide bases; failure to provide statement of alleged fact or expert opinion in support of the contention; and for failure to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(i), (ii), and (iii). GANE's assertions represent only its own unsupported opinion as to credible accident scenarios and consequences of accidents and its differing opinion of what the applicable regulations should require. Its opinion that local and state authorities are uninformed about emergency responses at GTRR is founded on a report of a misdirected telephone call by a person not acting for GANE (Tr. 269, 271-74, 278-79).

9. Contention 8: Reservoir Contamination

In this contention, GANE asserts that the Hemphill reservoir, located within a mile of the GTRR, is vulnerable to extensive contamination if there is an accidental release from the reactor. GANE further asserts that the contamination would exacerbate the chronic water shortage in the Atlanta region caused by the

rapidly growing population and deteriorating infrastructure. Amended Petition at 8-9.

The Applicant and the Staff oppose admission of this contention. The Applicant asserts that no credible accident has been postulated and the reservoir is located upwind from the prevailing winds at the reactor. The Staff maintains that GANE fails to provide any supporting fact or expert opinion as it is required to do under Commission regulations.

This contention about an accidental release contaminating the Hemphill reservoir is merely an expression of GANE's opinion. No basis is provided for any of these assertions. The Commission's regulations require, *inter alia*, that GANE provide a concise statement of the alleged facts or expert opinion to support the contention, and sufficient information to show that a genuine dispute exists with the Applicant. 10 C.F.R. § 2.714(b)(ii) and (iii). GANE has not met these requirements.

Specifically, GANE has not provided a concise statement of the alleged facts relating to how an accidental release would occur and how such a release would contaminate the reservoir, nor what expert opinion GANE intends to rely upon to prove the contention. Neither does GANE make any references to any specific sources or documents upon which it intends to rely to prove the contention. Without these showings GANE has not provided sufficient information to demonstrate that a genuine dispute exists with the Applicant regarding the postulated accidental release from the reactor and any subsequent contamination of the reservoir. Based on these considerations, the Board finds this contention inadmissible.

10. Contention 10: Financial Liability.

GANE claims in this contention that the GTRR is a financial liability to taxpayers of the State of Georgia and to the University. Specifically, GANE asserts that over half of the operating cost of the research reactor is paid by Georgia taxpayers, amounting to about half a million dollars per year; and it is questionable whether the other half of the costs can be generated by contract work because of lack of use of the GTRR. GANE believes that the University's request for a waiver of the annual \$60,000 fee from the Commission further underscores the fact that the reactor is a burden to the University. GANE further asserts that the decommissioning of the reactor "holds yet a stiff fee for Georgia taxpayers" due to uncertain cost estimates as a result of the lack of "real decommissioning" and the "failure of nuclear waste policy in this country to date." Finally, GANE states that it "envision[s] a noble role for Georgia Tech, if they will but accept it, to treat the nuclear waste and decommissioning aspects of the reactor seriously, and immediately, and make the needed discoveries

for humanity on the thorny issues of nuclear waste and decommissioning." Amended Petition at 10-11.

Both the Applicant and the Staff oppose admission of this contention. The Applicant states that it finds no merit in the contention because the reactor is being used for education, research, and public service. The Staff argues that the benefits and alternative use of the reactor are not appropriate issues for litigation in this proceeding; and GANE has not provided sufficient basis to dispute the Applicant's cost estimate of decommissioning.

As set forth, the issue of the research reactor being a financial burden to the taxpayers of Georgia or to the University is outside the scope of this proceeding and hence is beyond our jurisdiction. For this license renewal application, the Commission's regulations do not require a showing by the Applicant of lack of financial burden either to the taxpayers of Georgia or the University.

Although the Commission's rules may allow litigation of an alleged failure of an applicant's environmental report to provide an adequate cost-benefit analysis, GANE's contention is not framed this way at all. GANE has neither stated that there is a lack of cost-benefit analysis in the Applicant's environmental report nor asserted that it even wished to litigate this issue. Tr. 295-96.

The argument that the request for a waiver of the annual \$60,000 fee further underscores the financial burden to the University is moot because currently no fee is required. 10 C.F.R. § 170.11; Tr. 300-01. As to the decommissioning cost, by merely questioning the Applicant's cost estimate, GANE has not provided any facts or expert opinion to support its view. No factual or legal basis was provided by GANE to show that the Applicant has not met the requirements of 10 C.F.R. § 50.75, or any other Commission regulation.

GANE's statement regarding its envisioning a noble role for Georgia Tech to address the issues of nuclear waste and decommissioning is an expression of its opinion. It is not relevant to a proper issue in this proceeding.

Based on the above considerations, GANE in this contention has not met the requirements of 10 C.F.R. § 2.714(b)(ii) and (iii) in providing any basis of a genuine dispute with the Applicant on an issue of law or fact material to this proceeding. Therefore, the Board finds this contention inadmissible.

C. Order

For the reasons stated, and in light of the entire record of this proceeding, it is, this 26th day of April 1995, ORDERED:

1. The request for a hearing and petition for leave to intervene of Georgians Against Nuclear Energy (GANE) is hereby *granted*.
2. GANE Contentions 5 and 9 are hereby *admitted*.
3. GANE Contentions 1, 2, 3, 4, 6, 7, 8, and 10 are hereby *denied*.

4. The Licensing Board will conduct a telephone conference call in the near future, at a time to be identified by the Licensing Board following consultation with parties' representatives, to establish the mechanics of GANE's obtaining access to security information, as well as schedules for discovery, summary disposition motions (if sought by any party), and potential hearing schedules.

5. This Order is subject to appeal to the Commission in accordance with the requirements of 10 C.F.R. § 2.714a. Any such appeal must be filed within ten (10) days after service of this Order. Under 10 C.F.R. § 2.714a(c), this Order may be appealed only by the Applicant or the NRC Staff.

6. Notwithstanding the pendency of any appeals, the parties shall proceed to prosecute their cases before us with due diligence.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 26, 1995

Judge Kline joins in this Order in all respects except for the acceptance of Contention 5. Judge Kline's dissenting opinion with respect to that contention follows.

Dissenting Opinion of Judge Kline on Contention 5:

My colleagues would admit parts of Contention 5 that assert special hazards to GTRR because the City of Atlanta will shortly host the Olympic Games. They would treat the Olympic Games as causing an individual facility or site condition justifying alternate or additional security measures within the meaning of 10 C.F.R. § 73.60(f). However, I find that GANE's pleading has fallen short of providing acceptable bases for this contention under section 2.714(b)(2) and

it must be rejected before reaching the threshold for consideration of alternative provisions under section 73.60(f). GANE has provided no facts or expert opinion that support the contention.

GANE asserts that the Olympics have historically attracted terrorist activity and that the bomb-grade nuclear fuel at GTRR would be a tempting target for terrorists. GANE appears to be concerned about theft of special nuclear material (SNM) and radiological sabotage. Contention 5 could be viewed as expressing concern either that: (1) an attack on the GTRR is more likely during the Olympic Games or (2) that an attack on GTRR during the Games might be of a character that is more likely to succeed in causing radiological sabotage or a diplomatic disaster.

Petitioner's general concern that the reactor might be specially targeted for attack by terrorists during the Olympics lacks both factual and regulatory bases. GANE provides no authority showing that any reactor anywhere has been attacked by terrorists and there is no basis provided for its opinion that GTRR might be a tempting target for terrorists. Neither does GANE provide any authority supporting its view that the Licensee is required by regulations to consider and respond to subjectively perceived changes in risk of attack during special events such as the Olympics. My reading of sections 73.60 and 73.67 which specify security requirements for nonpower reactors did not reveal any such requirements.

GANE asserts several factual bases in support of Contention 5, including: (1) close proximity of Olympic housing to the reactor, (2) a terrorism incident at a previous Olympic event, and (3) a letter expressing security concerns that was written to the Commission by a previous employee of GTRR.¹⁵ In each case the asserted basis invites an inference that there might be generally increased likelihood of attack on GTRR during the Olympic Games. The bases are inadequate under the provisions of 10 C.F.R. § 2.714(b)(2)(i), (ii), and (iii) and for the reasons stated above. Even if the bases are true, and no party has disputed them, no violation of NRC regulations is cited and they fail to state a dispute of material fact with the Applicant. All assertions of increased risk are generic; no concrete basis suggesting the existence of a specific plan to target GTRR has been provided.

Section 73.67(a)-(d) requires licensees that possess or use special nuclear material of moderate or low strategic significance to take specific steps to control, mitigate, or otherwise abate threats of theft or diversion of special nuclear material. Additionally, the performance requirements found in section 73.40 require generally that the licensee protect against radiological sabotage

¹⁵ GANE asserted, as additional basis, at the prehearing conference that the nonpower reactor at UCLA was shut down during the Olympic Games in Los Angeles. No basis for this assertion was presented, nor is its relevance to this case evident. Tr. 176-77.

in accordance with security plans approved by the Commission. Section 73.60 provides additional security requirements, including protection against radiological sabotage, for nonpower reactors that possess in excess of formula quantities of special nuclear material. The SAR appears to show that GTRR possesses less than a formula quantity of SNM, however, and that section may not be applicable if there is no other inventory of SNM on site.

No basis has been provided suggesting that the Applicant has failed to comply with applicable regulations or that actions required by regulation would be less effective in preventing radiological sabotage or diversion of special nuclear material during the Olympics than at any other time. The Board may not make an inference of increased likelihood of attack or of successful theft or sabotage during special events such as the Olympic Games in the absence of bases provided by petitioners. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). I disagree with my colleagues' view that compliance with regulations is irrelevant to the question before us. Clearly some basis needs to be provided showing that compliance with applicable regulations would be inadequate to cope with the risk before the special provisions of section 73.60(f) are invoked.

The hypothetical use of grenades or rocket launchers against the reactor is inadequate basis for the contention because there is no citation of a requirement to repel such threats that is applicable to nonpower reactors. These weapons may be within the scope of the design-basis threats set forth in section 73.1(a)(1); however, the Staff appears to believe that the design-basis threat for radiological sabotage is not applicable to this reactor. Tr. 171-75. In its brief to the Board, the Staff cited section 73.1 in support of its view that GANE had not alleged that the licensee is obligated to consider rocket or grenade attacks on the reactor.¹⁶

Section 73.1(a) provides: "The following design basis threats *where referenced in ensuing sections of this part*, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material" (emphasis added). Neither section 73.60 nor section 73.67 specifically references the design-basis threats in section 73.1(a)(1). Nor does NRC guidance to licensees for the format and content of physical security plans refer to the design-basis threats of section 73.1(a)(1).¹⁷ I conclude that section 73.1(a)(1) does not apply to the GTRR and that the bases for Contention 5 that appear to rely on design-basis threats must be rejected.

¹⁶ NRC Staff Response at 24 n.33; NRC Staff's Response to Licensing Board's Memorandum and Order of March 3, 1995, dated March 20, 1995, at 5 n.4.

¹⁷ Standard Format and Content for a Licensee Physical Security Plan for the Protection of Special Nuclear Material of Moderate or Low Strategic Significance, Regulatory Guide 5.59 Rev. 1, February 1983. I find no reference to design basis threats in this guide. While regulatory guides do not substitute for regulations, it is inconceivable that an NRC guide could be issued with so gross an error as to overlook a design-basis threat that the Commission intends should apply.

I find that GANE was not unfairly handicapped in preparation of Contention 5 by lack of access to the GTRR security plan. Security vulnerabilities at GTRR could, if they exist, be adequately identified, for example, by expert perusal of the SAR, by direct inspection of the reactor, by interview of knowledgeable experts, or by reference to authoritative writings on industrial security. Petitioners provided nothing suggesting they have undertaken any effort beyond formulating their personal opinion in support of this contention.

GANES's concerns are so general as to be applicable in substantially equal measure to all of Atlanta and to any public event. In this case, Petitioner has provided no basis suggesting that there is a particular threat focused on GTRR. Nor has it shown any regulatory basis suggesting that GTRR is required to respond to generic assertions of increased risk associated with special events such as the Olympic Games. Contention 5 should be rejected.

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

**Directors'
Decisions
Under
10 CFR 2.206**

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. 50-361
50-362

SOUTHERN CALIFORNIA EDISON
COMPANY, *et al.*
(San Onofre Nuclear Generating
Station, Units 2 and 3)

April 27, 1995

The Director, Office of Nuclear Reactor Regulation, denies a petition filed on August 10, 1994, by Mr. Ted Dougherty requesting a shutdown of the San Onofre Nuclear Generating Station. The request was based on concerns regarding the vulnerability of SONGS to earthquakes because of the existence of nearby fault lines, and concerns regarding the defensibility of SONGS to a terrorist threat.

SEISMIC AND GEOLOGIC CRITERIA: PLANT DESIGN

Appendix A (Criterion 2) to 10 C.F.R. Part 50 states that the design basis for the nuclear power plant should reflect the most severe of the natural phenomena that have been historically reported for the site and surrounding area, the combinations of the effects of normal and accident conditions with the effects of the natural phenomena, and the importance of the safety functions to be performed.

SEISMIC AND GEOLOGIC CRITERIA: PLANT DESIGN

Appendix A to 10 C.F.R. Part 100, "Seismic and Geologic Siting Criteria for Nuclear Power Plants," Section III(c), requires that the nuclear power plant's design bases for earthquakes be determined through evaluation of the geologic and seismic history of the nuclear power plant site and surrounding region.

TECHNICAL ISSUES DISCUSSED: PHYSICAL PROTECTION OF NUCLEAR PLANTS

The design-basis threat for radiological sabotage has been modified by an amendment to 10 C.F.R. Part 73 to include use of a land vehicle by adversaries for transporting personnel and their hand-carried equipment to the proximity of vital areas and to include a land-vehicle bomb.

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

I. INTRODUCTION

On August 10, 1994, Mr. Ted Dougherty (the Petitioner) submitted a letter to the Nuclear Regulatory Commission (the Commission or NRC) requesting a shutdown of the San Onofre Nuclear Generating Station (SONGS). The Commission determined to act on this request pursuant to 10 C.F.R. § 2.206. The request was based on concerns regarding the vulnerability of SONGS to earthquakes because of the existence of nearby fault lines, and concerns regarding the defensibility of SONGS to a terrorist threat.

On September 22, 1994, I informed the Petitioner that the petition had been referred to this Office for action pursuant to section 2.206 of the Commission's regulations. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the Petitioner's request.

My Decision in this matter follows.

II. BACKGROUND

The Petitioner provided as basis for the request (1) a letter to the Governor of California wherein the Petitioner expressed concerns regarding the vulnerability of SONGS to earthquakes and (2) a *Los Angeles Times* article concerning the threat of vehicle bombs and the Commission's recent rule requiring nuclear generating plants to install antiterrorist barriers within 18 months.

III. DISCUSSION

A. Vulnerability of SONGS to Earthquakes

The Petitioner asserts that SONGS is vulnerable to a deep ocean quake as well as a magnitude 8 earthquake (or greater) on the Newport-Inglewood fault. He asserts that human error following an earthquake of this magnitude could result

in failure of the plant's safety systems to protect the plant, thereby resulting in a meltdown.

Before licensing SONGS (and all nuclear plants), the NRC reviewed the design of the facility including its ability to withstand the effects of natural phenomena such as earthquakes, tornadoes, and hurricanes without loss of capability to perform the safety functions. Appendix A (Criterion 2) to 10 C.F.R. Part 50 states that the design basis for the nuclear power plant should reflect the most severe of the natural phenomena that have been historically reported for the site and surrounding area, the combinations of the effects of normal and accident conditions with the effects of the natural phenomena, and the importance of the safety functions to be performed. Appendix A to 10 C.F.R. Part 100, "Seismic and Geologic Siting Criteria for Nuclear Power Plants," section III(C), requires that the nuclear power plant's design bases for earthquakes be determined through evaluation of the geologic and seismic history of the nuclear power plant site and surrounding region. The purpose of this determination is to estimate the magnitude of the strongest earthquake that might affect the site of a nuclear power plant during its operating lifetime. The earthquake postulated for the seismic design of a plant, called the Safe Shutdown Earthquake (SSE), defines the maximum ground motion for which certain nuclear power plant structures, systems, and components necessary for safe operation and shutdown are designed to remain functional (e.g., for decay heat removal after the reactor is shut down).

The San Onofre Nuclear Generating Station (SONGS) site had undergone geologic and seismic investigations and reviews prior to issuance of the construction permits, including surveys performed by the Applicant, the United States Geological Survey, the California Division of Mines and Geology, and the National Oceanic and Atmospheric Administration. The findings of these investigations were reviewed extensively by the Staff and were litigated extensively in proceedings concerning the issuance of the construction permits¹ and operating licenses² for SONGS Units 2 and 3.

The Petitioner asserts that SONGS is vulnerable to a deep ocean quake. There are a number of offshore faults in the coastal waters off Southern California. Of greatest concern to the San Onofre site is an offshore structure beginning with the Newport-Inglewood Zone of Deformation near Long Beach, passing the site about 8 kilometers offshore and extending south to the San Diego area as the Rose Canyon Fault Zone.³ This entire structure is known as the Offshore Zone

¹ See LBP-73-36, 6 AEC 929 (1973); ALAB-248, 8 AEC 957 (1974).

² See LBP-82-3, 15 NRC 61 (1982); ALAB-673, 15 NRC 688 (1982); ALAB-717, 17 NRC 346 (1983); and see *Carstens v. NRC*, 742 F.2d 1546 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (the Court of Appeals affirmed the Commission's granting of the operating licenses for SONGS Units 2 and 3, noting the voluminous record and substantial evidence supporting the seismic review).

³ See LBP-82-3, *supra*, 15 NRC at 68.

of Deformation (OZD).⁴ The Atomic Safety and Licensing Board determined, during the 1982 operating license proceeding, that, based on historic earthquake data, the distinctive geology of the area, and prevailing stresses in the earth's crust, the controlling feature for San Onofre is the OZD.⁵

The Petitioner asserts that SONGS is vulnerable to a magnitude 8 or greater earthquake on the Newport-Inglewood Fault. The largest earthquake known to have occurred on that fault is the 1933 Long Beach earthquake which was a magnitude 6.3.⁶ Testimony presented during the operating license proceeding concluded that the features of the OZD, its geologic strain rate, regional tectonic setting, and absence of extensive and/or through-going fault ruptures in near-surface strata along much of the OZD, all support earthquakes of less than about a magnitude 7.⁷ In addition, the NRC Staff concluded, based on an evaluation of historical seismicity of the OZD and an evaluation of the fault parameters, that a maximum magnitude of 7.0 is based upon a reasonable and conservative interpretation of all available geological and seismological information.⁸ The Atomic Safety and Licensing Board⁹ as well as the Atomic Safety and Licensing Appeal Board¹⁰ concluded that a magnitude 7 earthquake on the OZD is appropriately conservative.¹¹ The Petitioner has not provided any basis to support the likelihood of a magnitude 8 or greater earthquake on the Newport-Inglewood Fault or call into question the conclusion of the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board.

The Petitioner expresses concern that panic caused by an earthquake could result in a meltdown due to human error. The ability of a nuclear power plant to resist the forces generated by the ground motion during an earthquake is incorporated in the design and construction of the plant. Industry codes and practices that govern the design and construction of nuclear power plant structures and components are far more stringent than those used for residential and commercial buildings. As a result, nuclear power plants are able to resist earthquake ground motions well beyond their design bases and well beyond the ground motion that would result in damage to commercial buildings.

⁴ *Id.*

⁵ *Id.* at 69.

⁶ *Id.* at 104.

⁷ ALAB-673, *supra*, 15 NRC at 709 n.40.

⁸ NUREG-0712, "Safety Evaluation Report Related to the Operation of San Onofre Nuclear Generating Station, Units 2 and 3," § 2.5.2.3.4 (February 1981).

⁹ See LBP-82-3, *supra*, 15 NRC at 86.

¹⁰ ALAB-717, *supra*, 17 NRC at 364-65.

¹¹ The Petitioner also provided a scenario of the effects on the Los Angeles area of a magnitude 6 earthquake on the Newport-Inglewood Fault followed by a magnitude 8 earthquake. The Petitioner has failed to provide any basis to support this scenario. The Staff reviewed this scenario and determined that, based on the investigations and reviews discussed above, it has no basis in scientific theory or physical possibility.

As a safety requirement, nuclear power plants have strong-ground-motion seismic instruments in and near the sites. If the ground motion at a site exceeds a specified level, which is one-half or less of the Safe Shutdown Earthquake, the plant is required to shut down (10 C.F.R. Part 100, Appendix A, V(a)(2)). As a defense-in-depth design feature, SONGS has an automatic seismic scram system to shut down the reactors when the ground motion exceeds a conservatively selected threshold value.¹² Prior to resuming operations following plant shutdown as the result of an earthquake, the licensee is required to demonstrate to the Commission that no functional damage has occurred to those plant features necessary for continued safe operation.

In summary, based on exhaustive seismic and geologic investigations performed for the SONGS site, which has been subjected to extensive litigation, the seismic design basis for the plant is reasonably conservative.

The Petitioner has failed to provide an adequate basis for his concern regarding the seismic adequacy of SONGS and, accordingly, has not raised any substantial health or safety issue that would call into question the safe operation of SONGS.

B. Threat of Vehicle Bombs

The Petitioner asserts that SONGS is not defensible from terrorists. The Petitioner bases this assertion on a newspaper article (*Los Angeles Times*, Aug. 4, 1994) concerning the threat of vehicle bombs at nuclear plants and the Commission's recent rule requiring nuclear plants to install antiterrorist barriers within 18 months.

The Commission's regulations regarding physical protection of nuclear plants are set forth in 10 C.F.R. Part 73. The regulations require a physical protection system designed to protect against acts of radiological sabotage or theft of special nuclear material based on certain design-basis threats. The design-basis threats for radiological sabotage defined in 10 C.F.R. § 73.1(a)(1) include "a determined, violent, external assault." The potential threat posed by malevolent use of vehicles as part of a violent external assault and the need to protect against it, were the subject of detailed analysis before the NRC published its regulations on design-basis threat. However, the use of a land-vehicle bomb was not initially included in the design-basis threat for radiological sabotage.

The newspaper article cited by the Petitioner describes two events that occurred in February 1993: a forced vehicle entry into the protected area at Three Mile Island (TMI), Unit 1, and a van bomb which was detonated in a

¹²NUREG-0741, "Technical Specifications San Onofre Nuclear Generating Station Unit 2," Table 3.3.1 (February 1982); and NUREG-0952, "Technical Specifications San Onofre Nuclear Generating Station Unit 3," Table 3.3.1 (November 1982).

public underground parking garage at the World Trade Center in New York City. As a result of these events, the Commission directed the NRC Staff to reevaluate and, if necessary, update the design-basis threat for vehicle intrusions and the use of vehicle bombs.

In its subsequent review of the threat environment, the NRC Staff concluded that there is no indication of an actual vehicle threat against the domestic commercial nuclear industry (59 Fed. Reg. 38,889 (Aug. 1, 1994)). Nonetheless, in light of the above recent events, the NRC Staff concluded that a vehicle intrusion or bomb threat to a nuclear power plant could develop without warning in the future. Therefore, on August 1, 1994, the Commission published in the *Federal Register* (59 Fed. Reg. 38,889), a final regulation to amend its physical protection regulation for operating nuclear power reactors. The amendments modified the design-basis threat for radiological sabotage to include use of a land vehicle by adversaries for transporting personnel and their hand-carried equipment to the proximity of vital areas and to include a land-vehicle bomb (*see* 10 C.F.R. § 73.1(a)(1)(i)(E) and (iii)).

All operating commercial nuclear power plants, including SONGS Units 2 and 3, must comply with the modified design-basis threat. This amended rule requires reactor licensees to install vehicle control measures, including vehicle barrier systems, to protect against the malevolent use of a land vehicle, by February 29, 1996 (*see* 10 C.F.R. § 73.55(c)(9)). A description of the proposed vehicle control measures for all operating commercial power reactors was required to be submitted to the Commission by February 28, 1995, for review. The Licensee for SONGS submitted its proposed measures on February 24, 1995, and they are currently being reviewed by the NRC Staff.

The security program at SONGS has consistently demonstrated superior performance and continues to exceed regulatory requirements. In addition to the normal NRC inspection activities of the SONGS security program, an Operational Safeguards Response Evaluation (OSRE) was conducted with the assistance of members of the U.S. Army Special Forces. One objective of the OSRE is to evaluate the Licensee's abilities to respond to an external threat. The OSRE team concluded that SONGS had an excellent contingency response capability.

The Petitioner has failed to provide an adequate basis for asserting that the plant is not defensible. The Petitioner cited a newspaper article as basis for his allegation. The article does not provide any information that is new or different from that already considered by the Commission. The Staff has concluded that the Petitioner has not raised a significant health or safety issue.

IV. CONCLUSION

The NRC Staff has reviewed the basis and justification stated to support the Petitioner's request that the NRC take appropriate actions to cause the shutdown and dismantling of SONGS. This review did not reveal any substantial safety issues that would call into question the continued safe operation of SONGS.

The institution of proceedings in response to a request pursuant to 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). This standard has been applied to determine whether any action in response to the Petition is warranted. For the reasons discussed above, no basis exists for taking any action in response to the Petition as no substantial health or safety issues have been raised by the Petition. Accordingly, no action pursuant to section 2.206 is being taken in this matter.

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 this regulation, the 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 27th day of April 1995.