NUREG-0386
DIGEST No. 10

UNITED STATES
NUCLEAR REGULATORY COMMISSION STAFF
PRACTICE AND PROCEDURE DIGEST

Commission, Appeal Board and Licensing Board Decisions
July 1972 - December 1998

Manuscript Completed: June 2000
Date Published: June 2000

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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UNITED STATES NUCLEAR REGULATORY COMMISSION

STAFF PRACTICE AND PROCEDURE DIGEST

(The June 2000 Update includes Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through December 31, 1998.)

NOTE TO USERS

This is the tenth edition of the NRC Staff Practice and Procedure Digest. It contains a digest of significant Commission, Atomic Safety and Licensing Appeal Board, and Atomic Safety and Licensing Board decisions issued during the period from July 1, 1972 to December 31, 1998, interpreting the NRC's Rules of Practice in 10 CFR Part 2. Although the Appeal Board was abolished in 1991, Appeal Board precedent may still be cited, to the extent it is consistent with more recent case law and current rules of practice. This edition of the Digest replaces in toto earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules of Practice effective through December 1998. We have included the text of the Commission's Policy on Conduct of Adjudicatory Proceedings, CLI-98-12 (July 28, 1998), which sets out instructions and expectations for the conduct of adjudicatory proceedings. The digest also includes a quick-reference chart indicating the time table for adjudicatory filings under Part 2, Subparts B, G, L, and M. Subpart M, which applies to license transfer proceedings, became effective on December 3, 1998. See 63 Fed. Reg. 66721 (Dec. 3, 1998).

Please note the later case history for the following which occurred after the updated text of the digest was completed:

> Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325 (1998), was affirmed in National Whistleblower Center v. NRC, 208 F.3d 256 (D.C. Cir. 2000). The court's action followed a second round of briefing and argument by the parties after the court vacated sua sponte its initial judgment reversing the Commission. See National Whistleblower Center v. NRC, 196 F.3d 1271 (D.C. Cir. 1999), vacating 1999 WL 1024662 (D.C. Cir. No. 99-1002, Nov. 12, 1999).

The Digest is roughly structured in accordance with the chronological sequence of the nuclear facility licensing process as set forth in 10 CFR Part 2. Those decisions which did not fit into that structure are dealt with in a section on "general matters." Where appropriate, particular decisions are indexed under more than one heading. Some topical headings contain no decision citations or discussion. It is anticipated that future updates to the Digest will utilize these headings.

Persons using this Digest are placed on notice that it may not be used as an authoritative citation in support of any position before the Commission or any of its adjudicatory tribunals.

TIME TABLE FOR ADJUDICATIONS UNDER 10 C.F.R. PART 2, SUBPARTS B, G, AND L		
PLEADING OR RULING	**DEADLINE FOR FILING***	**NOTES**
I. Request for Hearing/Intervention Petition and Related Filings		
A) Subpart G (Formal Hearings)		
1) Hearing Request/Intervention Petition (§§ 2.105(d), 2.714(a)(1))	30 days after notice published or as specified in notice	
2) Contentions Supplement to Intervention Petition (§ 2.714(b)(1))	15 days prior to prehearing conference	
3) Answer to Intervention Petition or Contentions Supplement (§ 2.714(c))		
a) Party	10 days after service of petition or supplement	
b) Staff	15 days after service of petition or supplement	
B) Subpart L (Informal Hearings)		
1) Applicant Hearing Request (§§ 2.103(b)(2), 2.1205(b))	20 days from date of notice of denial/ proposed denial or as specified in notice	
2) Nonapplicant Hearing Request (§ 2.1205(d))		
a) Notice Published	30 days after notice published	
b) No Notice Published	earliest of 1) 30 days after actual notice of pending application; 2) 30 days after actual notice of grant of application; or 3) 180 days after grant of application	
3) Intervention Petition after Hearing Request Granted (§ 2.1205(k))	30 days after notice of hearing published	
4) Answer to Nonapplicant Hearing Request (§ 2.1205(g))		
a) Applicant	10 days after service of hearing request	
b) Staff	10 days after date presiding officer designated	
5) Answer to Intervention Petition (§ 2.1205(k)(2))	10 days after service of intervention petition	

TIME TABLE FOR ADJUDICATIONS UNDER 10 C.F.R. PART 2, SUBPARTS B, G, AND L		
PLEADING OR RULING	**DEADLINE FOR FILING***	**NOTES**
C) Subpart M (License Transfers)		
1) Hearing Request/Intervention Petition (§ 2.1306, § 2.1308)	20 days after notice of receipt of application is published in Federal Register; 45 days after notice of receipt is placed in Public Document Room for all other applications; or as otherwise provided	
2) Answers to Hearing Requests/ Intervention Petition (§ 2.1307(a))	10 days after service of request or petition	
3) Replies to Answers (§ 2.1307(b))	5 days after service of answer	
D) Subpart B (Enforcement Proceedings)		
1) Enforcement Order		
a) Request for Hearing (§ 2.202(a)(3))	20 days after date of order or as specified in order	
b) Motion to set aside immediate effectiveness of enforcement order (§ 2.202(c)(2)(i))	20 days after date of order or as specified in order	Presiding officer must decide motion expeditiously
Staff response	5 days after receipt of motion	
2) Request for Hearing on Civil Penalty Order (§ 2.205(d))	20 days after date of order or as specified in order	
II. Appellate Review		
A) Appeal as of Right from Grant or Denial of Intervention		
1) Subpart G (§ 2.714a)		
a) Notice of Appeal and Brief	10 days after service of presiding officer's order	
b) Responsive Brief	10 days after service of notice of appeal	
2) Subpart L (§ 2.1205(o))		
a) Appeal Statement	10 days after service of presiding officer's order	Must be succinct
b) Counter-statement	15 days after service of appeal statement	

TIME TABLE FOR ADJUDICATIONS UNDER 10 C.F.R. PART 2, SUBPARTS B, G, AND L		
PLEADING OR RULING	**DEADLINE FOR FILING***	**NOTES**
3) Subpart M		There are no "appeals" as such under Subpart M. The Commission itself may act as the Presiding Officer, 10 CFR § 2.1319(a). If some other person is appointed Presiding Officer, the Presiding Officer certifies the completed hearing record to the Commission for decision. 10 CFR § 2.1320(b)(3).
B) Request for Discretionary Review under Subparts G and L (§§ 2.786(b)-(c), 2.1253))		
1) Petition for Review	15 days after service of presiding officer's decision or action	10-page limit
2) Answer	10 days after service of petition	10-page limit
C) Commission Sua Sponte Review		
1) Subpart G (§ 2.786(a))	greater of 1) 40 days after date of presiding officer's decision or action; or 2) 30 days after a petition for review has been filed	
2) Subpart L (§§ 2.1251(a), 2.1253)	30 days after date of presiding officer's initial decision	
III. Stays, Motions, and Reconsideration Petitions		
A) Stays		
1) Subpart G (§ 2.788)		
a) Stay Request	10 days after service of presiding officer's decision or action	10-page limit
b) Answer	10 days after service of stay request	10-page limit

TIME TABLE FOR ADJUDICATIONS UNDER 10 C.F.R. PART 2, SUBPARTS B, G, AND L		
PLEADING OR RULING	**DEADLINE FOR FILING***	**NOTES**
2) Subpart L (§ 2.1263)		
a) Stay Request		
i) Presiding Officer's Decision or Action	10 days after service of presiding officer's decision or action	10-page limit
ii) Staff Licensing Action	At the time of request for hearing or within 10 days after staff action, whichever is later	10-page limit
b) Answer	10 days after service of stay request	10-page limit
3) Subpart M (§ 2.1327)		
a) Stay of NRC staff action on license transfer	Application for stay of effectiveness of staff's order on the application must be filed within 5 days of issuance of notice of staff actions pursuant to § 2.1316(a).	10-page limit
b) Answer	Within 10 days after service of application for a stay	10-page limit; no further reply is allowed
B) Motion (§§ 2.730(c), 2.1237(a), 2.1325)		
1) Party Answer	10 days after service of motion; 5 days under subpart M	Movant must seek presiding officer's permission to file a reply
2) Staff Answer	15 days after service of motion; 5 days under subpart M if staff is participant	
C) Petition for Reconsideration (§§ 2.771, 2.1259(b))	10 days after date of decision	
1) Party Answer	10 days after date of filing of petition	
2) Staff Answer	12 days after date of filing of petition	

* If required to do some act within a prescribed period after "service" of a document and if service is by mail, add 5 days to the time allowed for filing; for express mail add 2 days (§§ 2.710, 2.1203(d)). Under Subpart M (§ 2.1314) only 3 days may be added for service by regular mail; no additional time is granted for other forms of service. If required to do some act within a prescribed period after the "decision/ action/order" date or the "filing" date of a document, do not add any extra time to the period allowed for the act.

What is the difference between the "filing" and "service" dates? Under subparts G & L, filing is deemed complete when a document is placed in the mail, or transmitted to the NRC Office of the Secretary, Docketing and Service Branch, by any other means (see §§ 2.701, 2.1203(b), 2.1313). Assuming copies of a document are sent to the parties and the presiding officer on the same date, this "filing" date also would be the date that service is initiated or the "service" date for the document (see §§ 2.712(c)-(d), 2.1203(e)). However, under Subpart M filing is complete for hearing requests, intervention petitions, answers and replies when received. (See § 2.1313(a)). The "service" date should be clearly indicated

on the certificate of service that is required to accompany every document filed in a Commission adjudication (see §§ 2.712(f), 2.1203(e), 2.1313(d)).

What is the "decision/action/order" date? The "decision/action/order" date is the date the decision or order taking an action is signed. It could be one or two days before the "service" date -- the date the decision or order is served on the parties by the NRC Office of the Secretary, Docketing and Service Branch. It is also not the "docket" date, which is the date stamped on an order or other ruling, typically in the upper right corner, by the NRC Office of the Secretary, Docketing and Service Branch, to indicate the date on which that office actually receives the document.

In computing time, the day of the act, event, or default after which a designated time period begins to run is not included. Count weekends and holidays; however, if the filing date falls on one of these days, the deadline is postponed until the next business day (see (§§ 2.710, 2.1203(d), 2.1314(a)). Under Subpart M, in time periods of 7 days or less, Saturdays, Sundays and holidays are not counted. (See § 2.1314(b)).

Any time period may be extended or shortened by the Commission or the presiding officer (§§ 2.711, 2.1203(d), 2.1320(a)(7)).

Note: This chart is not a replacement for the procedural regulations in 10 C.F.R. Part 2. To the extent users rely on it, they do so at their own risk.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

STATEMENT OF POLICY ON CONDUCT OF ADJUDICATORY PROCEEDINGS

CLI-98-12, 48 NRC 18 (1998)
[63 Fed. Reg. 41872 (Aug. 5, 1998)]

I. INTRODUCTION

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings, within the framework of its existing Rules of Practice in 10 C.F.R. Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8,13 NRC 452 (May 20, 1981); 46 Fed. Reg. 28,533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 C.F.R. Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further

changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. SPECIFIC GUIDANCE

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, pre-filed testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 C.F.R. Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 C.F.R. § 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under section 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied "as otherwise ordered by the presiding officer." Boards should exercise their authority under these options and 10 C.F.R. § 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, *e.g.*, by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. *Private Fuel Storage, L.L.C.* (Private Fuel Storage Facility), CLI-98-7, 47 NRC __ (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. Parties' Obligations

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 C.F.R. § 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue

of law or fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in section 2.714(b)(2). *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The Commission re-emphasizes that licensing boards should continue to require adherence to section 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 C.F.R. Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1427, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants." *See* 10 C.F.R. §§ 55.71(d) and 51.95(c).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 C.F.R. § 2.760a. Such authority is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). The board may not proceed further with *sua sponte* issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise *sua sponte.*

Currently, 10 C.F.R. § 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 C.F.R. Part 54 may arise as the staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 C.F.R. § 2.730(f) early

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[1] "[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." *Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, Final Rule,* 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 C.F.R. § 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pre-trial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the staff. *See, e.g.,*10 C.F.R. §§ 2.720(h), 2.744. Under the existing practice, however, the staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the staff, such orders shall provide only that the staff identify the witnesses whose testimony the staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 C.F.R. § 2.1231. Accordingly, the staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the staff until the staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the staff before the staff's review documents are issued will expedite the hearing, discovery against the staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, *e.g.*, by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular,

the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. CONCLUSION

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

For the Commission

/s/ Annette Vietti-Cook

_____
Annette Vietti-Cook
Assistant Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of July, 1998.

PROCEDURAL CONSIDERATIONS

1.0 APPLICATION FOR LICENSE/PERMIT

1.1 Applicants

All co-owners of a nuclear power plant must be co-applicants for NRC licenses for the facility. To hold otherwise could place a cloud on significant areas of the NRC's regulatory authority and is not consistent with the safety considerations with which Congress was primarily concerned in the Atomic Energy Act. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 200-201 (1978). The Appeal Board's decision in Marble Hill thus overrules the Licensing Board's holding to the contrary in Omaha Public Power District (Fort Calhoun Station, Unit 2), LBP-77-5, 5 NRC 437 (1977).

1.2 Renewal Applications

Applications for a renewal of a license may be filed with the NRC. 10 CFR § 2.109 provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license authorizing activities of a continuing nature, the existing license will not be deemed to expire until the renewal application has been finally determined. A construction permit is a "license" for these purposes. 10 CFR § 2.109(a)(1993). See AEA § 185, 42 U.S.C. 2235 ("[f]or all other purposes of this Act, a construction permit is deemed to be a 'license'"); see also 10 CFR § 2.4. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 202 n.38 (1993).

As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management. The past performance of management may help indicate whether a licensee will comply with agency standards. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

Because NRC regulations provide that operating license renewals do not have to furnish information regarding the onsite storage of spent fuel or high level waste disposal, low-level waste storage and disposal, and mixed waste storage and disposal, these subjects are barred as contentions. Duke Energy Corp., LBP-98-33, 48 NRC 381, 391 (1998).

1.3 Applications for Early Site Review

The Commission's regulations in 10 CFR Part 2 have been amended to provide for an adjudicatory early site review. See 10 CFR §§ 2.101(a-1), 2.600 to 2.606. These early site review procedures, which differ in both form and effect from those of Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), are designed to result in the issuance of a partial initial decision with regard to site suitability matters chosen by the applicant.

An applicant who seeks early site review is not required to own the proposed power plant site. The real test for deciding on early site review is whether or not the applicant can produce the information required by regulation and necessary for an effective hearing. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1136 (1981).

The Commission's early site review regulations do not require that the applicant have a "firm plan" to construct a plant at the site, but rather are meant to provide an opportunity to resolve siting issues in advance of any substantial commitment of resources. 10 CFR § 2.101(a-1), §§ 2.600 et seq. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 975-976 (1981).

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

1.4 Form of Application for Construction Permit/Operating License

1.4.1 Form of Application for Initial License/Permit

Regulations permit the filing of an application in three parts: Antitrust Information; SAR; and ER (10 CFR § 2.101). The application is initially treated as a "tendered application" pending a preliminary Staff review for completeness. 10 CFR § 2.101 (a)(2).

1.4.2 Form of Renewal Application for License/Permit

(RESERVED)

1.5 Contents of Application

1.5.1 Incomplete Applications

The determination as to whether an application is sufficiently complete for docketing is for the Staff, rather than an adjudicatory board, to make. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 280 (1978).

A materials licensee may submit evidentiary material to supplement its license application where intervenors seek to invalidate the license because of alleged deficiencies and omissions in the license application. Curators of the University of Missouri, LBP-90-45, 32 NRC 449, 454-55 (1990). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 109-110 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

Although the Commission by no means encourages defective applications, an application which is minimally flawed is not automatically totally rejected. Further, the application may be modified or improved as NRC review goes forward. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995).

Pending staff review of a license extension application does not constitute a fatal defect in the application and does not afford an adequate basis for a contention. Such "open items" in license applications are not unusual and are generally not a cause for concern since they must eventually be dealt with by the Staff before the license can be granted. Duke Energy Corp., LBP-98-33, 48 NRC at 381, 386-87 (1998).

1.5.2 Material False Statements

For each alleged misrepresentation, section 186 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2236), requires that the Board be apprised of the following as precisely as possible: (1) what was said, (2) in what context the statement existed, (3) the proof that the statement was inaccurate or incomplete, (4) when (if applicable) the statement was corrected, and (5) whether the Board should be concerned about the length of delay between the statement and when it was corrected. This will require proof of the time line of actual events, demonstrating not only that they occurred but also when they occurred. In addition, the Board will require that the proof offered will make some allowance for inaccuracies in expression, understanding, and memory. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288, 303-04 (1994).

Under Section 186 of the Atomic Energy Act of 1954 (42 U.S.C. § 2236), a license or permit may be revoked for material false statements in the application. The Commission depends on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993).

Liability of an applicant or licensee for a material false statement in violation of Section 186a of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).

Licensee remains responsible for the contents of the application even if licensee used a consultant to assist in the preparation of the application. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 429 (1993).

Intent to deceive is irrelevant in determining whether there has been a material false statement under Section 186a of the Atomic Energy Act; a deliberate effort to mislead the NRC, however, is relevant to the matter of sanctions, once a material false statement has been found. Midland, supra, 16 NRC at 915; The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1387 (1984).

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347 (1976), the Appeal Board held that:

(1) A statement may be "false" within the meaning of Section 186 even if it is made without knowledge of its falsity - i.e., scienter is not a necessary element of a false statement under Section 186.

(2) Information is material under Section 186 if it would have a natural tendency or capability to influence the decision of the person or body to whom it is to be submitted - i.e., the information is material if a reasonable Staff member would consider it in reaching a conclusion. The information need not be relied upon in fact.

Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker, not whether the decisionmaker would, in fact, have relied on it. Determinations of materiality require careful, common sense judgments of the context in which information appears and the stage of the licensing process involved. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984); The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1408-09 (1984); In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427-29 (1993).

The mere existence of a question or discussion about the possible materiality of information does not necessarily make the information material. Midland, supra, 16 NRC at 914. The nature (e.g., physical attributes and capabilities) and status of an applicant's proposed facility are material matters in a decision whether to grant a radioactive byproduct materials license. Orem, Id. 37 NRC at 428.

The Commission that it need not rely on a false statement in order for it to be material, nor must the statement in fact induce the agency to grant an application. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423 (1993)

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), the Commission affirmed the Appeal Board's rulings supra and, in addition, held that silence (omissions) as to material facts regarding issues of major importance to licensing decisions is included in the Section 186 phrase "material false statement" since such an interpretation will effectuate the health and safety purposes of the Act. Thus, the sanctions of Section 186 apply not only to affirmative statements but to omissions of material facts important to health and safety.

A "material false statement" under Section 186a of the Atomic Energy Act encompasses omissions as well as affirmative statements. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 911 (1982), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984). The Commission has indicated, however, that it is reconsidering its views on what constitutes a material false statement in this regard. See 49 Fed. Reg. 8583, 8584 (1984).

Information concerning a licensee's or applicant's intent to deceive may call into question its "character," a matter the Commission is authorized to consider under Section 182 of the Atomic Energy Act, 42 U.S.C. 2232a, or its ability and willingness to comply with Agency regulations, as Section 103b, 42 U.S.C. § 2133b, requires. Midland, supra, 16 NRC at 915 n.25.

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

A deliberate false statement or withholding of material information would warrant the imposition of a severe sanction. Not only are material false statements and omissions punishable under Sections 234 and 186 of the Atomic Energy Act, but deliberate planning for such statements or concerns on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where those plans are not carried to fruition. When parties and their attorneys engage in conduct which skirts close to the line of improper conduct, they are running a grave risk of serious sanction if they cross that line. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

1.6 Docketing of License/Permit Application

If the application is found to be complete, a docket number will be assigned and the applicant and other appropriate officials notified. 10 CFR § 2.101(a)(3).

1.7 Notice of License/Permit Application

1.7.1 Publication of Notice in Federal Register

The Federal Register Act (44 U.S.C. § 1508) provides that a publication of a notice in the Federal Register constitutes notice to all persons residing in the United States. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982).

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice establish the time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

One may be charged with notice of matters published in the Federal Register. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). (**Note** - The Appeal Board expressly declined to reach the question of whether the Federal Register notice bound the petitioners to its terms. Id. at 10).

There appears to be no requirement that the rights of interested local governmental bodies to be made parties to a proceeding be spelled out in the notice of opportunity for hearing. Thus, a notice of opportunity for hearing is not defective simply because it fails to state the right of an interested governmental body to participate in a proceeding. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978).

The notice to parties wishing to intervene in hearings before the Commission published in the Federal Register is notice to all the world. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1085 (1982).

1.7.2 Amended Notice After Addition of New Owners

(RESERVED)

1.7.3 Notice on License Renewal

(RESERVED)

1.8 Staff Review of License/Permit Application

An ASLB has ruled that the Staff has a right to continue to meet privately with parties even though a hearing has been noticed, and that, while an ASLB has supervisory authority over Staff actions that are part of the hearing process, it has no such authority with regard to the Staff's review process. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975).

Note that 10 CFR § 2.102 explicitly provides that the Staff may request any one party to a proceeding to confer informally with the Staff during the Staff's review of an application.

In the absence of a demonstration that meetings were deliberately being scheduled with a view to limiting the ability of intervenors' representatives to attend, the imposition of hard and fast rules would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenor's opportunity to attend as one of the factors to be taken into account in making its decisions on the location of such meetings. Fairness demands that all parties be informed of the scheduling of such meetings at the same time. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

Adjudicatory boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, boards cannot direct the

Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

It is up to the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980). However, where a Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

One aspect of the NRC role in regulating nuclear power plants is to provide criteria forming the engineering baseline against which licensee system designs, including component specifications, are judged for adequacy. It has not been the Staff's practice to certify that any particular components are qualified for nuclear service, but, rather, it independently reviews designs and analyses, qualification documentation and quality assurance programs of licensees to determine adequacy. This review approach is consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.). Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 426 (1978).

Pursuant to 10 CFR § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-68, 16 NRC 741, 745 (1982); Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1008 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 651 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 506 (1986); Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693-94 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 12 (1987). The NRC is not required to make a new finding on the-adequacy of emergency preparedness plans for the issuance of a renewed nuclear power reactor operating license. 10 CFR § 50.47(a)(1), 56 Fed. Reg. 64943, 64966-67 (Dec. 13, 1991). In accordance with Section 50.47(a)(2), the Commission is to base its finding on a review of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented", and on a review of the NRC Staff assessment of applicant's onsite emergency plans. Zimmer, supra, 16 NRC at 745-46; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Union Electric Co. (Callaway Plant, Unit 1), ALAB-754, 18 NRC 1333, 1334-1335 (1983), affirming, LBP-83-71, 18 NRC 1105 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 652 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). However, 10 CFR 50.47(a)(2) does not mandate that a Board's finding on the adequacy of an emergency plan must be based on a review of FEMA findings and determinations. Since 10 CFR § 50.47(a)(2) also provides that any other information available to FEMA may be considered in assessing the adequacy of an emergency plan, a Board may rely on such evidence, properly admitted into the hearing record, when FEMA findings and determinations are not available. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 531-32 (1988). In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of the adequacy of an emergency plan. Zimmer, supra, 16 NRC at 746; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing, 10 CFR § 50.47(a)(2); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 365 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 239 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 714 (1988), aff'd in part and rev'd in part on other grounds, ALAB-924, 30 NRC 331 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 397, 624 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 139 n.38 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 360 (1989). The presumptive validity of FEMA findings does not depend upon the presentation of testimony by FEMA witnesses. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 437 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor is thus free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

1.9 Withdrawal of Application for License/Permit

An applicant may withdraw its application without prejudice unless there is legal harm to the intervenors or the public. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing, LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976).

The filing of an application to construct a nuclear power plant is wholly voluntary. The decision to withdraw an application is a business judgment. The law on withdrawal does not require a determination of whether the decision is sound. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

The right to a voluntary dismissal without prejudice is not absolute. Perkins, supra, 16 NRC at 1135, citing, LeCompte, supra, 528 F.2d at 604.

Where the defendant has prevailed or is about to prevail, an unconditional withdrawal cannot be approved. Perkins, supra, 16 NRC at 1135, citing, 9 Wright and Miller Federal Practice and Procedure, Civil, Section 2364 (1971).

10 CFR § 2.107(a) provides, in part, that:

> (t)he Commission...may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 581 (1988).

The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. The record must support any findings concerning the conduct and harm in question. Perkins, supra, 16 NRC at 1134, citing, LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice 41.05(1) at 41-58.

The Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm. Perkins, supra, 16 NRC at 1134, citing, LeCompte v. Mr. Chip, Inc., supra, 528 F.2d at 604.

A Licensing Board has no jurisdiction to impose conditions on the withdrawal of an application for an operating license where the applicant has filed a motion to terminate the operating license proceeding prior to the Board's issuance of a notice of hearing on the application. Public Service Co. of Indiana, and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986), citing, 10 CFR § 2.107(a). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-36, 34 NRC 193, 195 (1991). A notice of hearing is only issued after a Board considers any requests for hearing and intervention petitions which may have been submitted, and makes a determination that a hearing is warranted. Thus, the notice of receipt of an application for an operating license, notice of proposed action, and notice of opportunity for hearing are not functionally the notice of hearing referred to in 10 CFR § 2.107(a). Marble Hill, supra, 24 NRC at 723-24.

Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. Perkins, supra, 16 NRC at 1137.

The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982), citing, Jones v. SEC, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

In the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal without prejudice where the applicant has prevailed or where there has been a nonsuit as to particular issues. Perkins, supra, 16 NRC at 1136.

While Section 2.107 is phrased primarily in terms of requests for withdrawal of an application by an applicant, the Commission itself has entertained such requests made by other parties to a construction permit proceeding, Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974), and has indicated that such a request is normally to be directed to, and ruled upon by, the Atomic Safety and Licensing Board presiding in the proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-37, 8 AEC 627, n.1 (1974). Thus, it appears that a Licensing Board has the authority, under 10 CFR § 2.107, to consider a motion to compel withdrawal of an application filed by a party other than the applicant.

With regard to design changes affecting an application, where there is a fairly substantial change in design not reflected in the application, the remedy is not summary judgment against the applicant, nor is withdrawal and subsequent refiling of the application necessarily required. Rather, an amendment of the application is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974).

Following a request to withdraw an application the Board may dismiss the case "without prejudice," signifying that no disposition on the merits was made; or "with prejudice," suggesting otherwise. (10 CFR § 2.107(a), 10 CFR § 2.721(d)). A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties. It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 978-979 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1134 (1982), citing, Fed.R. Civ.P. 41(a)(1), (2); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976), citing, 5 Moore's Federal Practice, 41.05 (2d ed. 1981).

The Commission has the authority to condition the withdrawal of a license application on such terms as it thinks just (10 CFR 2.107(a)). However, dismissal with prejudice is a severe sanction which should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984).

General allegations of harm to property values, unsupported by affidavits or unrebutted pleadings, do not provide a basis for dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981), Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981).

Allegations of psychological harm from the pendency of the application, even if supported by the facts, do not warrant the dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing, Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983).

A Licensing Board has substantial leeway in defining the circumstances in which an application may be withdrawn (10 CFR § 2.107(a)), but the Board may not abuse this discretion by acting in an arbitrary fashion. The withdrawal terms set by the Board must bear a rational relationship to the conduct and legal harm at which they are aimed. Fulton, supra, 14 NRC at 974; Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983).

Under 10 CFR § 2.107(a), withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. However, to make a serious case for conditions, the Intervenors reasonably can be held to an obligation to offer some indication of their objective. The proponent of litigation always bears the burden of explaining which direction the litigation will take. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 191-93 (1995).

A Board may authorize the revocation of a Limited Work Authorization and the withdrawal of an application without prejudice after determining the adequacy of the applicant's site redress plan and clarifying the responsibilities of the applicant and Staff in the event that an alternate use for the site is found before redress is completed. United States Dept. of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

Where a motion for leave to withdraw a license application without prejudice has been filed with both an Appeal Board and a Licensing Board, it is for the Licensing Board, if portions of the proceeding remain before it, to pass upon the motion in the first instance. As to whether withdrawal should be granted without prejudice, the Board is to apply the guidance provided in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982).

The applicant for a license bears the cost of Staff work performed for its benefit, whether or not it withdraws its application prior to fruition. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1137 (1981). However, an applicant which withdrew its application prior to the November 6, 1981 issuance of revised regulations may not be billed for the costs incurred by the Staff in reviewing the application. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1338 (1984), citing, New England Power Co. v. NRC, 683 F.2d 12 (1st Cir. 1982).

Ordinarily parties are to bear their own litigation expense. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1139 (1982), citing, Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240; 44 L.Ed.2d 141; 95 S. Ct. 1612 (1975).

A claim for litigation costs under the "private attorney general" theory must have a statutory basis. Perkins, supra, 16 NRC at 1139, citing, Alyeska Pipeline, supra, 421 U.S. at 269.

Recovery of litigation costs by the prevailing party as an award for winning a presumably completed law suit, must be distinguished from the practice of reimbursing litigation costs as a condition on a dismissal without prejudice. The latter is not an award for winning anything, but it is intended as compensation to defendants who have been put to the trouble and expense to prepare a defense only to have the plaintiff change his mind, withdraw the complaint, but remain free to bring the action again. Perkins, supra, 16 NRC at 1140.

The absence of specific authority does not prevent the Commission's Boards from exercising reasonable authority necessary to carry out their responsibilities, and a money condition is not necessarily barred from consideration. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1140 (1982). Payment of attorney's fees is not

necessarily prohibited, as a matter of law, as a condition of withdrawal without prejudice of a construction permit application. Perkins, supra, 16 NRC at 1141. Another Licensing Board has noted, however, that the Commission is a body of limited powers. Its enabling legislation has no provisions empowering it to require the payment of a party's costs and expenses, nor do the regulations promulgated by the Commission provide for such payments. It has no equitable power it can exercise, as courts have. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983).

If intervenors prevail on a need-for-power issue, there is no entitlement to attorney's fees because as the prevailing party, they received what they paid for and are barred from recovery. On the other hand, if intervenors lose on the need-for-power issue, they may not recover their attorney's fees because they will suffer no legal harm in any filing of a new application. Perkins, supra, 16 NRC at 1142.

Where an applicant abandons its construction of a nuclear facility and requests that the construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating, LBP-83-8, 17 NRC 158 (1983).

The antitrust information required to be filed under 10 CFR § 50.33a is part of the permit application; therefore, any applicant who wishes to withdraw after filing antitrust information, must comply with the Commission's rule governing withdrawal of license applications (10 CFR § 2.107(a)), even if a hearing on the application had not yet been scheduled. To instead file a Notice of Prematurity and Advice of Withdrawal is an impermissible unilateral withdrawal, and the filing will be treated as a formal request for withdrawal under 10 CFR § 2.107(a). Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982). Prior to issuance of a notice of hearing, the Commission will treat an announced withdrawal of an application as a request for permission to withdraw the application. Sequoyah Fuels Corporation, CLI-93-7, 37 NRC 175, 179 (1993).

1.10 Abandonment of Application for License/Permit

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980).

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2.0 PREHEARING MATTERS

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2.2 Necessity of Hearing

The Commission's summary disposition rule (10 CFR § 2.749) gives a party a right to an evidentiary hearing only where there is a genuine issue of material fact. An important effect of this principle is that applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 301 (1982).

Where the NRC Staff proposes to grant an applicant's request for an exemption from requirements of the Commission's regulations, an intervenor who seeks a hearing on the exemption request must raise a material issue of fact regarding the application of 10 CFR § 50.12. However, the Commission did not address the question of whether Section 189a of the Atomic Energy Act gives a right to an adjudicatory hearing on an exemption request to an intervenor who has raised a material issue of fact concerning the proposed exemption. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 774-75 (1986), aff'd, Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 328 (1989) (the Commission again declined to address the question of whether Section 189a of the Atomic Energy Act establishes the right to request a hearing on an exemption from a Commission regulation).

10 CFR 2.105(a)(4), in effect in 1982, required that the Commission issue a notice of proposed action - also called a notice of opportunity for hearing - only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." A materials license amendment does not fall into these categories. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245, 256 (1982), aff'd sub. nom, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Nor do actions involving the shipping and transport of radioactive components taken by an applicant in anticipation of decommissioning, provided those activities do not violate 10 CFR § 50.59(a)(1). Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994). Furthermore, even in cases where Section 189a of the Atomic Energy Act requires a trial-type hearing, a person requesting a hearing must make some threshold showing that a hearing would be necessary to resolve opposing and supported

factual assertions. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245, 256 (1982), aff'd sub nom, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

Congress has, by statute, established the authority of the Commission to provide for hearings upon the request of any person whose interest may be affected by the licensing proceeding and to establish Licensing Boards to conduct such hearings. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1201 (1982). However, it is now clear that a formal "on the record" adjudicatory type hearing under Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554, like those conducted by Licensing Boards, is not required for so-called materials licenses. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651 (1984); see West Chicago Rare Earths, supra, 15 NRC at 244-62, aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Sequoyah Fuels Corporation (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 NRC 489, 495 (1986).

Constitutional due process does not require a formal adjudicatory hearing for a materials licensing case where the intervenors have not specified any health, safety, and environmental concerns which constitute liberty or property interests subject to due process protection, where the issues can be evaluated fully and fairly without using formal trial-type procedures, and where formal hearing procedures would add appreciably to the government's administrative burden. Sequoyah, supra, 24 NRC at 495-98.

Current NRC environmental regulations do not specify what type of hearing may be required for any Staff environmental finding regarding a materials license action. Sequoyah, supra, 24 NRC at 498.

The Staff may issue an amendment to a materials license without providing prior notice of an opportunity for a hearing. Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 574 (1990).

Atomic Energy Act § 189a(1) does not require a pre-effectiveness hearing on an application to transfer control of a license. However, as a matter of discretion, the Commission may direct the holding of a pre-effectiveness hearing if a proposed transfer of control raises potentially significant public health and safety issues. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76-79 (1992).

A licensee request to suspend the antitrust conditions in its operating license is a license amendment within the meaning of § 189a(1) of the Atomic Energy Act (AEA) which provides a hearing to any person whose interest may be affected by any proceeding for the granting, suspending, revoking, or amending of any license. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 238-39 (1991), aff'd in part and appeal denied, CLI-92-11, 36 NRC 47, 53-54 (1992). The NRC Staff's initial technical and legal assessment of a license amendment application and its determination concerning the propriety of the request

cannot substitute for the adjudicatory hearing to which the licensee would otherwise be entitled under AEA § 189a. Perry and Davis-Besse, supra, 34 NRC at 239, aff'd in part and appeal denied, CLI-92-11, 36 NRC 47, 60 (1992).

Atomic Energy Act Section 189a(1), which provides the opportunity to request a hearing to any person whose interest may be affected by a proceeding, confers hearing rights on licensees as well as on interested members of the public. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), CLI-92-11, 36 NRC 47, 53-54 (1992).

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980).

The Commission may grant a request for a post-construction hearing on a Part 52 combined construction permit and operating license from any person who makes a prima facie showing that (1) one or more of the acceptance criteria in the combined license have not been, or will not be met, and (2) the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. 10 CFR § 52.103(a),(b), 57 Fed. Reg. 60975, 60978 (Dec. 23, 1992). See, Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir 1992).

Where complainants were denied a hearing after they had alleged a failure of the Director to take stronger action, the Appeal Board, in upholding the denial, noted that the Director's decision in no way restricted the authority of the ASLB to further restrict or even deny the license for operation of the facility. Further, it was not grounds for a hearing that, if a hearing was not immediately held on the Director's decision, the money spent on the plant would later influence the Licensing Board's decision. Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 288-290 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1264 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

There is no statutory entitlement to a formal hearing under the Atomic Energy Act or NRC regulations with regard to materials licensing actions. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-21, 16 NRC 401, 402 (1982); Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983). Rather, to mandate that a hearing be convened, prospective intervenors must fulfill the requirements for intervention. The presiding officer's review of the postcards and letters from individuals living near the Rockwell International nuclear facilities found only vague and generalized allusions to danger or injury from radiation. Therefore, standing was not established and there was no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983).

Before entering into or amending an agreement to transfer to a state its regulatory control over Atomic Energy Act § 11e(2) byproduct material, the NRC must provide notice and an opportunity for a public hearing where the state's proposed regulatory standards for the byproduct material differ from the Commission's standards for such material. Atomic Energy Act § 274o. A formal adjudicatory hearing is not required. Notice and comment procedures are sufficient for determining whether the proposed state standards, evaluated generally and not as applied to specific sites, are equivalent to, or more stringent than, the corresponding Commission standards. State of Illinois, CLI-90-9, 32 NRC 210, 215-16 (1990), reconsid. denied, CLI-90-11, 32 NRC 333 (1990).

The NRC will conduct a formal hearing, if requested, on an application to renew a nuclear power reactor operating license. 10 CFR § 54.27, 56 Fed. Reg. 64943, 64960-61 (Dec. 13, 1991). However, a formal "on-the-record" hearing in accordance with the APA is not required for reactor license renewal proceedings under section 189 of the Atomic Energy Act. See Baltimore Gas and Electric Co., (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998). The hearing will be limited to consideration of issues concerning (1) age-related degradation unique to license renewal and (2) compliance with National Environmental Policy Act requirements. 10 CFR § 54.29(a),(b). The Commission may, at its discretion, admit an issue for resolution in the formal renewal hearing if the intervenor can demonstrate that the issue raises a concern relating to adequate protection which would occur only during the renewal period. 10 CFR § 54.29(c), 2.758(b)(2).

There is no legal requirement for a notice-and-comment rulemaking proceeding concerning the Commission's statutory concurrence in the Department of Energy's General Guidelines for Recommendation of Sites for Nuclear Waste Repositories, pursuant to Section 112(a) of the Nuclear Waste Policy Act of 1982. NRC Concurrence in High-Level Waste Repository Safety Guidelines Under Nuclear Waste Policy Act of 1982, CLI-83-26, 18 NRC 1139, 1140 (1983).

A Confirmatory Action Letter whereby the applicants voluntarily ceased low-power testing and agreed to obtain NRC Staff approval prior to resuming operations is not a suspension within the meaning of Section 189(a) of the Atomic Energy Act, and does not give the intervenors the right to a hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275-76 (1989), aff'd, ALAB-940, 32 NRC 225 (1990). In the Seabrook operating license proceeding, supra, the intervenors sought to litigate contentions involving the low-power testing even though the record had already closed. On appeal, the intervenors argued that the Licensing Board violated their right to a hearing on all issues material to the granting of a full-power operating license, Atomic Energy Act § 189a, by requiring that the intervenors' contentions meet the standards for reopening the record, 10 CFR § 2.734(a). The Appeal Board affirmed the Licensing Board decision, noting that: (1) although the intervenors labeled their contentions "low-power testing contentions", they actually raised issues which involved generic operational questions about plant readiness for full-power operation which could have been raised when the hearing began, Seabrook, supra, 32 NRC at 233-34, 240-41; and (2) while low-power testing is material to the operation of a licensed facility, it is not material to the initial issuance or grant of a full-power license, Seabrook, supra, 32 NRC at 234-37.

2.3 Location of Hearing

2.3.1 Public Interest Requirements Affecting Hearing Location

(RESERVED)

2.3.2 Convenience of Litigants Affecting Hearing Location

(SEE 3.3.5.2)

2.4 Issues for Hearing

(SEE 3.4 to 3.4.6)

2.5 Notice of Hearing

10 CFR 2.105(a)(4), in effect in 1982, required that the Commission issue a notice of proposed action - also called a notice of opportunity for hearing - only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." A materials license amendment does not fall into any of these categories. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Nor do actions involving the shipping and transport of radioactive components taken by an applicant in anticipation of decommissioning, provided those activities do not violate 10 CFR § 50.59(a)(1). Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994).

10 CFR § 2.105 requires that formal procedures under Part 2, Subpart G, be adhered to following a notice of proposed action issued under § 2.105. The Rules of Practice do not provide latitude to a Board to convene an informal hearing. General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 576 (1983).

2.5.1 Contents of Notice of Hearing

Operating license proceedings start with the notice of proposed action (10 CFR § 2.105) and are separate from prior proceedings. Thus, a Licensing Board in a construction permit hearing may not order that certain issues be tried at the OL proceeding. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 517 (1980).

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290 n.6 (1979); Public Service Company of Indiana

(Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). See also Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Tulsa Gamma Ray, Inc., LBP-90-42, 32 NRC 387, 388 (1990).

A notice of hearing must correspond to the agency's statutory authority over a given matter; it cannot confer or broaden that jurisdiction to matters expressly proscribed by law. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1123 (1981).

2.5.2 Adequacy of Notice of Hearing

One receiving filings in a proceeding is charged with reading and knowing matters therein which might affect his rights. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

Where an original notice of hearing is too narrowly drawn, a requirement in a subsequent notice that those who now seek to intervene state that they did not intervene before because of limitations in the original notice was not improper. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The notice of hearing in an enforcement proceeding must provide adequate notice of (1) the alleged violations and (2) the specific regulatory provisions upon which the Staff seeks to impose a civil penalty. Tulsa Gamma Ray, Inc., LBP-90-43, 32 NRC 390, 391-92 (1990), citing, 5 U.S.C. § 554(b)(3).

Even in the absence of any constructive notice of when an intervention petition must be filed, the possibility remains that an intervenor had actual notice of the pendency of an enforcement proceeding and failed to make a timely intervention request following that notice. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, aff'd, CLI-94-12, 40 NRC 64 (1994).

2.5.3 Publication of Notice of Hearing in Federal Register

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice establish time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

The Licensing Board rejected Petitioner's argument that "mere notice in the Federal Register ... is inadequate notice ...." The Federal Register Act expressly provides that such publication constitutes notice to "all persons residing within the States of the Union" (44 U.S.C. 1508). See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). See also Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975); Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 191-192 (1979).

In an operating license amendment proceeding, the Licensing Board ruled that the law required the NRC to publish once in the Federal Register notice of its intention to act on the application for amendment to the operating license. Turkey Point, supra, LBP-79-21, 10 NRC at 192.

Publication in the Federal Register of conditions on intervention is notice as to all of those conditions, and one cannot excuse a failure to meet those conditions by a claimed lack of knowledge. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

2.5.4 Requirement to Renotice

Where a full-term operating license proceeding had been delayed by a lengthy NRC Staff review and the original notice of the opportunity for a hearing had been issued ten years earlier, a Licensing Board found it necessary to renotice the opportunity for a hearing. Rochester Gas and Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 NRC 422 (1979) wherein the Appeal Board opined that a hearing notice issued "perhaps 5 to 10 years" earlier is "manifestly stale". The renotice cannot limit the scope of contentions to those involving design changes or those based on new information. The new notice must allow the raising of any issues which have not been previously heard and decided. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979).

2.6 Prehearing Conferences

Prehearing conference matters are governed generally by 10 CFR §§ 2.751a, 2.752.

There are several types of prehearing conferences, each of which serves a different purpose. For a discussion of the types of prehearing conferences and of the purposes of such conferences, see Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 76 (1978).

The purposes of a general prehearing conference, in general, are set out in 10 CFR § 2.752(a). Such a prehearing conference should be held within 60 days after completion of discovery. 10 CFR § 2.752(a). "Special" prehearing conferences, provided for by 10 CFR § 2.751a and applicable only to contested proceedings, may be utilized to consider the

sufficiency of petitions to intervene and of issues raised by intervenors. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

Where a party has an objection to the scheduling of the prehearing phase of a proceeding, he must lodge such objection promptly. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-377, 5 NRC 430 (1977).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request filed before the date of the conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

2.6.1 Transcripts of Prehearing Conferences

Prehearing conferences may be stenographically reported. 10 CFR §§ 2.751a(c), 2.752(b).

A Licensing Board must make a good faith effort to determine whether the facts support a party's motion to correct the transcript of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 51 (1986).

2.6.2 Special Prehearing Conferences

Special prehearing conferences are covered by 10 CFR § 2.751a. Such prehearing conferences:

(a) are required in contested proceedings only. 10 CFR § 2.751a, n.1a;

(b) will usually be held within 90 days of the issuance of notice of hearing or such other time as the Commission or presiding officer may deem appropriate, 10 CFR § 2.751a(a);

(c) will be utilized to rule on petitions to intervene unless this has already been done by a previous Licensing Board appointed for that purpose. Cf., Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973);

(d) may be utilized to exclude certain issues raised by petitions to intervene, the adequacy of which was not ruled upon when the petition was allowed, Duquesne Light Co., ALAB-109, supra;

(e) may be used to establish a schedule for further actions in the proceeding, to direct further informal conferences, and to establish other courses of action, as set forth in 10 CFR § 2.751a(a) and (b), to expedite the proceeding.

2.6.3 Prehearing Conference Order

2.6.3.1 Effect of Prehearing Conference Order

A prehearing conference order may describe action taken at the conference, schedule further actions, describe stipulations agreed to, identify key issues, provide for discovery and the like. The order should finalize the issues to be considered, 10 CFR Part 2, Appendix A, para. II(c), and will control the subsequent course of proceedings unless modified for cause. 10 CFR §§ 2.751a(d), 2.752(c).

2.6.3.2 Objections to Prehearing Conference Order

Objections to the prehearing conference order may be filed by parties other than the Staff within 5 days after service of the order and by the Staff within 10 days after service. 10 CFR §§ 2.751a(d), 2.752(c). Parties may not file replies to such objections unless the Board so directs. Id.

2.6.3.3 Appeal from Prehearing Conference Order

Since a prehearing conference order is interlocutory in nature, it is not generally appealable except with regard to matters for which interlocutory appeal is provided. In this vein that portion of a prehearing conference order which grants or wholly denies a petition for leave to intervene is appealable under 10 CFR § 2.714a. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973).

The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioner denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978).

2.6 Television Coverage of Prehearing Conferences

(SEE 6.32)

2.7 Conference Calls

Both prior to the start of a hearing and sometimes during recesses thereof, it may become necessary for the Board to communicate quickly with the parties. In this vein, the practice has grown up of using telephone conference calls. The Appeal Board has indicated that such calls should not be utilized unless all parties participate except in the case of the most dire necessity. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). If any rulings are made, the Licensing Board must make and enter a written order reflecting the ruling directly thereafter. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 814-815 (1976).

Where a party informs an adjudicatory board that it is not interested in a matter to be discussed in a conference call between the board and the other litigants, that party cannot later complain that it was not consulted or included in the conference call. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 n.63 (1978).

2.8 Prehearing Motions

2.8.1 Prehearing Motions Challenging ASLB Composition

Disqualification of adjudicatory board members is covered generally by 10 CFR § 2.704.

In Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973), the Appeal Board listed the circumstances under which a board member is subject to disqualification. Those circumstances include situations in which:

(1) the board member has a direct, personal, substantial pecuniary interest in the results of the case;

(2) the board member has a personal bias against a participant;

(3) the board member has served in a prosecutory or investigative role with regard to the same facts as are in issue;

(4) the board member has prejudged factual -- as distinguished from legal or policy -- issues;

(5) the board member has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

A litigant may move for disqualification of any board member who, by word or deed, has manifested a conflict of interest or a bias covered by the above listing.

10 C.F.R. 2.704(c) is meant to ensure both the integrity and appearance of integrity of the Commission's formal hearing process. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998).

2.8.1.1 Contents of Motion Challenging ASLB Composition

In Duquesne Light Co. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974), the Appeal Board summarized the requirements for disqualification motions as follows:

(1) motions must be accompanied by affidavits establishing a basis for the charge;

(2) motions must be filed in a timely manner, citing, Consumers Power Co., ALAB-101, supra; Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 n.1 (1973);

(3) motions for disqualification, as with all other motions, must be served on all parties or their attorneys, citing, 10 CFR § 2.701(b), 2.730(a).

The requirement of an affidavit must be met even if the basis for the motion is founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-225, 8 AEC 379 (1974).

2.8.1.2 Evidence of Bias in Challenges to ASLB Composition

The Commission applies a "very high threshold for disqualification" to recusal motions. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998). For a member to be disqualified, it must be shown that his "impartiality might reasonably be questioned." Id.

Although no specific guidelines can be set as to the type or quantum of evidence sufficient to support a disqualification motion, it is clear that the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a given party is not evidence of bias. To establish bias, something more must be shown than that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974).

Nor is an alleged institutional bias sufficient for disqualification. Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-164, 6 AEC 1143 (1973).

2.8.1.3 Waiver of Challenges to ASLB Composition

If a party has reason to believe that there are grounds for disqualification, he must raise the question at the earliest possible moment. Failure to move for disqualification as soon as the information giving rise to such a claim comes to light amounts to a waiver of the objection. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 385 (1974); Northern Indiana Public Service Co., ALAB-224, supra; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 64 (1973); Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-78-5, 7 NRC 147, 149 (1978).

2.9 Intervention

2.9.1 General Policy on Intervention

The general attitude of the Appeal Panel is that public participation through intervention is a positive factor in the licensing process and that intervenors perform a valuable function and are to be complimented and encouraged. See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-256, 1 NRC 10, 18 n.9 (1975); Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 2), ALAB-243, 8 AEC 850, 853 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425 (1974); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222 (1974)

The statutory mandate does not confer the automatic right of intervention upon anyone. The Commission may condition the exercise of that right upon the meeting of

reasonable procedural requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

A petitioner for intervention is entitled to party status if he (1) establishes standing and (2) pleads at least one valid contention. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982).

2.9.2 Intervenor's Need for Counsel

The NRC's Rules of Practice permit non-attorneys to appear and represent their organizations in agency proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Furthermore, lay representatives are not held to as high a standard as lawyers. But the right of participation accorded pro se representatives carries with it the corresponding responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources. Three Mile Island, supra, 19 NRC at 1247, citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

There is no requirement that an intervenor be represented by counsel in NRC proceedings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985). As a rule, pro se petitioners will be held to less rigid standards for pleading, although a totally deficient petition will be rejected. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487 (1973). While there is no requirement that an intervenor be represented by counsel in NRC proceedings, there are some indications that the regulations do not contemplate representation of a party by a non-lawyer and that any party who does not appear pro se must be represented by a lawyer. See 10 CFR § 2.713(a), (b); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-474, 7 NRC 746, 748 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440, 6 NRC 642, 643 n.3 (1977); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), Licensing Board Order of October 8, 1976 (unpublished). As the Three Mile Island and Cherokee cases cited amply demonstrate, however, any requirement that only lawyers appear in a representative capacity is usually waived, either explicitly or implicitly, as a matter of course.

Insofar as organizations are concerned, 10 CFR § 2.713(a) clearly limits representation to either an attorney or a member, and it can logically be read as precluding representation by an attorney and a member at the same time. But it does not appear to bar representation by a member throughout a proceeding if, at some earlier time during the proceeding, an attorney has made an appearance for the organization. Cincinnati Gas

& Electric Co. (William H. Zimmer Nuclear Station), LBP-79-17, 9 NRC 723, 724 (1979).

Following the withdrawal of its lead counsel on the eve of its hearing, an intervenor has an affirmative duty to request a postponement. A Board is not required to order a postponement sua sponte. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985).

2.9.3 Petitions to Intervene

Intervention is covered generally in 10 CFR §§ 2.714, 2.714a.

To participate under 10 C.F.R. § 2.714, a petitioner must establish its standing, must indicate the aspects of the proceeding in which it seeks to participate, and must proffer at least one acceptable contention. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996).

Simply because a filing is labeled a petition to intervene does not prevent the presiding officer from treating it as a request to initiate a hearing if this, in fact, is what the petitioner is seeking. Illinois Power Co. and Soyland Power Cooperative (Clinton Power Station, Unit 1), LBP-97-4, 45 NRC 125, 126 n.1 (1997), citing Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996).

Assuming there exists an NRC proceeding on the issues of concern to a petitioner, that petitioner must satisfy the minimum requirements of 10 CFR § 2.714 which governs intervention in NRC proceedings. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994).

In the first instance, the decision as to whether to grant or deny a petition to intervene or a request for a hearing lies with the Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Units 1 & 2), CLI-73-16, 6 AEC 391 (1973).

There is nothing in 10 CFR § 2.714 or the case law interpreting that rule which permits Licensing Boards to exclude certain groups because of their opinions on nuclear power, either generally or as related to specific plants, nor is there a Commission rule prescribing the conduct of any party (other than licensees or others subject to its regulatory jurisdictions) outside adjudicatory proceedings. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 31, 32 (1982).

The testimony of experts sponsored by petitioner may make a valuable contribution to the record, but the merits of that testimony need not be decided in order to admit a petitioner as a party. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2029 (1982).

In past operating license cases, petitions to intervene were sometimes considered and ruled upon by an ASLB especially appointed for that purpose, and a separate ASLB conducted separate proceedings if intervention were permitted. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). In construction permit cases, a single ASLB usually performed both tasks. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 n.2 (1973).

In ruling on a petition to intervene, the Licensing Board must consider, inter alia, the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any Order which may be entered in the proceeding on the petitioner's interests. 10 CFR § 2.714(d); Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 and No. 5), LBP-77-16, 5 NRC 650 (1977). These standards also apply to a petition to intervene in a materials licensing proceeding. Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 164, 166 (1991), citing, 10 CFR § 2.1205(9).

An intervention petition must, under 10 CFR § 2.714(a)(2), set forth with particularity certain factors regarding the petitioner's interest in the proceeding and address the criteria set forth in 10 CFR § 2.714(d). Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

A petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, and the specific aspect of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 CFR § 2.714(a)(2); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 88, 89, 90 (1990); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140 (1991); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994). The burden is on the petitioner to satisfy these requirements. 10 CFR 2.732; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34 (1987). A petition to intervene in a materials licensing proceeding must satisfy similar requirements. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-46, 147-48 (1989), citing, 10 CFR § 2.1205(d). A prospective petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer obtain. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993). A petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing. Id.

Petitioners for intervention are required by Commission regulations to set forth in their petitions their interest in the proceeding, how that interest might be affected by the result of the proceeding, the reasons why they should be permitted to intervene, and the specific aspects of the subject matter as to which intervention is sought. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431 (1982), citing, 10 CFR § 2.714(a)(2). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

The ASLB must make specific determinations as to whether the petition is proper and meets the requirements for intervention and must articulate in reasonable detail the basis for its determination. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-105, 6 AEC 181 (1973); Northern States Power Co. (Prairie Island Nuclear

Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 (1973). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 722 (1989) (rulings on intervention petitions should be in writing), aff'd, CLI-90-5, 31 NRC 337, 341 (1990).

Assuming that the requisite personal interest of the intervenor is shown, if the ASLB determines that there is present at least one contention which meets applicable requirements, intervention will be permitted. The ASLB has no duty to consider additional contentions for the purpose of determining whether intervention should be permitted. Mississippi Power & Light Co., ALAB-130, supra, 6 AEC at 424; Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

Although 10 CFR § 2.714 has been amended with regard to the time for filing contentions, the "one good contention" rule remains. 10 CFR § 2.714(b). Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 571 (1980).

10 CFR § 2.714 now permits the amendment of petitions to intervene and contentions up to 15 days prior to the first prehearing conference. The presiding board may, of course, set a different time period pursuant to 10 CFR § 2.711. General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992). See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-17, 36 NRC 23, 29 (1992). A petitioner has an unlimited right to amend its intervention petition until 15 days prior to the first prehearing conference. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91, 93 (1990), citing, 10 CFR § 2.714(a)(3). However, once the deadline has passed for the filing of an intervention petition in a 10 CFR Part 2, Subpart L informal adjudicatory proceeding, 10 CFR § 2.1205(c), the petitioner may amend or supplement a timely filed petition only at the discretion of the , 10 CFR § 2.1209. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 152 (1992).

A petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1432 (1982), citing, 10 CFR § 2.714(a)(2), Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 204-205 (1992).

Exercising his or her general authority to simplify and clarify the issues, see 10 C.F.R. § 2.714(f), a presiding officer can recast what a petitioner sets out as two contentions into one. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 22 (1996).

Pro se petitioners will be held to less rigid standards of clarity and precision with regard to the petition to intervene. Nevertheless, a totally deficient petition will be rejected.

Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973).

In NRC proceedings in which a hearing is not mandatory but depends upon the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon the intervention petition. If the petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978). See also Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981), citing, Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977).

Where a petitioner has not expressly requested a hearing on its petition, but where it seems clear from the petition as a whole that a hearing is what the petitioner desires, the Commission will not dismiss that petition solely on the basis of such a technical pleading defect. Yankee Atomic Electric Co.(Yankee Nuclear Power Station), CLI-96-1,43 NRC 1, 5 (1996).

Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission is authorized to establish reasonable regulations on procedural matters like the filing of petitions to intervene and on the proffering of contentions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983), citing, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Easton Utilities Commission v. AEC, 424 F.2d 847 (D.C. Cir. 1970). Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a. State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993).

The identity of specific individual members of a petitioner organization whose interests are being represented by that organization is not viewed as an integral and material portion of the petition to intervene. Any change in membership, therefore, does not require an amendment of the petition. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

While it is true that a petitioning organization must disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979), there is no requirement that the identification of such a member or members be made in the petition to intervene or in an attached affidavit. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

The provision in original 10 CFR § 2.714(a), that a petition to intervene be accompanied by a supporting affidavit setting forth the facts pertaining to the petitioner's interest, was abolished effective May 26, 1978. 43 Fed. Reg. 17,798

(1978). Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

Once a member has been identified sufficiently to afford verification by the other parties and the petition to intervene has been granted, it is presumed that the organizational petitioner continues to represent individual members with standing to intervene who authorize the intervention. It is doubtful that the death or relocation outside the geographical zone of interest of the only named members upon whom standing was based would defeat this presumption and require a further showing of standing. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

2.9.3.1 Pleading Requirements

Under 10 CFR § 2.714, a petition to intervene must:

(1) be in writing;

(2) identify the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene;

(3) set forth with particularity the interest of the petitioner in the matter, the manner in which that interest may be affected by the proceeding, and the reasons why the petitioner should be permitted to intervene with particular reference to the petitioner's right to be made a party under the Atomic Energy Act, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any order entered in the proceeding on petitioner's interest.

In addition, prior to the first prehearing conference, the petitioner must file a supplement to his petition to intervene which sets forth the contentions the petitioner seeks to have litigated and the basis for each contention set forth with reasonable specificity. 10 CFR § 2.714(b). Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982). Where a contention is made up of a general allegation which, standing alone, would not be admissible under 10 CFR § 2.714(b), plus one or more alleged bases for the contention set forth with reasonable specificity, the matters in controversy raised by each such contention are limited in scope to the specific alleged basis or bases set forth in the contention. Clinton, supra, 14 NRC at 1737.

Under 10 CFR § 2.714 and 10 CFR § 2.714(b) an intervention petition must not only set forth with particularity the interest of the petitioner and how that interest may be affected by the proceeding, but must also include the bases for each contention, sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted. Maine Yankee Atomic Power

Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986). In general, these elements have been construed as requiring the petitioner to show:

(a) that he has a personal interest in the matter (e.g., residence in proximity to the reactor - see Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188 (1973);

(b) how that interest may be adversely affected;

(c) the specific contentions as to which the petitioner desires to participate.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973); Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

While the threshold showing at the intervention stage of a Subpart L proceeding is exceedingly low, a statement of concern must be plead with enough specificity to allow a presiding officer the ability to ascertain whether or not what the intervenor seeks to litigate is truly relevant to the subject matter of the proceeding. Sequoyah Fuels Corp. LBP-94-39, 40 NRC 314 (1994).

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia Circuit upheld various aspects of 10 CFR § 2.714, including the requirement that contentions be specified, and the requirement that the basis for contentions be set forth.

Section 189a of the Atomic Energy Act does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem, without regard to the scope of the enforcement action actually proposed or taken. In order to be granted leave to intervene, one must demonstrate an interest affected by the action, as required by 10 CFR § 2.714. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), citing, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

Petitions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity. In contrast, Licensing Boards are to be lenient in this respect for petitions drawn pro se or by counsel new to the field or to the bar. Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975). For a more recent case acknowledging that a pro se petitioner for intervention should not be held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere in the

petition to intervene, see Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 82 (1978).

Although a totally deficient pleading may not be justified on the basis that it was prepared without the assistance of counsel, a pro se petitioner is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), cited in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982).

A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, his contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

A petition to intervene which seeks to raise antitrust contentions must comply with the requirements of 10 CFR § 2.714 and must also set forth with particularity:

(1) facts which describe a situation inconsistent with the antitrust laws or their underlying policies;

(2) facts which describe the existence of a meaningful nexus between the activities under the nuclear license and the aforementioned anticompetitive "situation":

(3) the specific relief sought, including whether, how and to what extent any license conditions imposed by the attorney general fail to provide the requested relief.

Wolf Creek, ALAB-279 supra; see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

Petitions to intervene must initially specify the "aspect or aspects" of the subject matter of the proceeding as to which the petitioner wishes to intervene. An "aspect" is broader than a "contention" but narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 278 (1978). A Board lacks jurisdiction to consider an intervention petition in which the aspect of the proposed intervention is not within the scope of the proceeding. Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986). Until the petitioner files a list of contentions, the publication in the Federal Register of a notice of opportunity for a hearing on proposed operating license amendments may serve to sufficiently specify the aspects as to which the petitioner wishes to intervene. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 159 (1991).

Under 10 CFR § 2.714 it is no longer necessary for petitioners for intervention to advance at least one viable contention when initially filing a petition to intervene. The petition may later be supplemented to include contentions. There is no single date when the petition must be supplemented. Pursuant to 10 CFR § 2.714(b), the supplement may be submitted without leave of the presiding officer 15 days prior to the special prehearing conference or, if none is held, the first prehearing conference. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 74 (1978).

Where an original notice of hearing is overly narrowly drawn, a requirement that those who subsequently seek to intervene state that they did not intervene before because of limitations in the original notice was not an abuse of discretion. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The petition of an organization to intervene must show that the person signing it has been authorized by the organization to do so. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). However, another Licensing Board granted an intervention petition filed by the highest ranking organizational officer without express authority from the organization. The Board was willing to infer the general authority of the officer to act on behalf of the organization to further its mission and purposes, pending official approval from the organization. The Board noted that the organization's subsequent filing of an intervention petition ratified the earlier petition filed by its officer. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 206-207 (1992).

2.9.3.2 Defects in Pleadings

Petitioners must follow NRC requirements in filing pleadings seeking a hearing. For an organization, these include a statement as to whom it represents, a sworn statement as to where the represented individuals reside or how far they reside from the alleged threat, and a plausible scenario concerning how they may suffer health or safety consequences. International Uranium Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 6 (1997).

Although the requirements of 10 CFR § 2.714 must ultimately be met, the Appeal Panel has made it clear that every benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116 (1994). As such, petitioners will usually be permitted to amend petitions containing curable defects. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631 (1973). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 15 (1994). A Licensing Board itself has no duty to recast contentions offered by a petitioner to make them acceptable under the regulations. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1660 (1982). Refusal to do so cannot constitute error. Seabrook, supra, citing, Zion, supra.

The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues. A concern has been expressed in Commission adjudicatory directives about not utilizing pleading "niceties" to exclude parties who have a clear, albeit imperfectly stated, interest. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979). Parties who appear before the Commission bear responsibility for any possible misapprehension of their position caused by the inadequacies of their briefs. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 143 n.17 (1993).

Intervention petitions and requests for hearing cannot properly raise antitrust issues and health and safety issues in the same proceedings. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

2.9.3.3 Time Limits/Late Petitions

The Commission's regulations at 10 CFR § 2.714(a)(1) provide that nontimely filings of petitions to participate as a party will not be entertained absent a determination that the petition should be granted based upon a balancing of five factors. (See 2.9.3.3.3 for five factors). Out of the five factors enumerated in 10 CFR § 2.714(a), the factors involving the availability of other means to protect petitioner's interest and the ability of other parties to represent petitioner's interest are entitled to less weight than the other three. (See 2.9.3.3.3). Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1381, 1384 (1982); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984), citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992).

Late intervention is possible until issuance of a full-power license. Therefore, issuance of a low-power license does not bar late intervention. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 160 (1993).

Regarding a Petition to intervene, some weight may be attached to the fact that lateness, though not justified, is not extreme. It is permissible to consider the fact that a petition was filed only two months late if the start of the proceeding will not be substantially delayed. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, 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, 150 (1979).

If the lateness of a Petition to intervene is not egregious, and will not cause substantial delay to the parties, those considerations will outweigh the fact that the balance of the five factors required under 10 CFR § 2.714(a)(1) tips slightly against the petitioner. Skagit/Hanford, supra, 16 NRC at 985.

It is within the presiding officer's discretion to permit an intervenor to make a belated lateness showing. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, aff'd on other grounds, CLI-94-12, 40 NRC 64 (1994).

The exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), it must be viewed in conjunction with the equally important policy favoring the observance of established time limits. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983).

2.9.3.3.1 Time for Filing Intervention Petitions

Petitions to intervene or requests for hearing must be filed not later than the time specified in the notice for hearing or as provided by the Commission, the presiding officer or the Licensing Board designated to rule on petitions and/or requests for hearing, or as provided in 10 CFR § 2.102(d)(3) (with regard to antitrust matters); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983).

For an intervenor who wishes to become a party to a hearing to protect its interest in seeing that the Staff enforcement order challenged in a proceeding is sustained, the matter adversely affecting the petitioner's interest is not the "order," with which it agrees, but the agency's "proceeding" relative to that order, which carries the potential for overturning or modifying the order in derogation of the petitioner's interest. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994).

The filing of an intervention petition is considered complete on the date it is deposited in the mail, not when it is actually postmarked. 10 CFR § 2.701(c). Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 205-206 (1992).

The award of an operating license effectively terminates the operating license proceeding and any construction permit amendment proceedings. Anyone who subsequently challenges the issuance of the operating license or seeks the suspension of the license should not file a petition for late

intervention, but instead, must file a petition, 10 CFR § 2.206, requesting that the Commission initiate enforcement action pursuant to 10 CFR § 2.202. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 160 (1993).

A Licensing Board did not abuse its discretion in shortening the time to file contentions where there were many intervenors. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

2.9.3.3.1.A Timeliness of Amendments to Intervention Petitions

A petitioner for intervention may amend its intervention petition without leave of the licensing board up to 15 days prior to the first prehearing conference. 10 CFR 2.714(a)(3). A licensing board may alter that 15 day period. 10 CFR § 2.711(a). Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992).

2.9.3.3.2 Sufficiency of Notice of Time Limits on Intervention

Although the Appeal Board has stated that it would leave open the question as to whether Federal Register notice without more is adequate to put a potential intervenor on notice for filing intervention petitions, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), the Board tacitly assumed that such notice was sufficient in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976) (claims by petitioner that there was a "press blackout" and that he was unaware of Commission rules requiring timely intervention will not excuse untimely petition for leave to intervene).

If the only agency issuance providing constructive notice of a filing deadline for hearing requests is a Staff enforcement order issued in accordance with 10 CFR § 2.202(a)(3) that, by its terms, is not applicable to persons who wish to intervene in support of the order, then an intervention petition filed by such a person cannot be deemed untimely for failing to meet an appropriately noticed filing deadline. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994)

2.9.3.3.3 Consideration of Untimely Petitions to Intervene

Section 10 CFR 2.714(a) provides that nontimely petitions to intervene or requests for hearing will not be considered absent a determination that the petition or request should be granted based upon a balancing of the following factors:

(1) good cause, if any, for failure to file on time;

(2) the availability of other means for protecting the petitioner's interests;

(3) the extent to which petitioner's participation might reasonably assist in developing a sound record;

(4) the extent to which the petitioner's interest will be represented by existing parties; and

(5) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1429 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.3 (1983), citing, 10 CFR § 2.714(a)(1); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1170 n.3 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 883 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1643-1644 (1984); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.3 (1985), affirmed, ALAB-816, 22 NRC 461 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 278 n.6 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 76 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 246-47, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992).

The Commission can summarily reject a petition for late intervention that fails to address the five factor test set forth in 10 CFR § 2.714(a)(1)(i)-(v) or the standing requirements in 10 CFR § 2.714(d)(1). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993).

This consideration must be weighed against the petitioner's strong interest in the proceeding under 10 CFR § 2.714(d). Skagit/Hanford, supra, 16 NRC at 984.

In ruling on a petition for leave to intervene that is untimely, the Commission must consider, in addition to the factors set forth in 10 CFR § 2.714(a)(1), the following factors set forth in 10 CFR § 2.714(d): (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983).

The burden of proof is on the petitioner. Thus, a person who files an untimely intervention petition must affirmatively address the five lateness factors in his petition, regardless of whether any other parties in the proceeding raise the tardiness issue. Even if the other parties waive the tardiness of the petition, a Board, on its own initiative, will review the petition and weigh the five lateness factors. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

A late petitioner who fails to address the five lateness factors in his petition does not have a right to a second opportunity to make a substantial showing on the lateness factors. However, a Board, as a matter of discretion, may give a late petitioner such an opportunity. Pilgrim, supra, 22 NRC at 468.

A late petitioner's obligation to affirmatively address the five lateness factors is not affected by the extent of the tardiness. However, the length of the delay, whether measured in days or years, may influence a Board's assessment of the lateness factors. Pilgrim, supra, ALAB-816, 22 NRC at 468 n.27.

Amendments to Section 2.714 make it clear that a showing of good cause for the untimeliness of a petition is only one factor to be considered and balanced. Prior to these amendments, the "good cause" factor was given special treatment, although a showing of good cause would not relieve a Licensing Board of its obligation to consider the other factors. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460 (1977); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977); Metropolitan Edison Co. (Three Mile Island

Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2026 (1982). In addition, it has been held that even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined, Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975), although the burden of justifying intervention on the basis of the other factors is considered to be greater when the petitioner fails to show good cause. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 1 NRC 395, 398 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191 (1992) [Board may not entertain nontimely filings absent a determination by the Board that the petitions should be granted based upon a balancing of the five factors specified in 10 CFR 2.714(a)(1)(i)-(v)]; Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993).

Absent a showing of good cause for a very late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764 (1982), citing, Grand Gulf, supra, 16 NRC at 1730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB 743, 18 NRC 387, 397 (1983); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1645 (1984); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993); State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296-97 (1993).

A petitioner who fails to show good cause for filing late may not always be required to make a compelling showing on the four remaining factors of 10 CFR § 2.714(a). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-19, 36 NRC 98, 105-106 (1992).

A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late-filed intervention petition. The additional four factors specified under 10 CFR § 2.714(a) must also be considered. However, where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 CFR § 2.714(a) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

To be accepted, a late-filed contention must satisfy not only the late-filed factors but also the requirements for contentions. A licensing board need not address these considerations in any particular order, although both are required for admissibility. Analyzing the contention requirements first permits a board to determine whether or not a significant health and safety or environmental question is being advanced, thus assisting the board in considering lateness factor (iii), the contribution to an adequate record to be made by the intervenor. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993).

The five factors listed in 10 CFR § 2.714(a) are to be considered in determining whether to allow late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 213-214 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989). Newly acquired standing by moving to the vicinity of a plant is not alone enough to justify belated intervention. Nor does being articulate show a contribution can be made in developing the record. Other parties having the same interest weigh against allowing late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241 (1980).

The first factor of those specified in 10 CFR § 2.714(a) is whether there exists "good cause, if any, for the failure to file on time." Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 862 (1980). In considering the "good cause" factor, the Appeal Board pointed out that a strong excuse for lateness will attenuate the showing necessary on the other factors of 10 CFR § 2.714. It added that the 1978 amendment of the language of § 2.714, far from altering this substantive principle, regarding excuse for lateness, merely codified it.

Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978).

The first and principal test for late intervention is whether a petitioner has demonstrated "good cause" for filing late. In addressing the good-cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322 (1994). Lacking a demonstration of "good cause" for lateness, a petitioner is bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request. 39 NRC at 329.

The burden of showing good cause is on the late petitioner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

The Appeal Board has held that whether there is "good cause" for a late filing depends entirely upon the substantiality of the reasons assigned for not having filed at an earlier date. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).

Although a concrete definition as to what constitutes "good cause" has not been established, certain excuses for delay have been held to be insufficient to justify late filing. For example, in Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330 (1974), aff'd, ALAB-238, 8 AEC 656 (1974), it was held that neither the fact that the corporate citizens' group seeking to intervene was not chartered prior to the cutoff date for filing, nor the fact that the applicant changed its application by dropping one of the two units it intended to build, gave good cause for late filing. Similarly, claims by a petitioner that there was a "press blackout" and that he was unaware of the Commission's rules requiring timely intervention will not excuse an untimely petition for leave to intervene. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), nor will failure to read the Federal Register. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), citing, New England Power and Light Co. (NEP Units 1 and 2), LBP-78-18, 7 NRC 932, 933-934 (1978); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). The showing of good cause is required even though a petitioner seeks to substitute itself for another party. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause." Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980) and South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80-81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Nor does preoccupation with other matters afford a basis for excusing a nontimely petition to intervene. Poor judgment or imprudence is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. Such a consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence. On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (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, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

The Licensing Board will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117, aff'd, ALAB-743, 18 NRC 38i (1983); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

The availability of new information may provide good cause for late intervention. The test is when the information became available and when the petitioner reasonably should have become aware of the information. The petitioner must establish that 1) the information is new and could not have been presented earlier, and 2) the petitioner acted promptly after learning of the new information. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73

(1992). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164-65 (1993).

Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980).

A Commission direction to the presiding officer to consider the admissibility of a particular late-filed matter does not preclude the presiding officer from giving the same consideration to other late-filed information submitted by a petitioner relevant to that matter. Cf. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979) (in remand proceeding on management capability issue, additional petitioners' attempt to seek late intervention to partcipate on that issue must be assessed under late-intervention criteria). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996).

Before admitting a contention based on new information, factors must be balanced such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted. However, in balancing those factors, the same weight given to each of them is not required. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

Confusing and misleading letters from the Staff to a prospective pro se petitioner for intervention, and failure of the Staff to respond in a timely fashion to certain communications from such a petitioner, constitute a strong showing of good cause for an untimely petition. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978). And where petitioner relied to its detriment on Staff's representations that no action would be immediately taken on licensee's application for renewal, elementary fairness requires that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered even after the license has been issued. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982).

A petitioner's claim that it was lulled into inaction because it relied upon the State, which later withdrew, to represent its interests does not constitute good cause for an untimely petition. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990). A petitioner who has relied

upon a State participating pursuant to 10 CFR § 2.715(c) to represent her interests in a proceeding cannot rely on her dissatisfaction with the State's performance as a valid excuse for a late-filed intervention petition where no claim is made that the State undertook to represent her interests specifically, as opposed to the public interest generally. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440, 6 NRC 642 (1977). See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); Comanche Peak, supra, 28 NRC at 610 (a petitioner's previous reliance on another party to assert its interests does not by itself constitute good cause), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80 (1990), aff'd, ALAB-950, 33 NRC 492, 49596 (1991). Nor will an explanation that full-time domestic and other responsibilities was the reason for filing an intervention petition almost three years late suffice. Cherokee, supra.

Just as a petitioner may not rely upon interests being represented by another party and then justify an untimely petition to intervene on the others' withdrawal, so a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify a late petition on that reliance when the other petition fails to represent those interests. A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). It must be established that petitioners were furnished erroneous information on matters of basic fact and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028.

Employees of an applicant or licensee are not exempt from the Commission's procedural rules. Thus, an employee's mere assertions of fears of retaliation from the employer do not establish good cause for late intervention. To encourage employees to raise potentially significant safety concerns or information, Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851(a), prohibits employer retaliation against any employee who commences or participates in any manner in an NRC proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 77-79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Nuclear Fuel Services, Inc. and New York

State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992). Petitioner satisfies the second and fourth parts of the five late intervention criteria in 10 CFR § 2.714(a)(1)(i)-(v) when there is currently no proceeding, assuming arguendo that the petitioner has standing, because there will generally be no other means by which that petitioner can protect its interest and because there is currently no proceeding, there will be no other party to represent petitioner's interest. However, these two factors are the least important of the five factors. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993).

In determining how compelling a showing a petitioner must make on the other four factors, a Licensing Board need not attach the same significance to a delay of months as to a delay involving a number of years. The significance of the tardiness, whether measured in months or years, will generally depend on the posture of the proceeding at the time the petition surfaces. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 398-399 (1983). See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-19, 36 NRC 98, 106 (1992).

With regard to the second factor - other means to protect petitioner's interest - the question is not whether other parties will adequately protect the interest of the petitioner, but whether there are other available means whereby the petitioner can itself protect its interest. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975).

The second factor in 10 CFR § 2.714(a) points away from allowing late intervention if the interest which the petitioner asserts can be protected by some means other than litigation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1433 (1982).

The suggestion that an organization could adequately protect its interest by submitting a limited appearance statement gives insufficient regard to the value of participational rights enjoyed by parties - including the entitlement to present evidence and to engage in cross-examination. Similarly, assertions that the organization might adequately protect its interest by making witnesses available to a successful petitioner or by transmitting information in its possession to appropriate State and local officials are without merit. Duke Power Company (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, 150 n.7 (1979).

Until the parties to a proceeding that oppose a late intervention petition suggest another forum that appears to promise a full hearing on the claims petitioner seeks to raise, a petitioner need not identify and particularize other remedies as inadequate. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 n.6 (1982).

A petition under 10 CFR § 2.206 for a show cause proceeding is not an adequate alternative means of protecting a late petitioner's interests. The Section 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial ab initio of an application for an operating license. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervenor. WPPSS, id. By analogy, the availability of nonadjudicatory Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor two under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985). But see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

As to the third factor with regard to "assistance in developing the record," a late petitioner placing heavy reliance on this factor and claiming that it has substantial technical expertise in this regard should present a bill of particulars in support of such a claim. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 764 (1978). At the

same time, it is not necessary that a petitioner have some specialized education, relevant experience or ability to offer qualified experts for a favorable finding on this factor to be made. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212-213 (1978).

When an intervention petitioner addresses the 10 CFR § 2.714(a)(3) criterion for late intervention requiring a showing of how its participation may reasonably be expected to assist in developing a sound record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-767, 19 NRC 984, 985 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1644 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74-75 (1992). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993).

Vague assertions regarding petitioner's ability or resources are insufficient. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing, Grand Gulf, supra, 16 NRC at 1730.

It is the petitioner's ability to contribute sound evidence rather than asserted legal skills that is of significance in determining whether the petitioner would contribute to the development of a sound record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 888 (1984), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982).

The ability to contribute to the development of a sound record is an even more important factor in cases where the grant or denial of the petition will also decide whether there will be any adjudicatory hearing. There is no reason to grant an inexcusably late intervention petition unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue, but is also able to make a worthwhile contribution on it. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-1181 (1983). See also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

With regard to the fourth factor of 10 CFR § 2.714(a), the extent to which petitioner's interest will be represented by existing parties, the fact that a successful petitioner has advanced a contention concededly akin to that of a late petitioner does not necessarily mean that the successful petitioner is both willing and able to represent the late petitioner's interest. Duke Power Company (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, 150 (1979). See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-19, 36 NRC 98, 109 (1992).

The Licensing Board in Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979) has expressed the view that NRC practice has failed to provide a clear cut answer to the question of whether the fourth factor, the extent to which the petitioner's interest will be represented by existing parties, is applicable when there are no intervening parties and no petitioners other than the latecomer, and a hearing will not be held if the late petitioner is denied leave to intervene. The Licensing Board reviewed past Licensing Board decisions on this question:

(1) In St. Lucie and Turkey Point the Licensing Board decided that the fourth factor was not directly applicable, noting that without the petitioner's admission there would be no other party to protect petitioner's interest. Florida Power and Light Company (St. Lucie Plant, Units 1 and 2 and Turkey Point, Units 3 and 4), LBP-77-23, 5 NRC 789, 800 (1977).

(2) In Summer the Licensing Board acknowledged uncertainty as to the applicability of factor four, but indicated that if the factor were applicable it would be given no weight because of the particular circumstances of that case. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213-214 (1978).

(3) In Kewaunee, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the fourth factor weighed in favor of admitting them as intervenors. Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

The Licensing Board ultimately ruled that the Commission intended that all five factors of 10 CFR § 2.714(a) should be balanced in every case involving an untimely petition. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979). The Board also ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." The fourth factor therefore, was held to weigh in favor of the late petitioners. Id.

In weighing the fourth factor, a board will not assume that the interests of a late petitioner will be adequately represented by the NRC Staff. The general public interest, as interpreted by the Staff, may often conflict with a late petitioner's private interests or perceptions of the public interest. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-1175 n.22 (1983). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986). Contra Consolidated Edison Co. of New York (Indian Point, Unit 2), LBP-82-1, 15 NRC 37, 41 (1982). However, the fact that it is likely that no one will represent a petitioner's perspective if its hearing request is denied is in itself insufficient for the Commission to excuse the untimeliness of the request. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994).

In balancing the factors in 10 CFR § 2.714(a), the Licensing Board may take into account the petitioner's governmental nature as it affects the extent to which petitioner's interest will be represented by existing parties (fourth factor of 10 CFR § 2.714(a)), although the petitioner's governmental status in and of itself will not excuse untimely petitions to intervene. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976).

With respect to the fifth factor, the extent to which a late petitioner's participation would delay a proceeding, the Appeal Board in Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), assessed this factor, as of the time of the Appeal Board's hearing, not as of the time the petitioners filed their petition. A person who attempts to intervene three and a half years after the

petition deadline has no right to assume that his intervention will go unchallenged; rather, he has every right to assume that objections will be made and that the appellate process might be invoked. Skagit, supra, 10 NRC at 172-173.

The fifth factor includes only that delay which can be attributed directly to the tardiness of the petition. Jamesport, supra, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 425 (1981).

Where there is no pending proceeding, the fifth factor for late intervention, the potential for delay if the petition is granted, weighs heavily against petitioner because granting the request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993).

The fifth and final factor of 10 CFR § 2.714(a)(1), potential for delay, is also of immense importance in the overall balancing process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983).

While this factor is particularly significant, it is not dispositive. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In considering the factor of delay, the magnitude of threatened delay must be weighed since not every delay is intolerable. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-77-9, 5 NRC 474 (1977). In addition, in deciding whether petitioners' participation would broaden the issues or delay the proceeding, it is proper for the Licensing Board to consider that the petitioners agreed to allow issuance of the construction permit before their antitrust contentions were heard, thereby eliminating any need to hold up plant construction pending resolution of those contentions. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 23 (1977).

An untimely intervention petition need not introduce an entirely new subject matter in order to "broaden the issues" for the purposes of 10 CFR § 2.714(a); expansion of issues already admitted to the proceeding also qualifies. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981).

The mere fact that a late petitioner will not cause additional delay or a broadening of the issue does not mean that an untimely petition should necessarily be granted. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977). However, from the standpoint of precluding intervention, the delay factor is extremely important and the later the petition to intervene, the more likely it is that the petitioner's participation

will result in delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. The greater the tardiness, the greater the likelihood that the addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976); Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

Holding a hearing on an export license application at a point when the NRC has had in its hands for two months the views of the Executive Branch that the proposed export would not be inimical to the common defense and security would undoubtedly "broaden" the issues and substantially "delay" the Commission's final decision on the fuel export application. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 330 (1994).

The permissive grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. Although Section 2.714(c) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it does reflect the expectation that, absent demonstrable good cause for the late filing, an individual so interested in the outcome of a particular proceeding will act to protect his interest within the established time limits. Skagit, supra, 10 NRC at 172-173.

A late intervenor may be required to take the proceeding as it finds it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing, Nuclear Fuel Services. Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). Licensing Boards have very broad discretion in their approach to the balancing process required under 10 CFR § 2.714(a). Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Given this wide latitude with regard to untimely petitions to intervene, a Licensing Board has the discretion to permit intervention, even though an acceptable excuse for the untimely filing is not forthcoming, if other considerations warrant its doing so. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977).

A petitioner whose late-filed petition to intervene has met the five-part test of 10 CFR § 2.714(a)(1) need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015 (1984).

In evaluating intervention petitions to determine whether the requisite specificity exists, whether there has been an adequate delineation of the basis for the contentions, and whether the issues sought to be raised are cognizable in an individual licensing proceeding, Licensing Boards will not appraise the merits of any of the assertions contained in the petition. But when considering untimely petitions, Licensing Boards are required to assess whether the petitioner has made a substantial showing of good cause for failure to file on time. In doing so, Boards must necessarily consider the merits of claims going to that issue. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978).

Non-parties, participating under 10 CFR § 2.715(c), need not comply with the requirements of 10 CFR § 2.714 that mandate that intervenors either file their contentions in a timely fashion or show cause for their late intervention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 688 (1981).

The key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and orderly conduct of our proceedings." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979), citing, Nuclear Fuel Services. Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

A Licensing Board has no latitude to admit a new party, i.e., an "eleventh hour" intervenor, to a proceeding as the hearing date approaches in circumstances where: (1) the extreme tardiness in seeking intervention is unjustified; (2) the certain or likely consequence would be prejudice to other parties as well as delaying the progress of the proceeding, particularly attributable to the broadening of issues; and (3) the substantiality of the contribution to the development of the record which might be made by that party is problematic. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 900 (1981). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 82-83 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

2.9.3.3.4 Appeals from Rulings on Late Intervention

Until a determination is made that intervenor has proffered a litigable contention, a presiding officer's ruling that the petitioner has established its standing is not so final as to be appealable under 10 CFR § 2.714a. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994).

Two considerations play key roles in deliberations on appeals from rulings on untimely intervention. The first is the Commission's admonition in Nuclear Fuel Services Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975), that 10 CFR § 2.714(a) was purposely drafted with the idea of "giving the Licensing Boards broad discretion in the circumstances of individual cases." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-396 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-769, 19 NRC 995, 1000 n.13 (1984). Consequently, a decision granting a tardy intervention petition will be reversed only where it can fairly be said that the Licensing Board's action was an abuse of the discretion conferred by Section 2.714(a). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). The second consideration flows from the principle that the propriety of the Board's action must be measured against the backdrop of the record made by the parties before it. Accordingly, on review the facts recounted in the papers supporting the petition to intervene must be credited to the extent that they deal with the merits of the issues. Insofar as the facts relate to the excuse for untimely filing, where they are not controverted by opposing affidavits they must be taken as true. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 13 (1977). In view of all of this, the chances of overturning a Licensing Board's finding that intervention, although late, would be valuable are slight. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), ALAB-223, 8 AEC 241 (1974).

In a decision vacating a Licensing Board's grant of late intervention because the grant was based on improper criteria, the Appeal Board refused to examine whether the petitioner had met the regulatory requirements for intervention (i.e., 10 CFR § 2.714). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63-64 (1979), petition for review denied, Puget Sound Power & Light Co. (Skagit Nuclear Project, Units 1 and 2), unreported, (January 16, 1980).

On appeal factual and legal components of the analysis underlying the Licensing Board's conclusion in reviewing Board decisions on untimely intervention petitions may be closely scrutinized. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Plant, Unit 1), ALAB-642, 13 NRC 881, 885 (1981).

It is for the Licensing Boards to make the initial assessment of how late intervention petitions fare in light of the intervention criteria. Skagit, supra, 9 NRC at 63. A Licensing Board's denial of a late intervention petition under the criteria specified in 10 CFR § 2.714(a) will not be overturned unless the Board has abused its discretion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763, 1764 (1982). It is not sufficient for a party to establish that the Licensing Board might justifiably have concluded that the five lateness factors listed in 10 CFR § 2.714(a)(1) favored the denial of the untimely intervention petition. The appellate tribunal must be persuaded that a reasonable mind could reach no other result. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

2.9.3.3.5 Mootness of Petitions to Intervene

Where the Commission was in the process of ruling on an untimely petition to intervene, when the applicant moved to amend its application and conclude the proceeding, the petition to intervene was dismissed as moot. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980).

Mootness is not necessarily dependent upon a party's views that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-19*, 42 NRC 191, 195 (1995).

2.9.3.4 Amendment of Petition Expanding Scope of Intervention

In order to expand the scope of a previously filed petition to intervene, an intervenor carries the burden of persuading the Licensing Board that the information upon which the expansion is based: (a) was objectively unavailable at the time the original petition was filed, and (b) had it been available, the petition's scope would have been broader. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

2.9.3.5 Withdrawal of Petition to Intervene

Voluntary withdrawal of a petition to intervene is without prejudice to reinstate the petition, although reinstatement can only be done on a showing of good cause.

Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973).

A party that voluntarily withdraws from a proceeding that was later resolved by a settlement agreement must satisfy the late intervention standards before seeking to reopen the record of that proceeding. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1 (1993)

Where only a single intervenor is party to an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. However, according to NRC procedure, it does serve to eliminate the withdrawing party's contention from litigation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990). Acceptance of contentions at the threshold stage of a licensing proceeding does not validate them as cognizable issues for litigation independent of their sponsoring intervenor. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981); South Texas, supra, 21 NRC at 383; Seabrook, supra, 31 NRC at 430-31, aff'd in Part on other grounds, ALAB-934, 32 NRC 1 (1990).

Where a lay person sought to withdraw both as an individual intervention petitioner and as the person on whom an organization relied for standing, a Licensing Board denied the motion to withdraw as the basis for the organization's standing in order to give the petitioner an opportunity to reconsider, since granting the motion would lead to dismissal of the entire proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 514 (1990). The organizational intervenor was subsequently dismissed from the proceeding when the individual upon whom it relied for standing was terminated from his employment in the geographical zone of interest of the plant, thereby losing the basis for his standing. Although the organization earlier had been given ample opportunity to establish its standing on other grounds, it failed to do so. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 14-15 (1990), aff'd, ALAB-952, 33 NRC 521 (1991).

Safety or environmental matters which may be left as outstanding issues by a withdrawing intervenor may be raised by a Board sua sponte or be subject to nonadjudicatory resolution by the NRC Staff. South Texas, supra, 21 NRC at 383 n.100. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 189-90 (1976).

The test that should be applied to determine whether one intervenor may be permitted to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding, is the five-factor test ordinarily used to determine whether to grant a nontimely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. South Texas, supra, 21 NRC at 381-82. See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor test, see Sections 2.9.3.3.3 and 2.9.5.5.

2.9.3.6 Intervention in Antitrust Proceedings

In addition to meeting the requirements of 10 CFR § 2.714, a petitioner seeking to intervene in an antitrust proceeding must:

(1) describe the situation allegedly inconsistent with the antitrust laws which is the basis for intervention:

(2) describe how that situation conflicts with the policies underlying the Sherman, Clayton or Federal Trade Commission Acts;

(3) describe how that situation would be created or maintained by activities under the proposed license;

(4) identify the relief sought; and

(5) explain why the relief sought fails to be satisfied by license conditions proposed by the Department of Justice.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981) (and cases cited therein). Note that for antitrust intervention, Catawba implies that the interest of a ratepayer or consumer of electricity may be within the zone of interests protected by Section 105 of the Atomic Energy Act. The petitioner, however, must still demonstrate that an injury to its interests would be the proximate result of anticompetitive activities by the applicant or licensee and such injury must be more than remote and tenuous. Id. at 13 NRC 30-32.

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws - however well pleaded - accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15

NRC 22, 29 (1982), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-575 (1975) and Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

When neither the Attorney General nor the NRC Staff has discerned antitrust problems warranting review under Section 105c, potential antitrust problems must be shown with reasonable clarity to justify granting a petition that would lead to protracted antitrust litigation involving a Pro se petitioner. Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), LBP-78-13, 7 NRC 583, 595 (1978).

Although Section 105 of the Atomic Energy Act encourages petitioners to voice their antitrust claims early in the licensing process, reasonable late requests for antitrust review are not precluded so long as they are made concurrent with licensing. Licensing Boards must have discretion to consider individual claims in a way which does justice to all of the policies which underlie Section 105c and the strength of particular claims justifying late intervention. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit -- the time when the advice of the Attorney General is sought -- and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978). The criteria of 10 CFR § 2.714 for late petitioners are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but Section 2.714 criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor, Id. Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. Id.

Where a late petition for intervention in an antitrust proceeding is involved, the special factors set forth within 10 CFR § 2.714(a)(1) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-28, 14 NRC 333, 338, 342 (1981). See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 246-47, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992).

2.9.3.7 Intervention in High-Level Waste Licensing Proceedings

The standards for intervention in high-level waste licensing proceedings are specified in 10 CFR § 2.1014.

2.9.3.8 Intervention in Informal, Subpart L Proceedings

To be admitted as a party to an informal adjudication under Subpart L of 10 C.F.R. Part 2 regarding a licensee-initiated materials license amendment, the individual or organization filing a hearing/intervention request must establish three things: (1) the petitioner is a "person whose interest may be affected by the proceeding" within the meaning of section 189a(1)(A) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1)(A), in that the petitioner has standing to participate in the proceeding consistent with the standards governing standing in judicial proceedings generally; (2) the petitioner has "areas of concern" regarding the requested licensing action that are germane to the subject matter of the amendment proceeding; and (3) the hearing/intervention petition was timely filed. See 10 C.F.R. § 2.1205(e), (h). Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 422 (1997); Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 261 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

In an informal adjudication under 10 CFR Part 2, Subpart L, the petitioner may request that the proceeding be conducted employing procedures other than those set forth in Subpart L, which could include use of the procedures for formal, trial-type adjudications set forth in Subpart G of Part 2. *See. id.* § 2.1209(k). Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 422 (1997).

2.9.3.8.1 Amendment to Hearing Petition

Unlike a formal adjudicatory proceeding under 10 CFR, Part 2, Subpart G, in an informal proceeding under Subpart L, the petitioner requesting a hearing does not have the right to amend or supplement an otherwise timely hearing petition once the deadline specified in 10 CFR §2.1205(c) for submitting hearing requests has passed. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 152 (1992).

In an informal adjudication under 10 CFR Part 2, Subpart L, a petitioner may amend or supplement a timely hearing request only as permitted by the presiding officer, who is afforded this discretionary authority under the general powers granted by 10 CFR 2.1209 to regulate the course of an informal proceeding. See, e.g., Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311 314-17 (1989). The presiding officer retains that discretion at least up through the point at which he or she makes a final ruling upon the sufficiency of the hearing request. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 152 (1992).

A presiding officer's determination to permit a hearing petition concerning a licensing action to be supplemented does not automatically extend the time for filing a stay request regarding that action. A litigant that wishes to extend the time for making a filing must do so by making an explicit request. See 10 CFR §§ 2.711, 2.1203(d). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262 (1992). [see also section 6.28 regarding informal proceedings and petitions to intervene therein]

2.9.4 Interest and Standing for Intervention

In making a standing determination, a presiding officer is to "construe the [intervention] petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996). Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 92 (1998).

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192 (1991); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333 (1998).

A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action. Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, aff'd, CLI-94-10, 40 NRC 43 (1994).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 374 (1992).

In Commission practice, a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), citing, Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34-35 (1987); Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 174 (1992). See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), aff'd in Part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992).

Both the Atomic Energy Act of 1954, as amended, and the Commission's regulations permit intervention only by a "person whose interest may be affected." The term "person" in this context includes corporate environmental groups which may represent members of the group provided that such members have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Standing to intervene as a matter of right does not hinge upon a petitioner's potential contribution to the decisionmaking process. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); see generally Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9 (1994). Nevertheless, a petitioner's potential contribution has a definite bearing on "discretionary intervention." See Section 2.9.4.2. infra.

In Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976), the Appeal Board certified the following questions to the Commission:

(1) Should standing in NRC proceedings be governed by "judicial" standards?

(2) If no "right" to intervene exists under whatever standing rules are found to be applicable, what degree of discretion exists in a Board to admit a petitioner anyway?

The Commission's response to the certified question is contained in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). Therein, the Commission ruled that judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189 of the Atomic Energy Act. As to the second question referred by the Appeal Board, the Commission held that Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, make some contribution to the Proceeding. In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board's judgment at the pleading stage that a party has crossed the standing threshold is entitled to substantial deference. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). The standing requirement arises from the hearing authorization in section 189a(1) of the Atomic Energy Act, providing a hearing "upon the request of any person whose interest may be affected" by a proceeding (emphasis supplied). Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978); Nuclear Engineering Company, Inc., (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744 (1978); Georgia Power Company, et al., Vogtle Electric Generating Plant, Units 1 and 2), LBP-92-38, 36 NRC 394 (1992); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993).

"There is no question that, in an operating license proceeding, the question of a potential intervenor's standing is a significant one. For if no petitioner for intervention can satisfactorily demonstrate standing, it is likely that no hearing will be held." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978).

Standing is not a mere legal technicality, it is, in fact, an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994).

As a line of Supreme Court cases makes clear, redressability is an essential element of standing. To establish standing, a petitioner must not only allege actual injury "fairly traceable" to the defendants' actions, it must also show the likelihood that the injury would be "redressed" if the petitioner obtains the relief requested. This requirement is grounded in the provision in article III of the constitution that limits jurisdiction to "cases and controversies." Where an alleged injury does not stem directly from the challenged governmental action, but instead involves predicting the actions of third parties not before the court, the difficulty of showing redressability is particularly great. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

2.9.4.1 Judicial Standing to Intervene

The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31; aff'd, CLI-94-10, 40 NRC 43 (1994); Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47 (1994); Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 91 (1998).

Judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189 of the Atomic Energy Act of 1954. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); see also Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151 (1994); Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 140-41 (1996); Quivira Mining Company (Ambrosia Lake Facility,

Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 153 (1998).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury-in-fact," and (b) the injury is arguably within the "zone of interests" protected by statutes governing the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13-14 (1994); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87 (1998).

In order to establish standing, a petitioner must show: (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 423 (1997); Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Shoreham-Wading River Central School District v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991); Kelley v. Selin, 42 F.3d 1501, 1507 (6th Cir. 1995), citing, Michigan v. U.S., 994 F.2d 1197, 1203 (6th Cir. 1993). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28-29 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192, 194-95 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 441-42 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 182 (1991); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-68 (1991); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121-122 (1992); Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 174-75 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994); Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 156 (1996); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 154 (1998). A contemporary delineation of those concepts appeared in Bennett v. Spear, 520 U.S. 154, 167, 117 S.Ct. 1154, 1163 (1997)(citing Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992)), where the Court observed that constitutional minimum standards of standing are that (1) the plaintiff suffer injury in fact, both actual or imminent; (2) there is a causal connection between the injury and the conduct in question; and (3) the injury likely will be redressed by a favorable decision. Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. Metropolitan Edison

Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 358 (1993).

Judicial standing permitted to challenge rule on dry cask storage for petitioners living nearby and asserting harm to their aesthetic interests and their physical health and that the value of his or her property will be diminished by the storage of nuclear waste in the VSC-24 casks at Palisades. Kelley v. Selin, 42 F.3d 1501, 1509 (6th Cir. 1995). Judicial standing to challenge rule on reporting requirement, even though comment was made on earlier "prescriptive" versus later "performance-based" rule. Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715 (D.C. Cir. 1997).

It generally is the practice for participants making factual claims regarding the circumstances that establish standing to do so in affidavit form that is notarized or includes a declaration that the statements are true and are made under penalty of perjury. Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4 (1997).

2.9.4.1.1 "Injury-In-Fact" and "Zone of Interest" Tests for Standing to Intervene

Although the Commission's Pebble Springs ruling (CLI-76-27, 4 NRC 610) permits discretionary intervention in certain limited circumstances, it stresses that, as a general rule, the propriety of intervention is to be examined in the light of judicial standing principles. The judicial principles referred to are those set forth in Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Such standards require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing, and (2) such injury is arguably within the zone of interests protected by the statute governing the proceeding. Wisconsin Electric Power Co. (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Nuclear Fuel Services, Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431, 1432 (1982), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.6 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 165, 166 (1991); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), LBP-91-28, 33 NRC 557, 559 (1991), aff'd on other grounds, CLI-91-14, 34 NRC 261, 266-68 (1991). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5 (1993); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-21, 46 NRC 273, 274 (1997); Yankee

Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1998).

Purely academic interests are not encompassed by 10 CFR § 2.714(a) which states that any person whose interest is affected by a proceeding shall file a written petition for leave to intervene. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 185 (1982). See generally, CLI-81-25, 14 NRC 616 (1981), (guidelines for Board). A mere academic interest in the outcome of a proceeding will not confer standing. The petitioner must allege some injury that has or will occur from the action taken as a result of the proceeding. Skagit/Hanford, supra, 15 NRC at 743.

Two tests must be satisfied to acquire standing: (1) petitioner must allege "injury-in-fact" (that some injury has occurred or will probably result from the action involved); (2) petitioner must allege an interest "arguably within the zone of interest" protected by the statute. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Warth v. Selden, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 428 (1984); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19 (1996); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55 (1997); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

It is not necessary that every injury asserted by petitioners be sufficiently concrete to satisfy these requirements; it is enough if some of the injuries claimed are, or result in, clearly adverse effects on petitioners. Kelley v. Selin, 42 F.3d 1501, 1507 (6th Cir. 1995), citing, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). An injury in fact must be "actual," "direct," and "genuine," but need not have already occurred. Potential or imminent injury is sufficient; there need only be a real possibility of concrete harm to a petitioner's interest as a result of the proceeding. Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 265 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

A petitioner must allege an "injury-in-fact" which must be within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). See Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 443, 444 (1991). A hearing petitioner bears the burden of establishing that the various injuries alleged to occur to its AEA-protected health and safety interests or its National Environmental Policy Act (NEPA)-protected environmental interests satisfy the three components of the injury in fact requirement. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993).

For purposes of assessing injury in fact (or any other aspect of standing), a hearing petitioner's factual assertions, if uncontroverted, must be accepted. Apollo, 37 NRC at 82. In evaluating a petitioner's claims of injury in fact, care must be taken to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." Apollo, 37 NRC at 82, citing City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), cert. denied, 117 L. Ed. 2d 460 (1992).

A petitioner must establish a causal nexus between the alleged injury and the challenged action. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 122 (1992); Apollo, supra, 37 NRC at 81; Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998); Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 276 (1998). When a petitioner is challenging the legality of government regulation of someone else, injury in fact as it relates to factors of causation and redressability is "ordinarily 'substantially more difficult' to establish." Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 n.20 (1993).

A petitioner who suffers only economic injury (i.e., harm to competition), lacks standing to bring a NEPA-based challenge to agency action. International Uranium (USA) (Receipt of material from Tonawanda, New York), CLI-98-23, 48 NRC 259 (1998); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998); both decisions were sustained on review in Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

A petitioner has not shown any reasonable nexus between himself or herself and any purported radiological impacts when, despite assertions about potential facility-related airborne and waterborne radiological contacts, he or she has not delineated these with enough concreteness to establish some impact on him that is sufficient to provide him or her with standing. By not providing any information that indicates whether water-related activities are being conducted upstream or downstream from a facility and by describing other activities only using vague terms such as "near," "close proximity," or "in the vicinity" of the facility at issue, the petitioner fails to carry his or her burden of establishing the requisite "injury in fact." Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425-26 (1997).

To attain standing, petitioners should show a plausible way in which activities licensed by the challenged amendment would injure them. The injury must be due to the amendment and not to the license itself, which was granted previously. The injury must occur to individuals whose residence is demonstrated in the filing and whom the organizations are authorized to represent. Energy Fuels Nuclear, Inc. (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429, 431 (1997).

It must be demonstrated that the injury is fairly traceable to the proposed action. Such a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible. Sequoyah Fuels Corp., supra, 40 NRC at 75. Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and

2), LBP-98-27, 48 NRC 271 (1998). It must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. Id. at 76.

An alleged injury to a purely legal interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990). But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123-26 1992), where the Licensing Board in a subsequent Perry license amendment proceeding declined to follow the ruling of the previous Perry board, (LBP-90-15 and LBP-90-25), supra. The Perry Board (LBP-92-4) held that § 189a of the Atomic Energy Act does not give a petitioner an absolute right to intervene in NRC proceedings, and only grants participation rights to a petitioner who has first established standing. An assertion of a procedural right to participate in NRC proceedings as an end in itself is insufficient to establish standing without a demonstration of a causal nexus with a substantive regulatory injury. But this was subsequently overturned by Commission in CLI-93-21 which essentially affirmed the earlier Perry decision and found that standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury, and the loss of rights to notice, opportunity for a hearing and opportunity for judicial review constitute a discrete injury. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-94 (1993).

With respect to "zone of interest," the Appeal Board, in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 103 n.6 (1976), rejected the contention that the Atomic Energy Act includes a "party aggrieved" provision which would require for standing purposes simply a showing of injury-in-fact. The Commission agreed with this analysis in its Pebble Springs decision. As such, zone of interest requirements are not met simply by invoking the Atomic Energy Act but must be satisfied by other means. The following should be noted with regard to "zone of interest" requirements:

(1) The directness of a petitioner's connection with a facility bears upon the sufficiency of its allegations of injury-in-fact, but not upon whether its interests fall within the zone of interest which Congress was protecting or regulating. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976).

(2) The Atomic Energy Act and its implementing regulations do not confer standing but rather require an additional showing that interests sought to be protected arguably fall within the zone of interests protected or regulated by the Act. Virginia Electric & Power Co., ALAB-342 supra; accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).

(3) While potential loss of business reputation is a cognizable "injury-in-fact," an interest in protecting business reputation and avoiding possible damage claims is not arguably within the zone of interest

which the Act seeks to protect or regulate. Virginia Electric & Power Co., ALAB-342, supra (business reputation of reactor vessel component fabricator clearly would be injured if components failed during operation; however, fabricator's interest in protecting his reputation by intervening in hearing on adequacy of vessel supports was not within the zone of interests sought to be protected by the Atomic Energy Act).

(4) The economic interest of a ratepayer is not sufficient to allow standing to intervene as a matter of right since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-1421 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977); Public Service Co. of Oklahoma (Black Fox Nuclear Power Station, Units 1 & 2), LBP-77-17, 5 NRC 657 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 130-31 (1992); Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 374 (1992). Nor is such interest within the zone of interests protected by the National Environmental Policy Act. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976).

(5) A person's interest as a taxpayer does not fall within the zone of interests sought to be protected by either the Atomic Energy Act or the National Environmental Policy Act. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

(6) Economic injury gives standing under the National Environmental Policy Act only if it is environmentally related. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1.977); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 39091 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 131 (1992). See also Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 640 (1975); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998) and International Uranium (USA) (Receipt of material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 264 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

The test is a cognizable interest that might be adversely affected by one or another outcome of the proceeding. No interest is to be presumed. There must be a concrete demonstration that harm could flow from a result of the

proceeding. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). The alleged injury, which may be either actual or threatened, must be both concrete and particularized, not "conjectural" or "hypothetical." As a result, standing has been denied when the threat of injury is too speculative. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

Concern that "bad precedent" may be set in a proceeding that could impact the petitioner's ability to contest similar matters in another proceeding is a "generalized grievance" that is "too academic" to provide the requisite injury in fact needed for standing as of right. See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), aff'd on other ground, CLI-92-11, 36 NRC 47 (1992), petition for review dismissed, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996).

A claim of personal injury that allegedly resulted from mismanagement would not result from the proposed extension of the construction permit completion date. Nor is such an injury protected under the AEA or NEPA. This grievance is in the area of employment rights and would not be redressed by a decision favorable to petitioners. A desire to expose alleged mismanagement is not an injury-in-fact and does not enhance petitioners position for standing. Texas Utilities Electric Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 375 (1992).

A petitioner must allege an "injury-in-fact" which he will suffer as a result of a Commission decision. He may not derive standing from the interests of another person or organization, nor may he seek to represent the interests of others without their express authorization. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

Although competitive injury may constitute injury in fact in an NRC licensing proceeding, a party relying for its standing on such injury must also demonstrate that it arguably falls within the zone of interests protected or regulated by the AEA or NEPA. Quivira Mining Corporation (Ambrose Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

An individual alleging that violation of constitutional provisions by governmental actions based on a statute will cause him identifiable injury should have standing to challenge the constitutionality of those actions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1445 (1982), citing, Chicano Police Officer's Association v. Stover, 526 F.2d 431, 436 (10th Cir. 1975), vacated and remanded on other grounds, 426 U.S. 994 (1976), holding on standing reaffirmed, 552 F.2d 918 (10th Cir. 1977); 3 K. Davis Administrative Law Treatise 22.08, at 240 (1958).

The courts have not resolved the issue of whether an individual who suffers economic injury as a result of a Board's decision to bar him from working in

a certain job would be within the zone of interests protected by the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). See, e.g., Consumers Power Co. (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).

Allegations that a plant will cause radiologically contaminated food which a person may consume are too remote and too generalized to provide a basis for standing to intervene. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1449 (1982); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

For antitrust purposes, the interest of a ratepayer or consumer of electricity is not necessarily beyond the zone of interests protected by Section 105 of the Atomic Energy Act. However, the petitioner must still demonstrate that an injury to its economic interests as a ratepayer would be the proximate result of anticompetitive activities by the licensee. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 592-593 (1978).

Antitrust considerations to one side, neither the Atomic Energy Act nor the National Environmental Policy Act includes in its "zone of interests" the purely economic personal concerns of a member/ratepayer of a cooperative that purchases power from a prospective facility co-owner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474-475 (1978). See also Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 744 (1982).

General economic concerns are not within the proper scope of issues to be litigated before the boards. Concerns about a facility's impact on local utility rates, the local economy, or a utility's solvency, etc., do not provide an adequate basis for standing of an intervenor or for the admission of an intervenor's contentions. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n.64 (1993). Such economic concerns are more appropriately raised before state economic regulatory agencies. Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991); Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 271 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

For an amendment authorizing transfer of 20% of the ownership of a facility, allegations that a petitioner would "receive" only 80% of the electricity produced by the plant rather than the 100% "assumed in the 'NEPA balance'" were insufficient to give standing as a matter of right because it was an economic injury outside the zone of interests to be protected and the NEPA cost-benefit analysis considers the overall benefits to society rather than benefits to an isolated portion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 390-90, aff'd, ALAB-470, 7 NRC 473 (1978).

The Commission applies judicial tests of "injury-in-fact" and "arguably within the zone of interest" to determine standing. "Injury" as a premise to standing must come from an action, in contrast to failure to take an action. One who claims that an Order in an enforcement action should have provided for more extensive relief does not show injury from relief granted and thus does not have standing to contest the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

Nuclear expert and citizens group who sought to challenge NRC reporting requirements (for performance-based containment leakage rate testing by nuclear power plants) fell within the zone of interests of the AEA because they arguably need access to information relating to successful as well as failed tests in order to exercise their rights under the AEA's hearing provision, 42 U.S.C. § 2239(a)(1)(A), and the § 2.206 petition provision. Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997).

An alleged future injury which is realistically threatened and immediate, and not merely speculative, may establish standing to intervene. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123 (1992). See Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 178-79 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994).

A request to transfer operating authority under a full power license for a power reactor may be deemed an action involving "clear implications for the offsite environment," for purposes of determining threshold injury. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 35 (1993).

An abstract, hypothetical injury is insufficient to establish standing to intervene. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, that is, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses

the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

An alleged injury to health and safety, shared equally by all those residing near a reactor, can form the basis for standing. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982).

The Atomic Energy Act authorizes the Commission to accord protection from radiological injury to both health and property interests. See AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b). Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).

Relative to a threshold standing determination, even minor radiological exposures resulting from a proposed license activity can be enough to create the requisite injury in fact. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70, aff'd, CLI-96-7, 43 NRC 235, 246-48 (1996). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 162-63 (1998).

A petitioner may base its standing upon a showing that his or her residence, or that of its members, is within the geographical zone that might be affected by an accidental release of fission products. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Close proximity has always been deemed enough standing alone, to establish the requisite interest for intervention. The incremental risk of reactor operation for an additional 13-15 years is sufficient to invoke the presumption of injury in fact for persons residing within 10 to 20 miles of the facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5 (1993). In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984), citing, South Texas, supra, 9 NRC at 443-44; Enrico Fermi, supra, 9 NRC at 78; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979).

An intervention petitioner who resides near a nuclear facility need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 287 (1995).

Petitioners may have standing if they reside close enough to a planned project so that there is reasonable apprehension of injury. When the staff delays issuance of the full license that is applied for, it is an indication of the reasonableness of petitioners' apprehensions of injury. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

A petitioner's identification of four organizational members whose interests have allegedly been injured or might be injured by actions taken in relation to the decommissioning process does not satisfy the "injury in fact" prong of the organizational standing test where those members live near the proposed site for the disposal of reactor materials and components and not near the site of the nuclear power plant from which the materials are to be removed. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.10 (1994).

A legislator lacks standing to intervene on behalf of the interests of his constituents who live near a nuclear facility. However, the legislator may participate in a proceeding in a private capacity if he can establish his own personal standing. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 358, n. 9 (1992).

In a materials license renewal proceeding under 10 CFR Part 30, as in construction permit and operating license proceedings under 10 CFR Part 50, the Appeal Board suggested that proximity to a large source of radioactive material is sufficient to establish the requisite interest for standing to intervene. Whether a petitioner's stated concern is in fact justified must be left for consideration when the merits of the controversy are reached. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982). See generally, LBP-82-24, 15 NRC 652 (1982), (decision reversed regarding petitioner's request to intervene). But see International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998). However, postcards and letters from individuals allegedly living near nuclear fuel element manufacturing and fuel element decladding facilities which make only vague and generalized allusions to danger or potential injury from radiation do not constitute a proper intervention statement. Rockwell International Corp. (Energy Systems Group Special Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777 (1983). More recent cases reject proximity to the site alone as a basis for standing. See Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993) (refusing to apply any presumption based on proximity and denying standing of petitioner residing within one eighth and within two miles of the facility). See

also Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997) (petitioner must assert reasonable nexus between himself and purported radiological impacts). Even though a license is conditional so that certain activities may not take place without further staff approval, the scope of the license is not narrowed. A petitioning party has standing to request a hearing if any of the activities under the license would cause injury. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

A presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).

Although residence within 50 miles is not an explicit requirement for intervention by right, that limit is consistent with precedent. Without a showing that a plant has a far greater than ordinary potential to injure outside a 50 mile limit, a person has a weak claim to the protection of a full adjudicatory proceeding; rulemaking or lobbying Congress are available to protect public interests of a general nature. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178-179 (1981); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 (1994).

However, the fact that a petitioner may reside within a 50-mile radius of a facility will not always be sufficient to establish standing to intervene. A Board will consider the nature of the proceeding, and will apply different standing considerations to proceedings involving construction permits or operating licenses than to proceedings involving license amendments. Thus, in a license amendment proceeding involving an existing facility's fuel pool, a Board denied intervention to a petitioner who resided 43 miles from the facility because the petitioner failed to demonstrate that the risk of injury from the fuel pool extended that far from the facility. Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985). But see, Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 213 (1992) [Intervention granted to petitioners residing within 1 to 3 miles after demonstrating the potential for injury from corrective redesign of the spent fuel pool].

A petitioner's residence within 50 miles of a nuclear facility was insufficient, by itself, to establish standing to intervene in an exemption proceeding where the exemption at issue involved the protection of workers in the facility and did not have the clear potential for offsite consequences affecting the general population. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 156-57 (1991) (proposed license amendments involved potential offsite safety consequences). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33

NRC 15, 29, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437 (1991); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 122 (1992); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 129-130 (1992); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 212-214 (1992); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998); Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271 (1998).

Residence more than 75 miles from a plant will not alone establish an interest sufficient for standing as a matter of right. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982), citing, Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Public Service Co. of Oklahoma (Black Fox Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977).

In an adjudicatory hearing regarding decommissioning plans, a hearing petition or supplementary petition which fails to allege any concrete or particularized injury that would occur as a result of the transportation of reactor materials or components to a low-level waste facility, does not satisfy the "injury in fact" prong. In addition, a petition fails to demonstrate "injury in fact" which only alleges that a petitioner's members live "close" to transportation routes that will be used for shipments of reactor materials and components to a low-level was facility and does not identify those routs or explain how "close" to those routes the petitioner's members actually live. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-02 (1994).

Where the Licensing Board rests its finding of standing on a combination of (a) the petitioners' proximity to the licensed facility, (b) petitioners' everyday use of the area near the reactor, and (c) the decommissioning effects described in the Commission's 1988 GEIS, the Commission determined that it was reasonable for the Board to find "that some, even if minor, public exposures can be anticipated" and "will be visited" on petitioners' members. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

There is no 50-mile presumption for determining areas in which environmental impacts must be evaluated. The standing requirement for

showing injury in fact has always been significantly less than for demonstrating an acceptable contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 248-49 (1993).

An organization has established standing by asserting that the Commission's decision not to prepare an environmental impact statement of the alleged de facto decommissioning of the Shoreham facility would injure the organization's ability to disseminate information which is essential to its organizational purpose and is within the zone of interests protected by the National Environmental Policy Act. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 435-36 (1991). The organization's alleged injury also was sufficient to establish standing in the Shoreham possession-only license proceeding where the organization asserted that the application for a possession-only license was another step in the alleged de facto decommissioning of the Shoreham facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541-43 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The organization is not required to suffer direct environmental harm in order to establish standing. The organization's alleged injury to its informational purpose is a cognizable injury under NEPA as long as there is a reasonable risk that environmental harm may occur. Shoreham, supra, 34 NRC at 135-36, citing, City of Los Angeles v. NHTSA, 912 F.2d 478, 492 (D.C. Cir. 1990). The Licensing Board in the Rancho Seco possession-only license proceeding has held that the alleged injury to an organization's ability to disseminate information is insufficient by itself to establish standing. There must also be a showing of a specific cognizable injury. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 27-28 (1991). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 57-61 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 128 (1992).

2.9.4.1.1.A Standing (Injury in Fact) and Zone of Interest Tests for Intervention in Informal Proceedings

In addressing the matter of standing in a decommissioning proceeding, to establish "injury in fact" it must be shown how any alleged harmful radiological, environmental, or other legally cognizable effects that will arise from activities under the decommissioning plan at issue will cause injury to each individual or organizational petitioner or, in the case of an organization relying upon representational standing, the members it represents. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153 (1992).

In contrast to rules governing the admission of contentions in formal adjudications under 10 CFR 2.714(b)(2), in specifying their areas of concern about the licensing activity that is the subject matter of the proceeding, see 10 CFR 2.1205(d)(3), the petitioners do not have to put forth a comprehensive exposition in support of the issues they wish to litigate. Nonetheless, to provide the presiding officer with a better understanding of their claims to aid him or her in making an informed determination about

whether those matters are germane to the proceeding, see 10 CFR 2.1205(g), the petitioners are well served by providing as much substantive information as possible regarding the basis for the concerns specified in their hearing petition. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154-55 (1992).

2.9.4.1.2 Standing of Organizations to Intervene

In order to establish organizational standing, an organization must allege: (1) that the action will cause an "injury in fact" to either (a) the organization's interests or (b) the interests of its members; and (2) that the injury is within the "zone of interests" protected by either the AEA. A party may intervene as of right only when he asserts his own interests under either the Energy Reorganization Act (ERA) or the National Environmental Policy Act (NEPA) and not when he asserts interests of third persons. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 68-69 (1996); aff'd, in part, CLI-96-7, 43 NRC 235 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343 (1998). A petitioning organization has standing to request a hearing if any of the activities under the license may cause injury to its interests or to one of its members. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

A party may intervene as of right only when he asserts his own interests under either the Atomic Energy Act or NEPA, and not when he asserts interests of third persons. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). Commission practice requires each party to separately establish standing. 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981). An organization may meet the injury-in-fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-113 (1979); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). Thus, a corporate environmental group has standing to intervene and represent members who have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Note, however, that a member's mere "interest in the problem" without a showing that the member will be affected is insufficient to give the organization standing. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). An

organization does not have independent standing to intervene in a licensing proceeding merely because it asserts an interest in the litigation. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976). An organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational interests that is within the scope of interests of the Atomic Energy Act or the National Environmental Policy Act. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-530 (1991). In this vein, for national environmental groups, standing is derived from injury-in-fact to individual members. South Texas, supra, 9 NRC at 647, citing, Sierra Club v. Morton, 405 U.S. 727 (1972). However, an organization specifically empowered by its members to promote certain of their interests has those members' authorization to act as their representative in any proceeding that may affect those interests. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1334 (1982); see Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-345 (1977); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-396 n.25 (1979); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13-15 (1994); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998). A member's authorization may be presumed when the sole or primary purpose of the organization is to oppose nuclear power in general or the facility at bar in particular. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 93-94 (1998). The petitioning organization must identify the members whose interests it represents, and state the members' places of residence and the extent of the members' activities located within close proximity to the plant. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991).

If individuals relied upon to establish representational standing for an organization fail to indicate they are members of that organization, their proximity to the facility cannot be used as a basis for representational standing. See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4) ALAB-952, 33 NRC 521, 530-31 (representational standing not present when individual relied on for standing is not organization member, but only representative of another organization), aff'd, CLI-91-13, 34 NRC185 (1991). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 n.11 (1996).

Merely because a petitioner may have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings, even if the scope of the earlier and later proceedings is similar. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 125-26 (1992).

Under certain circumstances, even if a current proceeding is separate from an earlier proceeding, the Commission may refuse to apply its rules of procedure in an overly formalistic manner by requiring that petitioners participating in the earlier proceeding must again identify their interests to participate in the current proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-14, 42 NRC 5, 7 (1995) (citing, Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2) LBP-91-33, 34 NRC 138 (1991).

For a case holding that a petitioner cannot assert the rights of third parties as a basis for intervention, see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, aff'd, ALAB-470, 7 NRC 473 (1978) (mother attempted to assert the rights of her son who attended medical school near a Proposed facility).

"[I]t is clear that an organization may establish its standing through the interest of its members; but, to do so, it must identify specifically the name and address of at least one affected member who wishes to be represented by the organization." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); see also Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994).

Thus, for representational standing, a group must identify at least one of its members by name and address and demonstrate how that member may be affected (such as by activities on or near the site) and show (preferably by affidavit) that the group is authorized to request a hearing on behalf of the member. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-549, 9 NRC 644, 646-47 (1979). Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 159, 163 (1998). The group must show that the amendment may injure the group, or someone the group is authorized to represent. International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 57 (1997).

A petitioner's identification of four organizational members whose interests have allegedly been injured or might be injured by actions taken in relation to the decommissioning process does not satisfy the "injury in fact" prong of the organizational standing test where those members live near the proposed site for the disposal of reactor materials and components and not near the site of the nuclear power plant from which the materials are to be

removed. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101-02 (1994).

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it. Fermi, supra, 8 NRC at 583. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990)]; Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

If an official of an organization has the requisite personal interests to support an intervention petition, her signature on the organization's petition for intervention is enough to give the organization standing to intervene. However the organization is not always necessarily required to produce an affidavit from a member or sponsor authorizing it to represent that member or sponsor. The organization may be presumed to represent the interests of those of its members or sponsors in the vicinity of the facility. (Where an organization has no members, its sponsors can be considered the equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization.) Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 728-729, 734-736 (1982).

An organization which bases its standing upon the interests of its sponsors must: (1) identify at least one sponsor who will be injured; (2) describe the nature of that injury; and (3) provide an authorization for the organization to represent the sponsor in the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 314 (1989).

To establish injury-in-fact, an organization must show a causal relationship between the alleged injury to its sponsor and the proposed licensing activity. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87 (1998).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979). See Dellums v. NRC, 863 F.2d 968, 972-73 (D.C. Cir. 1988).

A group does not have standing to assert the interest of plant workers, where it has no such workers among its members. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 11-12 (1993).

An organization seeking to obtain standing in a representative capacity must demonstrate that a member has in fact authorized such representation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2),

LBP-79-10, 9 NRC 439, 444 (1979), aff'd, ALAB-549, 9 NRC 644 (1979); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 185 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); see generally, CLI-81-25, 14 NRC 616 (1981), (Guidelines for Board); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 216 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 57 (1997). Where the affidavit of the member is devoid of any statement that he wants the organization to represent his interests, it is unwarranted for the Licensing Board to infer such authorization, particularly where the opportunity was offered to revise the document and was ignored. Beaver Valley, supra, 19 NRC at 411.

An organization was denied representational standing where the person on whom it based its standing was not an individual member of the organization, but instead was serving as the representative of another organization. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530-31 (1991).

To have standing, an organization must show injury either to its organizational interests or to the interests of members who have authorized it to act for them. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739-740 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91-92 (1990). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 389 (1991).

An organization depending upon injury to the interests of its members to establish standing, must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1976); Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 149 (1989); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315-16 (1989); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 565 (1990); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1),

LBP-91-1, 33 NRC 15, 29 (1991); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166 (1991); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-7, 33 NRC 179, 192-93 (1991); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-23, 33 NRC 430, 434 (1991); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-26, 33 NRC 537, 541 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The alleged injury-in-fact to the member must be within the purpose of the organization. Curators, supra, 31 NRC at 565-66.

Absent express authorization, an organization which is a party to an NRC proceeding may not represent persons other than its own members. Since there are no Commission regulations allowing parties to participate as private attorneys general, an organization acting as an intervenor may not claim to represent the public interest in general in addition to representing the specialized interests of its members. In this vein, a trade association of home heating oil dealers cannot be deemed to represent the interests of employees and customers of the dealers. Similarly, an organization of residents living near a proposed plant site cannot be deemed to represent the interests of other residents who are not members. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-77-11, 5 NRC 481 (1977); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982), citing, Shoreham, supra, 5 NRC at 481, 483. In a Subpart L proceeding, an organization lacked standing to litigate the consequences of a possible accident in a research laboratory where the health risks from the accident would be confined within the laboratory and the organization had not demonstrated that any of its members were workers inside the laboratory. Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103 (1990).

Indian Tribes, however, have been permitted to intervene as an entity, without demonstrating that a particular tribe member has an interest and wishes to be represented by the tribe. They also have participated in the more routine manner of identifying a tribe member who has individual standing but wishes representation. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996).

An organization must, in itself, and through its own membership, fulfill the requirements for standing. Skagit/Hanford, supra, 16 NRC at 984, citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

An organization has sufficiently demonstrated its standing to intervene if its petition is signed by a ranking official of the organization who himself has the requisite personal interest to support the intervention. An organization seeking intervention need not demonstrate that its membership had voted to seek intervention on the matter raised by a submitted contention, and had authorized the author of the intervention petition to represent the organization. Duke Power Company (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). Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 206-207 (1992) [the effect of ratification by a

principal of its agent's previous acts is to adopt those acts as the principal's own as of the time the agent acted].

An organization cannot meet the "interest" requirement for standing by acquiring a new member considerably after the deadline for filing of intervention petitions who meets the "interest" requirement, but who has not established good cause for the out-of-time filing. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 335 (1979). The organization cannot in this situation amend its original pleading to show the interest of the new member; the Licensing Board has interpreted 10 CFR § 2.714(a)(3) to permit amendment of a petition relative to interest only by those individuals who have made a timely filing and are merely particularizing how their interests may be affected. WPPSS, supra, 9 NRC at 336. But see, Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 288 (1995), wherein the Board found that membership on the date of the amended petition is sufficient for establishing standing, as supplying the name of an affected member is a permissible amendment.

Where the petitioner organization's membership solicitation brochure demonstrates that the organization's sole purpose is to oppose nuclear power in general and the construction and operation of nuclear plants in the northwest in particular, mere membership by a person with geographic standing to intervene, without specific representational authority, is sufficient to confer standing. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 482 (1983). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

A petitioner organization cannot amend its petition to satisfy the timeliness requirements for filing without leave of the Board to include an affidavit executed by someone who became a member after the due date for filing timely petition. WPPSS, supra, 17 NRC at 483.

It is not necessary for the individual on whom organizational standing is based to be conversant with, and able to defend, each and every contention raised by the organization in pursuing his interest. Litigation strategy and the technical details of the complex prosecution of a nuclear power intervention are best left to the resources of the organizational petitioners. WPPSS, supra, 17 NRC at 485.

10 C.F.R. § 2.715(c) does not give all governmental or quasi-governmental entities the right to participate in NRC adjudicative proceedings as full parties. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343 (1998), aff'd, CLI-98-21, 48 NRC 185 (1998).

2.9.4.1.3 Standing to Intervene in Export Licensing Cases

In Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission dealt with the question as to whether the Natural Resources Defense Council and the Sierra Club could intervene as of right and demand a hearing in an export licensing case. The case involved the export of fuel to India for the Tarapur project. The petitioners contended that at least one

member of the Sierra Club and several members of NRDC lived in India and thus would be subject to any hazards created by the reactor.

In rejecting the argument that there was a right to intervene, the Commission stated:

> If petitioners allege a concrete and direct injury their claim of standing is not impaired merely because similar harm is suffered by many others. However, if petitioners' asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction'. 3 NRC at 576.

The Commission held that the alleged interests were de minimis (3 NRC at 575), noting that, while in domestic licensing cases claims of risk that were somewhat remote have been recognized as forming a basis for intervention, Section 189(a) of the Act (42 U.S.C. § 2239(a)) would not be given such a broadly permissive reading (3 NRC at 571) in export licensing cases.

Consistent with its decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission has held that a petitioner is not entitled to intervene as a matter of right where its petition raises abstract issues relating to the conduct of U.S. foreign policy and protection of the national security. The petitioner must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. In the Matter of Ten Applications, CLI-77-24, 6 NRC 525, 531 (1977); Transnuclear, Inc. (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333, 336 (1998). Nevertheless, the Commission may, in its discretion, direct further public proceedings if it determines that such proceedings would be in the public interest even though the petitioner has not established a right under Section 189 of the Atomic Energy Act to intervene or demand a public hearing. Id. at 532. See also Braunkohle Transport. UZA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987), citing, 10 CFR § 110.84(a).

The contention that a major Federal action would have a significant environmental impact on a foreign nation is not cognizable under NEPA, and cannot support intervention. Babcock & Wilcox (Application for Considerations of Facility Export License), CLI-77-18, 5 NRC 1332, 1348 (1977).

Judicial precedents will be relied on in deciding issues of standing to intervene in export licensing. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 258 (1980). The Commission, throughout its history, has applied judicial standing tests to its export licensing proceedings. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).

Institutional interests in disseminating information and educating the public do not establish a claim of right under Section 189a of the Atomic Energy Act for purposes of standing because it would not constitute an interest affected by the proceeding. There must be a causal nexus between the refusal to allow standing and the inability to disseminate information. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 259 (1980).

Commission regulations in 10 CFR § 110.84(a)(1) provide that if a petitioner is not entitled to an AEA section 189a hearing as a matter of right because of a lack of standing, the Commission will nevertheless consider whether such a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the AEA. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 333 (1994).

Organization's institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient for to confer standing on the organization under section 189a of the Atomic Energy Act of 1954, as amended. Transnuclear, Inc., CLI-94-1, 39 NRC 1, 5 (1994).

2.9.4.1.4 Standing to Intervene in Specific Factual Situations

Residence within 30-40 miles of a reactor site has been held to be sufficient to show the requisite interest in raising safety questions. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631, 633-634 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Similarly, a person whose base of normal, everyday activities is within 25 miles of a nuclear facility can fairly be presumed to have an interest which might be affected by reactor construction and/or operation. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974). A petitioner must affirmatively state his place of residence and the extent of his work activities which are located within close proximity to the facility. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991). A person who regularly commutes past the entrance of a nuclear facility while conducting normal activities is presumed to have the requisite interest for standing. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990). Moreover, persons who allege that they use an area whose recreational benefits may

be diminished by a nuclear facility have been found to possess an adequate interest to allow intervention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973). On the other hand, it is proper for a Board to dismiss an intervention petition where the intervenor changes residence to an area not in the proximity of the reactor and totally fails to assume any significant participatory role in the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558 (1976).

The "proximity presumption" used in reactor construction and operating license proceedings should also apply to reactor license renewal proceedings. For construction permit and operating license proceedings, the NRC recognizes a presumption that persons who live, work or otherwise have contact within the area around the reactor have standing to intervene if they live within close proximity of the facility (e.g. 50 miles). Reactor license extension cases should be treated similarly because they allow operation of a reactor over an additional period of time during which the reactor can be subject to some of the same equipment failure and personnel error as during operations over the original period of the license. Duke Energy Corp. (Oconee Nuclear Station, Units 1,2, and 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998).

A petitioner who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility but who is not a minor or otherwise under a legal disability which would preclude his own participation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978).

"A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental release of fission products.' Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 371 n.6 (1973)." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973) (40 miles); Fermi, supra (35 miles).

A petitioner which bases its standing on its proximity to a nuclear facility must describe the nature of its property or residence and its proximity to the facility, and should describe how the health and safety of the petitioner may be jeopardized. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

The Licensing Board refused to allow intervention on the basis of the possibility of petitioners' consuming produce, meat products, or fish originating within 50 miles of the site. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979).

A petitioner owning and renting out farmland 10 to 15 miles from the site and visiting the farm occasionally was held not to meet standing requirements. WPPSS, supra, 9 NRC at 336-338.

One living 26 miles from a plant cannot claim, without more, that his aesthetic interests are harmed. Conjectural interests do not provide a basis for standing. Nor does economic harm or one's status as a ratepayer provide a basis for standing. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242, 243 n.8 (1980).

Intervenor organizations established their standing to intervene and seek relief regarding alleged health and safety or environmental injuries that may be visited upon their members who reside and engage in various activities in the area within 10 miles of a nuclear facility to be decommissioned. Because some, even if minor, public exposures can be anticipated from the decommissioning process, the Licensing Board is not "in a position at this threshold stage to rule out as a matter of certainty the existence of a reasonable possibility" that decommissioning might have an adverse impact to those, such as petitioners' members, who live or recreate in such close proximity to the facility, or use local waste transportation routes. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70 (1996); quoting, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

The fact that the petitioner is an intervenor with respect to the same issue in another proceeding does not give him standing to intervene for the purpose of protecting himself from adverse precedent in the proceeding in question. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Power Station, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 4 (1976).

Where there are two ongoing proceedings involving the same facility, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-23, 42 NRC 215, 217 (1995).

A petitioner's standing in a non-NRC proceeding is insufficient to establish standing in an NRC proceeding, at least in the absence of a showing of the equivalence of applicable standards and an overlap of relevant issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990).

Under certain circumstances, petitioners who participated in an earlier NRC proceeding will not be required to establish again their interests to participate in a subsequent, separate NRC proceeding involving the same facility. Thus, an organization which participated in an earlier proceeding as the representative of one of its members who resided in close proximity to the facility was conditionally granted leave to intervene in a subsequent, separate proceeding involving the same facility even though the organization failed to append affidavits to its intervention petition establishing the residence of its member. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). But see Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992).

Where a license amendment grants a co-licensee precisely the relief which the co-licensee seeks as a party to a pending proceeding, the co-licensee loses its standing to assert its claim in the proceeding. Nuclear Fuel Services and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982).

For the views of various Appeal Board members on whether a petitioner has the requisite interest where he has an economic interest which competes with nuclear power in generating electricity, see the three opinions in Long Island Lighting Co. (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631 (1975).

In a proceeding involving licensees' request to suspend the antitrust conditions in their operating licenses, a municipality established standing to intervene by demonstrating injury-in-fact based on a recently enacted municipal ordinance which provided for the construction, operation, and maintenance of a municipal electrical system. The municipality's possible future reliance on the existing antitrust conditions, imposed pursuant to Atomic Energy Act § 105, 42 U.S.C. § 2135, to protect its interest as a customer and competitor of the licensees was sufficient to place its interest within the zone of interests created by § 105. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-19, 36 NRC 98, 103-104 (1992).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

In a license amendment proceeding to allow two electric cooperatives to become co-owners of a nuclear plant, interests of a petitioner which stemmed from membership in the cooperative ("loss of equity," "threat of bankruptcy," "higher rates," "cost of replacement power," or "loss of property taxes") were insufficient to support standing as a matter of right. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Those persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for an extension of an existing construction permit, would have standing to intervene in [extension proceedings] to show that no good cause existed and, consequently, that new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-80-22, 12 NRC 191, 195, affirmed, ALAB-619, 12 NRC 558, 563-565 (1980).

Economic injury to ratepayers is not sufficient to confer standing upon State Commissions to challenge proposed license revocation because such injury results from termination of the project and not Commission "action," and because such injury cannot be redressed by favorable Commission action. Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-527-(1980) (views of Chairman Ahearn and Commissioner Hendrie).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979). Failure to produce an environmental impact statement in circumstances where required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116. If petitioners fail to respond to a presiding officer's reasonable and clearly articulated requests for more specific information regarding petitioners' claims of standing, the presiding officer is justified in rejecting the petitions for intervention. International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998).

2.9.4.2 Discretionary Intervention

Although a petitioner may lack standing to intervene as of right under judicial standing concepts, he may nevertheless be admitted to the proceeding in the Licensing Board's discretion. In determining whether discretionary intervention should be permitted, the Commission has indicated that the Licensing Board should be guided by the following factors, among others:

(a) Weighing in favor of allowing intervention --

(1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The nature and extent of the petitioner's property, financial. or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention --

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which the petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976). See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1435 (1982); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 35 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 17 n.16 (1990), aff'd, ALAB-952, 33 NRC 521, 532 (1991); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 249-51 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 182-83 (1992); see generally Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 141 (1993).

Under the six-factor test for discretionary intervention, a primary consideration is the first factor of assistance in developing a sound record. *See Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility, LBP-93-4, 37 NRC 72, 94 n.66 (1993) (If a hearing petitioner does not request permission to intervene in a proceeding as a matter of discretion, see Pebble Springs, CLI-76-27, 4 NRC at 614-17, it is not necessary to determine whether it could be afforded such intervention). The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979).

The primary factor to be considered is the significance of the contribution that a petitioner might make. Pebble Springs, supra. Thus, foremost among the factors listed above is whether the intervention would likely produce a valuable contribution to the NRC's decisionmaking process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 n.2 (1978); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 131-32 (1992). The need for a strong showing as to potential contribution is especially pressing in an operating license proceeding where no petitioners have established standing as of right and where, absent such a showing, no hearing would be held. Watts Bar, supra, 5 NRC at 1422. Where there are no intervenors as of right, a Licensing Board will determine whether a discernible public interest would be served by ordering a hearing based on a grant of discretionary intervention. Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 183-84 (1992).

For a case in which the Commission's discretionary intervention rule was applied, see Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976), where, despite petitioner's lack of judicial standing, intervention was permitted based upon petitioner's demonstration of the potential significant contribution it could make on substantial issues of law and fact not otherwise raised or presented and a showing of the importance and immediacy of those issues.

For discretionary intervention, the burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the petitioner's ability to contribute to development of a sound record include:

(1) a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;

(2) the specificity of such ability to contribute on those substantial issues of law or fact;

(3) justification of time spent on considering the substantial issues of law or fact;

(4) provision of additional testimony, particular expertise, or expert assistance;

(5) specialized education or pertinent experience.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990), aff'd, ALAB-952, 33 NRC 521, 532 (1991). Where a petitioner failed to respond to a Licensing Board order seeking clarification following presentation of evidence casting shadow on his purported qualifications, the Board was entitled to conclude that a petitioner would not help to create a sound record, and that the veracity of his other statements were suspect, leading to denial of his petition. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 457-458 (1979).

As to the second and third factors to be considered with regard to discretionary intervention (the nature and extent of property, financial or other interests in the proceeding and the possible effect any order might have on the petitioner's interest), interests which do not establish a right to intervention because they are not within the "zone of interests" to be protected by the Commission should not be considered as positive factors for the purposes of granting discretionary intervention. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, aff'd, ALAB-470, 7 NRC 473 (1978).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

In order for the Commission to grant a discretionary hearing in an export license proceeding, a petitioner must reflect in its submissions that it would offer something in a hearing that would generate significant new information or insight about the challenged action. The offer of "new evidence" that consists of documents that have already been in the public domain for some time does not meet the criteria for the grant of a discretionary hearing. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 334 (1994).

2.9.5 Contentions of Intervenors

Contentions constitute the method by which the parties to a licensing proceeding frame issues under NRC practice, similar to the use of pleadings in their judicial counterparts. Such contentions may be amended or refined as a result of additional information gained by discovery. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981). In proving its claim, a petitioner is not limited to the specific facts relied on to have its contention accepted, as long as the additional facts are material to the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 20-21 (1993).

The basis for a contention may not be undercut, and the contention thereby excluded, through an attack on the credibility of the expert who provided the basis for the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-98, 16 NRC 1459, 1466 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

The admission of a contention does not require anticipation of the contents of a document that has not been filed. A contention may address any current deficiency of the application, providing the contention is specific. Perry, supra, 16 NRC at 1469.

The Commission could not have intended that prior to admitting a contention advocating a safety measure, the Board should have found that a significant risk surely existed without such a safety measure. Such a finding should reflect the outcome of that litigation rather than its starting point. Consolidated Edison Co. of N.Y. (Indian Point, Unit 3) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, 16 NRC 1629, 1634 (1982).

A contention about a matter not covered by a specific rule need only allege that the matter poses a significant safety problem. That would be enough to raise an issue under the general requirement for operating licenses [10 CFR § 50.57(a)(3)] for finding of reasonable assurance of operation without endangering the health and safety of the public. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

An intervenor's failure to particularize certain contentions or even, arguendo, to pursue settlement negotiations, when taken by itself, does not warrant the out-of-hand dismissal of intervenors' proposed contentions. There is a sharp contrast between an intervenor's refusal to provide information requested by another party on discovery, even after a Licensing Board order compelling its disclosure, and the asserted failure of intervenors to take advantage of additional opportunity to narrow and particularize their contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 990 (1982).

Petitioners who have established their standing to present a contention that seeks modification or rejection of a nuclear facility decommissioning plan so as to avoid health and safety or environmental injury to the public also can pursue any contention alleging such modification/rejection relief based on circumstances such as purported occupational exposure to facility workers from decommissioning activities. *See* CLI-96-1, 43 NRC at 6. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70 (1996).

Pursuant to 10 CFR § 2.707, the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order, "to make such orders in regard to the failure as are just." The just result, where intervenors have not fully availed themselves of an opportunity to further particularize their contentions, is to simply rule on intervenors' contentions as they stand, dismissing those proposed contentions which lack adequate bases and specificity. Shoreham, supra, 16 NRC at 990; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 (1985).

The Licensing Board may limit the time for the filing of contentions to less than that normally allotted by the rules, 10 CFR § 2.714(a)(3) and (b), so that all participants know before they arrive at the special prehearing conference, what position the proponents of the plant are taking on the various contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). See also General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983) and Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

The pleading requirements set out in 10 CFR § 2.714 do not preclude a party from filing contentions in the original request for hearing and petition to intervene, but to be admissible the contentions must meet the specific pleading requirements set out in section 2.714(b) and (d). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993).

A Licensing Board should not address the merits of a contention when determining its admissibility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982), citing, Allens Creek, supra, 11 NRC at 542; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 933 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 446 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC 127 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). See Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984), citing, Allens Creek, supra, 11 NRC 542; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974), rev'd on other grounds, CLI-74-12, 7 AEC 203 (1974); and Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244-45 (1973). What is required is that an intervenor state the reasons for its concern. Seabrook, supra, citing, Allens Creek, supra.

The issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991).

The scope of permissible contentions is normally bounded by the scope of the proceeding itself. On remand from the Commission, however, the scope of issues is confined to issues identified by the Commission. Beyond that, however, an intervenor may seek to file late-filed contentions, subject to a balancing of the five factors set forth in 10 CFR § 2.714(a)(i)-(v), within the scope of the entire proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 206 (1993).

In a license amendment proceeding, a petitioner's contentions must focus on the issues identified in the notice of hearing, the amendment application, and the Staff's environmental responsibilities relating to the application. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991). A petitioner's allegation that a prior Licensing Board ruling is erroneous is a request for reconsideration and is not a proper subject for a contention. Shoreham, supra. 34 NRC at 282; Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-28, 48 NRC 279 (1998).

The regulation governing the filing period for proposed contentions states simply that they must be filed "not later than . . . fifteen . . . days prior to the holding of the first prehearing conference." 10 C.F.R. § 2.714(b)(1). By its terms, this regulation establishes only the latest time for filing proposed contentions. It does not preclude either the Board or the Commission from shortening that time frame. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 344 (1998).

Relevance is not the only criterion for admissibility of a contention. 10 CFR § 2.714 requires that the bases for each contention must be set forth with reasonable specificity. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1821 (1982). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-84 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617, 627 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 187 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 188 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 851 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 842, 847 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 162, 165 (1987), aff'd, ALAB-880, 26 NRC 449, 456 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 292-94 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, 458 (1988), aff'd, ALAB-893, 27 NRC 627 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 45-47 (1989) (documents cited by intervenors did not provide adequate bases for proposed contention), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). A long and detailed list of omissions and problems does not, without more, provide a basis for believing that there is a safety issue. Discovered problems are not in themselves grounds for admitting a contention. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 240 (1986).

The purposes of the basis-for-contention requirement are: (1) to help assure that the hearing process is not improperly invoked, for example, to attack statutory requirements or regulations; (2) to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose; (3) to assure that the proposed issues are proper for adjudication in the particular proceeding - i.e., generalized views of what applicable policies ought to be are not proper for adjudication; (4) to assure that the contentions apply to the facility at bar; and (5) to assure that there has been sufficient foundation assigned for the contentions to warrant further explanation. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987); Sierra Club v. NRC, 862 F.2d 222, 227-28 (9th Cir. 1988).

The fact that the Office of Investigation and the Office of Inspector and Auditor are investigating otherwise unidentified allegations is insufficient basis for admitting a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 858 (1986).

A Licensing Board will deny, without prejudice, a basis for a contention which involves an issue that is already under consideration by the Commission Staff. It would be premature for a Licensing Board to litigate an issue when a Commission determination might make the issue moot. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 341 (1991).

Neither the Commission's Rules of Practice nor the pertinent statement of consideration puts an absolute or relative limit on the number of contentions that may be admitted to a licensing proceeding. See 10 CFR § 2.714(a), (b); 43 Fed. Reg. 17798, 17799 (April 26, 1978). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982).

Pro se intervenors are not held in NRC proceedings to a high degree of technical compliance with legal requirements and, accordingly, as long as parties are sufficiently put on notice as to what has to be defended against or opposed, specificity requirements will generally be considered satisfied. However, that is not to suggest that a sound basis for each contention is not required to assure that the proposed issues are proper for adjudication. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-83-5, 17 NRC 134, 136 (1983).

Agency procedural requirements simply raising the threshold for admitting some contentions as an incidental effect of regulations designed to prevent unnecessary delay in the hearing process are reasonable. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983).

Should the subsequent issuance of the SER lead to a change in the FSAR and thereby modify or moot a contention based on that document, that contention can be amended or promptly disposed of by summary disposition or a stipulation. However, the possibility that such a circumstance could occur does not provide a reasonable basis for deferring the filing of safety-related contentions until the Staff issues its SER. Catawba, supra, 17 NRC at 1049.

NRC has the burden of complying with NEPA. The adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing proceeding. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. That does not mean that no environmental contentions can be formulated before the Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. Just as the submission of a safety-related contention based on the FSAR is not to be deferred simply because the Staff may later issue an SER

requiring a change in a safety matter, so too, the Commission expects that the filing of an environmental concern based on the applicant's environmental report will not be deferred simply because the Staff may subsequently provide a different analysis in its DES. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). See 10 CFR § 2.714(b)(2)(iii), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

2.9.5.1 Pleading Requirements for Contentions

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the U.S. Court of Appeals for the D.C. Circuit upheld, in part, the pleading requirements of 10 CFR § 2.714 governing petitions to intervene. Specifically, the Court ruled that:

(a) the requirement that contentions be specified does not violate Section 189(a) of the Act; and

(b) the requirement for a basis for contentions is valid.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982), citing, BPI v. Atomic Energy Commission, 502 F.2d 424, 428-429 (D.C. Cir. 1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 n.5 (1985).

NRC regulations require that an admissible contention consist of (1) a specific statement of the issue to be raised or converted; (2) a brief explanation of the bases for the contention; (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing; and (4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. See 10 CFR § 2.714(b)(2). Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 117-18 (1995); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996). A failure to comply with any of these requirements is grounds for dismissing the contention. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 117-18 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 365 (1998).

A petitioner who satisfies the interest requirement will be granted intervention if he states at least one contention within the scope of the proceeding with a proper factual basis. The Licensing Board has no duty to consider additional contentions for the purpose of determining the propriety of intervention once it has found that at least one good contention is stated. Mississippi Power & Light Co. (Grand Gulf

Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 220 (1976). Although these cases predate amendments to 10 CFR § 2.714, those amendments retain, and in fact specifically recite, the "one good contention rule." See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622 (1981); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 916 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 261 (1986); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-20, 33 NRC 416, 417 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 284 (1991); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 360 (1991); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 163 (1998).

The bare pendency of an investigation does not reflect that there is a substantive problem, or that there has been any violation, or that there even exists an outstanding significant safety issue, and thus cannot serve as a valid basis for a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 446 (1993).

Since a mandatory hearing is not required at the operating license stage, Licensing Boards should "take the utmost care" to assure that the "one good contention rule" is met in such a situation because, absent successful intervention, no hearing need be held. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 n.10 (1974).

Note that a State participating as an "interested State" under 10 CFR § 2.715(c) need not set forth in advance any affirmative contentions of its own. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-393 (1976).

Reasonable specificity requires that a contention include a reasonably specific articulation of its rationale. If an applicant believes that it can readily disprove a contention admissible on its face, the proper course is to move for summary disposition following its admission, not to assert a lack of specific basis at the pleading stage. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070-2071 (1982).

Particularly in the context of dealing with pro se petitioners, a finding regarding a contention's specificity should include consideration of the contention's bases. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (both contention and stated bases should be considered when question arises regarding admissibility of contention). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 162 (1996).

An intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984), citing, Catawba, supra, 16 NRC at 468. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 175-76 (1991). In Catawba, supra, the Board dealt with the question of whether the intervenor had provided sufficient information to support the admission of its contentions. An Appeal Board has rejected an applicant's claim that Catawba imposes on an intervenor the duty to include in its contentions a critical analysis or response to any applicant or NRC Staff positions on the issues raised by the contentions which might be found in the publicly available documentary material. Such detailed answers to the positions of other parties go, not to the admissibility of contentions, but to the actual merits of the contentions. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 62931 (1988). The "ironclad obligation" of a petitioner to examine publicly available documentary evidence in support of its contentions applies only to information in support of a contention. A requirement also to examine contrary publicly available documentary evidence would unduly exacerbate the considerable threshold that a petitioner must already meet under the current revised contention rules. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 22 n.29 (1993).

The basis and specificity requirements are particularly important for contentions involving broad quality assurance and quality control issues. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 634 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983).

Nor is a Licensing Board authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 635 (1985), rev'd and remanded on other grounds,

CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). The Braidwood Board permitted the intervenor to conduct further discovery and to amend its late-filed contention in order to comply with the basis and specificity requirements. The Board was willing to accommodate the intervenor because its contention involved potentially serious safety issues concerning the applicant's QA/QC program. Braidwood, supra, 21 NRC at 634-636, citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 509-511 (1984). According to the Board, its decision was not a conditional admission of a contention in violation of the Catawba ruling. The Board explained that it did reject the intervenor's late-filed contention, and that it properly exercised its discretion by giving the intervenor the opportunity to file an amended contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1737-39 (1985), rev'd and remanded, CLI-86-8, 23 NRC 241 (1986). The precedential value of the Licensing Board's allowance of further discovery and the subsequent filing of an amended contention is in doubt because of the Commission's reversal of the Licensing Board's admission of the contention for failure to satisfy the 10 CFR § 2.714(a)(1) standards for late-filed contentions. Braidwood, supra, 23 NRC 241. See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 476-79 (1985) (Moore, J., dissenting).

A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).

A Licensing Board has defined the failure to demonstrate the existence of a genuine dispute on a material issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of applicant's documents or that provide supporting reasons that tend to show that there is some specified omission from applicant's documents. The intervention petitioner in this case did not advance an independent basis for any of its contentions, and instead relied on alleged omissions and errors in the applicant's documents and analyses. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 515, 521 & n.12 (1990), citing, 10 CFR §§ 2.714(b) (2)(ii) and (iii).

Environmental contentions, to the extent possible, must be submitted on the basis of the licensee's Environmental Report (ER) and may not await the Staff's environmental document. The contentions may be amended or expanded if there are data or conclusions in the NRC issuance that differ significantly from data or conclusions in the ER. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993).

A recent amendment to the Commission's regulations has superseded prior NRC caselaw which held that 10 CFR § 2.714 did not require a petitioner to detail the evidence which would be offered in support of its proposed contentions. 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). 10 CFR § 2.714(b)(2)(ii) now specifically requires a petitioner to

provide a concise statement of the alleged facts or expert opinion which support its proposed contention, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. There is no regulatory requirement that an intervenor supply all the bases known at the time he files a contention. What is required is the filing of bases on which the intervenor intends to rely. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37, 39 (1994). The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-9121, 33 NRC 419, 422-24 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 166, 169-170, 175-76 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 279 (1991); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 214 (1992); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205 (1993); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

Under 2.714(b)(2)(iii) a contention is inadmissible where it fails to contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the application that Petitioners may dispute. Texas Utilities Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

A contention filed in an application proceeding to extend the completion date of a construction permit is not admissible where it does not directly challenge the Applicant's alleged good-cause justification for the delay. Petitioners' allegations of corporate wrongdoing do not show that a genuine dispute exists with Applicant on its justification for the delay. Texas Utilities Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

Contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the requirements of 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 188-190, 193 (1982); see generally, CLI-81-25, 14 NRC 616 (1981) (guidelines for Board).

A simple reference to a large number of documents does not provide a sufficient basis for a contention. An intervenor must clearly identify and summarize the incidents being relied upon, and identify and append specific portions of the documents. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1

and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

When a broad contention (though apparently admissible) has been admitted at an early stage in the proceeding, intervenors should be required to provide greater specificity and to particularize bases for the contention when the information required to do so has been developed. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-28, 20 NRC 129, 131 (1984).

The Commission's Rules of Practice do not require that a contention be in the form of a detailed brief; however, a contention, alleging an entire plan to be inadequate in that it fails to consider certain matters, should be required to specify in some way each portion of the plan alleged to be inadequate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982).

Originality of framing contentions is not a pleading requirement. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980).

The bases for a contention need not originate with the petitioner. Thus a petitioner seeking to challenge the adequacy of an application may base its contention on information contained in an NRC Staff letter to an applicant which requests additional information based on a regulatory guide citation. However, in order for the contention to be admissible, the petitioner must provide an adequate explanation of how alleged deficiencies support its contention and provide additional information in support. Louisiana Energy Services L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-339 (1991). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 136 (1992), appeal granted in part and remanded, CLI-93-3, 37 NRC 135 (1993).

The rules governing the admissibility of contentions (10 CFR § 2.714(b) and (d) were amended in 1989 to raise the threshold for the admission of contentions. Those rules now require, inter alia, a specific statement of law or fact to be raised or controverted, a brief explanation of the bases, a concise statement of facts or expert opinion that support the contention (with references to specific sources and documents), and sufficient information to show that a genuine issue exists with the applicant or licensee on a material issue. On NEPA issues, contentions are to be based, at least initially, on the applicant's or licensee's environmental report. The contention must, if proved, entitle the claimant to some relief. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205-06 (1993).

The "raised Threshold" for contentions must be reasonably applied and is not to be mechanically construed. Rules of practice are not to be applied in an "overly formalistic" manner. Rancho Seco, 38 NRC at 206.

Extraneous matters such as preservation of rights, statements of intervention, and directives for interpretation which accompany an **intervenor's list** of contentions will be disregarded as contrary to the Commission's Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-690 (1980).

It is not essential that pleadings of contentions be technically perfect. The Licensing Board would be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 650 (1979).

It 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. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116117 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987). However, a party is bound by the literal terms of its own contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 505 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 242 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 254 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 371-372 & n.310 (1991); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 166 (1998).

In order to determine the scope of an otherwise admissible contention, a Board will consider the contention together with its stated bases to identify the precise issue which the intervenor seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988).

A contention must be rejected where: it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be; it seeks to raise an issue which is not proper for adjudication in the proceeding; or it does not apply to the facility in question; or it seeks to raise an issue which is not concrete or litigable. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1268-1269 (1983); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 365 (1998).

At the pleading stage all that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1193 n.39 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 23-24 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 282 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411 (1991), appeal denied, CLI-91-12, 34 NRC 149 (1991).

At the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (citing, Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989), quoting Connecticut Bankers Association v. Board of Governors, 627 F.2d 245 (D.C. Cir. 1980).

In pleading for the admission of a contention, an intervenor is not required to prove the contention, but must allege at least some credible foundation for the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

Serious violations or other incidents may form the basis for a contention challenging the adequacy of management of a facility. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 297 (1995).

A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984), citing, Peach Bottom, supra, 8 AEC at 20-21; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1742 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427-28 (1990).

Consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 CFR § 2.714(d)(2)(ii), issues that would constitute "defenses" to an enforcement order are subject to dismissal under the appropriate circumstances. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 334 n.5 (1994); citing, Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 33 n.4 (1994).

2.9.5.2 Requirement of Oath from Intervenors

Amendments to 10 CFR § 2.714, effective on May 26, 1978, eliminated the requirement that petitions to intervene be filed under oath.

2.9.5.3 Requirement of Contentions for Purposes of Admitting Petitioner as a Party

10 CFR § 2.714 requires that there be some basis for the contentions set forth in the supplement to the petition to intervene and that the contentions themselves be set forth with particularity. In deciding whether these criteria are met, Licensing Boards are not to decide whether the proposed contentions are meritorious. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-183, 7 AEC 210, 216 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973). The Appeal Board has prohibited Licensing Boards from dismissing contentions on the merits at the pleading stage even if demonstrably insubstantial. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 789 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).

For a petitioner who supports a license application, all that need be initially asserted to fulfill the contention requirement of 10 CFR § 2.714 is that the application is meritorious and should be granted. After contentions opposing the

license application have been set forth, however, the Licensing Board is free to require intervenors supporting the application to take a position on those contentions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978).

Where intervenors have been consolidated, it is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

Recent amendments of 10 CFR § 2.714 have raised the threshold for the admission of a petitioner's proposed contentions. 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). A petitioner must provide a concise statement of the alleged facts or expert opinion which support its proposed contentions, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. 10 CFR § 2.714(b)(2)(ii). The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 166, 169-170, 175-76 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 279 (1991); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991).

Under 10 C.F.R. §2.714(b)(2)(ii)-(iii), to be admissible a contention must contain a specific statement of an issue of fact or law raised or controverted in a proceeding that is supported by a "basis" of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or opinions. The basis must be sufficient to show that a genuine dispute exists with the applicant on a material issue of fact or law. Moreover, while the intervenor need not prove its case at the contention stage or present factual support in affidavit or evidentiary form sufficient to withstand a summary disposition motion, it nonetheless must make a minimal showing that material facts are in dispute such that a further inquiry is appropriate, And, or course, any contention must fall within the scope of the issues set forth in the notice of opportunity for hearing on the proposed licensing action. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70-71 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235; (citing, Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 117-18 (1995)); Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998).

Under 10 CFR § 2.714(b)(2)(iii), if an application contains disputed information or omits required information, the petitioner normally must specify the portions of the application that are in dispute or are incomplete. However, a petitioner need not refer to a particular portion of the licensee's application when the licensee neither identified, nor was obligated to identify, the disputed issue in its application. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 41 (1993).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a "regulatory gap," the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing, 10 CFR § 2.758.

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The petitioners cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for denying admission of those proffered contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235.

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. Allens Creek, supra, 10 NRC at 524.

2.9.5.4 Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the Applicant's Environmental Report for factual material in support of a proposed contention. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979). A petitioner must file contentions based on any environmental issues raised by the applicant's Environmental Report. However, the petitioner may be permitted to file new or amended contentions based on new information contained in subsequent NRC environmental documents. 10 CFR § 2.714(b)(2)(iii), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993).

The specificity and basis requirements for a proposed contention under 10 CFR § 2.714(b) can be satisfied where the contention is based upon allegations in a sworn complaint filed in a judicial action and the applicable passages therein are specifically identified. This holds notwithstanding the fact that the allegations are contested. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292-94 (1984).

Once a contention has been admitted, Intervenor may litigate a new basis for the admitted contention (falling within the scope of the contention) without meeting the five-pronged test for a late-filed contention. The test for admitting the new basis is whether it is timely to consider the new basis, in light of its seriousness and of the timeliness with which it has been raised. The more serious the safety implications of the proposed new basis, the less important delay in presenting the basis. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37, 39 (1994).

An intervenor can establish a sufficient basis for a contention by referring to a source and drawing an assertion from that reference. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 69-70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); see also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 146 (1993).

To form the basis for an admissible contention, allegations of management improprieties or lack of "integrity" must be of more than historical interest: they must relate directly to the proposed licensing action. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

A document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show. When a report is the central support for a contention's basis, the contents of that report in its entirety is before the Board and, as such, is subject to Board scrutiny, both as to those portions of the report that support an intervenor's assertions and those portions that do not. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

Attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99 (1988).

A petitioner's imprecise reading of a reference document, or typographical errors in that document, cannot serve to generate an issue suitable for litigation. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995). 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. Id. at 305.

However, where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, a Licensing Board will dismiss the contention if the intervenor cannot offer another independent source of information on which to base the contention. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

An intervention petitioner may rely upon an NRC Staff regulatory guide to support a contention alleging that an application is deficient. The petitioner must provide an adequate explanation of how alleged inadequacies support its contention and provide additional information in support. It is insufficient for a petitioner to merely refer to a Staff letter to an applicant which requests additional information based on a regulatory guide citation. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-339, 347, 354 (1991). Furthermore, it is well established that NUREG's and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 98, 100 (1995). Nor does the NRC's review of regulations governing a particular issue serve as a basis for a particular contention concerning that issue. A petitioner's differing opinion as to what applicable regulations should (but do not) require also cannot serve as a basis for a contention. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 303 (1995).

2.9.5.5 Timeliness of Submission of Contentions

Not later than 15 days before a special prehearing conference or, where no special prehearing conference is held, 15 days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of his contentions. Additional time for filing the supplement may be granted based upon a balancing of the factors listed in 10 CFR § 2.714(a)(1). 10 CFR § 2.714(b); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-671, 15 NRC 508 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67-68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power station), ALAB-919, 30 NRC 29, 40 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990)

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

In considering the admissibility of late-filed contentions, the Licensing Board must balance the five factors specified in 10 CFR § 2.714(a) for dealing with nontimely filings. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear station), LBP-79-22, 10 NRC 213, 214 (1979); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). In addition, late-filed contentions filed on subsequently issued NRC environmental review documents are subject to the five factor test set forth in 10 CFR § 2.714(a)(1)(i)-(v). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993).

A late filed contention must meet the requirements concerning good cause for late filing pursuant to 10 CFR § 2.714(a)(1). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-90, 16 NRC 1359, 1360 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983).

The factors which must be balanced in determining whether to admit a late filed contention pursuant to 10 CFR § 2.714(a)(1) are: (1) Good cause, if any, for failure to file on time; (2) The availability of other means whereby the petitioner's interest will be protected; (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) The extent to which the petitioner's interest will be represented by existing parties; (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-30, 17 NRC 1132, 1141 (1983); Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261-1262 (1983), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1405 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating station, Unit 1), LBP-84-1, 19 NRC 29, 31,(1984), citing, Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1291 (1984), citing, Catawba, supra, 17 NRC 1041; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 52,6 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina ,Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 913-14 (1985); Texas Utilities Electric Co. (Comanche Peak steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579-80 (1986), aff'd, ALAB-868, 25 NRC 912, 921 (1987); Public Service Co. of New Hampshire

(Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 74 n.4 (1987); Public Service Co. of New Hampshire (Seabrook station, Units and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 447-48 & n.9 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC 127 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-907, 32 NRC 129 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 291 (1998).

The test to be applied to determine whether to admit for litigation a new basis for an admitted contention is "whether the motion [to admit the contention] was timely and whether it presents important information regarding a significant issue." Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1296 (1984); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-27, 40 NRC 103, 105 (1994).

A licensing board need not address in any particular order whether a late-filed contention meets the basis and specificity requirements and satisfies late-filed contention requirements so long as both are addressed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 436-37 (1993).

A Board must perform this balancing of the five lateness factors, even where all the parties to the proceeding have waived their objections and agreed, by stipulation, to the admission of the late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 251 (1986). See Boston Edison Co. (Pilgrim Nuclear Power station), ALAB-816, 22 NRC 461, 466 (1985).

The required balancing of factors is not obviated by the circumstances that the proffered contentions are those of a participant that has withdrawn from the proceeding. South Texas, supra, 16 NRC at 1367, citing, Gulf states Utilities Co. (River Bend station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977).

In balancing the lateness factors, all factors must be taken into account; however, there is no requirement that the same weight be given to each of them. South Texas, supra, 16 NRC at 1367, citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). A Board is entitled to considerable discretion in the method it

employs to balance the five lateness factors. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Virginia Electric and Power Co. (North Anna Power station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976).

Considerable importance generally has been attributed to factor one -- "good cause" for late filing -- in that a failure to meet this factor enhances considerably the burden of justifying the other factors. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996). Among the other four "late-filing" factors, factors three and five -- contribution to a sound record and broadening issues/delay in the proceeding -- generally have been considered as having the most significance in proceedings in which there are no other parties or ongoing related proceedings. See Shoreham, ALAB-743, 18 NRC at 399, 402; see also South Texas, LBP-82-91, 16 NRC at 368. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 25 (1996); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286 (1998).

When there are no other available means to protect a petitioner's interests, that factor and the factor of the extent to which other parties would protect that interest are entitled to less weight than the other three factors enumerated in 10 CFR § 2.714(a). Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-42, 18 NRC 112, 118 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 245 (1986); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

Where good cause for failure to file on time has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner without a good excuse for lateness may be required to take the proceeding as he finds it. South Texas, supra, 16 NRC at 1367, 1368, citing, Nuclear Fuel Services. Inc. and N.Y.S. Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975).

Where good cause for a late filing is demonstrated, the other factors are given lesser weight. Midland, supra, 16 NRC at 589; Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984).

Generally a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In some instances, however, the answer to the "good cause" factor may involve more than looking at the dates on the various documents submitted by the petitioners. Instead, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the new information "puzzle" were sufficently in place to make the particular concerns espoused reasonably apparent. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996).

In considering the extent to which the petitioner had shown good cause for filing supplements out-of-time, the Licensing Board recognized that the petitioner was appearing pro se until just before the special prehearing conference. Petitioner's early performance need not adhere rigidly to the Commission's standards and, in this situation, the Board would not weigh the good cause factor as heavily as it might otherwise. Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979).

Withdrawal of one party has been held not to constitute good cause for the delay of a petitioner in seeking to substitute itself for the withdrawing party, or, comparably, to adopt the withdrawing party's contentions. South Texas, supra, 16 NRC at 1369, citing, Gulf States Utilities Co. (River Bend station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977). The same standards apply to an existing intervenor seeking to adopt the abandoned contentions of another intervenor as to a "newly arriving legal stranger." South Texas, supra, 16 NRC at 1369. However, if under the circumstances of a Particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 (1985), citing, River Bend, supra, 6 NRC at 796.

The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982). Compare, LBP-82-53, 16 NRC 196, 200-01 (1982) (Up-to-date journals demonstrate good cause) and LBP-82-15, 15 NRC 555, 557 (1982).

The fact that petitioners raise an argument to support admission of a contention for the first time late in a proceeding is not necessarily fatal where the argument rests significantly on a licensee document prepared after the petitioner submitted its original contention and where petitioners promptly bring it to the adjudicator's attention. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996).

An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available several months prior to the filing of the contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628-629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

The determination whether to accept a contention that was susceptible of filing within the period prescribed by the Rules of Practice on an untimely basis involves a consideration of all five 10 CFR § 2.714(a) factors and not just the reason, substantial or not as the case may be, why the petitioner did not meet the deadline. Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-687, 16 NRC 460, 470 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

The proponent of a late contention should affirmatively address the five factors and demonstrate that, on balance, the contention should be admitted. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

Section 189a of the Atomic Energy Act of 1954, as amended ("Atomic Energy Act" or "Act") does not require the Commission to give controlling weight to the good cause factor in 10 CFR § 2.714(a)(1)(i) in determining whether to admit a late-filed contention based on licensing documents which were not required to be prepared early enough to provide a basis for a timely-filed contention. The unavailability of those documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983).

The institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 436-37 (1984); Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 84-85 (1985). Section 189a of the Act is not offended by a procedural rule that simply recognizes that the public's interest in an efficient administrative process is not properly accounted for by a rule of automatic admission for certain late-filed contentions. Catawba, supra, 17 NRC at 1046. See Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045-47. Cf. BPI v. AEC, 502 F.2d 424 (D.C. cir. 1974).

10 CFR § 2.714(a)(1) requires that all five factors enumerated in that regulation should be applied to late-filed contentions even where the licensing-related document, upon which the contentions are predicated, was not available within the time prescribed for filing timely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19 supra, 17 NRC at 1045; Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 207 (1994). The Commission has held that any refiled contention would have to meet the five-factor test of 10 CFR § 2.714(a)(1), if not timely filed, even if the specifics could not have been known earlier because the documents on which they were based had not yet been issued. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 796 (1983), citing, Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-13, 17 NRC 1041 (1983).

Even where an applicant does not comply with a standing order to serve all relevant papers on the Board and parties, the admissibility of an intervenor's late-filed contention directed toward such papers must be determined by a balancing of all five factors. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-765, 19 NRC 645, 657 (1984), overruling in part, LBP-84-16, 19 NRC 857, 868 (1984).

Under 10 CFR § 2.714(a), good cause may exist for a late-filed contention if it: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into existence and is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in that section. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n:4 (1983), citing, Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). However, an intervenor is not required to file contentions based upon a draft licensing-related document. West Chicago, supra, 29 NRC at 514.

An intervenor who has previously submitted timely contentions may establish good cause for the late filing of amended contentions by showing that the amended contentions: restate portions of the earlier timely-filed contentions; and were promptly filed in response to a Commission decision which stated a new legal principle. Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), LBP-86-36A, 24 NRC 575, 579 (1986), aff'd, ALAB-868, 25 NRC 912, 923 (1987).

A submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

The fact that a party may have delayed the filing of a contention in the hopes of settling the issue without resorting to litigation in an adjudicatory proceeding does not constitute good cause for failure to file on time. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

The admissibility of a late-filed contention must be determined by a balancing of all five of the late intervention factors in 10 CFR § 2.714(a). Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

When an intervenor does not show good cause for the nontimely submission of contentions, it must make a compelling showing on the other four criteria of 10 CFR § 2.714(a). Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-8511, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 244 (1986); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 (1987); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286 (1998); Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998).

With respect to the second factor of 10 CFR § 2.714(a) (availability of other means of protecting late petitioners' interest) and the fourth factor (the extent to which late petitioners' interest will be represented by existing parties), the applicants in Zimmer, supra, 10 NRC at 215, claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless an issue was raised in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra, 10 NRC at 215; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-528 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2),

ALAB-799, 21 NRC 360, 384 n.108 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173-77 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 914 (1985).

When considering the second factor of 10 CFR § 2.714(a)(1), the availability of other means to protect an intervenor's interests, a Board may only inquire whether there are other forums in which the intervenor itself might protect its interests. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-671, 15 NRC 508, 513 n.13 (1982).

Informal negotiations among parties, even under a Board's aegis, is not an adequate substitute for a party's right to pursue its legitimate interest in issues in formal adjudicatory hearings. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1191 (1985).

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra, 10 NRC at 216 n.4, citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

In determining what other means are available to protect a petitioner's interest, a board will consider the issues sought to be raised, the relief requested, and the stage of the proceeding. There may well be no alternative to providing a petitioner with an opportunity to participate in an adjudicatory hearing. However, in some circumstances, such as where the proposed contention deals with routinely filed post licensing reports by an applicant, a 10 CFR 2.206 petition may be sufficient to protect the petitioner's interests. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

A petitioner who otherwise has standing can put forth any contention that would entitle that petitioner to the relief it seeks, see CLI-96-1, 43 NRC 1, 6 (1996). Therefore, in deciding whether to admit a late-filed contention the petitioner otherwise would be entitled to litigate, the fact that the petitioner's contentions focus primarily on matters that will protect the interests of others does not mean the petitioner's "interest" should be afforded short shrift in assessing the late-filing factors of whether other means or other parties will protect the petitioner's interests. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 30 (1996).

A contention based on a Draft Environmental statement (DES) which contains no new information relevant to the contention, lacks good cause for late filing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982).

Ordinarily, it is sufficient to show good cause for lateness when a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report. However, a petitioner may be able to meet the late-filed contention requirements without a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report by presenting significant new evidence not previously available. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993).

Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but applicant will be permitted to respond. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 206 (1994), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Ability to contribute to the record is relevant to the admissibility of late-filed contentions. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 56 n.5 (1983). An intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v . NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). An intervenor must demonstrate special expertise concerning the subjects which it seeks to raise. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-36 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990). An intervenor need not present

expert witnesses or indicate what testimony it plans to present if it has established its ability to contribute to the development of a sound record in other ways. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1408 n.14 (1983). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-1183 (1983).

Nevertheless, an intervenor should provide specific information from which a Board can infer that the intervenor will contribute to the development of a sound record on the particular issue in question. An intervenor's bare assertion of past effectiveness in contributing to the development of a sound record on other issues in the current proceeding and in past proceedings is insufficient. Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985), citing, WPPSS, supra, 18 NRC at 1181, and Mississippi Power and Light Co. (Grand Gulf Nuclear station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power station), ALAB-919, 30 NRC 29, 40-41 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In assessing the "late-filing" factor of assistance in developing a sound record, the need to conduct discovery no doubt may excuse a lack of specificity about potential witnesses' testimony in those nontechnical cases where any testimonial evidence likely will come from licensee employees or contractors. See Commanche Peak, ALAB-868, 25 NRC at 925-26. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 28-29 (1996).

In determining an intervenor's ability to assist in the development of a sound record, it is erroneous to consider the performance of counsel in a different proceeding. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986). Contra Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), ALAB-868, 25 NRC 912, 926-27 (1987).

The technical nature of the issues involved in a proceeding cuts against an assertion that the legal acumen of counsel in NRC proceedings should be given weight under the "late-filing" factor" factor regarding assistance in developing a sound record. And, notwithstanding the fact an intervenor is entitled to make its case through cross-examination, that factor cannot be weighed favorably when the presiding officer has no reason to anticipate that cross-examination by counsel will be the sole means, or even the central method, for establishing the petitioner's case. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926 (1987). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 28 (1996).

If a petitioner fails to address the five criteria in 10 C.F.R. § 2.714(a) that govern late filed contentions, a petitioner does not meet its burden to establish the admissibility of such contentions. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 241 (1998); Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984).

The extent to which an intervenor may reasonably be expected to assist in developing a sound record is the most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985).

Given a proceeding initially noticed in 1978 for which a Special Prehearing Conference was held early in 1979, any currently filed contentions would be untimely. That does not mean, after balancing the factors in 10 CFR § 2.714(a) that the untimeliness should bar admission of the contention. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 55 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982).

A party seeking to add a new contention after the close of the record must satisfy both standards for admitting a late-filed contention set forth in 10 CFR § 2.714(a)(1) and the criteria, as established by case law, for reopening the record, Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), despite the fact that nontimely contentions raise matters which have not been previously litigated. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Diablo Canyon, supra, 16 NRC at 1714-15.

In evaluating the extent to which admission of a late-filed contention would delay the proceeding, a Board must determine whether, by filing late, the intervenor has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987).

Where the delay in filing contentions is great and the issues are serious, the seriousness of an issue does not imply that the party raising it is somehow forever exempted from the Rules of Practice. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

The fifth criteria for admission of a late-filed contention requires a board to determine whether the proceeding, and not the issuance of a license or the operation of a plant, will be delayed. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 29-30 (1996) .

The admission of any new contention may broaden and delay the completion of a proceeding by increasing the number of issues which must be considered. A Board may consider the following factors which may minimize the impact of the new contention: how close to the scheduled hearing date the new contention was filed; and the extent of discovery which had been completed prior to the filing of the new contention. A Board will not admit a new contention which is filed so close to the scheduled hearing date that the parties would be denied an adequate opportunity to pursue discovery on the contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630-631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

A Board may refuse to admit a late-filed contention where it determines that the contention is so rambling and disorganized that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983).

An intervenor's voluntary withdrawal of other, unrelated contentions may not be used to counterbalance any delays which might be caused by the admission of a late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

In evaluating the potential for delay, it is improper for the Board to balance the significance of the late-filed contention against the likelihood of delay. Such a balancing of factors is made in the overall evaluation of the five criteria for the admission of a late-filed contention. Braidwood, supra, 23 NRC at 248.

The Licensing Board's general authority to shape the course of a proceeding, 10 CFR § 2.718(e), will not be utilized as the foundation for the Board's acceptance of a late-filed contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984).

2.9.5.5.1 Late-filed Areas of Concern in Informal Proceedings

In submitting an amended or supplemental hearing petition, if the petitioners wish to raise and provide information regarding matters that were not specified in their initial hearing petition, they must make a showing that will satisfy the late-filing requirements of 10 CFR 2.1205(k). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992).

2.9.5.6 Contentions Challenging Regulations

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978).

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.758. Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980); Kansas Gas and Electric Co. (Wolf Creek Generating station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-89-1, 29 NRC 5, 18 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 410 (1991), appeal denied, CLI-91-12, 34 NRC 149, 156 (1991) (petitioner may not attack the testing methodology specified in a regulation, but may attack new proposed performance requirements); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 296 (1998).

When a Commission regulation permits the use of a particular analysis or technique, a contention which asserts that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1273 (1983).

Although Commission regulations may permit a board in some situations to approve minor adjustments to Commission-prescribed standards, a board will reject as inadmissible a contention which seeks major changes to those standards. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), ALAB-832, 23 NRC 135, 147-48 (1986) (intervenors sought major expansion of the emergency planning zone), rev'd in part, CLI-87-12, 26 NRC 383, 395 (1987) (the Appeal Board incorrectly admitted contentions which involved more than just minor adjustments to the emergency planning zone). See also Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-836, 23 NRC 479, 507 n.48 (1986).

Under 10 CFR § 2.758, the Commission has withheld jurisdiction from Licensing Boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain "special circumstances." Potomac Electric Power Co. (Douglas Point Nuclear Generating station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444 (1985). 10 CFR § 2.758 sets out those special circumstances which an intervenor must show to be applicable before a contention attacking the regulations will be admissible. Further, 10 CFR § 2.758 provides for certification to the Commission of the question of whether a rule or regulation of the Commission should be waived in a particular adjudicatory proceeding where an adjudicatory board determines that, as a result of special circumstances, a prima facie showing has been made that application of the rule in a particular way would not serve the purposes for which the rule was adopted and, accordingly, that a waiver should be authorized. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-585 (1978); Carolina Power and Light

Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546 (1986).

Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR § 2.758. It is not, however, enough merely to allege the existence of special circumstances; such circumstances must be set forth with particularity. The petition should be supported by proof, in affidavit or other appropriate form, sufficient for the Licensing Board to determine whether the petitioning party has made a prima facie showing for waiver. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

Licensing board rulings denying waiver requests pursuant to 10 CFR § 2.758, which are interlocutory, are not considered final for the purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

2.9.5.7 Contentions Involving Generic Issues

Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985). They appear to be permitted to accept "generic issues" which are not and are not about to become the subject of rulemaking, however. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1271 (1983). In order for a party or interested State to introduce such an issue into a proceeding, it must do more than present a list of generic technical issues being studied by the Staff or point to newly issued Regulatory Guides on a subject. There must be a nexus established between the generic issue and the particular permit or application in question. To establish such a nexus, it must be shown that (1) the generic issue has safety significance for the particular reactor under review, and (2) the fashion in which the application deals with the matter is unsatisfactory or the short term solution offered to the problem under study is inadequate. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1608 (1982), citing, River Bend, supra, 6 NRC at 773; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1657 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 418, 420 (1984), citing, River Bend, supra, 6 NRC at 773, and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, NRC 245, 248 (1978).

Parties interested in litigating unresolved safety issues must do something more than simply offer a checklist of unresolved issues; they must show that the issues

have some specific safety significance for the reactor in question and that the application fails to resolve the matters satisfactorily. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43 (1982), the Licensing Board rejected the applicant's contention that Douglas Point, supra, requires dismissal whenever there is pending rulemaking on a subject at issue. The Board distinguished Douglas Point on several grounds: (1) In Douglas Point, there were no existing regulations on the subject, while in Perry, regulations do exist and continue in force regardless of proposed rulemaking; (2) The issue in Perry --whether Perry should have an automated standby liquid control system (SLCS) given the plant's specific characteristics -- is far more specific than the issues in Douglas Point (i.e., nuclear waste disposal issues); (3) The proposed rules recommend a variety of approaches on the SLCS issue requiring analysis of the plant's situation, so any efforts by the Board to resolve the issue would contribute to the analysis; (4) The Commission did not bar consideration of such issues during the pendency of its proposed rulemaking, as it could have. Unless the Commission has specifically directed that contentions be dismissed during pendency of proposed rulemaking, no such dismissal is required.

Where the Commission has explicitly barred Board consideration of the subject of a contention on which rulemaking is pending, the Board may not exercise jurisdiction over the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 350 (1982). Where the Commission has held its own decision whether to review an Appeal Board opinion in abeyance pending its decision whether or not to initiate a further rulemaking, and has instructed the Licensing Boards to defer consideration of the issue, a contention involving the issue is unlitigable and inadmissible. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 417-18 (1984), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

A brief suspension of consideration of a contention will not be continued when it no longer appears likely that the Commission is about to issue a proposed rule on the matter which was the subject of the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 846-847 (1981).

While a Licensing Board should not accept contentions that are or are about to become the subject of general rulemaking, where a contention has long since been admitted and is still pending when notice of rulemaking is published, the intent of the Commission determines whether litigation of that contention should be undertaken. Texas Utilities Generating Co. (Comanche Peak steam Electric

station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Before a contention presenting a generic issue can be admitted, the intervenor must demonstrate a specific nexus between each contention and the facility that is the subject of the proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 165 (1987), aff'd on other grounds, ALAB-880, 26 NRC 449, 456-57 n.7 (1987), remanded on other grounds, sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

Contentions which constitute a general attack upon the methods used by the NRC Staff to insure compliance with regulations, without raising any issues specifically related to matters under construction, are not appropriate for resolution in a particular licensing proceeding. Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980).

2.9.5.8 Contentions Challenging Absent or Incomplete Documents

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980). Note, however, that the absence of licensing documents does not justify admission of contentions which do not meet the basis and specificity requirements of 10 CFR § 2.714. That is, a non-specific contention may not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable. Duke Power Co. (Catawba Nuclear station, Units 1 & 2), ALAB 687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). 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. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 297-98 (1995).

Rulings on contentions concerning undeveloped portions of emergency plans may be deferred. To admit such contentions would be to risk unnecessary litigation. But to deny the contentions would unfairly ignore the insufficient development of these portions. Fairness and efficiency seem to dictate that rulings on such contentions be deferred. The objectives of such deferrals are to encourage negotiation, to avoid unnecessary litigation, and to make necessary

litigation as focused as possible. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). Cf. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power station, Unit 1), ALAB-727, 17 NRC 760, 775-76 (1983).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

2.9.5.9 Contentions re Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974). The adequacy of an applicant's physical security plan is also a permissible issue in an operating license renewal proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 288 (1995).

An intervenor may not introduce a contention which questions the adequacy of an applicant's security plan "against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities." Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-27, 22 NRC 126, 135-36, 138 (1985), citing, 10 CFR § 50.13. However, section 50.13 does not preclude intervenors from challenging whether security systems satisfy governing security requirements set forth in 10 CFR Part 73. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292 (1995).

Where an intervenor seeking to challenge an applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 366 (1998).

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. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292 (1995).

The applicable design-basis threats against which an applicant must protect appear in 10 CFR § 73.1, to the extent referenced in sections applicable to particular types of reactors. The design-basis threat for research reactors includes "radiological sabotage." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292-93 (1995). The security plan for certain research reactors, insofar as it protects against radiological sabotage, may be modified to account for special circumstances. 10 CFR § 73.60(f). Id.

2.9.5.10 Defective Contentions

Where contentions are defective, for whatever reason, Licensing Boards have no duty to recast them to make them acceptable under 10 CFR § 2.714. Commonwealth Edison Co. (Zion station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

However, although a Licensing Board is not required to recast contentions to make them acceptable, it also is not precluded from doing so. Pennsylvania Power & Light Co. (Susquehanna steam Electric station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979). See also Arizona Public Service Co. (Palo Verde Nuclear Generating station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 406-408, 412-413 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991). The Palo Verde Licensing Board erred by inferring a basis for the petitioners' contention when the petitioners failed to comply with the requirements of 10 CFR § 2.714(b)(2) to clearly state the basis for its contention and to provide sufficient information to support its contention. Palo Verde, supra, 34 NRC at 155-56.

A contention's proponent must be afforded the opportunity to be heard in response to objections to the contention. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 119 (1994), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

It is the responsibility of the intervenor, not the Licensing Board, to provide the necessary information to satisfy the basis requirement for the admission of its contentions. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

A Licensing Board has consolidated otherwise inadmissible contentions with properly admitted contentions involving the same subject matter where such consolidation would not require the applicant to mount a defense that is substantially different or expanded from that which would be required by the admitted contentions. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989).

2.9.5.11 Discovery to Frame Contentions

A petitioner is not entitled to discovery to assist him in framing the contentions in his petition to intervene. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

An intervenor may not file a vague contention and place the burden upon the applicants and Staff to obtain further details through discovery. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990).

2.9.5.12 Stipulations on Contentions

(RESERVED)

2.9.6 Conditions on Grants of Intervention

10 CFR § 2.714(f) (formerly, 10 CFR § 2.714(e)) empowers a Licensing Board to condition an order granting intervention on such terms as may serve the purposes of restricting duplicative or repetitive evidence and of having common interests represented by a single spokesman. 10 CFR § 2.715a deals with the general authority to consolidate parties in construction permit or operating license proceedings. In a license amendment proceeding, there is no good reason why the provisions of Section 2.715a cannot be looked to in exercising the power granted by Section 2.714(f) (formerly, 10 CFR § 2.714(e)), which section applies to all adjudicatory proceedings. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.9 (1979).

2.9.7 Reinstatement of Intervenor After Withdrawal

A voluntary withdrawal of intervention is "without prejudice" in that it does not constitute a legal bar to the later reinstatement of the intervention upon the intervenor's showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973). The factors to be considered in the good cause determination are generally the same as those considered under 10 CFR § 2.714(a) with primary emphasis on the delay of the proceeding, prejudice to other parties and adequate protection of the intervenor's interests. Grand Gulf, supra.

2.9.8 Rights of Intervenors at Hearing

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor in an operating license proceeding is free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Concomitantly, once the record has closed, generic safety issue may be

litigated directly only if standards for late-filed contentions and reopening the record are met. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The rules cannot legitimately be read as requiring that, once an intervenor is represented by counsel, that counsel be the party's sole representative in the proceeding. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 994 (1983).

When a party is permitted to enter a case late, it is expected to take the case as it finds it. It follows that when a party that has participated in a case all along simply changes representatives in midstream, knowledge of the matters already heard and received into evidence is imputed to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor's status as a party in a proceeding does not of itself make it a spokesman for others. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986), aff'd, ALAB-854, 24 NRC 783 (1986), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979).

Under principles enunciated in Prairie Island, an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975). However, that does not elevate the intervenor's status to that of co-sponsor of the contentions. The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which it seeks to have litigated." 10 CFR § 2.714(b). It follows from this that one intervenor may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 n.102 (1985).

Contentions left without a sponsor due to the withdrawal of one intervenor may be adopted by another intervenor upon satisfaction of the five-factor balancing test ordinarily used to determine whether to grant a non-timely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985). See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor test, See Sections 2.9.3.3.3 and 2.9.5.5.

A contention which has been joined by two joint intervenors may not be withdrawn without the consent of both joint intervenors. Either of the joint intervenors may litigate the contention upon the other intervenor's withdrawal of sponsorship for the contention.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986).

An intervenor in an operating license proceeding may not proceed on the basis of allegations that the Staff has somehow failed in its performance; at least when the evidence shows that the alleged inadequate Staff review did not result in inadequacies in the analyses and performance of the applicant. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 565 n.29 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

2.9.8.1 Burden of Proof

A licensee generally bears the ultimate burden of proof. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing, 10 CFR § 2.732. But intervenors must give some basis for further inquiry. Three Mile Island, supra, 16 NRC at 1271, citing, Pennsylvania Power and Light Co. and Alleghany Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980). See Section 3.7.

Although 10 C.F.R. § 2.714 imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. Section 50.82(e) of 10 C.F.R. expressly requires that decommissioning be performed in accordance with the regulations, including the ALARA rule in 10 C.F.R. § 20.1101. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996).

An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). For a more detailed discussion, see Section 3.7.2.

In decommissioning cases there is a presumption that the licensee's choice of decommissioning alternatives is reasonable. It is, therefore, petitioners' burden to show "extraordinary circumstances" rebutting this presumption. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996).

2.9.8.2 Presentation of Evidence

2.9.8.2.1 Affirmative Presentation by Intervenor/Participants

An intervenor may not adduce affirmative evidence on an issue not raised by him unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8

AEC 857, 869 n.17, reconsid. den., ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). This rule does not apply to an interested State participating under 10 CFR § 2.715(c). Such a State may produce evidence on issues not raised by it. Project Management Corp. (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392-93 (1976).

2.9.8.2.2 Consolidation of Intervenor Presentations

A Licensing Board, in permitting intervention, may consolidate intervenors for the purpose of restricting duplicative or repetitive evidence and argument. 10 CFR § 2.714(f)(formerly, § 2.714(e)). In addition, parties with substantially similar interests and contentions may be ordered to consolidate their presentation of evidence, cross-examination and participation in general pursuant to 10 CFR § 2.715a. An order consolidating the participation of one party with the others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308-309 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 272-73 (1983), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1601 (1985); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 284 (1998).

The NRC Rules of Practice permit the consolidation of intervenors, but only where those parties have substantially the same interest that may be affected by the proceeding and where consolidation would not prejudice the rights of any party. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 993 (1983).

Only parties to a Commission licensing proceeding may be consolidated. Petitioners who are not admitted as parties may not be consolidated for the purposes of participation as a single party. 10 CFR § 2.715a; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. It is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

The Commission has issued a policy statement relating to consolidation of intervenors and the conduct of licensing proceedings. Pursuant to that Commission guidance, consolidation should not be ordered when it will prejudice the rights of any intervenor; however, in all appropriate cases,

single, lead intervenors should be designated to present evidence, conduct cross-examination, submit briefs, and propose findings of fact, conclusions of law, and argument. Except where other intervenors' interests will be prejudiced or upon a showing that the record will be incomplete, those activities should not be performed by such other intervenors. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

2.9.8.3 Cross-Examination by Intervenors

An intervenor may engage in cross-examination of witnesses dealing with issues not raised by him if the intervenor has a discernible interest in resolution of those issues. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867-68 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986). Licensing Boards must carefully restrict and monitor such cross-examination, however, to avoid repetition. Prairie Island, supra, 1 NRC 1.

In general, the intervenor's cross-examination may not be used to expand the number or boundaries of contested issues. Prairie Island, supra, 8 AEC 857. For a further discussion, see Section 3.13.1.

2.9.8.4 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings with respect to all issues whether or not raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986).

A Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

The right to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

2.9.8.5 Attendance at/Participation in Prehearing Conferences/Hearings

An intervenor seeking to be excused from a prehearing conference should file a request to this effect before the conference date. Such a request should present the justification for not attending. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). For a discussion of a party's duty to attend hearings, see Section 3.6.

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-13, 33 NRC 259, 262-63 (1991); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-92-3, 35 NRC 107, 109 (1992). In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the NRC Staff at the Special Prehearing Conference. Application of that sanction would also result in dismissal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

Dismissal of a party is the ultimate sanction applicable to an intervenor. On the other hand, where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and its contentions dismissed. Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-1596 (1982), citing, Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156 (1976).

2.9.8.6 Pleadings and Documents of Intervenors

An intervenor may not disregard an adjudicatory board's direction to file a memorandum without first seeking leave of the board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187 (1978).

2.9.9 Cost of Intervention

2.9.9.1 Financial Assistance to Intervenors

Congress has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in NRC regulatory or adjudicatory proceedings. Pub. L. No. 102-377, Title V, § 502, 106 Stat. 1342 (1992), 5 U.S.C. § 504 note. This law made permanent the proscription against such funding that had been attached to NRC appropriations bills for several previous years. See, e.g., Pub. L. No.97-88, Title V, § 502, 95 Stat. 1148 (1981) and Pub. L. No. 97-276, § 101(9), 96 Stat. 1135 (1982).

Prior to this time, the Commission had considered financial assistance to intervenors, even in the absence of express statutory authorization to do so. Although a Comptroller General opinion had suggested that the Commission might do so under certain circumstances, see Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CL1-76-23, 4 NRC 494 (1976), a judicial decision overruled a later related Comptroller General opinion involving another agency. Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). On this basis, in part, funding for intervenors was denied in Exxon Nuclear Co. (Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-31, 6 NRC 849 (1977). The Commission indicated that it favored funding intervenors but noted Congress had precluded such funding in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 and CLI-80-20, 11 NRC 705 (1980). The Commission had authorized free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in prior Commission rules, 10 CFR §§ 2.708(d), 2.712(f) and 2.750(c), 45 Fed. Reg. 49535 (July 25, 1980), but those rules were suspended in the face of the legislative bar on intervenor funding. See 46 Fed. Reg. 13681 (Feb.24, 1981).

The Commission does not have the authority to require the utility-applicants to themselves fund intervention nor to assess fees for that purpose where the service to be performed is for intervenors' benefit and is not one needed by the Commission to discharge its own licensing responsibilities. See Mississippi Power and Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). See also National Cable Television Association Inc. v. United States, 415 U.S. 336 (1978); Federal Power Commission v. New England Power Co.,415 U.S. 345 (1974); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717 (1982); Metropolitan Edison Co. (Three Mite island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1212 (1985), citing Pub. L. No. 98-360, 98 Stat. 403 (1984). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 14-15 (1981).

2.9.9.2 Intervenors' Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-608 (1977). This decision is of questionable weight in view of the developments pertaining to intervenor funding discussed in section 2.9.9.1.

2.9.10 Appeals by Intervenors

An intervenor may seek appellate redress on all issues whether or not those issues were raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974).

2.9.11 Intervention in Remanded Proceedings

The Licensing Board was "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission, and the petition for intervention dealt with matters outside that scope. The Licensing Board had limited jurisdiction in the proceeding and could consider only what had been remanded to it. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979).

2.10 Nonparty Participation - Limited Appearance and Interested States

2.10.1 Limited Appearances in NRC Adjudicatory Proceedings

Although limited appearers are not parties to any proceeding, statements by limited appearers can serve to alert the Licensing Board and the parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

2.10.1.1 Requirements for Limited Appearance

The requirements for becoming a limited appearer are set out in 10 CFR § 2.715. Based upon that section, the requirements for limited appearances are generally within the discretion of the presiding officer in the proceeding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

2.10.1.2 Scope/Limitations of Limited Appearances

Under 10 CFR § 2.715(a), the role of a limited appearer is restricted to making oral or written statements of his position on the issues within such limits and on such conditions as the Board may fix.

Pursuant to 10 CFR § 2.715(a), limited appearance statements may be permitted at the discretion of the presiding officer, but the person admitted may not otherwise participate in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

A limited appearance statement is not evidence and need only be taken into account by the Licensing Board to the extent that it may alert the Board or parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. ALAB-108, supra, (dictum).

The purpose of limited appearance statements is to alert the Licensing Board and parties to areas in which evidence may need to be adduced. Such statements do not constitute evidence, and accordingly, the Board is not obligated to discuss them in its decision. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing, 10 CFR § 2.715(a); Iowa Electric Light and Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

A person who makes a limited appearance before a Licensing Board may not appeal from that Board's decision. Metropolitan Edison Company (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

2.10.2 Participation by Nonparty Interested States

State agencies may choose to participate either as a party under 10 C.F.R. § 2.714 or as an interested state under 10 C.F.R. § 2.715(c). To participate under 10 C.F.R. § 2.714, a state agency must satisfy the same standards as an individual petitioner. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996).

Under 10 CFR § 2.715(c), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford representatives of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues. Even though a State has submitted contentions and intervened under 10 CFR § 2.714, it may participate as an "interested State" under 10 CFR § 2.715(c) on issues in the proceeding not raised by its own contentions. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1079 (1982), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). However, once a party is admitted as an interested State under Section 2.715(c), it may not reserve the right to intervene later under Section 2.714 with full party status. petition to intervene under the provisions of the latter section must conform to the requirements for late filed

petitions. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 723 (1982).

A Licensing Board may require the representative of an interested State to indicate in advance of the hearing the subject matter on which it wishes to participate, but such a showing is not a prerequisite of admission under 10 CFR § 2.715(c). Indian Point, supra, 15 NRC at 723.

Section 2.715(c) states that the Commission shall "afford representatives of an interested State... and or agencies thereof, a reasonable opportunity to participate." Given this language, a Licensing Board is not limited to recognizing only one representative of a State. Thus the Licensing Board may admit the Attorney General of an interested State even though a State law designates another person as the State's representative. Indian Point, supra, 15 NRC at 719. Although some language in the Indian Point decision seemed to indicate that State law does not control the designation of a State representative, the decision actually rested upon the fact that the State Attorney General did not agree that the State law designated someone other than the Attorney General to represent the State. In the absence of a contrary judicial decision, the Commission will defer to the Attorney General's interpretation of the State law designating the State's representative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148, 149 and n.13 (1987).

A State participating as an interested State may appeal an adjudicatory board's decision so that an interested State participating under 10 CFR § 2.715(c) constitutes the sole exception to the normal rule that a nonparty to a proceeding may not appeal from the decision in that proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Section 274(1) of the Atomic Energy Act confers a right to participate in licensing proceedings on the State of location for the subject facility. However, 10 CFR § 2.715(c) of the Commission's Rules of Practice extends an opportunity to participate not merely to the State in which a facility will be located, but also to those other States that demonstrate an interest cognizable under Section 2.715(c). Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977). See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

Although a State seeking to participate as an "interested State" under Section 2.715(c) need not state contentions, once in the proceeding it must comply with all the procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1615 (1982), citing, River Bend, supra, 6 NRC at 768. Nevertheless, the Commission has emphasized that the participation of an interested sovereign State, as a full

party or otherwise, is always desirable in the NRC licensing process. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977). A State's participation may be so important that the State's desire to be a party to Commission review may be one factor to consider in determining whether the State should be permitted to participate in the Commission review, even though the State has not fully complied with the requirements for such participation. Id.

A State has no right to participate in administrative appeals when it has not participated in the underlying hearing. The Commission will deny a State's extremely untimely petition to intervene as a non-party interested State which is filed on the eve of the Commission's licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

10 CFR § 2.715(c) has been amended to include counties and municipalities and agencies thereof as governmental entities in addition to States which may participate in NRC adjudicatory proceedings as "interested" government bodies.

A governmental body must demonstrate a genuine interest in participating in the proceeding. A Licensing Board denied a municipality permission to participate as an interested State in a reopened hearing where the municipality failed to: file proposed findings of fact; comply with a Board Order to indicate with reasonable specificity the subject matters on which it desired to participate; appear at an earlier evidentiary hearing; and specify its objections to the Staff reports which were the focus of the reopened hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136 (1986).

Section 2.715(c) was also amended to more clearly delineate the participation rights of "interested" government bodies. As amended, this section provides that "interested" government bodies may introduce evidence, interrogate witnesses, advise the Commission without taking a position on any issue, file proposed findings, appeal the Licensing Board's decision, and seek review by the Commission.

The mere filing by a State of a petition to participate in an operating license application pursuant to 10 CFR § 2.715(c) as an interested State is not cause for ordering a hearing. The application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 426 (1984), citing, Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

Although a State has a statutory right to a reasonable opportunity to participate in NRC proceedings, it may not seek to appeal on issues it did not participate in below, or seek remand of those issues. However, the State is given an opportunity to file a brief amicus curiae. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

A late decision by the Governor of a State to participate as representative of an interested State can be granted, but the Governor must take the proceeding as he finds it. He cannot complain of rulings made or procedural arrangements settled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983), citing, 10 CFR § 2.715(c); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

An interested State that has elected to litigate issues as a full party under 10 CFR § 2.714 is accorded the rights of an "interested State" under 10 CFR § 2.715(c) as to all other issues. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-9, 17 NRC 403, 407 (1983), citing, Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976).

10 CFR § 2.715(c) authorizes an interested State to introduce evidence with respect to those issues on which it has not taken a position. However, at the earliest possible date in advance of the hearing, an interested State must state with reasonable specificity those subject areas, other than its own contentions, in which it intends to participate. Seabrook, supra, 17 NRC at 407.

The presiding officer may require an interested governmental entity to indicate with reasonable specificity, in advance of the hearing, the subject matters on which it desires to participate. However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances, any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1140 (1983). See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

An interested State, once admitted to a proceeding, must observe the procedural requirements applicable to other participants. Every party, however, may seek modification for good cause of time limits previously set by a Board. Moreover, good cause, by its very nature, must be an ad hoc determination based on the facts and circumstances applicable to the particular determination. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983).

Although an interested State must observe applicable procedural requirements, including time limits, the facts and circumstances which would constitute good cause for extending the time available to a State may not be coextensive with those

warranting that action for another party. States need not, although they may, take a position with respect to an issue in order to participate in the resolution of that issue. Reflecting political changes which uniquely bear upon bodies such as States, a State's position on an issue (and the degree of its participation with respect to that issue) might understandably change during the course of a Board's consideration of the issue. The Commission itself has recognized such factors, and it has permitted States to participate even where contrary to a procedural requirement which might bar another party's participation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977); See 10 CFR § 2.715(c).

A county does not lose its right to participate as an interested governmental agency pursuant to 10 CFR § 2.715(c) because it has elected to participate as a full intervenor on specified contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19. 15 NRC 601, 617 (1982).

A State's status as an interested State does not confer upon it any special power to adopt contentions which have been abandoned by their sponsor. A State must observe the procedural requirements applicable to other participants. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

Any governmental participant seeking to advance a late contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions as well as the criteria for reopening the record. Shoreham, supra, 17 NRC at 1140.

2.11 Discovery

2.11.1 Time for Discovery

Discovery begins on admitted contentions after the first prehearing conference. 10 CFR 2.740(a)(1). Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945 (1982).

Under 10 CFR § 2.740(b)(1), there can be no formal discovery prior to the special prehearing conference provided for in Section 2.751a. In any event, a potential intervenor has no right to seek discovery prior to filing his petition to intervene. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). See also BPI v. AEC, 502 F.2d 424, 428-29 (D.C. Cir. 1974). Once an intervenor has been admitted, formal discovery is limited to matters in controversy which have been admitted. 10 CFR § 2.740(b)(1). Discovery on the subject matter of a contention in a licensing proceeding can be obtained only after the

contention has been admitted to the proceeding. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (the scope of a contention is determined by the literal terms of the contention, coupled with its stated bases), reconsid. denied on other grounds, LBP-88-25A, 28 NRC 435 (1988).

A Licensing Board denied an applicant's motion for leave to commence limited discovery against persons who had filed petitions to intervene (at that point, nonparties). The Board entertained substantial doubt as to its authority to order the requested discovery, but denied the motion specifically because it found no necessity to follow that course of action. The Board discussed at length the law relating to the prohibition found in 10 CFR § 2.740(b)(1) against discovery beginning prior to the prehearing conference provided for in 10 CFR § 2.751a. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 577-584 (1978).

Prior to the grant of a formal hearing on a proposed operating license amendment, a Licensing Board directed questions to the applicants and the NRC Staff to clarify the record regarding a possible safety issue which had not been addressed directly by the previous filings of the parties. The Board believed its questions were a permitted inquiry, 10 CFR § 2.756, to determine whether possible areas of concern could be resolved informally without a formal hearing. Such questions did not constitute impermissible discovery prior to the grant of a hearing. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-6, 33 NRC 169, 171-72 (1991).

Applicants are entitled to prompt discovery concerning the bases of contentions, since a good deal of information is already available from the FSAR and other documents early in the course of the proceeding. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 369 (1981).

Under 10 CFR § 2.740(b)(1), discovery is ordinarily to be completed before the prehearing conference held pursuant to 10 CFR § 2.752, absent good cause shown. The fact that a party did not engage in prehearing discovery to obtain an expert witness' "backup" calculations does not preclude a request at trial for such information, but the Licensing Board may take into account the delay in deciding to grant such a last minute request. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

The fact that late intervention has been permitted should not disrupt established discovery schedules since a tardy petitioner with no good excuse must take the proceeding as he finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

Under 10 CFR § 2.740(b)(1), discovery is available after a contention is admitted and may be terminated a reasonable time thereafter. Litigants are not entitled to further discovery as a matter of right with respect to information relevant to a contention which first surfaces long after discovery on that contention has been terminated. Duke Power

Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1431-32 (1984), aff'd, ALAB-813, 22 NRC 59 (1985). However, an Appeal Board held that a Licensing Board abused its discretion by denying intervenors the opportunity to conduct discovery of new information submitted by the applicant and admitted by the Board on a reopened record. The Appeal Board found that, although there might have been a need to conduct an expeditious hearing, it was improper to deny the intervenors the opportunity to conduct any discovery concerning the newly admitted information where it was not shown that the requested discovery would delay the hearing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. Nor does it entitle the party to an extension of time for discovery absent a showing of good cause, as judged by the standards of 10 CFR § 2.711. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

Under normal circumstances, motions for a stay of discovery should be filed with the licensing board rather than the Commission. See 10 CFR § 2.730(a). The Commission has the authority to exercise its "inherent supervisory powers over adjudicatory proceedings" and to address the stay motion itself, rather than either dismiss it or refer it to the licensing board. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 n.1 (1994) (citing Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991), reconsideration denied, CLI-92-6, 35 NRC 86 (1992)).

A party seeking to extend discovery beyond a deadline may obtain an extension on the discovery period only by showing that there is good cause shown for why the deadline was not met. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 260-61 (1994).

A party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

Though the period for discovery may have long since terminated, at least one Appeal Board decision seems to indicate that a party may obtain discovery in order to support a motion to reopen a hearing provided that the party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). But see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) and Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986) where the Commission has made it very clear that a movant seeking to reopen the record is not entitled to discovery to support its motion.

The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981). The Commission stated that in virtually all cases individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983), citing, Statement of Policy, supra, 13 NRC at 456. Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. Perry, supra, 18 NRC at 1401.

An intervenor who has agreed to an expedited discovery schedule during a prehearing conference is considered to have waived its objections to the schedule once the hearing has started. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

2.11.2 Discovery Rules

In general, the discovery rules as between all parties except the Staff follow the form of the Federal Rules of Civil Procedure. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975). Similarly, if a hearing is granted automatic discovery, including revealing names and addresses of individuals likely to have discoverable information relating to contentions, possible witnesses and identification of relevant documents, is appropriate. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998); Duke Energy Corporation (Oconee Nuclear Station, Units 1,2, and 3), CLI-98-17, 48 NRC 123, 125-26 (1998).

If there is no NRC rule that parallels a Federal Rule of Civil Procedure, the Board is not restricted from applying the Federal rule. While the Commission may have chosen to adopt only some of the Federal rules of practice to apply to all cases, it need not be inferred that the Commission intended to preclude a Licensing Board from following the guidance of the Federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. Seabrook, supra, 17 NRC at 497.

Rule 26(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of non-witness experts. Seabrook, supra, 17 NRC at 497; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) (discovery of a non-witness expert permitted only upon a showing of exceptional circumstances). The filing of an affidavit as part of a non-record filing with a Licensing Board does not make an individual an expert witness. Texas Utilities Electric Co.

(Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 947 (1987).

In modern administrative and legal practice, including NRC practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981); Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1984).

A party may seek discovery of another party without the necessity of Licensing-Board intervention. Where, however, discovery of a nonparty is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.720. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Only those State agencies which are parties in NRC proceedings are required to respond to requests under 10 CFR § 2.741 for the production of documents. In order to obtain documents from non-party State agencies, a party must file a request for a subpoena pursuant to 10 CFR § 2.720. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21-22 (1985), citing, Stanislaus, supra, 9 NRC at 683.

Applicants are entitled to discovery against intervenors in order to obtain the information necessary for applicant to meet its burden of proof. This does not amount to shifting the burden of proof to intervenors. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 338 (1980).

Each co-owner of a nuclear facility has an independent responsibility, to the extent that it is able, to provide a Licensing Board with a full and accurate record and with complete responses to discovery requests. The majority owner must keep the minority owners sufficiently well informed so that they can fulfill their responsibilities to the Board. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-27, 26 NRC 228, 230 (1987).

Intervenor may not directly seek settlement papers of the applicant through discovery. Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. 10 CFR § 2.759 states a policy encouraging settlement of contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring a party to produce its settlement documents because they are settlement documents would be inconsistent with this policy. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-184 (1979).

A plan to seek evidence primarily through discovery is a permissible approach for an intervenor to take. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1943 (1982).

Lack of knowledge is always an adequate response to discovery. A truthful "don't know" response is not sanctionable as a default in making discovery. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945, 1945 n.3 (1982).

At least one Licensing Board has held that intervenors may develop and support their contentions by getting a first round of discovery against other parties before the intervenors are required to provide responses to discovery against them. Catawba, supra, 16 NRC at 1945. But see 2.9.5.11, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

Discovery of the foundation upon which a contention is based is not only clearly within the realm of proper discovery, but also is necessary for an applicant's preparation for hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

A party's need for discovery outweighs any risk of harm from the potential release of information when the NRC Staff has indicated that no ongoing investigation will be jeopardized, when all identities and identifying information are excluded from discovery; and when all other information is discussed under the aegis of a protective order. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), affirmed, ALAB-764, 19 NRC 633 (1984).

Although a Demand for Information issued by the NRC is an important event that may affect an individual's career, the pendency of such a demand is not a reason to postpone a scheduled deposition. Where the individuals involved have known about the facts of the case for years, further preparation is not necessary for them to tell the truth. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-14, 39 NRC 251 (1994).

2.11.2.1 Construction of Discovery Rules

For discovery between parties other than the Staff, the discovery rules are to be construed very liberally. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1742 (1981).

Where a provision of the NRC discovery rules is similar or analogous to one of the Federal rules, judicial interpretations of that Federal rule can serve as guidance for interpreting the particular NRC rule. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978).

2.11.2.2 Scope of Discovery

The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). A party seeking discovery after the discovery period is over, however, must meet a higher standard of relevance. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), LBP-76-8, 3 NRC 199, 201 (1976). While the "general relevancy" test is fairly liberal, it does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus, parties may obtain discovery only of information which is relevant to the controverted subject matter of the proceeding, as identified in the prehearing order, or which is likely to lead to the discovery of admissible evidence. This rule applies as much to Part 70 licenses for special nuclear material as to Part 50 licenses for construction of utilization facilities. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). Moreover, while the scope of discovery is rather broad, requests phrased in terms of "all documents..." are not favored. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

However, when a lawyer has asked questions that are properly within the scope of the proceeding, objections to letting the witness answer are an obstruction to the discovery process. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-15, 39 NRC 254, 263 (1994).

A motion to compel discovery need not seek information which would be admissible per se in an adjudicatory proceeding. The motion need only request information which reasonably could lead to admissible evidence. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-112 (1992).

An intervenor may obtain information about other reactors in the course of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982).

An intervenor's motion which sought to preserve deficient components which the Applicant was removing from its plant was denied because the motion did not comply with the requirements for (1) a stay, or (2) a motion for discovery, since it did not express an intention to obtain information about the components. The questions raised in the intervenor's motion, including the possible need for destructive evaluation of the components, were directed to the adequacy and credibility of the applicant's evidence concerning the components. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 438 n.6 (1985).

In general, the discovery tools are the same as or similar to those provided for by the Federal Rules of Civil Procedure. The Commission's regulations permit depositions and requests for production of documents between intervenors and applicants without leave of the Commission and without any showing of good cause (10 CFR §§ 2.740a, 2.741). The regulations (10 CFR § 2.740b) specifically provide for interrogatories similar to those addressed by Rule 33 of the Federal Rules, although such interrogatories are not available for use against nonparties. The scope of discovery under the Commission's Rules of Practice is similar to discovery under the Federal Rules of Civil Procedure. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

Since written answers to interrogatories under oath as provided by 10 CFR § 2.740(b) are binding upon a party and may be used in the same manner as depositions, the authority of the person signing the answers to, in fact, provide such answers may be ascertained through discovery. Statements of counsel in briefs or arguments are not sufficient to establish this authority. Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1045 (1978).

If a party has insufficient information to answer interrogatories, a statement to that effect fulfills its obligation to respond. If the party subsequently obtains additional information, it must supplement its earlier response to include such newly acquired information, 10 CFR § 2.740(c). Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 911 (1980).

To determine subject matter relevance for discovery purposes, it is first necessary to examine the issue involved. In an antitrust proceeding, a discovery request will not be denied where the interrogatories are relevant only to proposed antitrust license conditions and not to whether a situation inconsistent with the antitrust laws exists. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

At least one Licensing Board has held that, in the proper circumstances, a party's right to take the deposition of another party's expert witness may be made contingent upon the payment of expert witness fees by the party seeking to take the deposition. Public Service Co. of Oklahoma (Black Fox, Units 1 & 2), LBP-77-18, 5 NRC 671, 673 (1977).

Intervenor has the burden of demonstrating that the benefit of a deposition of a seriously ill person outweighs the burden, given the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-24, 40 NRC 83, 85 (1994).

The lawyer of an ill individual sought as subject of a deposition may not assert that the deposition would impose an undue burden unless the proposed subject seeks to be protected or there is some reason to question the rationality behind the persons's willingness to be deposed. Vogtle, supra, 40 NRC at 86. The Licensing Board establishes conditions under which a voluntary agreement may be reached concerning the deposition of a seriously ill individual. Id.

Based on 10 CFR § 2.720(d) and § 2.740a(h), fees for subpoenas and the fee for deponents, respectively, are to be paid by the party at whose instance the subpoena was issued, and the deposition was held. Pursuant to 10 CFR § 2.740a(d), objections on questions of evidence at a deposition are simply to be noted in short form, without argument. The relief of a stay of a hearing to permit deposition of witnesses is inappropriate in the absence of any allegation of prejudice. Each party to an NRC proceeding is not required to convene its own deposition if it seeks to question a witness as to any matter beyond the scope of those issues raised on direct by the party noticing the deposition. No party has a proprietary interest in a deposition; therefore, no party has a proprietary interest in a subpoena issued to a deponent. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1544-1546 (1982).

The Licensing Board, as provided by 10 CFR § 2.740(c) and 10 CFR § 2.740(d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994). Thus, a Licensing Board may issue a protective order which limits the representatives of a party in a proceeding who may conduct discovery of particular documents. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 75 (1987).

Consistent with Board management of discovery under 10 CFR 2.718(e), discovery may be limited to the admitted bases of a contention during the first phase of a proceeding. After the hearing on the first phase, the Board can determine whether it has a complete record for decision or whether further discovery is necessary. [The actual scope of a contention may be broader than its specifically pleaded bases.] Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-15, 38 NRC 20 (1993).

A party is only required to reveal information in its possession or control. A party need not conduct extensive independent research, although it may be required to perform some investigation to determine what information it actually possesses. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). This holding has been codified in the Rules of Practice at 10 CFR § 2.740(b)(3) which also prohibits the use of interrogatories which request a party to explain the reasons why the party did not

use alternative data, assumptions, and analyses in developing its position on a matter in the proceeding. 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party is not required to search the record for information in order to respond to interrogatories where the issues that are the subject of the interrogatories are already defined in the record and the requesting party is as able to search the record as the party from whom discovery is requested. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 948 (1987).

2.11.2.3 Requests for Discovery During Hearing

Requests for background documents from a witness, to supply answers to cross-examination questions which the witness is unable to answer, cannot be denied solely because the material had not been previously requested through discovery. However, it can be denied where the request will cause significant delay in the hearing and the information sought has been substantially supplied through other testimony. Illinois Power Co. (Clinton Nuclear Station, Units 1 Z 2), ALAB-340, 4 NRC 27 (1976).

2.11.2.4 Privileged Matter

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. To obtain a protective order (10 CFR § 2.740(c)), it must be demonstrated that:

(1) the information in question is of a type customarily held in confidence by its originator;

(2) there is a rational basis for having customarily held it in confidence;

(3) it has, in fact, been kept in confidence; and

(4) it is not found in public sources.

Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). See also Section 6.23.3.

The claimant of a privilege must bear the burden of proving that it is entitled to such protection, including pleading it adequately in its response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983); see also United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (1996).

The party asserting the privilege regarding document sought in administrative agency investigation must establish the essential elements of the privilege. United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (1996). See Shoreham, supra, 16 NRC at 1153. Intervenors' mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet that burden. Seabrook, supra, 17 NRC at 495. Louisiana Energy Services (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 69 (1993).

It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to the asserting party setting forth its assertions of privilege and specifying those matters which it claims to be privileged. Shoreham, supra, 16 NRC at 1153.

Pursuant to 10 CFR § 2.740(b)(1), parties may generally obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. By choosing to model Section 2.740(b) after Federal Rule 26(b), without incorporating specific limitations, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Shoreham, supra, 16 NRC at 1157.

A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege to apply to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Claims of privilege must be specifically asserted with respect to particular documents. Privileges are not absolute and may or may not apply to a particular document, depending upon a variety of circumstances. Shoreham, supra, 16 NRC at 1153, citing, United States v. El Paso Co., 682 F.2d 530, reh'g denied, 688 F.2d 840 (1982), cert. denied, 104 S. Ct. 1927 (1984); United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

Under NRC rules, it is not clear when a balancing of interests is required before permitting disclosure of a report that is claimed to contain trade secrets or privileged or confidential commercial or financial information. The Federal Rules of Civil Procedure clearly permit a balance. See Fed R. Civ. P. 26(c)(7). NRC rules include a comparable balancing test, see 10 CFR § 2.740(c)(6), but this test is subject to the provisions of 10 CFR § 2.790. In particular, the balancing test appears to be overridden by section 2.790(b)(6). Cf. Pacific Gas and Electric Co.

(Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775 (1980) (access by intervenors to security plan permitted subject to protective order). Even though INPO reports to the NRC fall within the FOIA exemption for commercial or financial information obtained from a person privileged or confidential as set forth under NRC rules in 10 CFR § 2.790(a)(4), Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert denied, 507 U.S. 984 (1993), they may be provided under a protective order in accordance with 10 CFR 2.790(b)(6). Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-13, 38 NRC 11, 14-16 (1993).

In determining whether a party's inadvertent disclosure of a privileged document constitutes a waiver of the privilege, a Board will consider the adequacy of the precautions taken initially to prevent disclosure, whether the party was compelled to produce the document under a Board-imposed expedited discovery schedule, the number of documents which the party had to review, and whether the party, upon learning of the inadvertent disclosure, promptly objected to the production of the document. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 19-20 (1985).

Privilege against non-disclosure deemed waived where documents have been produced in public forum, e.g., to the NRC in a section 2.206 proceeding, for an investigation, or to the Congress. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-11, 37 NRC 469, 475 (1993).

When a claim of attorney-privilege is made for a document containing a simple report of facts, the Atomic Safety and Licensing Board may examine the document further in order to ascertain whether granting privilege to the document is consistent with the purposes of the attorney-privilege. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP 95-15, 42 NRC 51 (1995); rev'd on other grounds CLI-95-15, 42 NRC 181 (1995).

Even where a First Amendment or common law privilege is found applicable to a party or nonparty resisting discovery, that privilege is not absolute. A Licensing Board must balance the value of the information sought to be obtained with the harm caused by revealing the information. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), aff'd, ALAB-764, 19 NRC 633, 641 (1984).

Although a report prepared by a party's non-witness experts qualifies for the work product privilege, a Licensing Board may order discovery of those portions of the report which are relevant to 10 CFR 50, Appendix B determinations concerning the causes of deficiencies in the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-87-20, 25 NRC 953, 957 (1987).

The attorney-client protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice.

The privilege is applicable when a corporation is the client. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 185 (1995).

Statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Shoreham, supra, 16 NRC at 1158, citing, Fischel, 557 F.2d at 212.

The attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Shoreham, supra, 16 NRC at 1158, citing, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981), Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 188 (1995).

The attorney-client privilege may not be asserted where there is a conflict of interests between various clients represented by the same attorney. There is no attorney-client relationship unless the attorney is able to exercise independent professional judgment on behalf of the interests of a client. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-1469 (1984), citing, Rule 1.7 of the ABA Model Rules of Professional Conduct.

A qualified work product immunity extends over material gathered or prepared by an attorney for use in litigation, either current or reasonably anticipated at a future time. Although the privilege is not easily overridden, a party may gain discovery of such material upon a showing of a substantial need for the material in the preparation of its case and an inability to obtain the material by any other means without undue hardships. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473-1474 (1984), citing, Hickman v. Taylor, 329 U.S. 495 (1947), and 10 CFR § 2.740(b)(2).

Interrogatories that seek the disclosure of the factual bases and legal requirements that underlie contentions constitute proper discovery of the intervenor so long as the interrogatories do not seek the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the proceeding." 10 CFR § 2.740(b)(2). This rule was adopted from Rule 26(b)(3) of the Federal Rules of Civil Procedure. Where an NRC rule of practice is based on a Federal Rule of Civil Procedure, judicial interpretations of that federal rule can serve as guidance for the interpretation of the analogous rule. Louisiana Energy Services (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 68-69 (1993) (citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983). See also Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1159-62 (1982).

The purpose of the rule has been described as to protect "[s]ubject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence . . . ." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 68-69 (1993)(citing 4 Moore's Federal Practice ¶26.64[I] (2d ed. 1191), at 26-349.

Proof at a hearing that clients had been "hounded" or otherwise improperly treated could overcome claim of privilege, either under the work product privilege or the attorney-client privilege. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 125-126 (1993).

To claim the attorney-client privilege, it must be shown that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom a communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) legal assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1098 (1983), citing, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to a determination of whether such a document is privileged. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, O'Brien v. Board of Education of City School District of New York, 86 F.R.D. 548, 549 (S.D.N.Y. 1980).

To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. U.S. v. Construction Products Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996).

The attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Shoreham, supra, 16 NRC at 1158, citing, SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). Even if some commonly known factual matters were included in the discussion, or non-legal advice was exchanged, where the primary purpose of a meeting was the receipt of legal

advice, the entire contents thereof are protected by privilege. Midland, supra, 18 NRC at 1103, citing, Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). .

An attorney's representation, that all communications between the attorney and the party were for the purpose of receiving legal advice, is sufficient for an assertion of attorney-client privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 285 (1983), reconsideration denied, LBP-83-64, 18 NRC 766 (1983).

Communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was necessary to obtain informed legal advice [and] which might not have been made absent the privilege. Shoreham, supra, 16 NRC at 1159, citing, Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980).

Where legal advice is sought from an attorney in good faith by one who is or is seeking to become a client, the fact that the attorney is not subsequently retained in no way affects the privileged nature of the communications between them. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094 (1983).

The attorney-client privilege was not waived by the presence of third persons at a meeting between client and attorney, where the situation involved representatives of two joint clients seeking advice from the attorney of one such client about common legal problems. Midland, supra, 18 NRC at 1100.

Where the date of a meeting, its attenders, its purpose, and its broad general subject matter are revealed, the attorney-client privilege was not waived as to the substance of the meeting. Midland, supra, 18 NRC at 1102.

Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 187 (1995).

Under appropriate circumstances, the attorney-client privilege may extend to certain communications from employees to corporate counsel. However, not every employee who provides a privileged communication is thereby a "client" represented by corporate counsel, or a "party" to any pending legal dispute, for purposes of ABA Disciplinary Rule 7-104. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-31, 18 NRC 1303, 1305 (1983), citing, Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn, supra, did not overturn the well-established principle that counsel should be at liberty to approach witnesses for

an opposing party. Catawba, supra, 18 NRC at 1305, citing, Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

When the client is a corporation the attorney-client privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. Georgia Power Co. et al, (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 124 (1993), citing Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981).

Not every communication by an employee to counsel is privileged. Communications made for business or personal advice are not covered by the privilege. Privileged communication concerns matters within the scope of the employee's duties. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 187 (1995).

When the client is a corporation, the power to waive the attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. Vogtle, LBP-93-18, 38 NRC 121, 126 (1993) supra, citing In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129 v. Under Seal, 902 F.2d. 244, 248 (4th Cir. 1990).

Drafts of canned testimony not yet filed by a party are not subject to discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-28, 1 NRC 513, 514 (1975).

Security plans are not "classified," and are discoverable in accordance with the provisions of 10 CFR § 2.790(d). However, they are sensitive documents and are not to be made available to the public at large. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977). See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992). In order to discover such plans, (1) the moving party must demonstrate that the plan or a portion of it is relevant to the party's contentions; (2) the release of the plant security plan must usually be subject to a protective order; and (3) no witness may review the plan until he is first qualified as an expert with sufficient competence to evaluate it. Id. Only those portions of a security plan which are both relevant and necessary for the litigation of a party's contentions are subject to discovery. Id. at 1405.

An interrogatory seeking the identity and professional qualifications of persons relied upon by intervenors to review, analyze and study contentions and issues in a proceeding and to provide the bases for contentions is proper discovery. Such information is not privileged and is not a part of an attorney's work product even though the intervenor's attorney solicited the views and analyses of the persons involved and has the sole knowledge of their identity. General Electric Company

(Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 464-468 (1978).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981). This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR § 2.744(d), 2.790(a)(7); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 91 (1983); and is embodied in FOIA, 5 USC 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra) it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving future similar reports. South Texas, supra.

There may be a limited privilege for the identity of individuals who have expressly asked or been promised anonymity in coming forward with information concerning safety-related problems at a nuclear plant. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 537 (1982).

When the NRC Staff seeks the disclosure of the identities of sources of information alleging public health and safety violations at a facility, the Staff must explore any possible alternative means of obtaining the requested information from the individuals in order to protect their confidentiality and to minimize the intrusion into their First Amendment association rights. Richard E. Dow, CLI-91-9, 33 NRC 473, 479-80 (1991), citing, United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

In determining whether or not to issue a protective order to protect the confidentiality or to limit the disclosure of the identities of prospective witnesses, a Board will weigh the benefit of encouraging the testimony of such witnesses against the detriment of inhibiting public access to that information and the cumbersome procedures necessitated by a protective order. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-40, 22 NRC 759, 763 (1985).

Privilege to withhold the names of confidential informants is not absolute; it must yield where the informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. Comanche Peak, supra, 16 NRC at 537.

Even where an informer's qualified privilege exists, it will fail in light of the Board's need for the particular information in informed decisionmaking. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 538 (1982).

FOIA does not establish new government privileges against discovery. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

The Commission's rules on discovery have incorporated the exemptions contained in the FOIA. Id.

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120. The Commission, in adopting the standards of Exemption 5, and "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123. The Government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

The executive or deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994) . A government decision-maker will not be compelled to testify about the mental processes and methods by which a decision was made, unless there is a clear showing of misconduct or wrongdoing. Franklin Savings Association v. Ryan, 922 F.2d 209, 211-212 (4th Cir. 1991), citing, United States v. Morgan, 313 U.S. 409 (1941).

Documents compiled in investigations and inspections whose production could reasonably be expected to interfere with enforcement proceedings may be exempt from disclosure under 10 CFR § 2.790(a)(7)(i). This privilege protects investigatory files, including factual materials, from disclosure in order to prevent harm to either ongoing or contemplated investigations, or to prospective enforcement actions. The Commission itself may invoke the privilege. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 200-201 (1994).

The deliberative process privilege applies to information that is both predecisional and deliberative. A document is predecisional if it was prepared before the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision. Communications are deliberative if they reflect a consultative process. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197-98 (1994).

The executive privilege may be invoked in NRC proceedings. Shoreham, supra, 19 NRC at 1333, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982), citing, Federal Open Market Committee of the Federal Reserve System v. Merril, 443 U.S. 340, 360 (1979).

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Shoreham, supra, 16 NRC at 1164, citing, EPA v. Mink, 410 U.S. 73, 87-88 (1973); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983). The executive privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1342 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

The executive privilege protects both intra-agency and interagency documents and may even extend to outside consultants to an agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1346 (1984), citing, Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. Shoreham, supra, 16 NRC at 1164, citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung, supra, 40 F.R.D. at 327.

In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the Government interest in secrecy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164-1165 (1982), citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

The burden is upon the claimant of the executive privilege to demonstrate a proper entitlement to exemption from disclosure, including a demonstration of precise and certain reasons for preserving the confidentiality of governmental communications. Shoreham, supra, 16 NRC at 1144, 1165, citing, Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

It is appropriate to look to cases decided under Exemption 5 of the FOIA for guidance in resolving claims of executive privilege in NRC proceedings related to discovery, so long as it is done using a common-sense approach which recognizes any differing equities presented in such FOIA cases. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1163-1164 (1982).

A claim of executive privilege is not waived by participation as a litigant in the proceeding. Shoreham, supra, 16 NRC at 1164.

The privilege against disclosure of intragovernmental documents containing advisory opinions, recommendations and deliberations is a part of the broader executive privilege recognized by the courts. Shoreham, supra, 16 NRC at 1164, citing, United States v. Nixon, 418 U.S. 683, 705-711 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1226-1227 (1983).

The executive privilege is not limited to policymaking, but may attach to the deliberative process that precedes most decisions of government agencies. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982).

The purpose behind the privilege is to encourage frank discussions within the Government regarding the formulation of policy and the making of decisions. Shoreham, supra, 16 NRC at 1164, citing, United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973).

2.11.2.5 Protective Orders

In using protected information, "those subject to the protective order may not corroborate the accuracy (or inaccuracy) of outside information by using protected information gained through the hearing process." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 6 (1980).

An affidavit in support of a corporation's request for a protective order is insufficient where it does not establish the basis for the affiant's personal knowledge (if any) respecting the basis for the protective order -- that is, the policies and practices of the corporation with regard to preserving the confidentiality of information said to be proprietary in nature. The Board might well disregard the affidavit entirely on the ground that it was not shown to have been executed by a qualified individual. While it may not be necessary to have the chief executive officer of the company serve as affiant, there is ample warrant to require that facts pertaining to management policies and practices be presented by an official who is in a position to attest to those policies and practices (and the reasons for them) from personal knowledge. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28 (1979). In North Anna, the Appeal Board granted a protective order request but explicitly declined to find that the corporation requesting the order had met its burden of showing that the information in question was proprietary and entitled to protection from public disclosure under the standards set forth in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). No party had objected to the order, and the Appeal Board granted the order in the interest of obtaining the requested information without untoward further delay. However, its action should not be taken as precedent for future cases in which relief might be sought from an adjudicatory board based upon affidavits containing deficiencies as described above. North Anna, supra, 10 NRC at 28.

Pursuant to 10 CFR § 2.740(f)(2), the Board is empowered to make a protective order as it would make upon a motion pursuant to Section 2.740(c), in ruling upon a motion to compel made in accordance with Section 2.740(f). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

In at least one instance, a Licensing Board deemed it unnecessary to act on a motion for a protective order where a timely motion to compel is not filed. In such a case, the motion for protective order will be deemed granted and the matter closed upon the expiration of the time for filing a motion to compel. Duke Power

Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1952 (1982).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through the threat of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-86 (1983).

A movant seeking a grant of confidentiality with regard to its identity must demonstrate the harm which it could suffer if its identity is disclosed. Joseph J. Macktal, CLI-89-12, 30 NRC 19, 24 (1989), reconsid. denied, CLI-89-13, 30 NRC 27 (1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 77 (1992).

Licensing and Appeal Boards assume that protective orders will be obeyed unless a concrete showing to the contrary is made. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 643 n.14 (1984); see Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 287-88 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 769 (1983), citing, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983). One who violates such orders risks "serious sanction". Midland, supra, 18 NRC at 769. A Board may impose sanctions to remedy the harm resulting from a party's violation of a protective order, and to prevent future violations of the order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537, 541 (1988).

2.11.2.6 Work Product

To be privileged from discovery by the work product doctrine, as codified in 10 CFR § 2.740(b)(2), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. Ordinary work product, which does not include the mental impressions, conclusions, legal theories or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of materials in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1162 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983); U.S. v. Construction

Products Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 179 (1986) (documents required by NRC regulations are discoverable even though attorneys may have assisted in preparing the documents in anticipation of litigation). An intervenor's mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet the burden of proving it is entitled to protection from discovery. Seabrook, supra, 17 NRC at 495.

In the absence of unusual circumstances, a corporate party cannot immunize itself from otherwise proper discovery merely by using lawyers to make file searches for information required to answer an interrogatory. Houston Lighting & Power Company (South Texas Project, Units 1 & 2), LBP-79-5, 9 NRC 193, 195 (1979).

Drafts of testimony are not covered by the attorney work product privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1793-1794 (1981).

2.11.2.7 Updating Discovery Responses

The requirements for updating discovery responses are set forth in 10 CFR § 2.740(e). Generally, a response that was accurate and complete when made need not be updated to include later acquired information with certain exceptions set forth in Section 2.740(e). Of course, an adjudicatory board may impose the duty to supplement responses beyond that required by the regulations. 10 CFR § 2.740(e)(3).

2.11.2.8 Interrogatories

Interrogatories must have at least general relevancy, for discovery purposes, to the matter in controversy. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

Interrogatories will not be rejected solely on the number of questions. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 330-335 (1980). However, Licensing Boards may limit the number of interrogatories in accordance with the Commission's rules. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981).

Numbers alone do not determine the propriety of interrogatories. While a Board is authorized to impose a limit on interrogatories, the rules do not do so of their own force. In the absence of specific objections there is no occasion to review the propriety of interrogatories individually. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1941 (1982).

An intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Interrogatories designed to discover what, if any, evidence underlies an intervenor's own contentions are not out of order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Interrogatories served to determine the "regulatory basis" or "legal theory" for a contention are appropriate and important. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. Instead, a party must specify precisely which documents cited contain the desired information. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-67, 16 NRC 734, 736 (1982), citing, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1421, n.39 (1982); 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981); Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980).

To the extent the interrogatory seeks to uncover and examine the foundation upon which an answer to a specific interrogatory is based, it is proper, particularly where it relates to the interrogee's own contention. Interrogatories which inquire into the basis of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 493-94 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

2.11.3 Discovery Against the Staff

Discovery against the Staff is on a different footing than discovery in general. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). Discovery against the NRC Staff is not governed by the general rules but, instead, is governed by special provisions of the regulations. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 452-53 (1993); see, e.g., 10 CFR § 2.740(f)(3), 2.740a(j) and 2.741(e). Special provisions for discovery against the Staff are contained in 10 CFR § 2.720(h)(2)(i) (depositions); § 2.720(h)(2)(ii) (interrogatories); §§ 2.744, 2.790 (production of records and documents).

With respect to requests for admissions addressed to the Staff, the Staff stands on the same footing as any party. Neither 10 CFR § 2.742 nor any other section of the regulations provides for any different treatment of the Staff. The Board also found that Rule 36(b) of the Federal Rules of Civil Procedure is helpful in interpreting the Commission's rules concerning admissions. That rule states that the court may permit withdrawal or amendment of an admission when the presentation of the merits of the

action will be served thereby. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 and n.4 (1994).

Depositions of named NRC Staff members may be required only upon a showing of exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981); 10 CFR § 2.720(h)(2); Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 112 (1992). Factors considered in such a showing include whether: disclosure of the information is necessary to a proper decision in the proceeding; the information is not reasonably obtainable from another source; there is a need to expedite the proceeding. Id. at 223, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974).

According to provisions of 10 CFR § 2.720, interrogatories against the Staff may be enforced only upon a showing that the answers to be produced are necessary to a proper decision in the proceeding. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980).

With respect to interrogatories asked of the Staff, the Staff is not required to answer interrogatories unless this Licensing Board finds: (1) answers to the interrogatories are necessary to the determination of this case, and (2) answers to the interrogatories are not reasonably attainable from any other source. Vogtle, supra, 40 NRC at 94-95 (citing 10 CFR § 2.720(h)(2)(ii); compare 10 CFR § 2.740b(a)).

The Staff must respond to interrogatories requesting the names of Staff involved in issuing a Notice of Violation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 143 (1994).

Document requests against the Staff must be enforced where relevancy has been demonstrated unless production of the document is exempt under 10 CFR § 2.790. In that case, and only then, must it be demonstrated that disclosure is necessary to a proper decision in the matter. Palisades, supra. Even if a relevant document is exempt from disclosure pursuant to section 2.790(a), the document must still be released if it is necessary to a proper decision in the proceeding and not reasonably obtainable from another source. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

The Licensing Board weighed several factors related to the Staff's motion to defer discovery of certain documents related to an ongoing investigation. In limiting the extent of the deferral, the Board used a balancing test comprised of four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. It applied the Commission's guidance that these elements are guides `"in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.'" Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-22, 38 NRC 189, 193 (1993) (citing Oncology Services Corp. CLI-93-17, 38 NRC 44, 51

(1993), quoting United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency, 461 U.S. 555, 565 (1983)).

The NRC Staff is not required to compile a list of criticisms of a proposal nor to formulate a position on them in response to an interrogatory. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), LBP-82-113, 16 NRC 1907, 1908 (1982).

It is appropriate to require the Staff to answer requests for admissions concerning the truth of findings in its own report, which contains important collateral facts. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140-41 (1994). It is also appropriate to require the Staff to release segregable facts on which decisions have been made, even if those facts are contained in predecisional documents. Facts that are inextricably intertwined with opinions in predecisional documents need not be released. Georgia Power, et al., 40 NRC at 142.

FEMA (Federal Emergency Management Agency) is acting as a consultant to the NRC in emergency planning matters; therefore, its employees are entitled to limitations on discovery afforded NRC consultants by 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 701 (1983).

Provisions of the Memorandum of Understanding between FEMA and NRC qualify FEMA as an NRC consultant for purposes of 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 704 (1983).

2.11.4 Responses to Discovery Requests

It is an adequate response to any discovery request to state that the information or document requested is available in public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). This holding has been codified at 10 CFR § 2.740(b)(1). 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party's response to an interrogatory is adequate if it is true and complete, regardless of whether the discovering party is satisfied with the response. However, where a party's response is inconsistent with the party's previous statements and assertions made to the Staff, a Board will grant a motion to compel discovery. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 397-99 (1988), reconsid. denied, LBP-88-25A, 28 NRC 435 (1988).

An applicant is entitled to prompt answers to interrogatories inquiring into the factual bases for contentions and evidentiary support for them, since intervenors are not permitted to make skeletal contentions and keep the bases for them secret. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901, 903 (1981), citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12

NRC 317 (1980); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81-82 (1986). An intervenor's failure to timely answer an applicant's interrogatories is not excused by the fact that the delay in answering the interrogatories might not delay the remainder of the proceeding. West Chicago, supra, 23 NRC at 82.

Answers to interrogatories should be complete in themselves. The interrogating party should not need to sift through documents or other materials to obtain a complete answer. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421 n.39 (1982), citing, 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981).

10 CFR § 2.740(b)(1) provides in part that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding ... including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Answers to interrogatories or requests for documents which do not comply with this provision are inadequate. Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737-1738 (1981).

Pursuant to 10 CFR § 2.741(d), a party upon whom a request for the production of documents is served is required to serve, within 30 days, a written response stating either that the requested inspection will be permitted or stating its reasons for objecting to the request. A response must state, with respect to each item or category, either that inspection will be permitted or that the request is objectionable for specific reasons. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

A Board may require a party, who has been served with a discovery request which it believes is overly broad, to explain why the request is too broad and, if feasible, to interpret the request in a reasonable fashion and supply documents (or answer interrogatories) within the realm of reason. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-41, 22 NRC 765, 768 (1985).

A request for documents should not be deemed objectionable solely because there might be some burden attendant to their production. Shoreham, supra, 16 NRC at 1155. Pursuant to 10 CFR § 2.740(f)(1), failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to 10 CFR § 2.740(c). A party is not required to seek a protective order when it has, in fact responded by objecting. An evasive or incomplete answer or response shall be treated as a failure to answer or respond. Shoreham, supra, 16 NRC at 1152.

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687-688 (1981).

The involvement of a party's attorneys in litigation or other professional business does not excuse noncompliance with, nor extend deadlines for compliance with, discovery requests or other rules of practice, and is an inadequate response to a motion to compel discovery. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 373 (1981).

2.11.5 Compelling Discovery/Subpoenas

Discovery can be compelled where the person against whom discovery is sought resists (See 10 CFR § 2.740(f)). Subpoenas may also issue pursuant to 10 CFR § 2.720.

In the first instance, no one appears to be immune from an order compelling discovery. The ACRS, for example, has been ordered to provide materials which it declined to provide voluntarily. Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), CLI-74-16, 7 AEC 313 (1974). Nevertheless, where discovery is resisted by a nonparty (discovery against nonparties impliedly permitted under language of 10 CFR § 2.720(f), 2.740(c)), a greater showing of relevance and materiality appears to be necessary, and a party seeking discovery must show that:

(1) information sought is otherwise unavailable; and

(2) he has minimized the burden to be placed on the nonparty.

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-118, 6 AEC 263 (1973). Moreover, Licensing Boards have, on occasion, shown reluctance to enforce the discovery rules to the letter against intervenors. See, e.g., Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-74-74, 8 AEC 669 (1974).

Section 2.740(f) like its counterpart in the last sentence of Rule 37(d) of the Federal Rules of Civil Procedure from which the Commission's provision was copied, applies exclusively to situations where a person or party totally fails to respond to a set of interrogatories or document request. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-38, 40 NRC 309, 310 (1994) citing, 8 Charles A. Wright et. al., Federal Practice and Procedure § 2291 at 809-10 (1970).

Section 2.740 of the NRC's Rules of Practice, under which subpoenas are issued, is not founded upon the Commission's general rulemaking powers; rather, it rests upon the specific authority to issue subpoenas duces tecum contained in Section 161(c) of the Atomic Energy Act. Therefore, the rule of FMC v. Anglo-Canadian Shipping

Company, 335 F.2d 255 (9th Cir. 1964) that agency discovery rules cannot be founded on general rulemaking powers does not come into play. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 694 (1979). See also OIA Investigation, CLI-89-11, 30 NRC 11, 14-15 (1989), aff'd sub nom. U.S. v. Comley, 890 F.2d 539 (1st Cir. 1989).

The federal courts generally will enforce an administrative subpoena if: (1) the agency can articulate a proper purpose for issuing the subpoena; (2) the information sought by the subpoena is reasonably relevant to the purpose of the investigation; and (3) the subpoena is not too indefinite. The Commission can establish a proper purpose for issuing a subpoena by showing that the matter under investigation implicates public health and safety concerns in matters involving nuclear materials. U.S. v. Oncology Services Corp., 60 F.3d 1015, 1020 (3rd Cir. 1995); United States v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996); U.S. v. Comley, 890 F.2d 539, 541-42 (1st Cir. 1989); Five Star Products, Inc. and Construction Products Research, Inc., CLI-93-23, 38 NRC 169, 177-178 (1993). The courts may deny enforcement of the subpoena if it is shown by firm evidence that: the subpoena was issued for an improper purpose, such as bad faith or harassment; or enforcement of the subpoena would infringe upon the right to freedom of association by compelling a private organization to reveal the identities of its existing members, subjecting them to harassment, and discouraging the recruitment of new members. U.S. v. Comley, 890 F.2d 539, 542-44 (1st Cir. 1989).

The Commission may enforce a subpoena against a contractor or a subcontractor of a licensee to investigate alleged unlawful discrimination. Five Star Products, supra; see also, Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126 (1979).

The information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. Pacific Gas & Electric Co. (Stanislaus Nuclear Project Unit 1), ALAB-550, 9 NRC 683, 695 (1979); United States v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996).

Subpoenas must be issued in good faith, and pursuant to legitimate agency investigation. Metropolitan Edison Company (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 729 (1980).

The district court must enforce agency subpoena unless information is plainly incompetent and irrelevant to any lawful purpose of the agency. U.S. v. Oncology Services Corp., 60 F.3d 1015, 1020 (3rd Cir. 1995).

The referral of matters to the Department of Justice for criminal proceedings, which are separate and distinct from matters covered by subpoenas issued by the Director of Office of Inspection and Enforcement, does not bar the Commission from pursuing its general health and safety and civil enforcement responsibilities through issuance of subpoena. Section 161(c) of Atomic Energy Act, 42 U.S.C. § 2201(c). Metropolitan Edison Company (Three Mile Island, Unit 1), CLI-80-22, 11 NRC 724, 725 (1980).

10 CFR § 2.720(a) contemplates ex parte applications for the issuance of subpoenas. Although the Chairman of the Licensing Board "may require a showing of general relevance of the testimony or evidence sought," he is not obligated to do so. The matter of relevance can be entirely deferred until such time as a motion to quash or modify the subpoena raises the question of relevance. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698 n.22 (1979).

A Licensing Board is required to issue a subpoena if the discovering party has made a showing of general relevance concerning the testimony or evidence sought. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

Section 2.720(f) of the Rules of Practice specifically provides that a Licensing Board may condition the denial of a motion to quash or modify a subpoena duces tecum "on just and reasonable terms." That phrase is expansive enough in reach to allow the imposition of a condition that the subpoenaed person or company be reimbursed for document production costs. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698-699 (1979).

The Commission denied a motion to quash a Staff subpoena where the subpoenaed individual simply alleged that the records sought by the subpoena contained information of Staff misconduct. Richard E. Dow, CLI-91-9, 33 NRC 473, 478-79 (1991).

Generally, document production costs will not be awarded unless they are found to be not reasonably incident to the conduct of a respondent's business. Stanislaus, supra, 9 NRC at 702.

Where a party has filed objections to one or more interrogatories or document requests or set forth partial, albeit incomplete, answers in a discovery response, the last sentence of section 2.740(f) has no applicability. The proper procedure in such a situation is for the party opposing the discovery to await the filing of a motion to compel and then respond to that motion. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-38, 40 NRC 309, 310 (1994).

Under 10 CFR § 2.740 and § 2.740b, the presiding officer of a proceeding will rule upon motions to compel discovery which set forth the questions contained in the interrogatories, the responses of the party upon whom they were served, and arguments in support of the motion to compel discovery. An evasive or incomplete answer or response to an interrogatory shall be treated as a failure to answer or respond. Houston Lighting & Power Company (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-195 (1979).

Specific objections must be made to the alleged inadequacy of discrete responses. South Texas, supra, 9 NRC at 195.

A discovering party is entitled to direct answers or objections to each and every interrogatory posed. Objections should be plain enough and specific enough so that it can be understood in what way the interrogatories are claimed to be objectionable. General objections are insufficient. The burden of persuasion is on the objecting party to show that the interrogatory should not be answered, that the information called for is privileged, not relevant, or in some way not the proper subject of an interrogatory. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982).

A motion to compel is required under the rules to set forth detailed bases for Board action, including arguments in support of the motion. 10 CFR § 2.740(f). This means that relief will only be granted against a party resisting further discovery when the movant gives particularized and persuasive reasons for it. Generalized claims that answers are evasive or that objections are unsubstantial will not suffice. The movant must address each interrogatory, including consideration of the objection to it, point by point. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1950 (1982).

2.11.5.1 Compelling Discovery From ACRS and ACRS Consultants

Although 10 CFR § 2.720 does not explicitly cover consultants for advisory boards like the Advisory Committee on Reactor Safeguards (ACRS), it may fairly be read to include them where they have served in that capacity. Therefore, a party seeking to subpoena consultants to the ACRS may do so but must show the existence of exceptional circumstances before the subpoenas will be issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 42 n.2 (1979).

2.11.5.2 Sanctions for Failure to Comply with Discovery Orders

10 CFR § 2.707 authorizes the presiding officer to impose various sanctions on a party for its failure to, among other things, comply with a discovery order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 NRC 421, 433 (1983). Those sanctions include a finding of facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order. Pursuant to 10 CFR § 2.707, the failure of a party to comply with a Board's discovery order constitutes a default for which a Board may make such orders in regard to the failure as are just. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1122 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80 (1986).

A Licensing Board may dismiss the contentions of an intervenor who has failed to respond to an applicant's discovery requests, particularly where the intervenor has failed to file a response to the applicant's motion for summary disposition. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986). An intervenor's alleged poor preparation of a contention and a related

motion for summary disposition, as distinguished from the intervenor's failure to respond at all to discovery requests, does not warrant the dismissal of the intervenor's contention. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 679 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Pursuant to 10 CFR § 2.707, an intervenor can be dismissed from the proceeding for its failure to comply with discovery orders. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric & Gas Co. (Atlantic Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702 (1975).

Intervenors were dismissed from a proceeding when the Board determined that: the intervenors had engaged in a willful, bad faith strategy to obstruct discovery; the intervenors' actions and omissions prejudiced the applicant and the integrity of the adjudicatory process; and the imposition of lesser sanctions earlier in the proceeding had failed to correct the intervenors' actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 375-77 (1988), rev'd in part and vacated in part, ALAB-902, 28 NRC 423 (1988), review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). Where multiple Licensing Boards are presiding over different portions of an operating license proceeding, an individual Licensing Board's authority to order the dismissal of a party applies only to the hearing over which it has jurisdiction, and does not extend to those portions of the proceeding pending before the other Licensing Boards. A party who seeks the dismissal of another party from the entire proceeding must request the sanction of dismissal from each of the Boards before which different parts of the proceeding are pending. Shoreham, supra, 28 NRC at 428-30, review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). On directed certification from the Appeal Board of the intervenors' appeal of their dismissal as parties by the OL-3 Licensing Board (which issued LBP-88-24, supra), the Commission determined that the intervenors' conduct before the Licensing Board warranted their dismissal as parties from all proceedings pending before the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 231-32 (1989).

A licensee's motion for sanctions against an intervenor for failure to comply with discovery requests poses a three part consideration: (1) due process for the licensee; (2) due process for the intervenor; and (3) an overriding consideration of the public interest in a complete evidentiary record. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893, 897 (1980).

Counsel's allegations of certain problems as excuses for intervenor's failure to provide discovery did not justify reconsideration of the Board's imposition of sanctions for such failure, where such allegations were expressly dealt with in the Board's order compelling discovery. Nor can an intervenor challenge the sanctions on the grounds that other NRC cases involved lesser sanctions, where

the intervenor has willfully and deliberately refused to supply the evidentiary bases for its admitted contentions. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-82-5, 15 NRC 209, 213-214 (1982). See, however, ALAB-678, 15 NRC 1400 (1982), reversing the Byron Licensing Board's dismissal of intervenor for failure to comply with discovery orders on the ground that such a sanction was too severe in the circumstances.

The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. In selecting a sanction, Licensing Boards are to consider the relative importance of the unmet obligation; its potential harm to other parties or the orderly conduct of the proceeding; whether its occurrence is an isolated incident or a part of a pattern of behavior; the importance of the safety or environmental concerns raised by the party and all of the circumstances. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1947 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 590 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 392 (1983); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 848-49 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80-81 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 365-68 (1988); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 223 (1989).

The refusal of any party to make its witnesses available to participate in the prehearing examinations is an abandonment of its right to present the subject witness and testimony. An intervenor's intentional waiver of both the right to cross-examine and the right to present witnesses amounts to an effective abandonment of their contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935, 1936 (1982).

Although failure to comply with a Board order to respond to interrogatories may result in adverse findings of fact, the Board need not decide what adverse findings to adopt until action is necessary. When another procedure has been adopted requiring intervenors to shoulder the burden of going forward on a motion for summary disposition, it may be appropriate to await intervenor's filing on summary disposition, before deciding whether or not to impose sanctions for failure to respond to interrogatories pursuant to a Board order. Sanctions only will be appropriate if failure to respond prejudices applicant in the preparation of its case. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982).

Where an intervenor has failed to comply with discovery requests and orders, the Licensing Board may alter the usual order of presentation of evidence and require

an intervenor that would normally follow a licensee, to proceed with its case first. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in Dart on other grounds, CLI-85-2, 21 NRC 282 (1985). See Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977), cited with approval in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); 10 CFR § 2.731; 10 CFR Part 2, Appendix A, § V(d)(4); 5 U.S.C. § 556.

2.11.6 Appeals of Discovery Rulings

A Licensing Board order granting discovery against a third party is a final order for which appellate review may be sought; an order denying such discovery is interlocutory, and an appeal is not permitted. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973).

Motions to reconsider Board Orders must be made promptly, generally within 10 days of the date of issuance. In some cases, even shorter filing deadlines will be imposed. Once the opportunity to file a motion for reconsideration has run, the Board's rulings become the law of the case and may not subsequently be challenged successfully. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 259 (1994).

Interlocutory review of a discovery order is warranted when the alleged harm would be immediate and could not be redressed through future review of a final decision of the licensing board. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

A discovery order entered against a nonparty is a final order and thus is appealable. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 636 n.1 (1984).

Typically, discovery orders can be reviewed on appeal following a final judgment. A claim of privilege is not alone sufficient to justify interlocutory review. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995).

Earlier caselaw suggests that where a nonparty desires to appeal a discovery order against him, the proper procedure is for such person to enter a special appearance before the Licensing Board and then file an appropriate appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85 (1976).

To establish reversible error from the curtailment of discovery procedures, a party must demonstrate that such curtailment made it impossible to obtain crucial evidence.

Implicit in such a showing is proof that more diligent discovery was impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). The Appeal Board refused to review a discovery ruling referred to it by a Licensing Board when the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling and where the ruling was not novel. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual."

Questions about the scope of discovery concern matters which are particularly within a trial board's competence and appellate review of such rulings is usually best conducted at the end of case. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

2.11.7 Discovery in High-Level Waste Licensing Proceedings

2.11.7.1 Pre-License Application Licensing Board

Pursuant to 10 CFR § 2.1010, a Pre-License Application Licensing Board is authorized to resolve questions concerning: access to the Licensing Support System (LSS); the entry of documentary material into the LSS; discovery requests; and the development and operation of the LSS.

2.11.7.2 Licensing Support System

The Licensing Support System (LSS) is an electronic information management system, established pursuant to Subpart J of 10 CFR Part 2, which will contain the documentary material generated by the participants in the high-level waste licensing proceeding as well as NRC orders and decisions related to the proceeding.

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3.1 Licensing Board

3.1.1 General Role of Licensing Board

The general role of the Licensing Board is outlined in Appendix A to Part 2 of 10 CFR. In contested construction permit proceedings, the Board must make a determination as to the issues set out in 10 CFR Part 2, Appendix A, § VI(c)(1) and (3) as well as any issues raised by the parties. In an uncontested CP proceeding, the Board must make the determinations listed in 10 CFR Part 2, Appendix A, § VI(c)(2) and (3).

A Licensing Board is required to issue an initial decision in a case involving an application for a construction permit even if the proceeding is uncontested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 489 (1984), citing, 10 CFR § 2.104(b)(2) and (3).

In operating licensing proceedings as to radiological safety matters, the Board is to decide those issues put in controversy by the parties (10 CFR Part 2, Appendix A, § VIII(b)). In addition, the Board must require evidence and resolution of any significant safety matter of which it becomes aware regardless of whether the parties choose to put the matter in controversy. 10 CFR Part 2, Appendix A, § VIII(b). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524-25 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 362 (1973).

Normally, the Licensing Board is charged with compiling a factual record in a proceeding, analyzing the record, and making a determination based upon the record. The Commission will assume these functions of the Licensing Board only in extraordinary circumstances. Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 & 5), CLI-77-11, 5 NRC 719, 722 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1155 (1984).

The licensing board performs the important task of judging factual and legal disputes between parties, but it is not an institution trained or experienced in assessing the investigatory significance of raw evidence. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 225 (1995).

A Licensing Board is not required to do independent research or conduct de novo review of an application in a contested proceeding, but may rely upon uncontradicted Staff and applicant evidence. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 334-35 (1973); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, (1972), aff'd, UCS v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

A Licensing Board is not merely an evidence gathering body. Rather, it has the responsibility for appraising ab initio the record developed before it and for formulating the agency's initial decision based on that appraisal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Licensing Boards have a duty not only to resolve contested issues, but to articulate in reasonable detail the basis for the course of action chosen. A Board must do more than reach conclusions; it must confront the facts. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977). See also Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 14 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 533-34 (1988) (a Board is not required to make explicit findings if it decision otherwise articulates in reasonable detail the basis for its determinations). However, a Licensing Board is not required to refer specifically to every proposed finding. Limerick, supra, 25 NRC at 14.

Licensing Boards are bound to comply with directives of a higher tribunal, whether they agree with them or not. The same is true with respect to Commission review of Appeal Board action and judicial review of agency action. Any other alternative would be unworkable and would unacceptably undermine the rights of the parties. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983).

It is appropriate for the Board to address issues concerning the confidentiality of a portion of its record, regardless of whether the issue was raised by a party. Such an action is within the Board's general authority to respond to a "proposal" that a document be treated as proprietary and is not a prohibited sua sponte action of the Board. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216, 220 (1982); LBP-82-6, 15 NRC 281 (1982); and LBP-82-12, 15 NRC 354 (1982).

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 859, 871-72 (1986).

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A Licensing Board may conduct separate hearings on environmental, and radiological health and safety issues. Absent persuasive reasons against segmentation, contentions raising environmental questions need not be heard at the health and safety

stage of a proceeding notwithstanding the fact they may involve public health and safety considerations. Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 908 (1980).

It is impractical to delay licensing proceeding to await ASME action. The responsibility of the Board is to form its own independent conclusions about licensing issues. Regulations that reference the ASME code were not intended to give over the Commission's full rulemaking authority to a private organization on an ongoing basis; nor is a private organization intended to become the authority concerning criteria necessary to the issuance of a license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-33, 18 NRC 27, 35 (1983).

3.1.1.1 Role and Authority of the Chief Judge

The Chief Administrative Judge of the Licensing Board Panel is empowered to 1) establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and 2) determine which portions will be considered by one board as distinguished from another. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434 (1989); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 311 (1998).

The Commission expects the Chief Judge to exercise his authority to establish multiple boards only when: 1) the proceeding involves discrete and separable issues; 2) the issues can be more expeditiously handled by multiple boards than by a single board; and 3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C., supra, at 311.

As a general principle multiple boards should not be established if it would likely result in duplicative work or conflicting rulings. Private Fuel Storage, L.L.C., supra, at 312.

3.1.2 Powers/Duties of Licensing Board

The Licensing Board has the right and duty to develop a full record for decisionmaking in the public interest. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1199 (1982).

Licensing Boards are authorized to certify questions or refer rulings to the Commission. 10 C.F.R. §§ 2.718(i), 2.730(f); Cf. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 989 n.1 (1983).

When new information is submitted to the Licensing Board, it has the responsibility to review the information and decide whether it casts sufficient doubt on the safety of a facility. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983).

A Licensing Board is required to issue an initial decision in a case involving an application for a construct on permit even if the proceeding is uncontested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 489 (1984), citing, 10 CFR § 2.104(b)(2) and (3).

Although the limited work authorization and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. Clinch River, supra, 19 NRC at 492, citing, 10 CFR §§ 2.714(f),(g) (formerly, 10 CFR §§ 2.714(e),(f)).

Pursuant to its inherent supervisory authority, the Commission may issue orders expediting Board proceedings and suggesting time frames and schedules. Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998).

A Licensing Board has authorized the issuance of a full power operating license for the Seabrook facility even though several emergency planning issues remanded by the Appeal Board and a number of intervenors' motions for the admission of new contentions were still pending before the Licensing Board. The Board believed that the issuance of a full power operating license prior to the resolution of these open matters was appropriate where the Board determined that none of the open matters involved significant safety or regulatory matters which would undermine the Board's ultimate conclusion that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Seabrook facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-33, 30 NRC 656, 657-58 (1989), appeal dismissed as moot, ALAB-947, 33 NRC 299, 378 & n.331 (1991), citing, Massachusetts v. NRC, 924 F.2d 311, 330-32 (D.C. Cir. 1991). The Commission conducted an immediate effectiveness review pursuant to 10 CFR § 2.764, and determined that the Licensing Board's authorization of the issuance of a full power operating license should be allowed to take effect. The Commission denied the intervenors' motion for relief in the nature of mandamus on the ground that there was no clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending the completion of remand proceedings or resolution of all pending matters. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229-231 (1990).

A Board may express its preliminary concerns based on its review of early results from an applicant's intensive review program which seeks to verify the design and construction quality assurance of the facility. The Board's expression of its concerns during an early stage of the program may enable the applicant to modify its program in order to address more effectively the Board's concerns and questions. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-86-20, 23 NRC 844, 845 (1986).

A Licensing Board may appoint a special assistant to act as a settlement judge, consistent with the provisions of 10 CFR § 2.722. Cameo Diagnostic Center, Inc., LBP-94-13, 39 NRC 249 (1994).

3.1.2.1 Scope of Jurisdiction of Licensing Board

A Licensing Board has only the jurisdiction and power which the Commission delegates to it. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 725 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). See also Consolidated Edison Co. of N.Y.; Power Authority of the State of N.Y. (Indian Point, Unit No. 2, Indian Point, Unit No. 3), LBP-82-23, 15 NRC 647, 649 (1982); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 680 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991). Nevertheless, it has the power in the first instance to rule on the scope of its jurisdiction when it is challenged. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Duke Power Co. (Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 905 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). Once a board determines it has jurisdiction, it is entitled to proceed directly to the merits. Zimmer, supra, 18 NRC at 646, citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980).

The regulation permitting the Board to enter protective orders, 10 C.F.R. §2.740, is procedural and may not be read to enlarge the Licensing Board's authority into areas that the Commission has clearly assigned to other offices. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 226 (1995).

The effect of a Policy Statement of the Commission that deprives a Board of jurisdiction, is to prohibit that Board from inquiring into the procedural regularity of the policy statement. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 NRC 751 (1982).

After the issuance of a Licensing Board's initial decision on a particular issue, exclusive jurisdiction over the issue lies with the Appellate Tribunal. Section 2.717(a) of the Rules of Practice is reconcilable with 2.718(j) in that the identity of the presiding officer with exclusive jurisdiction over a particular issue changes as the proceeding moves up the appellate ladder. The parties should not be able to bestow jurisdiction on a presiding officer by selecting the tribunal for the relief sought by a motion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86, 16 NRC 1190, 1191, 1193 (1982).

Absent special circumstances, a Licensing Board may consider ab initio whether it has power to grant relief that has been specifically sought of it. Every tribunal possesses inherent rights and duties to determine in the first instance its own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

A Licensing Board's jurisdiction is defined by the Commission's notice of hearing. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 2 NRC 785, 790 (1985). See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1) LBP-87-23, 26 NRC 81, 84 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 504, 506 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20-21 (1991).

A Licensing Board generally can neither enlarge nor contract the jurisdiction conferred by the Commission. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974) Three Mile Island, supra, 26 NRC at 476; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-19, 30 NRC 55, 58, 59-60 (1989).

Where the Commission's notice of hearing is general and only refers to the application for an operating license, a Licensing Board has jurisdiction to consider all matters contained in the application, regardless of whether the matters were specifically listed in the notice of hearing. Catawba, supra, 22 NRC at 791-92 (application for an operating license contained proposal for spent fuel storage).

A reconstituted Licensing Board is legally competent to rule on all matters within its jurisdiction, including a party's objections to any orders issued by the original Licensing Board prior to the reconstitution of the Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-86-38A, 24 NRC 819, 821 (1986).

A Licensing Board does not have the jurisdiction to refer NRC examination cheaters for criminal prosecution, nor does it have authority over formulation of generic Staff procedures for administering NRC examinations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 302, 372 (1982).

The Atomic Safety and Licensing Board may not place itself in the position of deciding whether the NRC Staff should be permitted to refer information obtained through discovery to NRC investigatory staff offices. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-95-16, 42 NRC 221, 225 (1995).

The NRC's regulations do not contain provisions conferring jurisdiction on Licensing Boards to impose fines sua sponte. The powers granted to a Licensing Board by 10 CFR § 2.718 to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order do not include the power to impose a civil penalty. 10 CFR § 2.205(a) confers the authority to institute a civil penalty proceeding only upon the NRC's Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director, Office of Inspection and Enforcement. A Licensing Board becomes involved in a civil penalty proceeding only if the person charged with a violation requests a hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982); see 10 CFR § 2.205(f).

In a previously uncontested operating license proceeding, a Licensing Board has the jurisdiction to entertain a late-filed petition to intervene and to decide the issues raised by it until the Commission exercises its authority to license full power operation. The Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of record. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1380-1381 (1982).

The five notices and orders by which authority may be delegated to a Licensing Board include an order to initiate enforcement action (10 CFR § 2.202); an order calling for a hearing on imposition of civil penalties (10 CFR § 2.205(e)); a notice of hearing on an application for which a hearing must be provided (10 CFR § 2.104); a notice of opportunity for a hearing on an application not covered by 10 CFR § 2.104 (10 CFR § 2.105); and notice of opportunity for a hearing on antitrust matters (10 CFR § 2.102(d)(3)).

Where certain issues sought to be raised by an intervenor are not fairly within the scope of the issues for the proceeding as set forth in the Commission's notice of hearing, such additional issues are beyond the jurisdiction of the Licensing Board to decide. Union Electric Co. (Callaway Plant, Units 1 2), LBP-78-31, 8 NRC 366, 370-371 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 337-338, 344-345 (1991).

A Licensing Board which has been authorized to consider only the question of whether fundamental flaws were revealed by an exercise of an applicant's emergency plan does not also have the authority to retain jurisdiction to determine whether the flaws have been corrected. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988).

A Licensing Board which has been granted jurisdiction to preside over an operating license proceeding does not have jurisdiction to consider issues which may be raised by potential applications for operating license amendments. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-87-19, 25 NRC 950, 951 (1987 reconsideration denied, LBP-87-22, 26 NRC 41 (1987), both vacated as moot, ALAB-874, 26 NRC 156 (1987).

A Licensing Board's power in a license amendment proceeding is limited by the scope of the proceeding. Thus, in considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 CFR Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978).

In a license amendment proceeding, a Licensing Board has only limited jurisdiction. The Board may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the Commission's notice of hearing on the licensing action. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983), citing, Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988).

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 CFR Part 2, Subpart G includes the authority to permit an applicant for license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, 10 CFR § 2.714, and the right to file late contentions under certain conditions, 10 CFR § 2.714(a). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-1307 (1984).

A hearing is not mandatory on an operating license, but where a Board is convened it may look at all serious matters it deems merit further exploration. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 229-31 (1980). Where a Licensing Board has jurisdiction to consider an issue, a party to a proceeding before that Board must first seek relief from the Board; if the Licensing Board is clearly without jurisdiction, there is no need to present the matter to it for decision. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-5, 9 NRC 607 (1979).

A Licensing Board for an operating license proceeding is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the Board sua sponte. 10 CFR § 2.760a; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1102-03 (1982), citing, Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2, & 3), ALAB-319, 3 NRC 188, 190 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1),

LBP-82-115, 16 NRC 1923, 1933 (1982), citing, 10 CFR § 2.760a; Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 579 (1988). Specifically, the Board's jurisdiction is limited to a determination of findings of fact and conclusions of law on matters put into controversy by the parties to the proceeding or found by the Board to involve a serious safety, environmental or common defense and security question. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1969-70 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 & n.1 (1986), vacating, LBP-86-3, 23 NRC 69 (1986).

There is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976). The Commission's regulations limit operating license proceedings to "matters in controversy among the parties" or matters raised on a Licensing Board's own initiative sua sponte. 10 CFR § 2.104(c), 2.760a. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985).

The Licensing Board may assert jurisdiction over Part 70 material licensing issues raised in conjunction with an ongoing Part 50 licensing proceeding where the Part 70 materials license is integral to the project undergoing licensing consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 862-65 (1984), aff'd, ALAB-765, 19 NRC 645, 650-51 (1984), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976).

Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-465 (1980).

A Licensing Board must follow Appeal Board precedent as long as it has not countermanded by the Commission. Licensing Boards have no authority to pass judgment on the soundness of the rulings and instructions of a reviewing appellate tribunal. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 251-52 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988). Licensing Boards must adhere to the decisions, including interlocutory rulings, of reviewing appellate tribunals on questions which were actually decided or decided by necessary implication. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-60 (1992).

If a Licensing Board believes that circumstances warrant reopening the record for receipt of additional evidence, it has discretion to take that course of action. Where the Board was faced with an insufficient record for summary disposition, and knew of a document which had not been introduced into evidence which would support summary disposition, it was not improper to request submission of the document in support of a motion for summary disposition. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977).

A Licensing Board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of an appeal or the expiration of the period during which the Commission can exercise its right to review the record. See 10 CFR §§ 2.717(a), 2.760(a), 2.718(j), 2.786; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-83-12, 17 NRC 466, 467 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 683 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Three Mile Island, supra, 16 NRC at 1324. Until an appeal from an initial decision has been filed, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 (1983); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983). Where no appeal from an initial decision has been filed within the time allowed and the period for sua sponte review has not expired, jurisdiction to rule on a motion to reopen lies with the Licensing Board. Limerick, supra, 17 NRC at 757.

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the Board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

Where a Licensing Board has retained jurisdiction following issuance of initial decision to conduct further proceedings, it has jurisdiction to consider the admissibility of new contentions which are not related to any matter previously litigated. Zimmer, supra, 17 NRC at 467.

Pursuant to § 2.714(a), a Licensing Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting specificity requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Jurisdiction to rule on the admission of contentions, which were filed prior to final agency action and which have never been litigated, rests with the Licensing Board. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983).

A Board can authorize or refuse to authorize the issuance of an operating license. It does not, however, have general jurisdiction over the already authorized on-going construction of the plant for which an operating license application is pending, and it cannot suspend such a previously issued permit. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1086 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674. 15 NRC 1101, 1102-03 (1982).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978); Curators of University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995).

If an intervenor cannot present his case, the proper method to institute a proceeding by which the NRC would conduct its own investigation is to request action under 10 CFR § 2.206. It is not the Board's function to assist intervenors in preparing their cases and searching for their expert witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982). A Licensing Board is not an intervenor's advocate and has no independent obligation to compel the appearance of an intervenor's witness. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

Licensing Boards have the authority to call witnesses of their own, but the exercise of this discretion must be reasonable and like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

A presiding officer has jurisdiction to consider a timely motion for reconsideration filed after the issuance of an initial decision but before the timely filing of appeals. The Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 93-95 (1995). But, unless a Licensing Board takes action on a motion seeking reconsideration or clarification of a decision disposing of all matters before it, the Board does not retain jurisdiction normally lost, and the motion is effectively denied. Nuclear Fuel Services Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-83-15, 17 NRC 476, 477 (1983).

3.1.2.1.1 Authority in Construction Permit Proceedings Distinguished from Authority in Operating License Proceedings

A Licensing Board's powers are not coextensive with that of the Commission, but are based solely on delegations expressed or necessarily implied in regulation or in other Commission direction. A Licensing Board is not delegated authority to and cannot order a hearing in the public interest under 10 CFR § 2.104(a). The notice constituting a construction permit Licensing Board does not provide a basis for it to order a hearing on whether an operating license should be granted. A construction permit Licensing Board's jurisdiction will usually terminate before an operating license application is filed. Thus, it probably never could be delegated authority to determine whether a hearing on the operating license application is needed in the public interest. Similarly, the general authority of a Licensing Board to condition permits or licenses provides no basis for it to initiate other adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

A Licensing Board is limited in the types of actions it may take in a construction permit proceeding. Although it may impose conditions on the granting of a construction permit, it may not require the applicant to submit a different application. In a review of alternate sites, for example, a Licensing Board is not authorized to suggest or select preferable alternate sites or to require the applicant to reapply for a construction permit at a specified new site. The Board may only accept or reject the site proposed in the application or accept it with certain conditions. Given the limited number of appropriate responses to a construction permit application, a Licensing Board should deny a construction permit on the grounds of availability of preferable alternate sites only when the alternate site is obviously superior to the proposed site. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

In operating license proceedings, as distinguished from those involving construction permits, the role of NRC adjudicatory boards is quite limited insofar as uncontested matters are concerned. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 366, 370-71 (1978).

In Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582, 589-91 (1977), the Appeal Board determined that a second Licensing Board, constituted after an initial decision in a construction permit proceeding had been issued and the jurisdiction of the original Licensing Board had terminated, lacks authority to grant a petition for untimely intervention unless specifically delegated this authority by the Commission's regulations or one of the five notices or orders discussed in

Section 3.1.2.1., supra. The Appeal Board reasoned that Commission regulations providing for the automatic termination of the jurisdiction of the original Licensing Board revealed a policy for reasonable, timely termination of litigation. This policy would be frustrated if the second Licensing Board could, merely by its creation, reactivate and "inherit" the expired authority of the original Board. Since a Licensing Board has no independent authority to initiate adjudicatory proceedings (Id. at 592), and since the requisite authority was neither "inherited" nor specifically granted the second Board, that Board lacked authority to grant an untimely petition for intervention. Thus, the mere designation of a Licensing Board to entertain a petition does not in itself confer the requisite authority to grant the petition. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-389, 5 NRC 727 (1977). As a corollary, a Licensing Board cannot order a hearing in the absence of a pending construction permit or operating license proceeding, or some other proceeding which might arise upon the issuance of one of the five notices or orders listed above. South Texas, supra, 5 NRC at 592; Florida Power & Light Co. (St. Lucie Plant, Units 1 & 2) (Turkey Point, Units 3 & 4), LBP-77-23, 5 NRC 789 (1977). A Licensing Board is vested with the power to dismiss an application with prejudice. See 10 CFR §§ 2.107(a), 2.721(d). Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

A Licensing Board for an operating license proceeding does not have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend the previously issued construction permit. An intervenor wishing to halt such construction must file a petition under 10 CFR § 2.206 with the appropriate Commission official. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1103 (1982). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 870-871 (1984). A member of the public may challenge an action taken under 10 CFR § 50.59 (changes to a facility) only by means of a petition under 10 CFR § 2.206. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

A Licensing Board is not authorized to order an applicant for an operating license to pursue options and alternatives to its application, such as the abandonment of an entire unit of a plant. The Board must consider the application as it has been presented. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 (1984).

An operating license proceeding is not intended to provide a forum for the reconsideration of matters originally within the scope of the construction permit proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 (1985).

In an operating license proceeding, the Commission's regulations limit an adjudicatory board's finding to the issues put into contest by the parties. See 10 CFR § 2.760a. A board is not required to make, and, under the regulations cannot properly make, the ultimate finding comparable to that required in a construction permit proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

3.1.2.2 Scope of Authority to Rule on Petitions and Motions

Merely by having been constituted, a Licensing Board has authority to entertain petitions (10 CFR § 2.714((a)). To grant a petition, however, the Licensing Board must have been given the requisite authority specifically, either under Commission regulations or through one of the five notices or orders issued in relation to the proceeding in question.

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a Licensing Board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

A Licensing Board has jurisdiction to review an order of the Director of Nuclear Reactor Regulation which relates to a matter which could be admitted as a late-filed contention in a pending proceeding. The order does not have to be related to a currently admitted contention in the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 150-52 (1988), citing, 10 CFR § 2.717(b).

Licensing Boards lack authority to consider a motion for an Order to Show Cause pursuant to 10 CFR § 2.202 and 2.206. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

Licensing Boards also lack authority to consider claims for damages. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken, rests with the Appeal Board rather than the Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982).

In NRC proceedings in which a hearing is not mandatory but depends on the filing of a successful intervention petition, an "intervention" Licensing Board has authority only to pass upon intervention petitions. If a petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1

& 2), LBP-78-23, 8 NRC 71, 73 (1978); Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981). Thus, an "intervention" hearing board established solely for the purpose of passing on petitions to intervene does not have the additional authority to proceed beyond that assignment and to entertain filings going to the merits of matters in controversy between the petitioners and the applicant. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-18, 33 NRC 394, 395-96 (1991). An "intervention" board cannot, for example, rule on motions for summary disposition. Stanislaus, 5 NRC at 1177-1178.

A Licensing Board may entertain a request for declaratory relief. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977). This power stems from the fact that the Commission itself may grant declaratory relief under the APA, 5 U.S.C. § 554(e), and delegate that power to presiding officers. 5 U.S.C. § 556(c)(9). Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station), CLI-77-1, 5 NRC 1 (1977). In this vein, Licensing Boards have the authority to issue declaratory orders to terminate a controversy or remove uncertainty. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). A Licensing Board has utilized the following test to determine whether a genuine controversy exists sufficient to support the issuance of a declaratory order: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314-16 (1989), citing, SEC v. Sloan, 436 U.S. 103, 109 (1978), quoting, Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

A Licensing Board established for an operating license proceeding has authority to consider materials license questions where matters regarding a materials license bear on issues in the operating license application. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

If a Licensing Board determines that a participation agreement prohibiting the flow of electricity in interstate commerce is inconsistent with the antitrust laws, the Board may impose license conditions despite a Federal court injunction prohibiting participant from violating the agreement. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 577 (1979).

The power to grant an exemption from the regulations has not been delegated to Licensing Boards and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

Where the Staff has acted to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order or to enter into an agreement to take such actions to settle a proceeding, its actions are subject to review by the presiding officer. Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994).

3.1.2.3 Authority of Licensing Board to Raise Sua Sponte Issues

A Licensing Board has the power to raise sua sponte any significant environmental or safety issue in operating license hearings, although this power should be used sparingly in OL cases. 10 CFR § 2.760a; Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Plant, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board's independent responsibilities under NEPA may require it to raise environmental issues not raised by a party. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

The Board has the prerogative, under the regulations, to consider raising serious issues sua sponte and the responsibility of reviewing materials filed before it to determine whether the parties have brought such an issue before. This is particularly necessary when an issue is excluded from the proceeding because it has not been properly raised rather than because it has been rejected on its merits. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

Pursuant to 10 CFR § 2.760a and the Commission's Memorandum dated June 30, 1981, a Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that would prompt reasonable minds to inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 697 (1981).

The regulations limiting the Board's authority to raise sua sponte issues restrict its right to consider safety, environmental or defense matters not raised by parties but do not restrict its responsibility to oversee the fairness and efficiency of proceedings and to raise important procedural questions on its own motion. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-24A, 15 NRC 661, 664 (1982).

Because Boards may raise important safety and environmental issues sua sponte, they should review even untimely contentions to determine that they do not raise important issues that should be considered sua sponte. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-32 (1982).

A Licensing Board's inherent power to shape the course of a proceeding should not be confused with its limited authority under 10 CFR § 2.760a to shape the issues of the proceeding.

The latter is not a substitute for or a means to accomplish the former. Sua sponte authority is not a case management tool. Accordingly, the apparent need to expedite a procedure or monitor the Staff's progress in identifying and/or evaluating potential safety or environmental issues are not factors that authorize a Board to exercise its sua sponte authority. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113 (1981).

The incompleteness of Staff review of an issue is not in itself sufficient to satisfy the standard for sua sponte review. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516, 519 (1985), citing, Comanche Peak, supra, 14 NRC at 1114. However, a Board may take into account the pendency and likely efficacy of NRC Staff non-adjudicatory review in determining whether or not to invoke its sua sponte review authority. South Texas, supra, 21 NRC at 519-523, citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982), reconsideration denied, CLI-83-4, 17 NRC 75 (1983), and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-75, 18 NRC 1254 (1983).

A Board decision to review a proposal concerning the withholding of a portion of the record from the public is an appropriate exercise of Board authority and is not subject to the sua sponte limitation on Board authority. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982) and LBP-82-12, 15 NRC 354 (1982). Because exercise of this authority does not give rise to a sua sponte issue, notification of the Commission is not required.

The Board's authority to consider substantive issues is limited by the sua sponte rule, but the same limitation does not apply to its consideration of procedural matters, such as confidentiality issues arising under 10 CFR § 2.790. While it would not always be appropriate for the Board to take up proprietary matters on its own, where the Board finds the Staff's review unsatisfactory, sua sponte review of those matters may be necessary. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 288 (1982).

A Board may raise a procedural question, such as whether a portion of its record should be treated as proprietary or released to the public, regardless of whether the full scope of the question has been raised by a party. Point Beach, supra.

Information that will help the Board decide whether to raise a sua sponte issue should be made available to the Board. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-9, 15 NRC 339, 340 (1982).

Board inquiries related to admitted contentions do not create sua sponte matters requiring notification of the Commission. That the Board gives advance notification to a party that related questions may be asked does not convert those questions into sua sponte issues requiring notification of the Commission. Nor is notification required when a Board has already completed action on a procedural matter and no further obligation has been imposed on a party. The sua sponte rule is intended to preclude major, substantive inquiries not related to subject matter already before the Board, not minor procedural matters. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-12, 15 NRC 354, 356 (1982).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 CFR §§ 2.760a, 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980). An adjudicatory board's decision to exercise its sua sponte authority must be based on evidence contained in the record. A board may not engage in discovery in an attempt to obtain information upon which to establish the existence of a serious safety or environmental issue. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986).

A Licensing Board may, under 10 CFR § 2.760a, raise and decide, sua sponte, a serious safety, environmental, or common defense and security matter, should it determine such a serious issue exists. The limitations imposed by regulation on a Board's review of a matter not in contest (and therefore not subject to the more intense scrutiny afforded by the adversarial process) do not override a Board's authority to invoke 10 CFR § 2.760a. The Commission may, however, on a case-by-case basis relieve the Boards of any obligation to pursue uncontested issues. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1112 and n.58 (1983), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 n.7 (1978).

A Licensing Board has ruled that exercise of its sua sponte authority to examine certain serious issues is not dependent on either (1) the presence of any party to raise or pursue those issues in the proceeding, or (2) the particular stage of the proceeding. Thus, the Licensing Board determined that it could properly retain jurisdiction over an intervenor's admissible contentions even though the intervenor had been dismissed from the proceeding prior to the issuance of a

notice of hearing. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-32, 32 NRC 181, 185-86 (1990), overruled, CLI-91-13, 34 NRC 185, 188-89 (1991). The Commission made clear that a Licensing Board does not have the authority to raise a sua sponte issue in an operating license or operating license amendment proceeding where all parties in the proceeding have withdrawn or been dismissed. If the Board believes that serious safety issues remain to be addressed, it should refer those issues to the NRC Staff for review. Turkey Point, supra, 34 NRC at 188-89.

3.1.2.4 Expedited Proceedings; Timing of Rulings

Licensing Boards have broad discretion regarding the appropriate time for ruling on petitions and motions filed with them. Absent clear prejudice to the petitioner from a Licensing Board's deferral of a decision on a pending motion, an Appeal Board is constrained from taking any action since the standard of review of a Licensing Board's deferral of action is whether such deferral is a clear abuse of discretion. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A Licensing Board has authority under 10 CFR § 2.711(a) to extend or lessen the times provided in the Rules for taking any action. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

As a general matter, when expedition is necessary, the Commission's Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening, even drastically in some circumstances, the various time limits for the party's filings and limiting the time for, and type of, discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.711; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

Procedures for expediting a proceeding, however, should not depart substantially from those set forth in the Rules of Practice, and steps to expedite a case are appropriate only upon a party's good cause showing that expedition is essential. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.711.

Under extraordinary circumstances, it is appropriate for the Licensing Board to address questions to an applicant even before formal action has been completed concerning admission of an intervenor into a license amendment proceeding. These questions need not be considered sua sponte issues requiring notification of the Commission. The Board may also authorize a variety of special filings in order to expedite a proceeding and may even grant petitioners the right to utilize discovery even before they are admitted as parties. However, special sensitivity

must be shown to intervenor's procedural rights when the cause for haste in a proceeding was a voluntary decision by the applicant concerning both the timing and content of its request for a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-39, 14 NRC 819, 821, 824 (1981); LBP-81-55, 14 NRC 1017 (1981).

Under exceptional circumstances, Board questions may precede discovery by the parties. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-44, 14 NRC 850, 851 (1981).

When time pressures cause special difficulties for intervenors, discovery against intervenors may be restricted in order to prevent interference with their preparation for a hearing. A presiding officer has discretionary power to authorize specially tailored proceedings in the interest of expedition. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 NRC 862, 863 (1981).

When quick action is required on a license amendment, it is appropriate to interpret petitioner's safety concerns broadly and to admit a single broad contention that will permit wide-ranging discovery within the limited time without the need to decide repeated motions for late filing of new contentions. But the contentions must still relate to the license amendment which is requested. Petitioner may not challenge the safety of activities already permitted under the license. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981).

Though the Board may admit a single broad contention in the interest of expedition, its liberal policy towards admissions may be rescinded when the time pressure justifying it is relieved. However, issues already raised under the liberal policy are not retroactively affected by its rescission. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-19A, 15 NRC 623, 625 (1982).

In Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of New York (Indian Point, Unit No. 3), LBP-82-12A, 15 NRC 515 (1982), the intervention petitioner filed a motion requesting permission to observe the emergency planning exercise scheduled to be held two days later for the Indian Point Facility. The Licensing Board ruled that, although 10 CFR § 2.741 directs that a party first seek discovery of this sort from another party and that only after a 30-day opportunity to respond can the party apply to the Board for relief, in this case, strict adherence to the rule would not be required. Where, as here, the exigencies of the case do not permit a 30-day response period, procedural delicacy will not be allowed to frustrate the purpose of the hearing -- especially where no party is seriously disadvantaged by expediting the action. Indian Point, 15 NRC at 518. Furthermore where the issue of adequacy of emergency planning was clearly an issue to be fully investigated and the

observations of the potential intervenors the next day would be useful to the Board in its deliberations, the Board would deny licensee's request for stay and certification to the Commission, since to grant these motions would render the issue moot. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-12B, 15 NRC 523, 525 (1982).

3.1.2.5 Licensing Board's Relationship with the NRC Staff

A Licensing Board may not delegate its obligation to decide issues in controversy to the Staff. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), (rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 [1984]), citing, Perry, supra, 2 NRC at 737.

The rule against delegation applies even to issues a Licensing Board raises on its own motion in an operating license proceeding. Byron, supra, 19 NRC at 211, citing, Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The rule against delegation applies, in particular, to quality assurance issues. Byron, supra, 19 NRC at 212, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). However, where there is nothing remaining to be adjudicated on a quality assurance issue, the adequacy of a 100 percent reinspection of a contractor's work may be delegated to the Staff to consider post-hearing. Byron, supra, 19 NRC at 216-17.

On the other hand, with respect to emergency planning, the Licensing Board will accept predictive findings and post-hearing verification by Staff of the formulation and implementation of aspects of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in Dart on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361-362 (1991).

With respect to emergency planning it is "established NRC practice that, where appropriate, the Licensing Board may refer minor safety matters not pertinent to its basic findings to the NRC staff for posthearing resolution, and may make predictive findings regarding emergency planning that are subject to posthearing verification." Louisiana Energy Services (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 108 (1996), citing Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 331 (D.C. Cir.), cert. denied, 502 U.S. 899 (1991). But only matters not material to the basic findings necessary for issuance of a license may be referred to the NRC staff for post hearing resolution -- e.g., minor procedural or verification questions. The "posthearing" approach should be employed sparingly and only in clear cases. Louisiana Energy Services (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 108 (1996) (internal quotations and citations omitted).

In a construction permit proceeding, the Licensing Board has a duty to assure that the NRC Staff's review was adequate even as to matters which are uncontested. Gulf States Utilities Co. (River Bend Station, Units 1 & 2),

ALAB-444, 6 NRC 760, 774 (1977). In this vein, a more recent case reiterating the rule that a Licensing Board may not delegate its obligation to decide significant issues to the NRC Staff is Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978).

A Licensing Board does not have the power, under 10 CFR § 2.718 or any other regulation, to direct the Staff in the performance of its independent responsibilities. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

Whether a Board may modify an order or action of the Staff depends on the relationship of the order to the subject matter of a pending proceeding. If closely related, a Staff order may not be issued, or is subject to a stay until resolution of the contested issue. If far removed from the subject matter of a pending proceeding, a Staff order should not be considered by the Board. Finally, there are matters which are properly the subject of independent Staff action, but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board is also appropriate. Nuclear Fuel Services Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1082 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979).

Issues relating to NRC Staff compliance with and implementation of a Licensing Board order, rather than the order itself, should be presented to the Licensing Board in the first instance, rather than to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 (1982).

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a Licensing Board interfere in the review activities of the Staff. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

The decision whether to approve a plan for construction during the period in which certain design engineering and construction management, and possibly construction responsibilities, are being transferred from one contractor to another

is initially within the province of the NRC Staff. But because of the safety significance of the work to be performed, and its clear bearing on whether, or on what terms, a project should be licensed, and on the resolution of certain existing contentions, consideration of the adequacy of, and controls to be exercised by, the applicants and NRC Staff over such work falls well within the jurisdiction of the Licensing Board. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 919-20 (1981).

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's functions should bring the matter to the Commission's attention or certify the matter to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). Ordinarily, Licensing Boards should not decide whether a given action significantly affects the environment without the record support provided by the Staff's environmental review. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330 (1981).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

Applying the criteria of Summer, supra, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health effects contention. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2),

LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances, an adjudicatory board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a fullterm, full power operating license has been issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

For a Licensing Board to accept unsupported NRC Staff statements would be to abrogate its ultimate responsibility and would be substituting the Staff's judgment for its own. On ultimate issues of fact, the Board must see the evidence from which to reach its own independent conclusions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1916 (1982).

Should a Staff review demonstrate the need for corrective action, the decision on the adequacy of such a corrective action is one that the Licensing Board may not delegate. Case law suggests that even in cases where a Board resolves an issue in an applicant's favor leaving the Staff to perform what is believed to be a confirmatory review, the Staff should inform the Board should it discover that corrective action is warranted. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 520 n.21 (1983).

3.1.2.6 Licensing Board's Relationship with Other Agencies

The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977). In this case, the Wisconsin Public Service Commission decided that some of the applicants were "foreign corporations" and could not construct the Tyrone facility. Although the Appeal Board would not question the State's ruling, it remanded the case to reconsider financial and technical qualifications in light of the changes in legal relationships of the co-applicants that resulted from the State determination. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 899 (1985).

In the absence of a controlling contrary judicial precedent, the Commission will defer to a State Attorney General's interpretation of State law concerning the designation of representatives of a State participating in an NRC proceeding as an interested State. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148 (1987).

The Commission lacks the authority to disqualify a State official or an entire State agency based on an assertion that they have prejudged fundamental issues in a proceeding involving the transfer of jurisdiction to a State to regulate nuclear waste products. A party must pursue such due process claims under State law. State of Illinois (Section 274 Agreement), CLI-88-6, 28 NRC 75, 88 (1988).

A Licensing Board does not have jurisdiction in a construction permit proceeding under the Atomic Energy Act to review the decision of the Rural Electrification Administration to guarantee a construction loan to a part owner of the facility being reviewed. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 267-68 (1978).

It would be improper for a Licensing Board to entertain a collateral attack upon any action or inaction of sister Federal agencies on a matter over which the Commission is totally devoid of any jurisdiction. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Thus, a Licensing Board refused to review whether FEMA complied with its own agency regulations in performing its emergency planning responsibilities. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18-19 (1989).

As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the Council on Environmental Quality. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 461 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 228-29 (9th Cir. 1988).

Although the Commission will take cognizance of activities before other legal tribunals when the facts so warrant, it should not delay its licensing proceedings or withhold a license merely because some other legal tribunal might conceivably take future action which may later impact upon the operation of a nuclear facility. Palo Verde, supra, 16 NRC at 1991, citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978); Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units and 3), ALAB-171, 7 AEC 37, 39 (1974); and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); Long Island Lighting Co. (Shoreham Nuclear

Power Station, Unit 1), LBP-85-12, 21 NRC 644, 900 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 & n.9 (1985), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 847 (1985).

3.1.2.7 Conduct of Hearing by Licensing Board

The Commission, in its discretion, will determine whether formal or informal hearing procedures will be used to conduct a Part 52 post-construction hearing on a combined construction permit and operating license. 10 CFR § 52.103(d), 57 Fed. Reg. 60975, 60978 (Dec. 23, 1992). See Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

The presiding officer has the duty to conduct a fair and impartial hearing, to maintain order and to take appropriate action to avoid delay. Specific powers of the presiding officer are set forth in 10 CFR § 2.718. While the Licensing Board has broad discretion as to the manner in which a hearing is conducted, any actions pursuant to that discretion must be supported by a record that indicates that such action was based on a consideration of discretionary factors. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978).

A Licensing Board has considerable flexibility in regulating the course of a hearing and designating the order of procedure. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 (1985), citing, 10 CFR § 2.718(e), 2.731. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245-46 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Although the Commission's Rules of Practice set forth a general schedule for the filing of proposed findings, a Licensing Board is authorized to alter that schedule or to dispense with it entirely. Limerick, supra, 22 NRC at 727, citing, 10 CFR § 2.754(a).

Pursuant to 10 CFR § 2.718, the Licensing Board has the duty to conduct a fair and impartial hearing under the law, which includes the responsibility to impose upon all parties to a proceeding the obligation to disclose all potential conflicts of interest. Fundamental fairness clearly requires disclosure of potential conflicts so as to enable the Board to determine the materiality of such information. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-73, 16 NRC 974, 979 (1982). See also Georgia Power Co. (Vogtle Electric Generating Plant Units 1 and 2), LBP-93-8, 37 NRC 292, 299-301 (1993).

A Board may refer a potential conflict of interest matter to the NRC General Counsel, who is responsible for interpreting the NRC's conflict of interest rules. Once the matter has been handled in accordance with NRC internal procedures, a Board will not review independently either the General Counsel's determination on the matter or the judgment on whether any punitive measures are required. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 583-584 (1985).

While a Licensing Board should endeavor to conduct a licensing proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 730 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 558 (1986).

The procedures set forth in the Rules of Practice are the only ones that should be used (absent explicit Commission instructions in a particular case) in any licensing proceeding. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.718; 10 CFR Part 2, Appendix A.

A Board must use its powers to assure that the hearing is focused upon the matters in controversy and that the hearing process is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1152 (1984), citing, 10 CFR Part 2, Appendix A, § V. A Board may limit cross-examination, redirect a party's presentation of its case, restrict the introduction of reports and other material into evidence, and require the submittal of all or part of the evidence in written form as long as the parties are not thereby prejudiced. Shoreham, supra, 20 NRC at 1151-1154, 1178.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Public Service Co. of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

A Commission-ordered discretionary proceeding before a Licensing Board held to resolve issues designated by the Commission, although adjudicatory in form, was not an "on-the-record" proceeding within the meaning of the Atomic Energy Act. Therefore, in admitting and formulating contentions and sub-issues and determining order of presentation, the Board would not be bound by 10 CFR Part 2. As to all other matters, 10 CFR Part 2 would control. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1, 5 n.4 (1981), clarified, CLI-81-23, 14 NRC 610, 611 (1981).

In order that a proper record is compiled on all matters in controversy, as well as sua sponte issues raised by it, a hearing board has the right and responsibility to take an active role in the examination of witnesses. South Carolina Electric and

Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 893 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498-499 (1985). Although a Board may exercise broad discretion in determining the extent of its direct participation in the hearing, the Board should avoid excessive involvement which could prejudice any of the parties. Perry, supra, 21 NRC at 499. This does not mean that a Licensing Board should remain mute during a hearing and ignore deficiencies in the testimony. A Board must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 741 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

The presiding officer in a materials licensing proceeding is authorized to submit written questions to the applicant in order to develop a complete hearing record. However, such authority may not be exercised until a notice of hearing has been published and the hearing file has been created. Rockwell International Corp. (Rocketdyne Division), LBP-89-29, 30 NRC 299, 302-303 nn. 5, 10 (1989), citing, 10 CFR § 2.1233(a) and 54 Fed. Reg. 8269 (February 28, 1989). Upon discretionary interlocutory review, the Appeal Board clarified the role of the presiding officer under the 10 CFR Part 2, Subpart L informal adjudication procedures. Although the presiding officer is given substantial discretion and an enhanced role as a technical fact finder, the authority to control the development of the hearing record may be exercised only after: (1) a determination of whether the petitioners have the requisite standing and interests to intervene, 10 CFR § 2.1205(g); (2) the preparation of the hearing file by the NRC Staff, 10 CFR § 2.1231(a), (b); and (3) the parties' submittal of their initial evidentiary presentations, 10 CFR § 2.1233(a). Only after the issues have been defined by the parties is it then appropriate for the presiding officer to submit written questions to the parties. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-18 (1989), aff'd, CLI-90-5, 31 NRC 337, 339 (1990). A presiding officer has denied intervenors leave to respond to an NRC Staff response to questions which the presiding officer had addressed to all the parties where the intervenors failed to describe sufficiently the alleged deficiencies in the Staff response. Curators of the University of Missouri, LBP-91-14, 33 NRC 265, 266 (1991). The presiding officer may encourage the parties to reach a settlement. However, the presiding officer may not participate in any private and confidential settlement negotiations among the parties. Any settlement conference conducted by the presiding officer pursuant to 10 CFR § 2.1209(c) must be open to the public, absent compelling circumstances. Rockwell, supra, 30 NRC at 720-21, aff'd, CLI-90-5, 31 NRC 337, 339-340 (1990).

The presiding officer in an informal adjudicatory proceeding has the discretion to allow or require oral presentations by any party where it is necessary to create an adequate record for decision. Curators of the University of Missouri, LBP-91-31,

34 NRC 29, 110-112, 127 & n.194 (1991), citing, 10 CFR § 2.1235(a), clarified, LBP-91-34, 34 NRC 159 (1991).

In accordance with 10 CFR § 2.1235, when the credibility of various affiants is at the center of the parties' dispute, the Presiding Officer must convene an oral presentation session to receive testimony. Frank J. Calabrese Jr. (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 85 (1997).

The presiding officer in a Subpart L informal adjudicatory proceeding, who was concerned about an incomplete hearing file, ordered the Staff to include in the hearing file any NRC report (including inspection reports and findings of violation) and any correspondence between the NRC and the licensee during the previous 10 years which the intervenors could reasonably believe to be relevant to any of their admitted areas of concern. Curators of the University of Missouri, LBP-90-22, 31 NRC 592, 593 (1990), citing, 10 CFR § 2.1231(b). See Curators of the University of Missouri, LBP-90-33, 32 NRC 245, 250 (1990) (only NRC reports or correspondence with the licensee must be included in the hearing record). The presiding officer further directed the Staff to serve all such relevant documents on the parties, since there was no local public document room and the burden on the Staff to provide a copy of publicly available documents to the intervenors' attorney was minuscule. Curators of the University of Missouri, LBP-90-27, 32 NRC 40, 42-43 (1990).

The Commission has issued a Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), which provides guidance to Licensing Boards on the timely completion of proceedings while ensuring a full and fair record. Specific areas addressed include: scheduling of proceedings; consolidation of intervenors; negotiations by parties; discovery; settlement conferences; timely rulings; summary disposition; devices to expedite party presentations, such as pre-filed testimony outlines; round-table expert witness testimony; filing of proposed findings of fact and conclusions of law; and scheduling to allow prompt issuance of an initial decision in cases where construction has been completed.

The Commission also outlined examples of sanctions a Licensing Board may impose on a participant in a proceeding who fails to meet its obligations. A Board can warn the offending party that its conduct will not be tolerated in the future, refuse to consider a filing by that party, deny the right to cross-examine or present evidence, dismiss one or more of its contentions, impose sanctions on its counsel, or in severe cases dismiss the party from the proceeding. In selecting a sanction, a Board should consider the relative importance of the unmet obligation, potential for harm to other parties or the orderly course of the proceedings, whether the occurrence is part of a pattern of behavior, the importance of any safety or environmental concerns raised by the party, and all of the circumstances (13 NRC 452 at 454). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191, 194-95 (1992).

Consistency with the Commission's Statement of Policy on Conduct of Licensing Proceedings requires that in general delay be avoided, and specifically that a Board obtain Commission guidance when it becomes apparent that such guidance will be necessary. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 604 (1983).

Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. In addition, they may defer depositions to allow both parties to have equal access to extensive evidence which might be adverse to the deponent. Georgia Power Co. (Vogtle Electric Generating Plant Units 1 and 2), LBP-93-8, 37 NRC 292, 299-301 (1993). However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48, 53 (1982).

The Commission has inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before Licensing Boards. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 34 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (the Commission directed the Licensing Board to suspend consideration of certain issues), reconsid. denied, CLI-92-6, 35 NRC 86 (1992); Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85 (1992).

3.1.3 Quorum Requirements for Licensing Board Hearing

In Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974), the Appeal Board attempted to establish elaborate rules to be followed before a Licensing Board may sit with a quorum only, despite the fact that 10 CFR § 2.721(d) requires only a chairman and one technical member to be present. The Appeal Board's ruling in ALAB-222 was reviewed by the Commission in CLI-74-35, 8 AEC 374 (1974). There, the Commission held that hearings by quorum are permitted according to the terms of 10 CFR § 2.721(d) and that inflexible guidelines for invoking the quorum

rule are inappropriate. At the same time, the Commission indicated that quorum hearings should be avoided wherever practicable and that absence of a Licensing Board member must be explained on the record (8 AEC 374 at 376).

3.1.4 Disqualification of a Licensing Board Member

3.1.4.1 Motion to Disqualify Adjudicatory Board Member

The rules governing motions for disqualification or recusal are generally the same for the administrative judiciary as for the judicial branch itself, and the Commission has followed that practice. Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 NRC 385, 386 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998).

The general requirements for motions to disqualify are discussed in Duquesne Light Co. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974). Based on that discussion and on cases dealing with related matters:

(1) all disqualification motions must be timely filed. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973). In particular, any question of bias of a Licensing Board member must be raised at the earliest possible time or it is waived. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 384-386 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 (1984). The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for disqualification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1081-1082 (1984); Seabrook (ALAB-757), supra, 18 NRC at 1361.

(2) a disqualification motion must be accompanied by an affidavit establishing the basis for the charge, even if founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center), ALAB-225, 8 AEC 379 (1974); Shoreham, supra, 20 NRC at 23, n.1; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-8515, 22 NRC 184, 185 n.3 (1985).

(3) a disqualification motion, as with all other motions, must be served on all parties or their attorneys. 10 CFR §§ 2.701(b), 2.730(a).

Disqualification of a Licensing Board member, either on his own motion or on motion of a party, is addressed in 10 CFR § 2.704. Strict compliance with Section 2.704(c) is required. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 86 (1981). A motion to disqualify a member of a Licensing Board is determined by the individual Board member rather than by the full Licensing Board. Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21 n.26 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1186 n.1 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-6, 11 NRC 411 (1980). In those cases where a party's motion for disqualification of a Board member is denied and the Board member does not recuse himself, Section 2.704(c) explicitly requires that the Licensing Board refer the matter to the Appeal Board or the Commission. Allens Creek, supra, 13 NRC at 86; Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998).

The Appeal Board has stressed that a party moving for disqualification of a Licensing Board member has a manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement of 10 CFR § 2.704(c). Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978). See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982).

Nevertheless, as to the affidavit requirement, the Appeal Board has held that the movant's failure to file a supporting affidavit is not crucial where the motion to disqualify is founded on a fact to which the Licensing Board itself had called attention and is particularly narrow thereby obviating the need to reduce the likelihood of an irresponsible attack on the Board member in question through use of an affidavit. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978).

An intervenor's status as a party to a proceeding does not of itself give it standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). However, a party requesting disqualification may attempt to establish by reference to a Board member's overall conduct that a pervasive climate of prejudice exists in which the party cannot obtain a fair hearing. A party may also attempt to demonstrate a pattern of bias by a Board member toward a class of participants of which it is a member. Seabrook, supra, 18 NRC at 1187-1188. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1199 n.12 (1983).

A challenged member of an Appeal Board must first be given an opportunity to disqualify himself, before the Commission will act. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-9, 11 NRC 436 (1980).

3.1.4.2 Grounds for Disqualification of Adjudicatory Board Member

The aforementioned rules (3.1.4.1) with respect to motions to disqualify apply, of course, where the motion is based on the assertion that a Board member is biased. Although a Board member or the entire Board will be disqualified if bias is shown, the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a particular party is not evidence of bias against that party. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721, 726 n.60 (1985). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988). Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 34 (1979).

The disqualification of a Licensing Board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-614, 12 NRC 347, 348-49 (1980).

In the absence of bias, an Appeal Board member who participated as an adjudicator in a construction permit proceeding for a facility is not required to disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511 (1980).

An administrative trier of fact is subject to disqualification if:

(1) he has a direct, personal, substantial pecuniary interest in a result:

(2) he has a personal bias against a participant;

(3) he has served in a prosecutive or investigative role with regard to the same facts as are in issue;

(4) he has prejudged factual - as distinguished from legal or policy - issues: or

(5) he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal site), ALAB-494, 8 NRC 299, 301 (1978); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984), citing, Public Service Electric and Gas Co. (Hope Creek Generating station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

The fact that a member of an adjudicatory tribunal may have a crystallized point of view on questions of law or policy is not a basis for his or her disqualification. Shoreham, supra, 20 NRC at 34, citing, Midland, supra, 6 AEC at 66; Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988).

In its decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982), the Commission made clear that Licensing Board members are governed by the same disqualification standards that apply to Federal judges. Hope Creek, supra, 19 NRC at 20. The current statutory foundation for the disqualification standards is found in 28 U.S.C., Sections 144 and 455. Section 144 requires a Federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. Hope Creek, supra, 19 NRC at 20. Section 455(a) imposes an objective standard which is whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. Hope Creek, supra, 19 NRC at 21-22; Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998).

Under 28 U.S.C. § 455(b)(2), a judge must disqualify himself in circumstances where, inter alia, he served in private practice as a lawyer in the "matter in controversy." In accord with 28 U.S.C. § 455(e), disqualification in such circumstances may not be waived. Hope Creek, supra, 19 NRC at 21.

In applying the disqualification standards under 28 U.S.C. § 455(b)(2), the Appeal Board concluded that, in the instance of an adjudicator versed in a scientific discipline rather than in the law, disqualification is required if he previously

provided technical services to one of the parties in connection with the "matter in controversy." Hope Creek, supra, 19 NRC at 23. To determine whether the construction permit proceeding and the operating license proceeding for the same facility should be deemed the same "matter" for 28 U.S.C. § 455(b)(2) purposes, the Appeal Board adopted the "wholly unrelated" test, and found the two to be sufficiently related that the Licensing Board judge should have recused himself. Hope Creek, supra, 19 NRC at 24-25.

An administrative trier of fact is subject to disqualification for the appearance of bias or prejudgment of the factual issues as well as for actual bias or prejudgment. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568 (1985); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326 (1998); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-11, 47 NRC 302, 330-331 (1998).

Disqualifying bias or prejudice of a trial judge must generally stem from an extra-judicial source even under the objective standard for recusal which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Preliminary assessments, made on the record, during the course of an adjudicatory proceeding, based solely upon application of the decision-maker's judgment to material properly before him in the proceeding, do not compel disqualification as a matter of law. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1364-1365 (1982), citing, United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973); In Re International Business Machines Corporation, 618 F.2d 923, 929 (2d Cir. 1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1197 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721 (1985).

The fact that a Board member's actions are erroneous, superfluous, or inappropriate does not, without more, demonstrate an extrajudicial bias. Matters are extrajudicial when they do not relate to a Board member's official duties in a case. Rulings, conduct, or remarks of a Board member in response to matters which arise in administrative proceedings are not extrajudicial. Seabrook (ALAB-749), supra, 18 NRC at 1200. See also Seabrook (ALAB-748), supra, 18 NRC at 1188; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 640-41 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A judge will not be disqualified on the basis of: occasional use of strong language toward a party or in expressing views on matters arising from the proceeding; or actions which may be controversial or may provoke strong reactions by parties in

the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Limerick, supra, 22 NRC at 721; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A letter from a Board judge expressing his opinions to a judge presiding over a related criminal case did not reflect extrajudicial bias since the contents of the letter were based solely on the record developed during the NRC proceeding. The factor to consider is the source of the information, not the forum in which it is communicated. Three Mile Island, supra, 21 NRC at 569-570. Such a letter does not violate Canon 3A(6) of the Code of Judicial Conduct which prohibits a judge from commenting publicly about a pending or impending proceeding in any court. Canon 3A(6) applies to general public comment, not the transmittal of specific information by a judge to another court. Three Mile Island, supra, 21 NRC at 571. Such a letter also does not violate Canon 2B of the Code of Judicial Conduct which prohibits a judge from lending the prestige of his office to advance the private interests of others and from voluntarily testifying as a character witness. Canon 2B seeks to prevent a judge's testimony from having an undue influence in a trial. Three Mile Island, supra, 21 NRC at 570.

Membership in a national professional organization does not perforce disqualify a person from adjudicating a matter to which a local chapter of the organization is a party. Sheffield, supra, 8 NRC at 302.

3.1.4.3 Improperly Influencing an Adjudicatory Board Decision

Where a Licensing Board has been subjected to an attempt to improperly influence the content or timing of its decision, the Board is duty-bound to call attention to that fact promptly on its own initiative. On the other hand, a Licensing Board which has not been subjected to attempts at improper influence need not investigate allegations that such attempts were contemplated or promised. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 102 (1977).

3.1.5 Resignation of a Licensing Board Member

The Administrative Procedure Act requirement that the official who presides at the reception of evidence must make the recommendation or initial decision (5 U.S.C. § 554(d)) includes an exception for the circumstance in which that official becomes "unavailable to the agency." When a Licensing Board member resigns from the Commission, he becomes "unavailable" (10 CFR § 2.704(d)). Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 101 (1977). Resignation of a Board member during a proceeding is not, of itself, grounds for declaring a mistrial and starting the proceedings anew. Id. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977) was affirmed generally and on the point cited herein in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

"Unavailability" of a Licensing Board member is dealt with generally in 10 CFR § 2.704(d).

3.2 Export Licensing Hearings

3.2.1 Scope of Export Licensing Hearings

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission, in making its export licensing determinations, will consider non-proliferation and safeguards concerns, and not foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-61 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

The focus of section 134 of the Atomic Energy Act of 1954, as amended, is on discouraging the continued use of high-enriched uranium as reactor fuel and not its per se prohibition. Transnuclear, Inc., CLI-94-1, 39 NRC 17 (1994); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333 (1998).

3.3 Hearing Scheduling Matters

3.3.1 Scheduling of Hearings

An ASLB may not schedule a hearing for a time when it is known that a technical member will be unavailable for more than one half of one day unless there is no reasonable alternative to such scheduling. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 238 (1974).

Otherwise, an ASLB has general authority to regulate the course of a licensing proceeding and may schedule hearings on specific issues pending related developments on other issues. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977). In deciding whether early hearings should be held on specific issues, the Board should consider:

(1) the likelihood that early findings would retain their validity:

(2) the advantage to the public interest and to the litigants in having early, though possibly, inconclusive, resolution of certain issues:

(3) the extent to which early hearings on certain issues might occasion prejudice to one or more litigants, particularly in the event that such issues were later reopened because of supervening developments.

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975); accord Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975).

As a general rule, scheduling is a matter of Licensing Board discretion which will not be interfered with absent a "truly exceptional situation". Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 CFR 2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet to be filed operating license application. Shearon Harris, supra, ALAB-577, 11 NRC 18, 27-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Section 2.104(a) of the Commission's Rules of Practice contemplates determination of a need for a hearing in the public interest on an operating license, only after application for such a license is made. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 27-28 (1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Generally speaking, Licensing Boards determine scheduling matters on the basis of representations of counsel about projected completion dates, availability of necessary information, and adequate opportunities for a fair and thorough hearing. The Board would take a harder look at an applicant's projected completion date if it could only be met by a greatly accelerated schedule, with minimal opportunities for discovery and the exercise of other procedural rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 286-87 (1983).

A Licensing Board's denial of a request for a schedule change will be overturned only on finding that the Board abused its discretion by setting a schedule that deprives a party of its right to procedural due process. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982), quoting, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1

and 2), ALAB-459, 7 NRC 179, 188 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

3.3.1.1 Public Interest Requirements re Hearing Schedule

In matters of scheduling, the paramount consideration is the public interest. The public interest is usually served by as rapid a decision as is possible consistent with everyone's opportunity to be heard. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

To fulfill its obligation under the Administrative Procedure Act to decide cases within a reasonable time, the Commission established expedited procedures for the conduct of the 1988 Shoreham emergency planning exercise proceeding in order to minimize the delays resulting from the Commission's usual procedures, while still preserving the rights of the parties. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-70 (1988), citing, Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

Findings under 10 CFR § 2.104(a) on a need for a public hearing on an application for an operating license in the public interest cannot be made until after such application is filed. Such finding must be based on the application and all information then available. While the Commission can determine that a hearing on an operating license is needed in the public interest, a Licensing Board could not. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

3.3.1.2 Convenience of Litigants re Hearing Schedule

Although the convenience of litigants is entitled to recognition, it cannot be dispositive on questions of scheduling. Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684-685 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

Nevertheless, ASLB action in keeping to its schedule despite intervenors' assertions that they were unable to prepare for cross-examination or to attend the hearing because of a need to prepare briefs in a related matter in the U.S. Court of Appeals has been held to be an error requiring reopening of the hearing. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.3.1.3 Adjourned Hearings

(RESERVED)

3.3.2 Postponement of Hearings

3.3.2.1 Factors Considered in Hearing Postponement

Where there is no immediate need for the license sought, the ASLB decision as to whether to go forward with hearings or postpone them should be guided by the three factors listed in the Douglas Point case; namely:

(1) the likelihood that findings would retain their validity;

(2) the advantage to the public and to litigants in having early, though possibly inconclusive, resolution;

(3) the possible prejudice arising from an early hearing.

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

The fact that a party has failed to retain counsel in a timely manner is not grounds for seeking a delay in the commencement of hearings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 816 (1975).

A Licensing Board has considered the following factors in evaluating an NRC Staff motion to stay the commencement of a show cause proceeding involving the Staff's issuance of an immediately effective license suspension order: 1) the length of the requested stay; 2) the reasons for requesting the stay; 3) whether the licensee has persistently asserted its rights to a prompt hearing and to other procedural means to resolve the matter; and 4) the resulting prejudice to the licensee's interests if the stay is granted. Finlay Testing Laboratories, Inc., LBP-88-1A, 27 NRC 19, 23-26 (1988), citing, Barker v. Wingo, 407 U.S. 514 (1972).

A motion to suspend the proceeding pending resolution in state court of a state agency's determination concerning site suitability is appropriate in a situation where a particular course of action by an Applicant is being challenged under state law. Whether the particular course of action is a violation of state law is a question for state authorities to determine, not a question for which a Licensing Board is an appropriate arbiter. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-26, 44 NRC 406, 409 (1996).

3.3.2.2 Effect of Plant Deferral on Hearing Postponement

The deferral of a plant which has been noticed for hearing does not necessarily mean that hearings should be postponed. At the same time, an ASLB does have authority to adjust discovery and hearing schedules in response to such deferral. Wisconsin Electric Power Co. (Koshkonong Nuclear Power Plant, Units 1 & 2), CLI-75-2, 1 NRC 39 (1975). Note also that the adjudicatory early site review procedures set forth in 10 CFR Part 2 provide a means by which separate, early hearings may be held on site suitability matters despite the fact that the proposed plant and related construction permit proceedings have been deferred.

3.3.2.3 Sudden Absence of ASLB Member at Hearing

When there is a sudden absence of a technical member, consideration of hearing postponement must be made, and if time permits, the parties' views must be solicited before a postponement decision is rendered. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974).

Note that in Commonwealth Edison Co. (Zion Station, Units 1 & 2), CLI-74-35, 8 AEC 374 (1974), the Commission reviewed ALAB-222. While the Commission was not in total agreement with the Appeal Board's setting of inflexible guidelines for invoking the quorum rule, it agreed in principle with the Appeal Board's view that all three ASLB members must participate to the maximum extent possible in evidentiary hearings. As such, it appears that the above guidance from ALAB-222 remains in effect.

3.3.2.4 Time Extensions for Case Preparation Before Hearing

In view of the disparity between the Staff and applicant on the one hand and intervenors on the other with regard to the time available for review and case preparation, the Appeal Panel has been solicitous of intervenors' desires for additional time for case preparation. See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986, 992-93 (1974). At the same time, a party's failure to have as yet retained counsel does not provide grounds for seeking a delay in proceedings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Moreover, a party must make a timely request for additional time to prepare its case; otherwise, it may waive its right to complain. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978). More recently, too, both the Commission and the Appeal Board have made it clear that the fact that a party may possess fewer resources than others to devote to a proceeding does not relieve that party of its hearing obligations. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982).

The Appeal Board granted Staff's request for an extension of a deadline for filing written testimony but called the matter to the attention of the Commission, which has supervisory authority over the Staff. In granting the extension, made as a result of the Staff's inability to meet the earlier deadline due to assignment of Staff to Three Mile Island related matters, the Board rejected the intervenor's suggestion that it hold a hearing to determine the reasons for, and reasonableness of, the extension request. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12 (1979).

Where time extensions have been granted, the original time period is not material to a determination as to whether due process has been observed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 467 (1980).

In considering motions for extensions of time the Commission's construction of "good cause" to require a showing of "unavoidable and extreme circumstances" constitutes a reasonable means of avoiding undue delay in a license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Commission's Policy Statements and the

APA. Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 342 (1998).

3.3.3 Scheduling Disagreements Among Parties

Parties must lodge promptly any objections they may have to the scheduling of the prehearing phase of a proceeding. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2 & 3), ALAB-377, 5 NRC 430 (1977).

3.3.4 Appeals of Hearing Date Rulings

As a general rule, scheduling is a matter of ASLB discretion. Scheduling decisions will not be reviewed absent a "truly exceptional situation" which warrants interlocutory consideration. Public Service Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975). Since the responsibility for conduct of the hearing rests with the presiding officer pursuant to 5 U.S.C. § 556(c) and 10 CFR § 2.718, a Licensing Board's scheduling decision will not be examined except where there is a claim that such decision constituted an abuse of discretion and amounted to a denial of procedural due process. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188 (1978); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 379 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 74 & n.68, 83 (1985).

With regard to claims of insufficient time to prepare for a hearing, even if a party is correct in its assertion that the Staff received an initial time advantage in preparing testimony as a result of scheduling, it must make a reasonable effort to have the procedural error corrected (by requesting additional time to respond) and not wait to use the error as grounds for appeal if the party disagrees with the decision on the merits. A party is entitled to a fair hearing, not a perfect one. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 188-89 (1978).

Although, absent special circumstances, Licensing Board scheduling determinations were not reviewed absent a claim of deprivation of due process, the former Appeal Board would, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

3.3.5 Location of Hearing

(RESERVED)

3.3.5.1 Public Interest Requirements re Hearing Location

(RESERVED)

3.3.5.2 Convenience of Litigants Affecting Hearing Location

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-531 (1979).

3.3.6 Consolidation of Hearings and of Parties

Consolidation of hearings is covered generally by 10 CFR § 2.716. Consolidation of parties is covered generally by 10 CFR § 2.715a.

A Board, on its own initiative, may consolidate parties who share substantially the same interest and who raise substantially the same questions, except when such action would prejudice one of the intervenors. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986), citing, 10 CFR § 2.715a and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

Consolidation is primarily discretionary with the Boards involved. Taking into account the familiarity of the Licensing Boards with the issues most likely to bear on a consolidation motion, the Commission will interpose its judgment in consolidation cases only in the most unusual circumstances. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-26, 4 NRC 608 (1976). See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 89 (1992).

Under 10 CFR § 2.716, consolidation is permitted if found to be conducive to the proper dispatch of the Board's business and to the ends of justice. Dairyland Power Cooperative (La Crosse Boiling Water Reactor, Operating License and Show Cause), LBP-81-31, 14 NRC 375, 377 (1981). See Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-13A, 35 NRC 205, 205-206 (1992) (a 10 CFR 2, Subpart G proceeding and a 10 CFR 2, Subpart L proceeding were consolidated as a Subpart G proceeding), explained, LBP-92-16A, 36 NRC 18, 19-22 (1992).

Upon discretionary interlocutory review of the Bloomsburg consolidation order, LBP-92-13A, supra, the Commission found that the Licensing Board and the presiding officer had exceeded their authority by consolidating the Subpart G and Subpart L proceedings. The consolidation order converted the informal Subpart L proceeding into a formal Subpart G proceeding without the authorization of the Commission in violation of 10 CFR § 2.1209(k), which requires a presiding officer in a Subpart L proceeding to use the Subpart L informal hearing procedures unless he recommends and receives Commission approval to apply other procedures. However, the Commission deferred

to the judgment of the Licensing Board and presiding officer, and authorized the consolidation of the Subpart G and Subpart L proceedings as a Subpart G proceeding. The Commission noted the potential commonality of issues in the proceedings and the desire to avoid potential procedural complications. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 87, 89-91 (1992).

The Commission may in its own discretion order the consolidation of two or more export licensing proceedings, and may utilize 10 CFR § 2.716 as guidance for deciding whether or not to take such action. Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328-1329 (1977). Note, however, that persons who are not parties to either of two adjudicatory proceedings have no standing to have those proceedings consolidated under Section 2.716. Id. at 1328. Where proceedings on two separate applications are consolidated, the Commission may explicitly reserve the right to act upon the applications at different times. Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-78-4, 7 NRC 311, 312 (1978). See also Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 894 (1987).

3.3.7 In Camera Hearings

No reason exists for an in camera hearing on security grounds where there is no showing of some incremental gain in security from keeping the information secret. Duke Power Co. (Amendment to Materials License SNM-1773, Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), CLI-80-3, 11 NRC 185, 186 (1980).

Procedures for in camera hearings are discussed in Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227 (1980).

Where a party to a hearing objects to the disclosure of information and makes out a prima facie case that the material is proprietary in nature, it is proper for an adjudicatory board to issue a protective order and conduct an in camera session. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Because the party that seeks disclosure of allegedly proprietary information has the right to conduct cross-examination in camera, no prejudice results from an adjudicatory board's use of this procedure. Three Mile Island, supra, 21 NRC at 1215.

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered; if an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's

ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1025 (1981).

3.4 Issues for Hearing

The judgment of a Licensing Board with regard to what is or is not in controversy in a proceeding being conducted by it is entitled to great respect. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency plans are fundamentally flawed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 31-33 (1993).

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). See also Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1269, 1286 (1983).

The Commission's delegation of authority to a Licensing Board to conduct any necessary proceedings pursuant to 10 CFR Part 2, Subpart G includes the authority to permit an applicant for a license amendment to file contentions in a hearing requested by other parties even though the applicant may have waived its own right to a hearing. There are no specific regulations which govern the filing of contentions by an applicant. However, since an applicant is a party to a proceeding, it should have the same rights as other parties to the proceeding, which include the right to submit contentions, 10 CFR § 2.714, and the right to file late contentions under certain conditions, 10 CFR § 2.714(a). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-1307 (1984).

In a Subpart L case, a presiding officer may propose ways of narrowing issues, of settling deadlines for completion of aspects of a case, of identifying issues for a settlement on legal briefs, and for eliciting procedural suggestions from the parties. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

The issue of management capability to operate a facility is better determined at the time of the operating license application, than years in advance on the basis of preliminary plans. Carolina Power Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated. Lack of either technical competence or character qualifications on the part of a licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application. In making determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. However, not every

licensing action throws open an opportunity to engage in an inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute. The issue of character is a proper matter for inquiry in a license transfer proceeding. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). See also Piping Specialists, Inc. 36 NRC 156, 163, n.5 (1992).

A decisionmaking body must confront the facts and legal arguments presented by the parties and articulate the reasons for its conclusions on disputed issues, i.e., take a hard look at the salient problems. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 366 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 836 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982).

Findings under 10 CFR § 2.104(a) on a need for a public hearing on issues involved in an application for an operating license cannot be made until after such application is filed. Such finding must be based on the application and information then available. Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Since the Appendix I (of 10 CFR 50) rule itself does not specify health effects, and there is no evidence that the purpose of the Appendix I rulemaking was to determine generally health effects from Appendix I releases, it follows that health effects of Appendix I releases must be litigable in individual licensing proceedings. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 276 (1980). See also Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-105, 16 NRC 1629, 1641 (1982), citing, Black Fox, supra, 12 NRC at 264.

Upon certification the Commission held that in view of the fact that the TMI accident resulted in generation of hydrogen gas in excess of hydrogen generation design basis assumptions of 10 CFR § 50.44, hydrogen gas control could be properly litigated under Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR § 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guidelines values. Metropolitan Edison Company (Three Mile Island, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980). See also Illinois Power Co. (Clinton Power Station, Unit 1), LBP-82-103, 16 NRC 1603, 1609 (1982), citing, Three Mile Island, supra, 11 NRC at 675.

Whether non-NRC permits are required is the responsibility of bodies that issue such permits, not the NRC. Thus, the issue of whether or not a party has obtained other appropriate permits is not admissible in a Licensing Board hearing. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998).

A genuine scientific disagreement on a central decisional issue is the type of matter that should ordinarily be raised for adversarial exploration and eventual resolution in the adjudicatory context. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 105 (1983). See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 (1976), aff'd sub nom. Virginia

Electric and Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 912-13 (1982), review declined, CLI-83-2, 17 NRC 69 (1983).

The Commission may entirely eliminate certain issues from operating license consideration on the ground that they are suited for examination only at the earlier construction permit stage. Short of that, the Commission has considerable discretion to provide by rule that only issues that were or could have been raised by a party to the construction permit proceeding will not be entertained at the operating license stage except upon such a showing as "changed circumstances" or "newly discovered evidence." Commission practice, however, has been to determine the litigability of issues at the operating license stage with reference to conventional res judicata and collateral estoppel principles. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 696-97 (1982).

It is not a profitable use of adjudicatory time to litigate the Probabilistic Risk Assessment (PRA) methodology used on the chance that different methodology would identify a new problem or substantially modify existing safety concerns. If it is known that a problem exists which would be illustrated by a change in PRA methodology, that problem can be litigated directly; there is no need to modify the PRA to consider it. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 73 (1983).

3.4.1 Intervenor's Contentions - Admissibility at Hearing

Contentions are like Federal court complaints; before any decision that a contention should not be entertained, the proponent of the contention must be given some chance to be heard in response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979).

10 CFR § 2.714 sets forth the criteria by which ASLBs are to judge the admissibility of contentions. Pursuant to that regulation, a contention is acceptable as an issue in controversy if some basis is provided for the contention and the basis is set forth with particularity. In passing on the admissibility of a contention, a Licensing Board is not to consider the merits of the contention itself. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 216 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Illinois Power Co. (Clinton Power Station, Units 1 and 2), LBP-81-15, 13 NRC 708, 711 (1981). "[T]he general requirements in 10 C.F.R. § 2.714(b)(2)(i)-(iii) mandate that a contention's sponsor provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the Applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 365 (1998).

Although amendments to the Commission's Rules of Practice with regard to intervention have affected the time as to which contentions must be filed, the amended rules retain the requirement that the basis for contentions be set forth with reasonable specificity. 10 CFR § 2.714(b); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 802 n.73 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). A Licensing Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the requirement of reasonable specificity set forth in 10 CFR § 2.714. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

General fears or criticisms of past practices of the nuclear industry or the applicant are not appropriate bases for contentions unless there is reason to suspect the specific procedures or safety-related tests used in a proposed demonstration program which requires a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1026 (1981).

Where the laws of physics deprive a proposed contention of any credible or arguable basis, the contention will not be admitted. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 870 (1984), aff'd, ALAB-765, 19 NRC 645, 654 n.13 (1984); compare Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Whether or not a basis for contentions has been established must be decided by considering the contentions in the context of the entire record of the case up to the time the contentions are filed. Thus, when an application for a license amendment is itself incomplete, the standard for the admission of contentions is lowered, because it is easier for petitioners to have reasons for believing that the application has not demonstrated the safety of the proposed procedures for which an amendment is sought. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853 (1981).

A contention concerning the health effects of radon emissions will be admitted only if the documented opinion of one or more qualified authorities is provided to the Licensing Board that the incremental (health effects of) fuel cycle-related radon emissions will be greater than those determined in the Appeal Board proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1454 (1982), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC 632, 635 (1981).

Where the only NEPA matters in controversy are legal contentions that there has been a failure to comply with NEPA and 10 CFR Part 51, the Board may rule on the contentions without further evidentiary hearings, making use of the existing evidentiary record and additional material of which it can take official notice. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 NRC 1724, 1728 (1981).

When considering admission of new intervenor contentions based on new regulatory requirements, the Licensing Board must find a "nexus" between the new requirements and the particular facility involved in the proceeding, and that the contentions raise significant issues. The new contentions need not be solely related to contentions previously admitted, but may address themselves to the new requirements imposed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233-34 (1981).

In the context of the record before the presiding officer, including the arguments of the participants, if the presiding officer's reasons for rejecting an intervenors contentions "may be reasonably discerned," the presiding officer has provided an adequate explanation for that contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 290-91 (1988).

As a general rule, Licensing Boards should not accept in individual license proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission. As a corollary, certain issues included in an adjudicatory proceeding may be rendered inappropriate for resolution in that proceeding because the Commission has taken generic action during the pendency of the adjudication. There may nonetheless be situations in which matters subject to generic consideration may also be evaluated on a case-by-case basis where such evaluation is contemplated by, or at least consistent with, the approach adopted in the rulemaking proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889-90 (1983), aff'd, CLI-84-11, 20 NRC 1 (1984).

Contractual disputes among electric utilities regarding, for example, interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, are matters that do not fall within the jurisdiction of the Licensing Board and should properly be addressed to FERC or state agencies that regulate electric utilities. Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31; aff'd, CLI-94-10, 40 NRC 43 (1994).

3.4.2 Issues Not Raised by Parties

A Licensing Board may, on its own motion, explore issues which the parties themselves have not placed in controversy. 10 CFR § 2.760a; Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). This power, however, is not a license to conduct fishing expeditions and, in operating license proceedings, should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious safety or environmental issue remains. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-74-28, 8 AEC 7 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985). The Commission's Indian Point ruling has been incorporated into the regulations in modified form at 10 CFR § 2.760a.

When a Licensing Board in an operating license proceeding considers issues which might be deemed to be raised sua sponte by the Board, it should transmit copies of the order raising such issues to the Commission and General Counsel in accordance with the Secretary's memo of June 30, 1981. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-923 (1981).

The Licensing Board may be alerted to such serious issues not raised by the parties through the statements of those making limited appearances. See Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

Pursuant to authority granted under 10 CFR § 2.760a, the presiding officer in an operating license proceeding may examine matters not put into controversy by the parties only where he or she determines that a serious safety, environmental or

common defense and security matter exists. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

The Commission has directed that when a Licensing Board or an Appeal Board raises an issue sua sponte in an operating license proceeding, it must issue a separate order making the requisite findings, briefly state its reasons for raising the issue, and forward a copy of the order to the OGC and the Commission. Comanche Peak, CLI-81-24, supra; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987). A Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that reasonable minds could inquire further. Very specific findings are not required since they could cause prejudgment problems. The Board need only give its reasons for raising the problem. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 697 (1981).

In an operating license proceeding where a hearing is convened as a result of intervention, the Licensing Board will resolve all issues raised by the parties and any issues which it raises sua sponte. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). The decision as to all other matters which need to be considered prior to issuance of the operating license is the responsibility of the NRC Staff alone. Indian Point, supra, 3 NRC at 190; Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 58 (1984). Once the Licensing Board has resolved all contested issues and any sua sponte issues, the NRC Staff then has the authority to decide if any other matters need to be considered prior to the issuance of an operating license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-23, 14 NRC 159 (1981). The mere acceptance of a contention does not justify a Board's assuming that a serious safety, environmental, or common defense and security matter exists or otherwise relieve it of the obligation under 10 CFR § 2.760a to affirmatively determine that such a situation exists. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981).

In a construction permit proceeding, the Licensing Board has a duty to assure that the NRC Staff's review was adequate, even as to matters which are uncontested. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 774 (1977).

3.4.3 Issues Not Addressed by a Party

The fact that the Staff may be estopped from asserting a position does not affect a Board's independent responsibility to consider the issue involved. Southern California

Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975).

An adjudicatory board's examination of unresolved generic safety issues, not put into controversy by the parties, is necessarily limited to whether the Staff's approach is plausible, and whether the explanations given for support of continued safe operation of the facility are sufficient on their face. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-620, 12 NRC 574, 577 (1980).

The parties must be given an opportunity, at oral hearing or by written pleadings, to produce relevant evidence concerning abuses of Commission regulations and adjudicatory process, but if a party fails to formally tender such evidence, the Licensing Board should not engage in its own independent and selective search of the record. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978 (1981).

3.4.4 Separate Hearings on Special Issues

Pursuant to a Licensing Board's general power to regulate the course of a hearing under 10 CFR § 2.718, such Boards have the authority to consider, either on their own or at a party's request, a particular issue separately from and prior to other issues that must be decided in a proceeding. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 544 (1975). See also 10 CFR Part 2, Appendix A, para. I(c)(1). Indeed, multiple contentions can be grouped and litigated in separate segments of the evidentiary hearing so as to enable the Licensing Board to issue separate partial initial decisions, each of which decides a major segment of the case. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983).

In a special proceeding, where the Commission has specified the issues for hearing, a Licensing Board is obliged to resolve all such issues even in the absence of active participation by intervenors. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

A request for a low-power license does not give rise to an entire proceeding separate and apart from a pending full-power operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981).

The Appeal Board's holding in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), that any early findings made by a Licensing Board, in circumstances where the applicant had disclosed an intent to postpone construction for several years, would be open to reconsideration "only if supervening developments or newly available evidence so warrant", does not support a later Licensing Board's action in imposing a similar

limitation on the right to raise issues which were not encompassed by the early findings. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979), reconsid. denied, ALAB-539, 9 NRC 422 (1979).

The Chief Judge of the Licensing Board Panel is empowered to establish multiple boards only when: 1) the proceeding involves discrete and separable issues; 2) the issues can be more expeditiously handled by multiple boards than by a single board; and 3) multiple boards can conduct the proceedings in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 311 (1998); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998).

3.4.5 Construction Permit Extension Proceedings

An applicant who fails to file a timely request for an extension of its construction permit and allows the permit to expire does not automatically forfeit the permit. The Commission has held that a construction permit does not lapse until the Commission has taken affirmative action to complete the forfeiture. The Commission will consider and may grant an untimely application for an extension of the construction permit, without requiring the initiation of a new construction permit proceeding. However, the applicant must still establish good cause for an extension of its permit. In addition, the applicant is not entitled to continue its construction activities after the expiration date of its permit and prior to any extension of its permit. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 120 & nn. 4-5 (1986).

Intervenors in a construction permit extension proceeding may only litigate those issues that (1) arise from the reasons assigned to the requested extension, and (2) cannot abide the operating license proceeding. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-80-31, 12 NRC 699, 701 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1301 (1982).

A licensee's substantial completion of construction, lawfully undertaken during the pendency of petitioner's challenge to a construction extension request, renders moot any controversy over further extension of the completion date in the construction permit. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993).

Section 185 of the AEA, 42 U.S.C. §2235, provides that a construction permit will not expire and no rights under the permit will be forfeited unless two circumstances are present: (1) the facility is not completed, and (2) the latest date for completion has passed. If construction is complete, no further extension of the completion date is required. Comanche Peak, CLI-93-10, 37 NRC at 201. Commission regulations provide that the substantial completion of a facility's construction satisfies the AEA's requirements regarding completion of the facility. See 10 CFR §§ 50.56 and 50.57(a)(1) (1993). Comanche Peak, CLI-93-10, 37 NRC at 201 n.35.

The filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the licensee may lawfully continue construction activities pending a final determination of its application. Id. at 202.

Contentions having no discernible relationship to the construction permit extension are inadmissible in a permit extension proceeding; a show-cause proceeding under 10 CFR § 2.206 is the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-81-6, 13 NRC 253, 254 (1981), citing, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980); Shoreham, supra, 15 NRC at 1302; Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 979 (1984).

The scope of review for construction period recapture proceedings may be broader than that for license renewal, inasmuch as the Commission issued a new rule (10 C.F.R. Part 54) for license renewal specifically spelling out and limiting the scope of such proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 13-14 (1993).

The focus of any construction permit extension proceeding is to be whether "good cause" exists for the requested extension.

Determination of the scope of an extension proceeding should be based on "common sense" and the "totality of the circumstances," more specifically whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and, prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1227, 1229-30 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980). See Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984).

The NRC's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension; the same limitation to apply to any interested person seeking to challenge the request for an extension. The most "common sense" approach to the interpretation of Section 185 of the Atomic Energy Act and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. WPPSS, supra, 16 NRC at 1228-1229; Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 550-51 (1983); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-846, 19 NRC 975, 978 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121 (1986).

A permit holder may establish good cause for delays by showing a need to correct deficiencies which resulted from a previous corporate policy to speed construction by intentionally violating NRC requirements. The permit holder must also show that the previous policy has since been discarded and repudiated. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 403 (1986).

The only question litigable in a construction permit extension proceeding -- whether the licensee has demonstrated "good cause" for the extension -- is no longer of legal interest after the licensee has lawfully completed construction under the permit and requires no further extension of the completion date. Comanche Peak, supra, CLI-93-10, 37 NRC at 204.

Proceedings on construction permit extensions are limited in scope to challenges to the licensee's asserted "good cause" for the extension, and are not an avenue to challenge a pending operating license. Id. at 205.

An intervenor's concerns about substantive safety issues are inadmissible in a construction permit extension proceeding. Such concerns are more appropriately raised in an operating license proceeding or in a 10 CFR 2.206 petition for NRC Staff enforcement action against the applicant. Comanche Peak, supra, 23 NRC at 121 & n.6, 123.

The test for determining whether a contention is within the scope of a construction permit extension proceeding is a two-pronged one. First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatory." If both prongs are met, the delay is without "good cause." WPPSS, supra, CLI-82-29, 16 NRC at 1231; ALAB-722, 17 NRC at 551; Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-84-9, 19 NRC 497, 502 (1984), aff'd, ALAB-771, 19 NRC 1183, 1189 (1984).

"Dilatory conduct" in the sense used by the Commission in defining the test for determining whether a contention is within the scope of a construction permit extension proceeding means the intentional delay of construction without a valid purpose. WPPSS, supra, ALAB-722, 17 NRC at 552; WPPSS, supra, LBP-84-9, 19 NRC at 502, aff'd, ALAB-771, 19 NRC at 1 190 .

An intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. WPPSS, supra, LBP-84-9, 19 NRC at 504, aff'd, ALAB-771, 19 NRC at 1190.

The Licensing Board should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives. It is not the Board's mission to superintend utility management when it makes business judgments for which it is ultimately responsible. WPPSS, supra, ALAB-771, 19 NRC at 1190-91, citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 757-58 (1978).

Unless an applicant is responsible for delays in completion of construction and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such a proceeding and is proven true, the Atomic Energy Act and implementing regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed. WPPSS, supra, ALAB-722, 17 NRC at 553.

A consideration of the health, safety or environmental effects of delaying construction cannot be heard at the construction permit extension proceeding but must await the operating license stage. WPPSS, supra, LBP-84-9, 19 NRC at 506-07, aff'd, ALAB-771, 19 NRC at 1189.

There is no basis in the Atomic Energy Act or in the regulations for challenging the period of time in the requested extension on the grounds that the period requested is too short. WPPSS, supra, LBP-84-9, 19 NRC at 506, aff'd, ALAB-771, 19 NRC at 1191.

In a construction period recapture proceeding, implementation of maintenance and surveillance programs may be challenged, even though the paper programs are not being modified. Irrespective of how comprehensive a program may appear on paper, it will be essentially without value unless it is timely, continuously, and properly implemented. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 19 (1993) (citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973).

Numerous, repetitious cited violations or other incidents may form the basis for a contention questioning the adequacy of a maintenance or surveillance program, even though none of the individual violations or other incidents rises to the level of a serious safety issue. When sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may be in order. Pacific Gas and Electric Co., supra, LBP-93-1, 37 NRC 5, 19 (1993).

3.4.6 Export Licensing Proceedings Issues

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-proliferation Act of 1978, the Commission in making its export licensing determinations focuses on non-proliferation and safeguards concerns, and not on foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-261 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981). (See also 6.31.2)

3.5 Summary Disposition

In Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974), the Appeal Board found that summary disposition, governed by 10 CFR § 2.749, was analogous to and had a judicial counterpart in Rule 56 of the Federal Rules of Civil Procedure which authorizes the filing of a motion for summary judgment. See also Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-754 (1977); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986).

Decisions arising under the Federal Rules may serve as guidelines to Licensing Boards in applying 10 CFR 2.749. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Perry, supra, 6 NRC at 754; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878-879 (1974). Subsequent decisions of Licensing Boards have analogized 10 CFR § 2.749 to Rule 56 to the extent that the Rule applied in the cases in question. See, e.g., Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 787 n.51 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878 (1974). (See also 5.8.5) Further, because the Commission's summary disposition rules borrow extensively from Rule 56 of the Federal Rules of Civil Procedure, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for the Commission's rules. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167 (1995) citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). Thus, pursuant to Rule 56(c) and by analogy the Commission's summary disposition rule, "[o]nly disputes facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Under the concept of summary disposition (or summary judgment), the motion is granted only where the movant is entitled to judgment as a matter of law, where it is quite clear what the truth is and where there is no genuine issue of material fact that remains for trial. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), LBP-73-29, 6 AEC 682, 688 (1973). A contention will not be summarily dismissed where the Licensing Board determines that there still exist controverted issues of material fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 640-41 (1981). Admission as a party to a Commission proceeding based on one acceptable contention does not preclude summary disposition nor guarantee a party a hearing on its contentions. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 n.15 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Section 2.749, like Rule 56, is a procedural device to be used as part of a screening mechanism for eliminating unnecessary consideration of assertions which do not involve factual controversy. Use of summary disposition to resolve tenuous issues raised in petitions to intervene has been encouraged by the Commission and the Appeal Board. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 (1981); Mississippi Power & Light Co. (Grand Gulf Nuclear

Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981). If the issue is demonstrably insubstantial, it should be decided pursuant to summary disposition procedures to avoid unnecessary and possibly time-consuming hearings. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

The Commission's summary disposition rule (10 CFR § 2.749) gives a party a right to an evidentiary hearing only where there is a genuine issue of material fact. Cameo Diagnostic Centre, Inc., LBP-94-34, 40 NRC 169 (1994). An important effect of this principle is that applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 301 (1982).

On its face, 10 CFR § 2.749 provides a remedy only with regard to matters which have not already been the subject of an evidentiary hearing in the proceedings at bar, but which are susceptible of final resolution on the papers submitted by the parties in advance of any such hearing. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-554, 10 NRC 15, 19 (1979).

Pursuant to 10 CFR § 2.749, once a party has filed a motion for summary disposition the Licensing Board is expressly prohibited by the rule from entertaining any further supporting statements. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-37, 40 NRC 288 (1994).

A Board may grant summary disposition as to all or any part of the matters involved in an operating license proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 634 (1986), citing, 10 CFR § 2.749(a). In a construction permit proceeding, summary disposition may only be granted as to specific subordinate issues and may not be granted as to the ultimate issue of whether the permit should be authorized. 10 CFR § 2.749(d).

In opposing summary disposition by seeking to establish the existence of a genuine dispute regarding a material factual issue, a party must present sufficiently probative evidence. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence that is "merely colorable" or is "not significantly probative" will not preclude summary judgment). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 92, 100 n.11 (1996).

In an interesting approach seeking to avoid relitigation of matters considered in a prior proceeding concerning the same reactor, a Licensing Board invited motions for summary disposition which rely on the record of the prior proceeding. In response, the intervenor was expected to indicate why the prior record was inadequate and why further proceedings might be necessary. The Licensing Board planned to take official notice of the record in the prior proceeding and render a decision as to whether further evidentiary hearings were necessary. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 408 (1985).

If intervenors present evidence or argument that directly and logically challenges the basis for summary disposition, creating a genuine issue of fact for resolution by the Board, then summary disposition cannot be granted. On the other hand, if intervenors' facts are fully and satisfactorily explained by other parties, without any direct conflict of evidence, then

intervenors will have failed to show the presence of a genuine issue of material fact. However, after finishing the process of reviewing facts contained in the intervenor's response, the Board must also examine the motion to see whether the movant's unopposed findings of fact establish the basis for summary disposition. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1913 (1982).

With the consent of the parties, the Board may adopt a somewhat more lenient standard for granting summary disposition than is provided under 10 CFR § 2.749. For example, the Board may grant summary disposition whenever it decides that it can arrive at a reasonable decision without benefit of a hearing. That test would permit the Board to grant summary disposition under some circumstances in which it would otherwise be required to find that there is a genuine issue of fact requiring trial. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-25, 19 NRC 1589, 1591 (1984).

3.5.1 Use of Summary Disposition

The Commission has encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-425 (1973).

A Licensing Board will deny intervenors' motion for summary disposition where the intervenors have not raised any litigable issues because of their failure to submit admissible contentions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 741 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484, 490 n.19 (]991).

3.5.1.1 Construction Permit Hearings

While, as a general rule, summary disposition can be granted in nearly any proceeding as to nearly any matter for which there is no genuine issue of material fact, there is an exception under NRC Practice. In construction permit hearings, summary disposition may not be used to determine the ultimate issue as to whether the CP will be granted. 10 CFR § 2.749(d). See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767 (1980).

3.5.1.2 Amendments to Existing Licenses

Summary disposition may be used in license amendment proceedings where a hearing is held with respect to the amendment. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). See, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 566-567 (1979); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985).

3.5.2 Motions for Summary Disposition

Once an applicant has submitted a motion that makes a proper showing for summary disposition, the litmus test of whether or not to grant the summary disposition motion is whether Intervenor has presented a genuine issue as to any material fact that is relevant to its allegation that could lead to some form of relief. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288 (1994).

Under the Rules of Practice, 10 CFR Part 2, a motion for summary disposition should be granted if the Licensing Board determines, with respect to the question at issue, that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. 10 CFR § 2.749(d).

10 CFR § 2.749 permits a Board to deny summarily motions for summary disposition which occur shortly before a hearing where the motion would require the diversion of the parties' or the Board's resources from preparation for the hearing. The Regents of the University of California (UCLA Research Reactor), LBP-82-93, 16 NRC 1391, 1393 (1982).

The Board may not dictate to any party the manner in which it presents its case. The Board may not substitute its judgment for the parties' on the merits of their case in order to summarily dismiss their motions, but it must deal with the motions on the merits before reaching a conclusion. UCLA Research Reactor, supra, 16 NRC at 1394, 1395.

A presiding officer need consider only those purported factual disputes that are "material" to the resolution of the issues raised in a summary disposition motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (factual disputes that are "irrelevant or unnecessary" will not preclude summary judgment). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 99 (1996).

A presiding officer typically will not consider a motion for summary disposition at the same time he is making a determination about the admissibility of a contention. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 38 (1996).

Under the NRC Rules of Practice, there is required to be annexed to a motion for summary disposition a "separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982), citing, 10 CFR § 2.749(a). Where such facts are properly presented and are not controverted, they are deemed to be admitted. La Crosse, supra, 16 NRC at 520; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288, 293-94 (1994) citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 239-40 (1993); see Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 305 (1985).

If there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should have been permitted or required to proceed further, the motion must be denied. General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). As the Board rules on such a motion, all statements of material facts required to be served by the moving party must be deemed to be admitted, unless controverted by the statement required to be served by the opposing party. 10 CFR § 2.749. Motions for summary disposition under Section 2.749 are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient. The asserted facts must be material and of a substantial nature, not fanciful or merely suspicious. Where neither an answer opposing the motion nor a statement of material fact has been filed by an intervenor, and where Staff and applicants have filed affidavits to show that no genuine issue exists, the motion for summary judgment will not be defeated. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 NRC 593, 595-96 (1982). The legal standards governing motions for summary disposition pursuant to 10 CFR § 2.749 were reiterated by the Commission in Advanced Medical Systems, Inc., CLI-93-22, 38 NRC 98, 102-03 (1993), reconsideration denied, CLI-93-24, 38 NRC 187 (1993); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 239-40 (1993).

Similarly, where a licensee opposing summary disposition in an enforcement proceeding does not contest occurrence of the essential facts contained in signed statements or reports of interview of former licensee employees, general objections to the Staff's reliance on such documents or bald assertions that the employees were "disgruntled" workers are insufficient to show a concrete, material issue of fact that would defeat summary disposition. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1984), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In opposing summary disposition by seeking to establish the existence of a genuine dispute regarding a material factual issue, a party must present sufficiently probative evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence that is "merely colorable" or is "not significantly probative" will not preclude summary judgment). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86 n. 9 (1996). Further, a party's bald assertion, even when supported by an expert, will not establish a genuine material factual dispute. See United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981) (in the context of summary judgment motion, an expert must back up his opinion with specific facts) see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 807 (9th Cir. 1988) (expert's study based on "unsupported assumptions and unsound extrapolation " cannot be used to support summary judgment motion). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 103 (1996). A party that had discovery following the filing of the dispositive motion generally cannot interpose claims based on a lack of information as the valid basis for a genuine material factual dispute. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 101-102 (1996).

A summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same

allegation. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631632 (1982).

The party filing the summary disposition motion has the burden of demonstrating the absence of any genuine issue of material fact. The opposing party must append to its response a statement of material facts about which there exists a genuine issue to be heard. If the responding party does not adequately controvert material facts set forth in the motion, the party faces the possibility that those facts may be deemed admitted. See 10 C.F.R. § 2.749(a). If the evidence before the Board does not establish the absence of a genuine issue of material fact, then the motion must be denied even if there is no opposing evidence. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). Nevertheless, a party opposing a motion cannot rely on a simple denial of the movant's material facts, but must set forth specific facts showing there is a genuine issue of material fact. See 10 C.F.R. § 2.749(b). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 92-93 (1996).

Answers to interrogatories can be used to counter evidentiary material proffered in support of a motion for summary disposition, but only if they are made on the basis of personal knowledge, over facts that would be admissible as evidence, and are made by a respondent competent to testify to those facts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1175 (1983).

3.5.2.1 Time For Filing Motions for Summary Disposition

A motion for summary disposition may be filed at any time during a proceeding. 10 CFR § 2.749(a), 54 Fed. Reg. 33168, 33181 (August 11, 1989); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); 46 Fed. Reg. 30328, 30330, 30331 (June 8, 1981). If the Licensing Board determines that there are not genuine issues of material fact, it may grant summary disposition even before discovery is otherwise completed if the party opposing the motion cannot identify what specific information it seeks to obtain through further discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.749(c); Fed. R. Civ. P. 56(f); Sec. & Exch. Comm'n v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981); Donofrio v. Camp, 470 F.2d 428, 431-432 (D.C. Cir. 1972). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992).

A Licensing Board convened solely to rule on petitions to intervene lacks the jurisdiction to consider filings going to the merits of the controversy. Consequently, such a Board cannot entertain motions for summary disposition. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). The filing of such motions must, therefore, await the appointment of a hearing board.

In Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 336 (1982), the Board permitted late filing of affidavits in support of a motion for summary disposition where: (1) blizzard conditions and misunderstandings as to late filing requirements existed; (2) no serious delay in the proceedings resulted; and (3) the testimony and affidavits submitted were particularly helpful and directly relevant to the safety of the spent fuel pool amendment being sought.

3.5.2.2 Time for Filing Response to Summary Disposition Motion

Section 2.749(a) requires that responses to motions for summary disposition be filed within 20 days after service of the motion. But see Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 436 (1985) (the Licensing Board extended the time period for the Applicants' response to an intervenor's motion for summary disposition where the Applicants, pursuant to a Management Plan to resolve design and quality assurance issues, were gathering information to establish the adequacy and safety of the plant).

A party who seeks an extension of the time period for the filing of its response to a motion for summary disposition should not merely assert the existence of potential witnesses who might be persuaded to testify on its behalf. A party should provide some assurances that the potential witnesses will appear and will testify on pertinent matters. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872. 26 NRC 127, 143 (1987).

3.5.2.3 Contents of Motions/Responses (Summary Disposition)

The general requirements as to contents of motions for summary disposition and responses thereto are set out in 10 CFR § 2.749.

A grant of summary disposition is proper where the pleadings and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 CFR § 2.749(d). Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1003 (1981), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-86-27, 24 NRC 255, 261 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC 495, 498, 506 (1988); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 475 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-9, 28 NRC 271, 272-73 (1989); All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-44, 32 NRC 433, 447 (1990); Rhodes-Sayre & Associates, Inc., LBP-91-15, 33 NRC 268, 271-72 (1991). The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact and evidence must be viewed in the light most favorable to the party opposing summary judgment. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Dr. James E. Bauer (Order Prohibiting Involvement in NRC Licensed Activities), LBP-95-7, 41 NRC 323, 329 (1995).

All material facts set forth in the motion and not adequately controverted by the response are deemed to be admitted. 10 CFR § 2.749(a). Cleveland Electric

Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 61 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 225 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422-23 (1990); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 216 & n.15, 218 (1991), aff'd, CLI-93-22, 38 NRC 98 (1993). A party opposing the motion may not rely on a simple denial of material facts stated by the movant but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are insufficient. 10 CFR § 2.749(b); Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632-33 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 212, 216 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-88-12, 27 NRC 495, 498, 504-06 (1988); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542 & n.5 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 451 (1991), aff'd, CLI-92-8, 35 NRC 145 (1992). The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or the fact will be deemed admitted. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

When the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebuttal evidence or submit an affidavit explaining why it is impractical to do so. Where a party opposing the motion is unable to file affidavits in opposition in the time available, he may file an affidavit showing good reasons for his inability to make a timely response in which case the Board may refuse summary disposition or grant a continuance to permit proper affidavits to be prepared. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 103 (1993). 10 CFR § 2.749(c). A party which seeks to conduct discovery to respond to a summary disposition motion must file an affidavit which identifies the specific information it seeks to obtain and shows how that information is essential to its opposition to the summary disposition motion. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992).

One possible answer to a motion for summary disposition is the assertion that discovery is needed to respond fully to the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 152 (1992). Such a request generally should be made in a pleading supported by an affidavit. See id. See also General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 166 n.20 (1996). The functional equivalent of such a filing may be the statements of counsel during a prehearing conference outlining the discovery needed to support the party's case. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8 (1996).

As to affidavits in support of a motion for a summary disposition, a document submitted with a verified letter in which the attestation states that the person is "duly authorized to execute and file this information on behalf of the applicants" is not sufficient to make the document admissible into evidence pursuant to § 2.749(b). An affidavit must be submitted by a person to show he is competent to testify to all matters discussed in the document. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 755 (1977). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 500-501 (1991).

Although 10 CFR § 2.749(b) does not expressly require that the affidavit be based on a witness' personal knowledge of the material facts, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418-419 (1986).

Movant's papers which are insufficient to show an absence of an issue of fact, cannot premise a grant of summary judgment. Similarly, a response opposing a motion for summary judgment must have a statement of material facts. Mere allegations and denials will not suffice, but there must be a showing of genuine issues of fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); 10 CFR § 2.749(b); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 229, 231 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-88-23, 28 NRC 178, 182 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 662-65 (1988). In that connection, it would frequently not be sufficient for an opponent to rely on quotations from or citations to published work of researchers who have apparently reached conclusions at variance with the movant's affiants. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 436 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

Answers to interrogatories can be used to counter evidentiary material proffered in support of a motion for summary disposition, but only if they are made on the basis of personal knowledge, over facts that would be admissible as evidence, and are made by a respondent competent to testify to those facts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1175 (1983).

An opponent's allegation of missing information without a showing of its materiality is insufficient to defeat a motion for summary disposition. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 687-88 (1989), vacated and reversed, ALAB-944, 33 NRC 81, 140-48 (1991).

3.5.3 Summary Disposition Rules

By and large, the rules and standards established by the courts for granting or denying a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will be applied by Licensing Boards in their consideration of motions for summary disposition under 10 CFR § 2.749. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974).

Based on judicial interpretations of Rule 56, the burden of proof with respect to summary disposition is upon the movant who must demonstrate the absence of any genuine issue of material fact. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 102 (1993); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Adickes v. Kress and Co., 398 U.S. 144, 157 (1970); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 445 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-27, 28 NRC 455, 460, 461-62 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-31, 28 NRC 652, 665 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 67, 69 (1990), aff'd, ALAB-950, 33 NRC 492 (1991); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994); Cameo Diagnostic Centre, Inc., LBP-94-34, 40 NRC 169, 171 (1994), citing Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Summary disposition is not appropriate when the movant fails to carry its burden setting forth all material facts pertaining to its summary disposition motion. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 466 (1995). Thus, if a movant fails to make the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention. La Crosse, supra, 16 NRC at 519. See Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 435 (1984), reconsid. den. on other grounds, LBP-8415, 19 NRC 837, 838 (1984).

Nonetheless, where a proponent of a contention fails to respond to a motion for summary disposition, it does so at its own risk; for, if a contention is to remain litigable, there must at least be presented to the Board a sufficient factual basis "to require reasonable minds to inquire further." La Crosse, supra, 16 NRC at 519-20, citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-93-12, 38 NRC 5 (1993). To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact. Poller v. Columbia Broadcasting Co. Inc., 368 U.S. 464 (1962);

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1954); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981). The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974) and cases cited therein at pp. 878-879. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963); Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 417 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 632 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-91-24, 33 NRC 446, 450 (1991), aff'd, CLI-92-8, 35 NRC 145 (1992). The opposing party need not show that he would prevail on the issues but only that there are genuine issues to be tried. American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1967); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418 (1986). The fact that the party opposing summary disposition failed to submit evidence controverting the disposition does not mean that the motion must be granted.

The proponent of the motion must still meet his burden of proof to establish the absence of a genuine issue of material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986). The Board's function, based on the filing and supporting material, is simply to determine whether genuine issues exist between the parties. It has no role to decide or resolve such issues at this stage of the proceeding. The parties opposing such motions may not rest on mere allegations or denials, and facts not controverted are deemed to be admitted. Since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994).

Even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. An intervenor that does respond to a motion for summary disposition but that fails to file the required "separate statement" should be no worse off than one who fails to respond at all. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 62 (1983).

The regulations do not require merely the showing of a "material issue of fact" or an "issue of fact." They require a genuine issue of material fact. To be genuine, the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983). Absent any probative evidence supporting the claim, mere assertions of a dispute as to material facts does not invalidate the licensing Board's grant of summary disposition. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 309-310 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The hearsay nature of an investigator's interview report with a witness does not bar its consideration in deciding whether to grant summary disposition, particularly in the absence of any evidence suggesting the report's inherent unreliability or any material objection to the statement of facts recounted in the interview report. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The NRC staff's subsequent decision to rescind an enforcement order does not constitute an admission that disputed facts remained regarding the sufficiency of the order when issued. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Based on the record, in Gulf States, the Board concluded that the question of whether bankruptcy courts will adequately fund nuclear facilities to ensure safety constitutes a disputed factual question for which summary disposition is inappropriate. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 471 (1995).

Where the existing record is insufficient to allow summary disposition, it is not improper for a Licensing Board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition motion. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 752 (1977).

When summary disposition is requested before discovery is completed, the Board may deny the request either upon a showing of the existence of a genuine issue of material fact or upon a showing that there is good reason for the Board to defer judgment until after specific discovery requests are made and answered. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1021 (1981).

The limitation on summary disposition in a construction permit proceeding does not apply in a construction permit amendment proceeding. Summary disposition may be granted in a CP amendment proceeding where there is no genuine issue as to any material fact that warrants a hearing and the moving party is entitled to a decision in its favor as a matter of law. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 and n.14 (1984).

In an operating license proceeding, where significant health and safety or environmental issues are involved, a Licensing Board should grant a motion for summary disposition only if it is convinced from the material filed that the public health and safety or the environment will be satisfactorily protected. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977); 10 CFR § 2.760a; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986).

In an operating license proceeding, summary disposition on safety issues should not be considered or granted until after the Staff's Safety Evaluation Report and the ACRS letter have been issued. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 NRC 680, 681 (1977).

An answer filed in response to a summary disposition motion, in support of the motion, was not considered by the Licensing Board because 10 CFR § 2.749 provided only for answers "opposing the motion." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557 (1979). Subsequently, the holding in Salem, supra, was rendered invalid by a change to 10 CFR § 2.749(a) which specifically permits responses in support of, as well as in opposition to, motions for summary disposition. 45 Fed. Reg. 68919 (Oct. 17, 1980).

In responding to a statement filed in support of a motion for summary disposition, a party who opposes the motion may only address new facts and arguments presented in the statement. The party may not raise additional arguments beyond the scope of the statement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-30, 24 NRC 437, 439 n.1 (1986).

In an action challenging a civil penalty for violations of both the Commission's regulations and the facility's license condition, the Board held prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no

violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 107-08 (1993).

When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. Where the movant has satisfied his initial burden and has supported his motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1174 n.4 (1983). If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained or may take other appropriate action. 10 CFR § 2.729(c). Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 103 n.16 (1993). Prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. Advanced Medical Systems, supra, CLI-93-22 at 108.

A movant for summary disposition is generally prohibited from filing a reply to another party's answer to the motion. 10 CFR § 2.749(a). However, pursuant to its general authority under 10 CFR § 2.718(e), a Licensing Board may lift the prohibition if the movant can establish a compelling reason or need to file a reply. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201, 204 (1987), reconsid. denied, LBP-87-29, 26 NRC 302 (1987). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499-500 (1991).

In the summary disposition area, health effects contentions have been differentiated from other contentions. An opponent of summary disposition in the health effects area must have some new (post-1975) and substantial evidence that casts doubt on the BEIR estimates. Furthermore, he must be prepared to present that evidence through qualified witnesses at the hearing. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 437 (1984), reconsid. den., LBP-84-15, 19 NRC 837, 838 (1984), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 277 (1980).

Any legal or factual issue a party wants to propose in challenging (or supporting) an enforcement order must bear some relationship to those bases by tending to establish either alone or with other issues, that some explicit or implicit legal or factual predicate to the order should not (or should) be sustained. Further, a party called upon to demonstrate this relationship must be able to do so by more than a bald

pronouncement that the issue is "relevant." Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 336 n.7 (1994); Cf. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 308 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table) (mere assertions of dispute over material facts do not invalidate grant of summary disposition).

3.5.4 Content of Summary Disposition Order

In granting summary judgment, the Licensing Board should set forth the legal and factual bases for its action. Where it has not, the record will be examined and see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

An evidentiary hearing would be necessary only if a genuine issue of material fact were in dispute. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 119-20 (1993).

3.5.5 Appeals from Rulings on Summary Disposition

As is the case under Rule 56 of the Federal Rules, a denial of a motion for summary disposition is interlocutory and, therefore, not appealable. Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93 (1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 331 (1985). This applies as well to denials of partial summary disposition. Waterford, cited in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551 (1981). An order granting summary disposition of an intervenor's sole contention is not interlocutory since the consequence is intervenor's dismissal from the proceeding. As such, it is immediately appealable. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981). An order summarily dismissing some, but not all, of an intervenor's contentions which does not have the effect of dismissing the intervenor from the proceeding is interlocutory in nature and an appeal must await the issuance of an initial decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1198 n.3 (1985); Turkey Point, supra, 22 NRC at 331.

Where a Licensing Board has not set forth the legal and factual basis for its action on a summary judgment motion, the Appeal Board will examine the record to see if there are any genuine issues. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

3.5.6 Other Dispositive Motions/Failure to State a Claim

Commission Rules of Practice make no provision for motions for orders of dismissal for failing to state a legal claim. However, the Federal Rules of Civil Procedure do in Rule 12(b)(6), and Licensing Boards occasionally look to federal cases interpreting that rule

for guidance. In the consideration of such dismissal motions, which are not generally viewed favorably by the courts, all factual allegations of the complaint are to be considered true and to be read in a light most favorable to the nonmoving party. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994).

3.6 Attendance at and Participation in Hearings

An intervenor may not step in and out of participation in a particular issue at will. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975). According to one Licensing Board, an intervenor who raises an issue and then refuses to actively participate in the hearing may lose his right to appeal the Licensing Board's decision. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156 (1976). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-851, 24 NRC 529, 530 (1986), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), review declined, CLI-83-2, 17 NRC 69 (1983). A party's total failure to assume a significant participational role in a proceeding (e.g., his failure to appear at hearings and to file proposed findings), at least in combination with other factors militating against his being retained as a party, will, upon motion of another party, result in his dismissal from the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558, 560 (1976).

If an intervenor "walks out" of a hearing, it is nevertheless proper for the Licensing Board to proceed in his absence. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 251 (1975); 10 CFR § 2.707(b). The best practice in such a situation is for the Board to make thorough inquiry as to the issues raised by the absent intervenor despite his absence. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 849 (1974).

A party who was dismissed from a proceeding for failing to respond, without good cause, to Board orders reactivating the proceeding, must satisfy the criteria for untimely petitions to intervene in order to be readmitted. General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1642-1643 (1984).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request presented before the date of the conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

The appropriate sanction for willful refusal to attend a prehearing conference is dismissal of the petition for intervention. In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the Staff at the prehearing conference. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the

Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

A participant in an NRC proceeding should anticipate having to manipulate its resources, however limited, to meet its obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530 (1979); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 559 (1986).

3.7 Burden and Means of Proof

A licensee generally bears the ultimate burden of proof. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing, 10 CFR § 2.732. But intervenors must give some basis for further inquiry. Three Mile Island, supra, 16 NRC at 1271.

Government entities have the same burdens in proving their cases in NRC licensing proceedings as private entities. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 (1997).

The ultimate burden of proof in a licensing proceeding on the question of whether a permit or license should be issued is upon the applicant. But where one of the other parties to the proceeding contends that, for a specific reason the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once the party has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant, which as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. Louisiana Power and Light Co. (Waterford steam Electric station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973); Louisiana Power and Light Co. (Waterford steam Electric station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985). See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 103 (1976); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear station, Unit 2), ALAB-926, 31 NRC 1, 15-16 (1990).

Where the Licensing Board directed an intervenor to proceed with its case first because of the intervenor's failure to comply with certain discovery requests and Board orders, the alteration in the order of presentation did not shift the burden of proof. That burden has

been and remains on the licensee. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

Under Commission practice, the applicant for a construction permit or operating license always has the ultimate burden of proof. 10 CFR § 2.732. The degree to which he must persuade the board (burden of persuasion) should depend upon the gravity of the matters in controversy. Virginia Electric & Power Company (North Anna Power station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17, n.18 (1975).

An applicant has the burden of proof to demonstrate that the off-site emergency plan complies with Commission rules and guidance. The burden must be carried whether or not the applicant is primarily responsible for carrying out a particular aspect of the plan. Consumers Power Co. (Big Rock Point Plant), LBP-82-77, 16 NRC 1096, 1099 (1982), citing, 10 CFR § 2.732.

An applicant has the burden of proving, prior to the issuance of a full-power license, that there is reasonable assurance that adequate protective measures can and will be taken in an emergency. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-836, 23 NRC 479, 518 (1986), citing, 10 CFR § 50.47(a)(1). However, an applicant is not required to prove and reprove essentially unchallenged factual elements of its case. An intervenor may not merely assert a need for more current information without having raised any questions concerning the accuracy of the applicant's submitted facts. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-857, 25 NRC 7, 13 (1987).

There is some authority to the effect that in show cause proceedings for modification of a construction permit, the burden of going forward is on the Staff or intervenor who is seeking the modification since such party is the "proponent of an order." Consumers Power Company (Midland Plant, Units 1 & 2), LBP-74-54, 8 AEC 112 (1974).

With respect to motions, the moving party has the burden of proving that the motion should be granted and he must present information tending to show that allegations in support of his motion are true. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977).

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 215-16 (1996), (citing, 55 Fed. Reg. 27,645, 27646 (1990); St Joseph Radiology Associates, Inc. (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic), LBP-92-34, 36 NRC 317, 321-22 (1992)); Aharon Ben-Haim, Ph.D. (Upper Montclair, New Jersey), LBP-97-15, 46 NRC 60, 61 (1997). (See General Matters-Immediate Effectiveness Review).

The general rule that the applicant carries the burden of proof does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978).

The applicant carries the burden of proof on safety issues. Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 17 (1975).

An applicant who challenges the Staff's denial of his application for an operator's license has the burden of proving that the Staff incorrectly graded or administered the operator examination. If the applicant establishes a prima facie case that the Staff acted incorrectly, then the burden of going forward with evidence shifts to the Staff. Alfred J. Morabito (Senior Operator License for Beaver Valley Power station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987).

3.7.1 Duties of Applicant/Licensee

A licensee of a nuclear power plant has a great responsibility to the public, one that is increased by the Commission's heavy dependence on the licensee for accurate and timely information about the facility and its operation. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Louisiana Power and Light Co. (Waterford Steam Electric station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985).

The NRC is dependent upon all of its licensees for accurate and timely information. The Licensee must have a detailed knowledge of the quality of installed plant equipment. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 712 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982).

In general, if a party has doubts about whether to disclose information, it should do so, as the ultimate decision with regard to materiality is for the decisionmaker, not the parties. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982).

The ultimate burden of persuasion rests with applicant and with NRC Staff to extent Staff supports the applicant's position. Parties saddled with this burden typically proceed first and then have the right to rebut the case presented by their adversaries. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 529 (1979). Because the licensee, rather than the Staff, bears the burden of proof in a licensing proceeding, the adequacy of the Staff's safety review is, in the final analysis, not determinative of whether the application should be approved. Consequently, it would be pointless for the presiding officer to rule upon the

adequacy of the Staff's review. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995).

3.7.2 Intervenor's Contentions - Burden and Means of Proof

It has long been held that an intervenor has the burden of going forward, either by direct evidence or by cross-examination, as to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1008, reconsid. den., ALAB-166, 6 AEC 1148 (1973), remanded on other gnds., CLI-74-2, 7 AEC 2, aff'd, ALAB-175, 7 AEC 62 (1974); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 589 (1983).

Where an intervenor raises a particular contention challenging a licensee's ability to operate a nuclear power plant in a safe manner, the intervenor necessarily assumes the burden of going forward with the evidence to support that contention. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor must come forward with sufficient evidence to require reasonable minds to inquire further, and it has an obligation to reveal pursuant to a discovery request what the evidence is. That requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination. Seabrook, supra, 17 NRC at 589.

This requirement has, on occasion, been questioned by the courts in those situations in which the information is in the hands of the Staff and/or applicant. See, e.g., York Committee for a Safe Environment v. NRC, 527 F.2d 812 at n.12 (D.C. Cir. 1975).

The scope of the "burden of going forward" rule has also been questioned by the courts. In Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir, 1976), the Court of Appeals indicated that an intervenor, in commenting on a draft EIS, need only bring sufficient attention to an issue "to stimulate the Commission's consideration of it" in order to trigger a requirement that the NRC consider whether the issue should receive detailed treatment in an EIS. The court stated that this test does not support the imposition of the burden of an affirmative evidentiary showing. Id. at n.13. Aeschliman was reversed in this regard by the U.S. Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978). Therein, the Court held that it is "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Id. at 553. The Court found that the NRC's use of " a threshold test," requiring intervenors to make a "showing sufficient to require reasonable minds to inquire further," was well within the agency's discretion. Id. at 554. See also Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric station, Units 1 and 2), ALAB-693, 16 NRC 952, 957

(1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978).

While the outlines of an intervenor's burdens with respect to its contentions may not be fully defined, it is clear that the Commission's rules do not preclude an intervenor from building its case defensively, on the basis of cross-examination. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Zion station, Units 1 & 2), ALAB-226, 8 AEC 381, 389 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-505 (1973).

The "threshold test," restored by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978), goes only to the matter of the showing necessary to initiate an inquiry into a specific alternative which an intervenor (or prospective intervenor) thinks should be explored, and not to the placement of the burden of proof once such an inquiry actually has been undertaken in an adjudicatory context. Public Service Co. of New Hampshire (Seabrook station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982), the Board required intervenors to file a Motion Concerning Litigable Issues, by which the burden of going forward on summary disposition (but not the burden of proof) was placed on the intervenors. However, applicant and Staff would have to respond and intervenors reply. Thereafter, the standard for summary disposition would be the same as required under the rules. This special procedure was appropriate because time pressures had caused the Board to apply a lax standard for admission of contentions, depriving applicants of full notice of the contentions in the proceeding, and because applicants had already shown substantial grounds for summary disposition of all contentions in the course of a hearing that had already been completed. The Motion for Litigable Issues was intended to parallel the Motion for Summary Disposition in all but one respect--that intervenor was required to file first and to come forward with evidence indicating the existence of genuine issues of fact before applicant had to file a summary disposition motion. Applicant retained the burden of proof demonstrating the absence of genuine issues of fact, just as it would if it had originated the summary disposition process by its own motion. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-88, 16 NRC 1335, 1339 (1982).

3.7.3 Specific Issues - Means of Proof

3.7.3.1 Exclusion Area Controls

The applicant must demonstrate constant total control of the entire exclusion area except for roads and waterways. As to those, only a showing of post-accident control is necessary. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 393-395 (1975). Note also that in certain situations there may be very narrow stretches of land (e.g., a

narrow strand of beach below the mean high tide line) the lack of total control of which might readily be viewed as de minimus. Where such a de minimus situation exists, strict application of the constant total control requirements may be inappropriate. Id. at 394-395.

3.7.3.2 Need for Facility

NEPA implicitly requires that a proposed facility exhibit some benefit to justify its construction or licensing. In the case of a nuclear power plant, the plant arguably has no benefit unless it is needed. Thus, a showing of need for the facility is apparently required to justify the licensing thereof. This need can be demonstrated either by a showing that there is a need for additional generating capacity to produce needed power or by a showing that the nuclear plant is needed as a substitute for plants that burn fossil fuels that are in short supply. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-354 (1975). See also Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978). A plant may also be justified on the basis that it is needed to replace scarce natural gas as an ultimate energy resource ("i.e., to satisfy residential and business energy requirements now being directly met by natural gas"). Wolf Creek, 7 NRC at 327. In evaluating a utility's load forecast, "the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made." Wolf Creek, 7 NRC at 328. Because of the uncertainty involved in predicting future demand and the serious consequences of not having generating capacity available when needed, an isolated forecast which is appreciably lower than all others in the record may be accepted only if the Board finds that the isolated ground." Wolf Creek, 7 NRC at 332.

Prior to rule changes precluding the consideration of need for power in operating license adjudications, it was held that a change in the need for power at the operating license stage must be sufficiently extensive to offset the environmental and economic costs of construction before it may be raised as a viable contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 684 (1981). Under the current rules, need for power now may be litigated in operating license proceedings only if it is shown, pursuant to 10 CFR § 2.758, that special circumstances warrant waiver of the rules prohibiting litigation of need for power. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 889-890 (1984), citing, 10 CFR 51.53(c); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 (1985).

The substitution theory, whereby the need for a nuclear power facility is based on the need to substitute nuclear-generated power for that produced using fossil fuels, has been upheld as providing an adequate basis on which to establish need for the facility. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 97-98 (1st Cir. 1978).

Considerable weight should be accorded the electrical demand forecast of a State utilities commission that is responsible by law for providing current analyses of probable electrical demand growth and which has conducted public hearings on the subject. A party may have the opportunity to challenge the analysis of such commission. Nevertheless, where the evidence does not show that such analysis is seriously defective or rests on a fatally flawed foundation, no abdication of NRC responsibilities under NEPA results from according conclusive effect to such a forecast. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 240-241 (1978).

The U.S. Supreme Court has noted that there is little doubt that under the Atomic Energy Act of 1954 (AEA), State public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). But this Commission's responsibilities regarding need for power have their primary roots in NEPA rather than the AEA. NEPA does not foreclose the placement of heavy reliance on the judgment of local regulatory bodies charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligations to meet customer demands. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 388-389 (1978).

3.7.3.3 Burden and Means of Proof in Interim Licensing Suspension Cases

Several cases have set forth the requirements as to burden of proof and burden of going forward in interim licensing suspension cases. These rulings were promulgated in the context of the Commission's General Statement of Policy on the Uranium Fuel Cycle (41 Fed. Reg. 34707, Aug. 16, 1976) but presumably would be applicable in similar contexts that may arise in the future.

In a motion by intervenors for suspension of a construction permit in such a situation, the applicant for the CP has the burden of proof. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976); Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-346, 4 NRC 214 (1976). An applicant faced with such a motion stands in jeopardy of having the motion summarily granted where he does not make an evidentiary showing or even address the relevant factors bearing on the propriety of suspension in his response to the motion. Id. The applicant also has the burden of going forward with evidence. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). This burden of going forward is not triggered by a motion to suspend a CP which fails to state any reason which might support the grant of the motion. Id. On the other hand, the Board's duty to entertain the motion and the applicant's duty to go forward is triggered where the motion contains supporting reasons "sufficient to require reasonable minds to inquire further." Id.

3.7.3.4 Availability of Uranium Supply

In considering the extent of uranium resources, a Board should not restrict itself to established resources which have already been discovered and evaluated in terms of economic feasibility but should consider, in addition, "probable" uranium resources which will likely be available over the next 40 years. The Board should also consider the total number of reactors "currently in operation, under construction, and on order" rather than the number reasonably expected to be operational in the time period under consideration since future reactors will not be licensed unless there is sufficient fuel for them as well as previously licensed reactors. Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 323-25 (1978). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977) and ALAB-317, 3 NRC 175 (1976).

In order to establish the availability of an uranium supply, a construction permit applicant need not demonstrate that it has a long-term contract for fuel. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-347, 4 NRC 216, 222 (1976).

3.7.3.5 Environmental Costs

(RESERVED)

3.7.3.5.1 Cost of Withdrawing Farmland from Production

The environmental cost of withdrawing farmland is "deemed to be the costs of the generation (if necessary) of an equal amount of production on other land." Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 335 (1978). The Appeal Board specifically rejected the analytical approach in which the lost productivity is compared to available national cropland resources as "an 'empty ritual' with a predetermined result" since this approach will always lead to the conclusion that withdrawal will have an insignificant impact. Id. (See also 6.16.6.1.1)

3.7.3.6 Alternate Sites Under NEPA

To establish that no suggested alternative site is "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site and individual alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

3.7.3.7 Management Capability

Under the Atomic Energy Act, the Commission is authorized to consider a licensee's character or integrity in deciding whether to continue or revoke its

operating license. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). A licensee's ethics and technical proficiency are both legitimate areas of inquiry insofar as consideration of the licensee's overall management competence is at issue. Three Mile Island, supra, 19 NRC at 1227; Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156, 153 (1992).

Candor is an especially important element of management character because of the Commission's heavy dependence on an applicant or licensee to provide accurate and timely information about its facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985), citing, Three Mile Island, supra, 19 NRC at 1208; Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156 (1992).

Another measure of the overall competence and character of an applicant or licensee is the extent to which the company management is willing to implement its quality assurance program. Waterford, supra, 22 NRC at 15 n.5, citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973). A Board may properly consider a company's efforts to remedy any construction and related QA deficiencies. Ignoring such remedial efforts would discourage companies from promptly undertaking such corrective measures. Waterford, supra, 22 NRC at 15, 53 n.64, citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371-74 (1985).

Areas of inquiry to determine if a utility is capable of operating a facility are outlined in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit no. 1), CLI-80-5, 11 NRC 408 (1980); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659 (1984).

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

The generally applicable standard for licensee character and integrity is whether there is reasonable assurance that the licensee has the character to operate the facility in a manner consistent with the public health and safety and NRC requirements. To decide that issue, the Commission may consider evidence of licensee behavior having a rational connection to safe operation of the facility and some reasonable relationship to licensee's candor, truthfulness, and willingness to

abide by regulatory requirements and accept responsibility to protect public health and safety. In this regard, the Commission can rest its decision on evidence that past inadequacies have been corrected and that current licensee management has the requisite character. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

Like "negligence," the standard of "reasonable management conduct" requires considerable judgement by the trier of fact. As there is no precedent directly on point regarding lack of reasonable management conduct by a non-expert manager, it is appropriate, therefore, for the Licensing Board to be very careful not to apply a standard that is too demanding and that benefits too much from hindsight. Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156, 166, n.13 (1992).

3.8 Burden of Persuasion (Degree of Proof)

For an applicant to prevail on each factual issue, its position must be supported by a preponderance of the evidence. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 577 (1984), review declined, CLI-84-14, 20 NRC 285 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 (1985). See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 360 (1978), reconsideration denied, ALAB-467, 7 NRC 459 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 405 n.19 (1976).

The burden of persuasion (degree to which a party must convince the Board) should be influenced by the "gravity" of the matter in controversy. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17 n.18 (1975).

A Licensing Board has utilized the clear and convincing evidence standard with regard to findings concerning the falsification and manipulation of test results by a licensee's personnel because such findings could result in serious injuries to the reputations of the individuals involved. The Board also believed that a more stringent evidentiary standard was justified where the events in question allegedly occurred seven or eight years before the hearing and the memories of the witnesses had faded. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 691 (1987). Compare Piping Specialists. Inc. and Forrest L. Roudebush, LBP-92-25, 36 NRC 156, 186 (1992).

3.8.1 Environmental Effects Under NEPA

It is not necessary that environmental effects be demonstrated with certainty. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1191-92 (1975).

It is appropriate to focus only on whether a partial interim action will increase the environmental effects over those analyzed for the full proposed action where there is

no reasonable basis to foresee that the full action will not be permitted in the future. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 629 n.76 (1983).

3.9 Stipulations

10 CFR § 2.753 permits stipulation as to facts in a licensing proceeding. Such stipulations are generally encouraged. See, e.g., Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-74-2, 7 AEC 2, 3 n.1 (1974). However, in the NEPA context, Licensing Boards retain an independent obligation to assure that NEPA is complied with and its policies protected despite stipulations to that effect. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-75-14, 2 NRC 835, 838 (1975).

3.10 Official Notice of Facts

Under 10 CFR § 2.743(i), official notice may be taken of any fact of which U.S. Courts may take judicial notice. In addition, Licensing Boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. Pursuant to 10 C.F.R. § 2.743(i), the Commission may take official notice of publicly available documents filed in the docket of a Federal Energy Regulatory Commission proceeding. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996). In any event, parties must have the opportunity to controvert facts which have been officially noticed.

Pursuant to this regulation, Licensing and Appeal Boards have taken official notice of such matters as:

(1) a statement in a letter from the AEC's General Manager that future releases of radioactivity from a particular reactor would not exceed the lowest limit established for all reactors at the same site. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-74-25, 7 AEC 711, 733 (1974);

(2) Commission records, letters from applicants and materials on file in the Public Document Room to establish the facts with regard to the Ginna fuel problem as that problem related to an appeal in another case. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), ALAB-75, 5 AEC 309, 310 (1972);

(3) portions of a hearing record in another Commission proceeding involving the same parties and a similar facility design. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-5, 7 AEC 82, 92 (1974);

(4) a statement, set forth in a pleading filed by a party in another Commission proceeding, of AEC responses to interrogatories propounded in a court case to which the agency was a party. Catawba, supra, 7 AEC at 96;

(5) Staff reports and WASH documents. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-74-22, 7 AEC 659, 667 (1974);

(6) ACRS letters on file in the Public Document Room. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 332 (1973);

(7) the existence of an applicant's Federal Water Pollution Control Act Section 401 certificate. Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973).

In most of these cases, the basis for taking official notice was that the document or material noticed was within the knowledge of the Commission as an expert body or was a part of the public records of the Commission (See, e.g., cases cited in items 1, 2, 3, 5 and 6 supra).

In the same vein, it would appear that nothing would preclude a Licensing Board from taking official notice of reports and documents filed with the agency by regulated parties, provided that parties to the proceeding are given adequate opportunity to controvert the matter as to which official notice is taken. See, e.g., Market Street Ry Co. v. Railroad Commission of California, 324 U.S. 548, 562 (1945) (agency's decision based in part on officially noticed monthly operating reports filed with agency by party); State of Wisconsin v. FPC, 201 F.2d 183, 186 (1952), cert. den., 345 U.S. 934 (1953) (regulatory agency can and should take official notice of reports filed with it by regulated company).

The Commission may take official notice of a matter which is beyond reasonable controversy and which is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74-75 (1991), citing, Government of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991).

10 CFR § 2.743(i) requires that the parties be informed of the precise facts as to which official notice will be taken and be given the opportunity to controvert those facts. Moreover, it is clear that official notice applies to facts, not opinions or conclusions. Consequently, it is improper to take official notice of opinions and conclusions. Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), LBP-74-26, 7 AEC 758, 760 (1974). While official notice is appropriate as to background facts or facts relating only indirectly to the issues, it is inappropriate as to facts directly and specifically at issue in a proceeding. K. Davis, Administrative Law Treatise, § 15.08.

Official notice of information in another proceeding is permissible where the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 n.3 (1982), citing, United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-530 (1945); 10 CFR 2.743(i).

The use of officially noticeable material is unobjectionable in proper circumstances. 10 CFR § 2.743(i). Interested parties, how ever, must have an effective chance to respond to crucial facts. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 350 (1983), citing, Carson Products Co. v. Califano, 594 F.2d 453, 459 (5th Cir. 1979).

A Licensing Board will decline to take official notice of a matter which is initially presented in a party's proposed findings of fact and conclusions of law since this would deny opposing parties the opportunity under 10 CFR § 2.734(c) to confront the facts noticed. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 565-66 (1988).

Absent good cause, a Licensing Board will not take official notice of documents which are introduced for the first time as attachments to a party's proposed findings of fact. In order to be properly admitted as evidence, such documents should be offered as exhibits before the close of the record so that the other parties have an opportunity to raise objections to the documents. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 687-88 (1987).

The Commission's reference to various documents in the background section of an order and notice of hearing does not indicate that the Commission has taken official notice of such documents. A party who wishes to rely upon such documents as evidence in the hearing should offer the documents as exhibits before the close of the record. Three Mile Island Inquiry, supra, 25 NRC at 688-89.

A Licensing Board will not take official notice of State law. Thus, if a party wishes to base proposed findings on a State's regulations, such regulations must be offered and accepted as an exhibit. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 525, 549 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

3.11 Evidence

10 CFR § 2.743 generally delineates the types and forms of evidence which will be accepted and, in some cases must be submitted in NRC licensing proceedings.

Generally, testimony is to be pre-filed in writing before the hearing. Pre-filed testimony must be served on the other parties at least 15 days in advance of the hearing at which it will be presented, though the presiding officer may permit introduction of testimony not so served either with the consent of all parties present or after they have had a reasonable chance to examine it. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92 (1977). Note, however, that where the proffering party gives an exhibit to the other parties the night before the hearing and then alters it over objection at the hearing the following day, it is error to admit such evidence since the objecting parties had no reasonable opportunity to examine it. Id.

Parties in civil penalty proceedings are exempt from the general requirement for filing prefiled written direct testimony. Tulsa Gamma Ray, Inc., LBP-91-25, 33 NRC 535, 536 (1991), citing, 10 CFR § 2.743(b)(3). Prepared testimony, while generally used in licensing proceedings, is not required in certain enforcement proceedings. 10 C.F.R. 2.743(b)(3). Conam Inspection, Inc. (Itasca, IL), LBP-98-2, 47 NRC 3, 5 (1998). However, a Licensing Board may require the filing of prefiled written direct testimony in an enforcement proceeding pursuant to its authority to order depositions to be taken and to regulate the course of the hearing and the conduct of the participants. Piping Specialists, Inc. LBP-92-7, 35 NRC 163, 165 (1992).

Technical analyses offered in evidence must be sponsored by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 (1983), citing, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754-56 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 n.22 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 350-51 (1988). A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

3.11.1 Rules of Evidence

While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983). See generally Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

3.11.1.1 Admissibility of Evidence

Evidence is admissible if it is relevant, material, reliable and not repetitious. 10 CFR § 2.743(c). Under this standard, the application for a permit or license is admissible upon authentication. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974).

Prepared testimony may be struck where the witness lacks personal knowledge of the matters in the testimony and lacks expertise to interpret facts contained therein. Georgia Institute of Technology (Georgia Tech Research Reactor Atlanta, Georgia), LBP-96-10, 43 NRC 231, 232-33 (1996).

This same standard applies to proceedings conducted under the informal adjudication procedures of 10 CFR Part 2, Subpart L. The presiding officer in such proceedings may strike, on motion or on the presiding officer's own initiative, any portion of a written presentation or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable. Rockwell International Corp. (Rocketdyne Division), LBP-90-10, 31 NRC 293, 298 (1990), citing, 10 CFR § 2.1233(e).

A determination on materiality will precede the admission of an exhibit into evidence, but this is not an ironclad requirement in administrative proceedings in which no jury is involved. The determinations of materiality could be safely left to a later date without prejudicing the interests of any new party. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

The requirement of authentication or identification as a condition precedent to the admissibility of evidence in NRC licensing proceedings is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 (1983), citing, Fed. R. Evid. 901(a).

The Final Safety Analysis Report (FSAR) is conditionally admissible as substantive evidence, but once portions of the FSAR are put into controversy, applicants must present one or more competent witnesses to defend them. San Onofre, supra, 17 NRC at 366.

A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-659 (1971).

In order for expert testimony to be admissible, it need only (1) assist the trier of fact, and (2) be rendered by a properly qualified witness. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983). See Fed. R. Evid. 702; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985).

The opinions of an expert witness which are based on scientific principles, acquired through training or experience, and data derived from analyses or by perception are admissible as evidence. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 & n.52 (1985). See Fed. R. Evid. 702; McGuire, supra, 15 NRC at 475.

The fact that a witness is employed by a party, or paid by a party, goes only to the persuasiveness or weight that should be accorded the expert's testimony, not to its admissibility. Waterford, supra, 17 NRC at 1091; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-39, 22 NRC 755, 756 (1985).

3.11.1.1.1 Admissibility of Hearsay Evidence

Hearsay evidence is generally admissible in administrative proceedings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411-12 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 501 n.67 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

There is still a requirement, however, that the hearsay evidence be reliable. For example, a statement by an unknown expert to a nonexpert witness which such witness proffers as substantive evidence is unreliable and, therefore, inadmissible. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92 (1977). In addition to being reliable, hearsay evidence must be relevant, material and not unduly repetitious, to be admissible under 10 CFR § 2.743(c). Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).

Although the testimony of an expert witness which is based on work or analyses performed by other people is essentially hearsay, such expert testimony is admissible in administrative proceedings if its reliability can be determined through questioning of the expert witness. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 718 (1985).

In considering a motion for summary disposition, a Board will require a witness to testify from personal knowledge in order to establish material facts which are legitimately in dispute. This requirement applies as well to expert witnesses who, although generally permitted to base their opinion testimony on hearsay, may only establish those material facts of which they have direct, personal knowledge. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418-19 (1986).

The fact that the NRC Staff's charges in support of an enforcement order may be "hearsay" allegations does not provide sufficient reason to dismiss those claims ab initio. See Oncology Services Corp., LBP-93-20, 38 NRC 130, 135 n.2 (1993) (hearsay evidence generally admissible in administrative hearing if reliable, relevant, and material). Rather, so long as those allegations are in dispute, the validity and sufficiency of any "hearsay" information upon which they are based generally is a matter to be tested in the context of an evidentiary hearing in which the Staff must provide adequate probative evidence to carry its burden of proof. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

3.11.1.2 Hypothetical Questions

Hypothetical questions may be propounded to a witness. Such questions are proper and become a part of the record, however, only to the extent that they include facts which are supported by the evidence or which the evidence tends to prove. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 828-29 (1976).

3.11.1.3 Reliance on Scientific Treatises, Newspapers, Periodicals

An expert may rely on scientific treatises and articles despite the fact that they are, by their very nature, hearsay. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976). The Appeal Board in Clinton left open the question as to whether an expert could similarly rely on newspapers and other periodicals.

An expert witness may testify about analyses performed by other experts. If an expert witness were required to derive all his background data from experiments which he personally conducted, such expert would rarely be qualified to give any opinion on any subject whatsoever. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 718 (1985), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972).

An intervenor in a materials licensing proceeding who relies upon newspaper articles to support its written presentation, 10 CFR § 2.1233(d), must include a clearly cross-referenced set of copies of the articles containing numbered pages and dates of publication. Rockwell International Corp. (Rocketdyne Division), LBP-90-11, 31 NRC 320, 323 (1990).

3.11.1.4 Off-the-Record Comments

Obviously, nothing can be treated as evidence which has not been introduced and admitted as such. In this vein, off-the-record ex parte communications carry no weight in adjudicatory proceedings and cannot be treated as evidence. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 191 (1978).

3.11.1.5 Presumptions and Inferences

With respect to safeguards information, the Commission has declined to permit any presumption that a party who has demonstrated standing in a proceeding cannot be trusted with sensitive information. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 100 (1983).

In any NRC licensing proceeding, a FEMA (Federal Emergency Management Agency) finding will constitute a rebuttable presumption on questions of adequacy

and implementation capability of emergency planning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 702 (1983), citing, 10 CFR § 50.47(a)(2).

When a party has relevant evidence within his control which he fails to produce, it may be inferred that such evidence is unfavorable to him. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

Although the testimony of a public official working for a government agency may be entitled to a presumption (albeit rebuttable) that public officials are presumed to have performed their official duties in a proper manner, this presumption does not apply where the official is not operating in a traditional governmental capacity but rather as an official of a regulated entity operated by a government unit. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 (1997).

3.11.1.6 Government Documents

NRC adjudicatory boards may follow Rule 902 of the Federal Rules of Evidence, waiving the need for extrinsic evidence of authenticity as a precondition to admitting official government documents to allow into evidence government documents. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 49 (1979).

3.11.2 Status of ACRS Letters

Section 182(b) of the Atomic Energy Act of 1954 and 10 CFR § 2.743(g) of the Commission's Rules of Practice require that the Advisory Committee on Reactor Safeguards (ACRS) letter be proffered and received into evidence. However, because the ACRS is not subject to cross-examination, the ACRS letter cannot be admitted for the truth of its contents, nor may it provide the basis for any findings where the proceeding in which it is offered is a contested one. Arkansas Power & Light Co. (Arkansas Nuclear-1, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

The contents of an ACRS report are not admissible in evidence for the truth of any matter stated therein as to controverted issues, but only for the limited purpose of establishing compliance with statutory requirements. A Licensing Board may rely upon the conclusion of the ACRS on issues that are not controverted by any party. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 and n.36 (1983). See also Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 340 (1973).

A Licensing Board may rely upon conclusions of the ACRS on issues that are not controverted by any party. 10 CFR Part 2, Appendix A, § V(f)(1),(2). However, the contents of an Advisory Committee on Reactor Safeguards (ACRS) report cannot, of itself, serve as an underpinning for findings on health and safety aspects of licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 518 (1983), citing, Arkansas Power and Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 32 (1973).

3.11.3 Presentation of Evidence by Intervenors

An intervenor may not adduce affirmative evidence on an issue that he has not raised himself unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17 (1974). Nevertheless, an intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), affirming, ALAB-244, 8 AEC 857, 867-888 (1974).

An intervenor which has failed to present allegedly relevant information during direct examination of a witness in a Licensing Board proceeding may not assert that the information nevertheless should be considered on appeal since it could have been elicited during cross-examination. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 387 n.49 (1990).

3.11.4 Evidentiary Objections

Objections to particular evidence or the manner of presentation thereof must be made in a timely fashion. Failure to object to evidence bars the subsequent taking of exceptions to its admission. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 554 n.56 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). To preserve a claim of error on an evidentiary ruling, a party must interpose its objection and the basis therefore clearly and affirmatively. If a party appears to acquiesce in an adverse ruling and does not insist clearly on the right to introduce evidence, the Appeal Board will not find that the evidence was improperly excluded. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 362 n.90 (1978).

3.11.5 Statutory Construction; Weight

"Absent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Supreme Court recently has gone even further, indicating that, when the words of a statute are unambiguous, no further judicial inquiry into legislative history of the language is permissible. Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 301 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

If an NRC regulation is legislative in character, the rules of interpretation applicable to statutes will be equally germane to determining that regulation's meaning. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 143.

Where the meaning of a regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. We must enforce the regulation as written. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145.

The Licensing Board may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written. To discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145.

The "best source of legislative history" is the congressional reports on a particular bill. See Alabama Power Co., 692 F.2d. at 1368. Perry, Davis-Besse, supra, 36 NRC at 302, aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Statement of witnesses during a congressional hearing that are neither made by a member of Congress nor referenced in the relevant committee report are normally to be accorded little, if any, weight. See Kelly v. Robinson, 479 U.S. 36, 50 n. 13 (1986). Perry, Davis-Besse, 36 NRC at 302 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

A legislative body will be afforded a large measure of deference in its choice of which aspects of a particular evil it wishes to eliminate. See e.g. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). Perry, Davis-Besse, 36 NRC at 307 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.11.5.1 Due Process:

An equal protection challenge to an economic classification is reviewed under the rational basis standard, which requires that any classifications established in the challenged statute must rationally further a legitimate government objective. See. e.g. Nordlinger v. Hahn, 120 L. Ed. 2d 1, 12 (1992). Perry, Davis-Besse, 36 NRC at 306 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.11.5.2 Bias or Prejudgment, Disqualification:

In reviewing an agency decision allegedly subject to bias, including improper legislative influence, the independent assessment of an adjudicatory decision-maker regarding the merits of the parties' legal (as opposed to factual) positions will attenuate any earlier impropriety. See Gulf Oil Corp. v. FPC, 563 F.2d 588, 611-12 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978). Perry, Davis-Besse, 36 NRC at 308 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

3.12 Witnesses at Hearing

Because of the complex nature of the subject matter in NRC hearings, witness panels are often utilized. It is recognized in such a procedure that no one member of the panel will possess the variety of skills and experience necessary to permit him to endorse and explain the entire testimony. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 569 (1977).

The testimony and opinion of a witness who claims no personal knowledge of, or expertise in, a particular aspect of the subject matter of his testimony will not be accorded the weight given testimony on that question from an expert witness reporting results of careful and deliberate measurements. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-78-15, 7 NRC 642, 647 n.8 (1978).

While a Licensing Board has held that prepared testimony should be the work and words of the witness, not his counsel, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1799 (1981), the Appeal Board has made it clear that what is important is not who originated the words that comprise the prepared testimony but rather whether the witness can truthfully attest that the testimony is complete and accurate to the best of his or her knowledge. Midland, ALAB-691, 16 NRC 897, 918 (1982).

Where technical issues are being discussed, Licensing Boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand simultaneously so they may respond immediately on an opposing witness' answer to a question. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). The admission of surrebuttal testimony is a matter within the discretion of a Licensing Board, particularly when the party sponsoring the testimony reasonably should have anticipated the attack upon its evidence. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397 n. 101 (1990), citing, Cellular Mobile Systems v. FCC, 782 F.2d 182, 201-02 (D.C. Cir. 1985).

Where the credibility of evidence turns on the demeanor of a witness, an appellate board will give the judgment of the trial board, which saw and heard the testimony, particularly great deference. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1218 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). However, demeanor is of little weight where other testimony, documentary evidence, and common sense suggest a contrary result. Three Mile Island, supra, 19 NRC at 1218.

3.12.1 Compelling Appearance of Witness

10 CFR § 2.720 provides that, pursuant to proper application by a party, a Licensing Board may compel the attendance and testimony of a witness by the issuance of a subpoena. A Licensing Board has no independent obligation to compel the appearance of a witness. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 215 (1986).

A NRC subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance. United States v. Powell, 379 U.S. 48, 57-58 (1964); Construction Products Research Inc. v. United States, 73 F.3d 464, 469-71 (2d Cir.), cert. denied, 519 U.S. 927 (1996). St. Mary's Medical Center, CLI-97-14, 46 NRC 287, 291 (1997). The NRC may begin an investigation "merely on suspicion that the law is being violated, or even just

because it wants assurances that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). The NRC's subpoena power is essentially analogous to the broad subpoena powers accorded to a grand jury. Powell, 379 U.S. at 57; Morton Salt Co., 338 U.S. at 642-43; Oklahoma Press Co. v. Walling, 327 U.S. 186, 209 (1946). St. Mary's Medical Center, CLI-97-14, 46 NRC 287, 291 (1997).

The Rules of Practice preclude a Licensing Board from declining to issue a subpoena on any basis other than that the testimony sought lacks "general relevance." In ruling on a request for a subpoena, the Board is specifically prohibited from attempting "to determine the admissibility of evidence." 10 CFR § 2.720(a); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 93 (1977).

3.12.1.1 NRC Staff as Witnesses

The provisions of 10 CFR § 2.720(a)-(g) for compelling attendance and testimony do not apply to NRC Commissioners or Staff. 10 CFR § 2.720(h). Nevertheless, once a Staff witness has appeared, he may be recalled and compelled to testify further, despite the provisions of 10 CFR § 2.720(h), if it is established that there is a need for the additional testimony on the subject matter. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974).

The Rules of Practice do not permit particular Staff witnesses to be subpoenaed. But a licensing board, pursuant to 10 C.F.R. § 2.720(h)(2), may upon a showing of exceptional circumstances, require the attendance and testimony of NRC personnel. Where an NRC employee has taken positions at odds with those espoused by witnesses to be presented by the Staff, on matters at issue in a proceeding, exceptional circumstances exist. The Board determined that differing views of such matters are facts differing from those likely to be presented by the Staff witnesses and, on that basis, required the attendance and testimony of named NRC personnel. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-96-8, 43 NRC 178, 180-81 (1996).

3.12.1.2 ACRS Members as Witnesses

Members of the ACRS are not subject to examination in an adjudicatory proceeding with regard to the contents of an ACRS Report. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 766 n.10 (1977).

The Appeal Board, at intervenors' request, directed that certain consultants to the ACRS appear as witnesses in the proceeding before the Board. Such an appearance was proper under the circumstances of the case, since the ACRS consultants had testified via subpoena at the licensing board level at intervenors' request. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-604, 12 NRC 149, 150-51 (1980).

3.12.2 Sequestration of Witnesses

In Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565 (1977), the Appeal Board considered a Staff request for discretionary review of a Licensing Board ruling which excluded prospective Staff witnesses from the hearing room while other witnesses testified. The Appeal Board noted that while sequestration orders must be granted as a matter of right in Federal district court cases, NRC adjudicatory proceedings are clearly different in that direct testimony is generally pre-filed in writing.

As such, all potential witnesses know in advance the basic positions to be taken by other witnesses. In this situation, the value of sequestration is reduced. Moreover, the highly technical and complex nature of NRC proceedings often demands that counsel have the aid of expert assistance during cross-examination of other parties' witnesses.

In view of these considerations, the Appeal Board held that sequestration is only proper where there is some countervailing purpose which it could serve. The Board found no such purpose in this case, but in fact, found that sequestration here threatened to impede full development of the record. As such, the Licensing Board's order was overturned. The Appeal Board also noted that there may be grounds to distinguish between Staff witnesses and other witnesses with respect to sequestration, with the Staff being less subject to sequestration than other witnesses, depending on the circumstances.

3.12.3 Board Witnesses

Where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-08 (1977).

In the interest of a complete record, the Staff may be ordered to submit written testimony from a "knowledgeable witness" on a particular issue in a proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-607, 12 NRC 165, 167 (1980).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Thus, while Licensing Boards have the authority to call witnesses of their own, the exercise of this discretion must be reasonable and, like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Applying the criteria of Summer, supra, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health effects contention. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

3.12.4 Expert Witnesses

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his expertise. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of the expert should be established by showing either academic training or relevant experience or some combination of the two. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978). As to academic training, such training that bears no particular relationship to the matters for which an individual is proposed as an expert witness is insufficient, standing alone, to qualify the individual as an expert witness on such matters. Diablo Canyon, LBP-78-36, 8 NRC at 571. In addition, the fact that a proposed expert witness was accepted as an expert on the subject matter by another Licensing Board in a separate proceeding does not necessarily mean that a subsequent Board will accept the witness as an expert. Diablo Canyon, LBP-78-36, 8 NRC at 572.

A witness is qualified as an expert by knowledge, skill, experience, training, or education. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing, Fed. R. Evid. 702. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

The value of testimony by a witness at NRC proceedings is not undermined merely by the fact that the witness is a hired consultant of a licensee. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1211 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability -- for whatever reason -- to provide the foundation for them to the decision maker and litigants. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 171-72 (1989), stay denied on other grounds, ALAB-914, 29 NRC 357 (1989), affirmed on other grounds, ALAB-926, 31 NRC 1 (1990). An assertion of "engineering judgment", without any explanation or reasons for the judgment, is insufficient to support the conclusions of an expert engineering witness. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1420 (1983), modified on reconsid.

sub nom., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 518, 532 (1984).

A Board should give no weight to the testimony of an asserted expert witness who can supply no scientific basis for his statements (other than his belief) and disparages his own testimony. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 735 (1985).

A witness testifying to the results of an analysis need not have at hand every piece of datum utilized in performing that analysis. In this area, a rule of reason must be applied. It is not unreasonable, however, to insist that, where the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated. North Anna, supra, 10 NRC at 27.

A Licensing Board may refuse to accept an expert witness' prefiled written testimony as evidence in a licensing proceeding in the absence of the expert's personal appearance for cross-examination at the hearing. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983). See generally 10 CFR § 2.718; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658-59 (1971).

Merely because expert witnesses for all parties reach similar conclusions on an issue does not mean that the Licensing Board must reach the same conclusion. The significance of various facts is for the Board to determine, based on the record, and cannot be delegated to the expert witnesses of various parties, even if they all agree. The Board must satisfy itself that the conclusions reached have a solid foundation. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 270 (1997).

3.12.4.1 Fees for Expert Witnesses

Commission regulations provide for expert witness fees in connection with depositions (10 CFR § 2.740(h)) and for subpoenaed witnesses (10 CFR § 2.720(d)). Although these regulations specify that the fees will be those "paid to witnesses in the district courts of the United States," there had been some uncertainty as to whether the fees referred to were the statutory fees of 28 U.S.C. § 1821 or the expert witness fees of Rule 26 of the Federal Rules of Civil Procedure. In Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977), the Licensing Board ruled that the fees referred to in the regulations were the statutory fees. The Board suggested that payment of expert witness fees is especially appropriate when the witness was secured because of his experience and when the witness' expert opinions would be explored during the deposition or testimony. The Board relied on 10 CFR § 2.720(f), which permits conditioning denial of a motion to quash subpoenas on compliance with certain terms and conditions which could include payment of witness fees, and on 10 CFR § 2.740(c), which provides for orders requiring compliance with terms and conditions, including payment of witness fees, prior to deposition.

3.13 Cross-Examination

Cross-examination must be limited to the scope of the contentions admitted for litigation and can appropriately be limited to the scope of direct examination. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 698, affirmed, CLI-82-11, 15 NRC 1383 (1982); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 867, 869 (1974); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985).

In exercising its discretion to limit what appears to be improper cross-examination, a Licensing Board may insist on some offer of proof or other advance indication of what the cross-examiner hopes to elicit from the witness. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978); San Onofre, supra, 15 NRC at 697; Prairie Island, supra, 8 AEC at 869.

The authority of a Board to demand cross-examination plans is encompassed by the Board's power to control the conduct of hearings and to take all necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination. 10 CFR §§ 2.718(e), 2.757(c). Such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 377 (1985). 10 CFR § 2.743 clearly gives the presiding officer the discretion to require the submittal of a cross-examination plan from any party seeking to conduct cross-examination. The plan must contain a brief description of the issues on which cross-examination will be conducted, the objectives to be achieved by cross-examination, and the proposed line of questions designed to achieve those objectives. 10 CFR § 2.743(a), (b)(2), 54 Fed. Reg. 33168, 33181 (August 11, 1989). Civil penalty proceedings and proceedings for the modification, suspension, or revocation of a license are exempt from these requirements. 10 CFR § 2.743(b)(3).

Although the Rules of Practice generally require parties to submit cross-examination plans to the Licensing Board, they do not require parties to provide other parties with advance notice of exhibits they plan to use in cross examinations. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180 (1994).

Even if cross-examination is wrongly denied, such denial does not constitute prejudicial error per se. The complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding. Waterford, supra, 17 NRC at 1096; San Onofre, supra, 15 NRC at 697 n.14; San Onofre, supra, 15 NRC at 1384; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 76 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 495 (1986).

Cross-examination, though subject to restriction, is a fundamental right conferred on parties to formal adjudication in NRC proceedings by the Administrative Procedure Act and by the Commission's Rules of Practice. Cross-examination during a deposition, which might suffice under truly exceptional circumstances, is not otherwise a ready substitute for cross-examination before the presiding officer. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), LBP-83-29, 17 NRC 1117, 1120 (1983).

3.13.1 Cross-Examination By Intervenors

The ability to conduct cross-examination in an adjudication is not such a fundamental right that its denial constitutes pre judicial error per se. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

An intervenor may cross-examine a witness on those portions of his testimony which relate to matters that have been placed in controversy by any party to the proceeding, as long as the intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), affirming, ALAB-244, 8 AEC 857 (1974). In the case of a reopened proceeding, permissible inquiry through cross-examination necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977).

It is error to preclude cross-examination on the ground that intervenors have the burden of proving the validity of their contentions through their own witnesses since it is clear that intervenors may build their case "defensively" through cross-examination. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 356 (1978); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1745 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

Calculations underlying a mathematical estimate which is in controversy are clearly relevant since they may reveal errors in the computation of that estimate. Hartsville, supra, 7 NRC at 355-56. A Licensing Board might be justified in denying a motion to require production of such calculations to aid cross-examination on the estimate as a matter of discretion in regulating the course of the hearing. See, e.g., Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 32-36 (1976). However, an Appeal Board will not affirm a decision to cut off cross-examination on the basis that it was within the proper limits of a Licensing Board's discretion when the record does not indicate that the Licensing Board considered this discretionary basis. Hartsville, supra, 7 NRC at 356.

An intervenor's cross-examination may not be used to expand the number or scope of contested issues. Prairie Island, supra, 8 AEC at 867. To assure that cross-examination does not expand the boundaries of issues, a Licensing Board may:

(1) require in advance that an intervenor indicate what it will attempt to establish on cross-examination;

(2) limit cross-examination if the Board determines that it will be of no value for development of a full record on the issues;

(3) halt cross-examination which makes no contribution to development of a record on the issues; and

(4) consolidate intervenors for purposes of cross-examination on the same point where it is appropriate to do so in accordance with the provisions of 10 CFR § 2.715a.

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

While an intervenor has a right to cross-examine on any issue in which he has a discernible interest, the Licensing Board has a duty to monitor and restrict such cross-examination to avoid repetition. CLI-75-1 supra, 1 NRC 1. The Board is explicitly authorized to take the necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination, and the Board may properly limit cross-examination which is merely repetitive. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Prairie Island, supra, ALAB-244, 8 AEC 857, 868. Moreover, cross-examination must be strictly limited to the scope of the direct examination. Prairie Island, CLI-75-1, 1 NRC 1 and ALAB-244, 8 AEC 857 at 867. As a general proposition, no party has a right to unfettered or unlimited cross-examination and cross-examination may not be carried to unreasonable lengths. The test is whether the information sought is necessary for a full and true disclosure of the facts. Prairie Island, supra, ALAB-244, 8 AEC 857, 869 n.16; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1674-1675 (1982), citing, Section 181 of the Atomic Energy Act; Section 7(c) of the APA, 5 U.S.C. 556(d). This limitation applies equally to cross-examination on issues raised sua sponte by the Licensing Board in an operating license proceeding. Id. at 8 AEC 869.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. Public Service Co. of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

Unnecessary cross-examination may be limited by a Licensing Board, in its discretion, to expedite the orderly presentation of each party's case. Cross-examination plans (submitted to the Board alone) are encouraged, as are trial briefs and prefiled testimony outlines. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

Licensing Boards are authorized to establish reasonable time limits for the examination of witnesses, including cross-examination, under 10 CFR §§ 2.718(c) and 2.757(c), Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) and relevant judicial decisions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1428 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986). See MCI Communications Corp. v. AT&T, 85 F.R.D. 28 (N.D. Ill. 1979), aff'd, 708 F.2d 1081, 1170-73 (7th Cir. 1983).

A Licensing Board has the authority to direct that parties to an operating license proceeding conduct their initial cross-examination by means of prehearing examinations in the nature of depositions. Pursuant to 10 CFR § 2.718, a Board has the power to regulate the course of the hearing and the conduct of the participants, as well as to take any other action consistent with the APA. See also 10 CFR § 2.757, 10 CFR Part 2, App. A, IV. In expediting the hearing process using the case management method contained in Part 2, a Board should ensure that the hearings are fair, and produce a record which leads to high quality decisions and adequately protects the public health and safety and the environment. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1677 (1982), citing, Statement of Policy, supra, 13 NRC at 453.

In considering whether to impose controls on cross-examination, questions raised by the applicant concerning the adequacy of the Staffs of the Appeal Board or Commission to review a lengthy record, either on appeal or sua sponte, should not be taken into account. To the extent that cross-examination may contribute to a meaningful record, it should not be limited to accommodate asserted staffing deficiencies within NRC. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 992 (1983).

3.13.2 Cross-Examination by Experts

The rules of practice permit a party to have its cross-examination of others performed by individuals with technical expertise in the subject matter of the cross-examination provided that the proposed interrogator is shown to meet the requirements set forth in 10 CFR § 2.633(a). An expert interrogator need not meet the same standard of expertise as an expert witness. The standard for interrogators under 10 CFR § 2.733(a) is that the individual "is qualified by scientific training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination." The Regents of the University of California (UCLA Research Reactor), LBP-81-29, 14 NRC 353, 354-55 (1981).

3.13.3 Inability to Cross-Examine as Grounds to Reopen

Where a Licensing Board holds to its hearing schedule despite a claim by an intervenor that he is unable to prepare for the cross-examination of witnesses because of scheduling problems, the proceeding will be reopened to allow the intervenor to cross-examine witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

3.14 Record of Hearing

It is not necessary for legal materials, including the Standard Review Plan, Regulatory Guides, documents constituting Staff guidance, and industry code sections applicable to a facility, to be in the evidentiary record. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 NRC 415, 418 (1983).

3.14.1 Supplementing Hearing Record by Affidavits

Gaps in the record may not be filled by affidavit where the issue is technical and complex. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-284, 2 NRC 197, 205-06 (1975).

There is no significance to the content of affidavits which do not disclose the identity of individuals making statements in the affidavit. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-525, 9 NRC 111, 114 (1979).

3.14.2 Reopening Hearing Record

If a Licensing Board believes that circumstances warrant reopening the record for receipt of additional evidence, it has discretion to take that course of action. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977). It may do so, for example, in order to receive additional documents in support of motion for summary disposition where the existing record is insufficient. Id. at 752. For a discussion of reopening, see Section 4.4.

Reopening a record is an extraordinary action. To prevail, the petitioners must demonstrate that their motions are timely, that the issues they seek to litigate are significant, and that the information they seek to add to the record would change the results. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 915 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1207 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1216 (1985).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983).

A motion to reopen the evidentiary record because of previously undiscovered conclusions of an NRC Staff inspection group must establish the existence of differing

technical bases for the conclusions. The conclusions alone would be insufficient evidence to justify reopening of the record. Three Mile Island, supra, 15 NRC at 916.

Reopening the record is within the Licensing Board's discretion and need not be done absent a showing that the outcome of the proceeding might be affected and that reopening the record would involve issues of major significance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-46, 15 NRC 1531, 1535 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station), 10 NRC 775, 804 (1978); Public Service Co. of New Hampshire (Seabrook Station), 6 NRC 33, 64, n.35 (1977); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973).

After the record is closed in an operating license proceeding, where parties proffering new contentions do not meet legal standards for further hearings, that the contentions raise serious issues is insufficient justification to reopen the record to consider them as Board issues when the contentions are being dealt with in the course of ongoing NRC investigation and Staff monitoring. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110 (1982). See LBP-82-54, 16 NRC 210; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 236 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

Although the standard for reopening the record in an NRC proceeding has been variously stated, the traditional standard requires that (1) the motion be timely, (2) significant new evidence of a safety question exist, and (3) the new evidence might materially affect the outcome. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 800 n.66 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 476 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1260 (1984), rev'd in part on other gnds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-8, 21 NRC 1111, 1113 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986).

The traditional standard for reopening applies in determining whether a record should be reopened on the basis of new information. The standard does not apply where the issue is whether the record should be reopened because of an inadequate record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985).

The Board must be persuaded that a serious safety matter is at stake before it is appropriate for it to require supplementation of the record. Texas Utilities Generating

Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 NRC 415, 418 (1983). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 412 n.5, 413 (1987).

In proceedings where the evidentiary record has been closed, the record should not be reopened on TMI related issues relating to either low or full power absent a showing, by the moving party, of significant new evidence not included in the record, that materially affects the decision. Bare allegations or simple submission of new contentions is not sufficient, only significant new evidence requires reopening. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The factors to be applied in reopening the record are not necessarily additive. Even if timely, the motion may be denied if it does not raise an issue of major significance. However, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1143 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984).

3.14.3 Material Not Contained in Hearing Record

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 n.33 (1986). The Licensing Board may not base a decision on factual material which has not been introduced into evidence. However, if extra-record material raises an issue of possible importance to matters such as public health, the material may be examined on review. If this examination creates a serious doubt about the decision reached by the Licensing Board, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-352 (1978). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-937, 32 NRC 135, 150-152 (1990).

Whether or not proffered affidavits would leave the Licensing Board's result unchanged, simple equity precludes reopening the record in aid of intervenors' apparent desire to attack the decision below on fresh grounds. Where the presentation of new matter to supplement the record is untimely, its possible significance to the outcome of the proceeding is of no moment, at least where the issue to which it relates is devoid of grave public health and safety or environmental implications. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC

34, 38-39 (1981), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); and Hartsville, supra.

3.15 Interlocutory Review via Directed Certification

3.16 Licensing Board Findings (See also Standards for Reversing Licensing Boards § 5.6)

The findings of a Licensing Board must be supported by reliable, probative and substantial evidence in the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184 (1975). It is well settled that the possibility that inconsistent or even contrary views could be drawn if the views of an opposing party's experts were accepted does not prevent the Licensing Board's findings from being supported by substantial evidence. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 866 (1975).

A Licensing Board is free to decide a case on a theory different from that on which it was tried but when it does so, it has a concomitant obligation to bring this fact to the attention of the parties before it and to afford them a fair opportunity to present argument, and where appropriate, evidence. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 55-56 (1978); Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975). Note that as to a Licensing Board's findings, the appellate tribunal has authority to make factual findings on the basis of record evidence which are different from those reached by a Licensing Board and can issue supplementary findings of its own. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). The appellate decision can be based on grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and/or evidence. Id. In any event, decisions may be based on factual material which has not been introduced into evidence. Otherwise, other parties would be deprived of the opportunity to impeach the evidence through cross-examination or to refute it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

A Licensing Board decision which is pending on appeal will be vacated when, subsequent to the issuance of the decision, circumstances have changed so as to significantly alter the evidentiary basis of the decision. Where a party seeks to change its position or materially alter its earlier presentation to the Licensing Board, the hearing record no longer represents the actual situation in the case. Other parties should be given an appropriate opportunity to comment upon or to rebut any new information which is material to the resolution of issues. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 115-17 (1991).

The Board's initial decision should contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3, & 4), ALAB-256, 1 NRC 10, 14 n.8 (1975). Despite the fact that a number of older cases have held that a Licensing

Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 449 F.2d 1069 (D.C. Cir 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). While the Seabrook Appeal Board found that the deficiencies in the initial decision were not so serious as to require reversal, especially in view of the fact that the Appeal Board itself would make findings of fact where necessary, the Appeal Board made it clear that a Licensing Board's blatant failure to follow the Appeal Board's direction in this regard is ground for reversal of the Licensing Board's decision.

Notwithstanding its authority to do so, the Appeal Board was normally reluctant to search the record to determine whether it included sufficient information to support conclusions for which the Licensing Board failed to provide adequate justification. A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Seabrook, supra, 6 NRC at 42. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 530-31 (1988). Note, however, that in at least one case the Appeal Board did search the record where (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy and (2) it did not take an extended period of time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 368 (1978).

The admonition that Licensing Boards must clearly set forth the basis for their decisions applies to a Board's determination with respect to alternatives under NEPA. Thus, although a Licensing Board may utilize its expertise in selecting between alternatives, some explanation is necessary. Otherwise, the requirement of the Administrative Procedure Act that conclusions be founded upon substantial evidence and based on reasoned findings "become[s] lost in the haze of so-called expertise." Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

When evidence is presented to the Licensing Board in response to appellate instruction that a matter is to be investigated, the Licensing Board is obligated to make findings and issue a ruling on the matter. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 368 (1978).

In Public Service Company of New Hampshire (Seabrook Station, Units & 2), ALAB-471, 7 NRC 477, 492 (1978), the Appeal Board reiterated that the bases for decisions must be set forth in detail, noting that, in carrying out its NEPA responsibilities, an agency "must go beyond mere assertions and indicate its basis for them so that the end product is" an informed and adequately explained judgment.

Licensing Boards have an obligation "to articulate in reasonable detail the basis for [their] determination." A substantial failure of the Licensing Board in this regard can result in the matter being remanded for reconsideration and a full explication of the reasons underlying whatever result that Board might reach upon such reconsideration. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410-412 (1978).

The fact that a Licensing Board poses questions requiring that evidence be produced at the hearing in response to those questions does not create an inviolate duty on the part of the Board to make findings specifically addressing the subject matter of the questions. Portland General Electric Company (Trojan Nuclear Plant), LBP-78-32, 8 NRC 413, 416 (1978).

A Licensing Board decision which rests significant findings on expert opinion not susceptible of being tested on examination of the witness is a fit candidate for reversal. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979).

Licensing Boards passing on construction permit applications must be satisfied that requirements for an operating license, including those involving management capability, can be met by the applicant at the time such license is sought. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Where evidence may have been introduced by intervenors in an operating license proceeding, but the construction permit Licensing Board made no explicit findings with regard to those matters, and at the construction permit stage the proceeding was not contested, the operating license Licensing Board will decline to treat the construction permit Licensing Board's general findings as an implicit resolution of matters raised by intervenors. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 79 n.6 (1979).

In order to avoid unnecessary and costly delays in starting the operation of a plant, a Board may conduct and complete operating license hearings prior to the completion of construction of the plant. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622, 1627 (1985), review denied, CLI-85-14, 22 NRC 177, 178 (1985). Thus, a Board must make some predictive findings and, "in effect, approve applicant's present plans for future regulatory compliance." Diablo Canyon, supra, 21 NRC at 1627, citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 79 (1981).

There is no requirement mandated by the Atomic Energy Act nor the Commission's regulations that a Licensing Board may not resolve a contested issue if any form of confirmatory analysis is ongoing as of the close of the record on that issue, where a Licensing Board is able to make the basic findings prerequisite to the issuance of an operating license based on the existing record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 519 (1983), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974) and Public

Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622, 1628 (1985), review denied, CLI-85-14, 22 NRC 177, 178 (1985).

Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 923 (1981).

3.16.1 Independent Calculations by Licensing Board

A Board is free to draw conclusions by applying known engineering principles to and making mathematical calculations from facts in the record whether or not any witness purported to attempt this exercise. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437, rev. on other gnds., CLI-74-40, 8 AEC 809 (1974). However, the Board must adequately explain the basis for its conclusions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

3.17 Res Judicata and Collateral Estoppel

Although the judicially developed doctrine of res judicata is not fully applicable in administrative proceedings, the considerations of fairness, to parties and conservation of resources embodied in this doctrine are relevant. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 27 (1978), citing, Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

Thus, as a general rule, it appears that res judicata principles may be applied, where appropriate, in NRC adjudicatory proceedings. Consistent with those principles, res judicata does not apply when the foundation for a proposed action arises after the prior ruling advanced as the basis for res judicata or when the party seeking to employ the doctrine had the benefit, when he obtained the prior ruling, of a more favorable standard as to burden of proof than is now available to him. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

The common law rules regarding res judicata do not apply, in a strict sense, to administrative agencies. Res judicata need not be applied by an administrative agency where there are overriding public policy interests which favor re-litigation. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing, International Harvester Co. v. Occupational Safety and Health Review Commission, 628 F.2d 982, 986 (7th Cir. 1980).

The res judicata or other preclusive effect of a previously decided issue is appropriately decided at the time the issue is raised anew. Louisiana Energy Services, L.P (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113,114 (1998).

When an agency decision involves substantial policy issues, an agency's need for flexibility outweighs the need for repose provided by the principle of res judicata. Clinch River, supra, 16 NRC at 420, citing, Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969); FTC v.

Texaco, 555 F.2d 867, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), rehearing denied, 434 U.S. 883 (1977).

A change in external circumstances is not required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to which an old policy applied. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982), citing, Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969).

An Agency must be free to consider changes that occur in the way it perceives the facts, even though the objective circumstances remain unchanged. Clinch River, supra, 16 NRC at 420, citing, Maxwell, supra; FTC v. Texaco, 555 F.2d 867, 874 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977), rehearing denied, 434 U.S. 883 (1977).

Principles of collateral estoppel, like those of res judicata, may be applied in administrative adjudicatory proceedings. U.S. v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982); Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 25 n.40 (1984), citing, Farley, supra; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 n.2 (1994); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995).

Collateral estoppel precludes re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. Davis-Besse, supra; Farley, supra. As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues." Safety Light, 41 NRC at 442, citing Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

The application of collateral estoppel does not hinge on the correctness of the decision or interlocutory ruling of the first tribunal. Moore's Federal Practice, para. 0.405[1] and [4.1] at 629, 634-37 (2d ed. 1974); Davis-Besse, supra; Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995). It is enough that the tribunal had jurisdiction to render the decision, that the prior judgment was rendered on the merits, that the cause of action was the same, and that the party against whom the doctrine is asserted was a party to the earlier litigation or in privity with such a party. Davis-Besse, supra. Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties. Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-640, 13 NRC 487, 543 (1981). In virtually every case in which the doctrine of

collateral estoppel was asserted to prevent litigation of a contention, it was held that privity must exist between the intervenor advancing the contention and the intervenor which litigated it in the prior proceeding. General Electric Co. (GETR Vallecitos), LBP-85-4, 21 NRC 399, 404 (1985) and cases cited. But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-200 (1981). Conversely, that parties to the former action were not joined to the second action does not prevent application of the principle. Dreyfus v. First National Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir. 1970), cert. denied, 400 U.S. 832 (1970); Hummel v. Equitable Assurance Society, 151 F.2d 994, 996 (7th Cir. 1945); Davis-Besse, supra, 5 NRC 557. Where circumstances have changed (as to context or law, burden of proof or material facts) from when the issues were formerly litigated or where public interest calls for re-litigation of issues, neither collateral estoppel nor res judicata applies. Farley, supra, 7 AEC 203; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 286 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 56-57 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989); Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 445 (1995). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 126-127 (1992); Ohio Edison Company (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Company; Toledo Edison Company (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1) LBP-92-32, 36 NRC 269, 285 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). Furthermore, under neither principle does a judicial decision become binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. 2 Davis, Administrative Law Treatise, 18.12 at pp. 627-28. Cf. US v. Radio Corp. of America, 358 U.S. 334, 347-52 (1959). Where application of collateral estoppel would not affect the Commission's ability to control its internal proceedings, however, a prior court decision may be binding on the NRC. Davis-Besse, supra.

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-575 (1979). Whatever other public policy factors may outweigh the application of the doctrine of collateral estoppel, the correctness of the earlier determination of an issue is not among them. Simply stated, issue preclusion does not depend on the correctness of a prior decision. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995).

There is no basis under the Atomic Energy Act or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit

stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages; principles of res judicata and collateral estoppel then come into play. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 464 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1044 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1081 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). A contention already litigated between the same parties at the construction permit stage may not be re-litigated in an operating license proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 78-82 (1982); Shearon Harris, supra, 23 NRC at 536.

A party which has litigated a particular issue during an NRC proceeding is not collaterally estopped from litigating in a subsequent proceeding an issue which, although similar, is different in degree from the earlier litigated issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 849 (1987), aff'd, ALAB-869, 26 NRC 13, 22 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

A party countering a motion for summary judgment based on res judicata need only recite the facts found in the other proceedings, and need not independently support those "facts." Houston Lighting & Power Co. (South Texas Project, Units 1 & 2). ALAB-575, 11 NRC 14, 15 n.3 (1980).

When certain issues have been adequately explored and resolved in an early phase of a proceeding, an intervenor may not re-litigate similar issues in a subsequent phase of the proceeding unless there are different circumstances which may have a material bearing on the resolution of the issues in the subsequent proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 402-403 (1990). "To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree such as might place before the court an issue different in some respect from the one decided in the initial case." Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446 (1995) citing 1B Moore's Federal Practice ¶0.448, at III.-642 (2d ed. 1995). Similarly, "a change or development n the controlling legal principles" or a "change [in] the legal atmosphere" may make issue preclusion inapplicable. Safety Light, 41 NRC at 446; citing Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948).

Collateral estoppel requires presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 (1983), citing, Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986), see also Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 445 (1995). In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Shearon Harris, supra, 23 NRC at 536; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993).

The doctrine of collateral estoppel traditionally applies only when the parties in the case were also parties (or their privies) in the previous case. A limited extension of that doctrine permits "offensive" collateral estoppel, i.e., the claim by a person not a party to previous litigation that an issue had already been fully litigated against the defendant and that the defendant should be held to the previous decision because he has already had his day in court. Parklane Hosiery Co., Inc. v. Leo M. Shore, 439 U.S. 322 (1979), see also Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995). At least one Licensing Board has held that, in operating license proceedings, estoppel may also be applied defensively, to preclude an intervenor who was not a party from raising issues litigated in the construction permit proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-201 (1981). This would not appear to be wholly consistent with the Appeal Board's ruling in Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Station, Units 1 and 2), ALAB-640, 13 NRC 487. 543 (1981).

The Licensing Board which conducted the San Onofre operating license hearing relied upon similar reasoning. The Board held that, although "identity of the parties" and "full prior adjudication of the issues" are textbook elements of the doctrines of res judicata and collateral estoppel, they are not prerequisites to foreclosure of issues at the operating stage which were or could have been litigated at the construction permit stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 82 (1982). When an issue was known at the construction permit stage and was the subject of intensive scrutiny, anyone who could have (even if no one had) litigated the issue at that time can not later seek to do so at the operating license hearing without a showing of changed circumstances or newly discovered evidence. San Onofre, supra, 15 NRC at 78-82. The Appeal Board subsequently found that the Licensing Board had erred. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15

NRC 688, 694-696 (1982); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 353-354 (1983). The doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as having their day in court. There is no public policy reason why the Agency's administrative proceedings warrant a looser standard. San Onofre (ALAB-673), supra, 15 NRC at 696. The Appeal Board also disagreed with the Licensing Board's statement that organizations or persons who share a general point of view will adequately represent one another in NRC proceedings. San Onofre (ALAB-673), supra, 15 NRC at 695-696.

The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another is whether legal accountability between the two groups or virtual representation of one group by the other is shown. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 n.3 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 1 and 2), ALAB-673, 15 NRC 688, 695-96 (1982) (dictum).

An operating license Board will not apply collateral estoppel to an issue which was considered during an uncontested construction permit hearing. When there are no adverse parties in the construction permit hearing, there can be neither privity of parties nor "actual litigation" of the issue sufficient to support reliance on collateral estoppel. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 622-624 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 506 (1989) (collateral estoppel does not apply to an issue which was reviewed by the NRC Staff, but which was not previously the subject of a contested proceeding).

An intervenor in an operating license proceeding, who was not a party in the construction permit proceeding, is not collaterally estopped from raising and re-litigating issues which were fully investigated in the construction permit proceeding. However, the intervenor has the burden of providing even greater specificity than normally required for its contentions. The intervenor must specify how circumstances have changed since the construction permit proceeding or how the Licensing Board erred in the construction permit proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 539-40 (1986). Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 n.5 (1983).

Where the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in litigation of similar issues under a different statute. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-29-27, 10 NRC 563, 571 (1979).

The Commission will give effect to factual findings of Federal courts and sister agencies when those findings are part of a final judgment, even when the party seeking estoppel effect was not a party to the initial litigation. Although the application of collateral estoppel would be denied if a party could have easily joined in the prior litigation, the Commission will apply collateral estoppel even though it is alleged that a party could have joined in, if the prior litigation was a complex antitrust case. Furthermore, FERC determinations about the applicability of antitrust laws are sufficiently similar to Commission determinations to be entitled to collateral estoppel effect. Even a shift in the burden of persuasion does not exclude the application of collateral estoppel when it is apparent that the FERC opinion did not arrive at its antitrust conclusions because of the burden of persuasion. On the other hand, the decision of a Federal district court on a summary judgment motion is not a final judgment entitled to collateral estoppel effect, particularly when the court did not fully explain the grounds for its opinion and when its decision was issued after the hearing board had already begun studying the record and had formed factual conclusions which were not adequately addressed in the district court's opinion. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167, 1173-80, 1189-90 (1981). The repose doctrines of res judicata, collateral estoppel, laches and the law of the case are applicable in NRC adjudicatory proceedings generally and all may be applied in antitrust proceedings because 'litigation has the same conclusive power in antitrust as elsewhere.' Ohio Edison Company (Perry Nuclear Power Plant, Unit 1); Cleveland Electric Illuminating Company; Toledo Edison Company (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-92-32, 36 NRC 269, 285 (1992), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

The repose doctrine of law of the case acts to bar re-litigation of the same issue in subsequent stages of the same proceeding. Perry, 36 NRC at 283, supra, citing Arizona v. California, 460 U.S. 605, 618 (1983). The repose doctrines of res judicata and collateral estoppel are somewhat related. As described by the Supreme Court: under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). Both doctrines thus bar re-litigation by the same parties of the same substantive issues. Res judicata also bars litigation of an issue that could have been litigated in the prior cause of action. Perry, 36 NRC at 284-85, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

To establish the defense of laches, which is an equitable doctrine that bars the late filing of a claim if a party would be prejudiced because of its actions during the interim were taken in reliance on the right challenged by the claimant, "the evidence must show both that the delay was unreasonable and that it prejudiced the defendant.' Van Bourg v. Nitze, 388 F. 2d 557, 565 (D.C. Cir. 1967) (quoting Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966). Perry, 36 NRC at 286, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). It is well established that the absence of "subject matter" jurisdiction may be raised at any time in a proceeding without regard to timeliness considerations. Perry, 36 NRC at 387, supra, aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Summary disposition may be denied on the basis of res judicata and collateral estoppel. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14 (1980), affirming, LBP-79-27, 10 NRC 563 (1979).

3.18 Termination of Proceedings

3.18.1 Procedures for Termination

Pursuant to 10 CFR § 2.203, any negotiated settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the presiding officer. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996), aff'd, CLI-97-13, 46 NRC 195 (1997).

The issue is not whether the matter before the Board presents the best settlement that could have been obtained. The Board's obligation instead is merely to determine whether the agreement is within the reaches of the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 257 (1996). If the agreement is not in the public interest, the Board may require an adjudication of any issues that require resolution prior to termination of the proceeding. Id. at 256. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998).

The Commission looks with favor upon settlements and is loath to second-guess the parties' (including Staff's) evaluation of their own interest. The Commission, like the Board, looks independently at such settlements to see whether they meet the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

10 CFR § 2.203 authorizes a Board to terminate a proceeding, at any time after the issuance of a notice of hearing, on the basis of a settlement agreement, according due weight to the position of the Staff. Robert L. Dickherber and Commonwealth Edison Co. (Quad Cities Nuclear Power Station), LBP-90-28, 32 NRC 85, 86-87 (1990); St. Mary Medical Center-Hobart and St. Mary Medical Center-Gary, LBP-90-46, 32 NRC 463, 465 (1990); Kelli J. Hinds (Order Prohibiting Involvement In Licensed Activities), LBP-94-32, 40 NRC 147 (1994); Indiana Regional Cancer Center, LBP-94-36, 40 NRC 283, 284 (1994); Safety Light Corp. (Bloomsburg Site Decontamination, Decommissioning, License Renewal Denials, and Transfer of Assets), LBP-94-41, 40 NRC 340 (1994). The rationale for providing due weight to the position of the Staff may be grounded on the merited understanding that, in the end, the Staff is responsible for maintaining protection for the health and safety of the public and, in the absence of evidence substantiating challenges to the exercise of that responsibility, the Staff's position should be upheld. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996). A Licensing Board will review a proposed settlement agreement to determine if approval of the agreement might prejudice the outcome of a related NRC proceeding. New York Power Authority (James A. Fitzpatrick Nuclear Power Plant) and David M. Manning, LBP-92-1, 35 NRC 11, 17-18 (1992).

10 CFR § 2.203 sets forth the Board's function in reviewing settlements in enforcement cases. It provides that (1) settlements are subject to the Board's approval; (2) the Board, in considering whether to approve a settlement, should "accord[] due weight to the position of the staff"; and (3) the Board may "order such adjudication of the issues as [it] may deem to be required in the public interest to dispose of the proceeding". Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

Termination of adjudicatory proceedings on a construction permit application should be accomplished by a motion filed by applicant's counsel with those tribunals having present jurisdiction over the proceeding. A letter by a lay official to the Commission when the Licensing Board has jurisdiction over the matter is not enough. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 668-9 (1980).

An operating license proceeding may not be terminated solely on the basis of a Stipulation whereby all the parties have agreed to terminate the proceeding. The parties must formally file a motion to terminate with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-14, 29 NRC 487, 488-89 (1989).

Where an amendment to an operating license has been noticed, and a petition for intervention has been filed, but the application for amendment is withdrawn prior to the Licensing Board ruling on the intervention petition and issuing a Notice of Hearing as provided in 10 CFR § 2.105(e)(2), the Commission, not the Licensing Board, has jurisdiction over the withdrawal of the application. See 10 CFR § 2.107(a). Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-93-16, 38 NRC 23 (1993), aff., CLI-93-20, 38 NRC 83 (1993). However, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances. CLI-93-20 at 85.

Termination of a proceeding with prejudice is not warranted where there has been no demonstration that there has been substantial prejudice to an opposing party or to the public interest. That an opposing party may "linger in uncertainty"about a future application does not constitute such a demonstration. In addition, termination with prejudice would be inappropriate in the absence of any information that would justify precluding the site from such future use. Northern States Power Company (Independent Spent Fuel Storage Installation), LBP-97-17, 46 NRC 227, 231-232 (1997).

Under 10 C.F.R. §2.107(a), when a Notice of Hearing has not been issued, the Atomic Safety and Licensing Board has the authority to grant a motion to terminate a proceeding by the Petitioners. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-97-13, 46 NRC 11, 12 (1997).

3.18.2 Post-Termination Authority of Commission

10 CFR § 2.107(a) expressly empowers Licensing Boards to impose conditions upon the withdrawal of a permit or license application after the issuance of a notice of hearing. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 669 n.2 (1980).

Pursuant to its general supervisory authority and responsibility over safety matters, the Commission may direct the NRC Staff to evaluate safety matters of potential concern

which remain after the termination of a proceeding. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 67-68 (1992).

3.18.3 Dismissal

Proceeding dismissed where there is continuous failure to provide information requested by the Board and information important to show petitioner's continued participation in the proceeding. Daniel J. McCool (Order Prohibiting Environment in NRC Licensed Activities), LBP-95-11, 41 NRC 475, 476-77 (1995).

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POST HEARING MATTERS

4.0 POST HEARING MATTERS

4.1 Settlements and Stipulations

10 CFR § 2.759 expressly provides, and the Commission stresses, that the fair and reasonable settlement of contested initial licensing proceedings is encouraged. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 283 (1979). This was reiterated in the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981); see also Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-94-10, 39 NRC 126 (1994); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma), LBP-97-19, 46 NRC 237, 238 (1997).

The Presiding Officer may attempt to facilitate negotiations between parties when they are seeking to resolve some or all of the pending issues. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-20, 48 NRC 137, 138 (1998).

Parties may seek appointment of a settlement judge in accordance with the Commission's guidance in Rockwell Int'l Corp., CLI-90-05, 31 NRC 337 (1990).

When a party requests to withdraw a petition pursuant to a settlement, it is appropriate for a licensing board to review the settlement to determine whether it is in the public interest. 10 C.F.R. § 2.759. See also Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomic (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256-57 (1996); John Boschuk, Jr. (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-15, 48 NRC 57, 59 (1998); Lourdes T. Boschuk (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-16, 48 NRC 63, 65 (1998); Magdy Elamir, M.D. (Newark, NJ), LBP-98-25, 48 NRC 226, 227 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13 (1998). (See also 3.18.1). When the board has held extensive hearing and has analyzed the record, it may not need to see the settlement agreement in order to conclude that the withdrawal of the petitioner is in the public interest. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 NRC 59, 63-65 (1996).

A licensing Board may refuse to dismiss a proceeding "with prejudice" even though all the participants jointly request that action, unless it is persuaded by legal and factual arguments in support of that request. General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-29, 36 NRC 225 (1992). A settlement agreement must be submitted to the Licensing Board for a determination as to whether it is "fair and reasonable" in accordance with 10 CFR 2.759. A petition may be dismissed with prejudice providing that a Board reviews the settlement agreement and finds, consistent with 10 CFR 2.759, that it is a "fair and reasonable settlement." General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-30, 36 NRC 227 (1992).

Pursuant to 10 C.F.R. § 2.203, in contested enforcement proceedings settlements are subject to the approval of a presiding officer, or if none has been assigned, the Chief Administrative Law Judge, according due weight to the position of staff. The settlement need not be immediately approved. If it is in the "public interest," an adjudication of the issues may be ordered. 10 C.F.R. § 2.203; Sequoyah Fuels Corp. and General Atomics, LBP-96-18, 42 NRC 150, 154 (1995); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma),

LBP-97-19, 46 NRC 237, 238 (1997); Conam Inspection, Inc. (Itasca, IL), LBP 98-31, 48 NRC 369 (1998).

The Commission is willing to presume that its staff acted in the agency's best interest in agreeing to the settlements. Only if the settlement's opponents show some "substantial" public-interest reason to overcome that presumption will the Commission undo the settlement. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 208 (1997).

In the Orem case, although the Commission expressed reservations about aspects of the settlement agreement, the Commission permitted the agreement to take effect since it did not find the agreement to be, on balance, against the public interest. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993). Cf. Safety Light Corp. (Bloomsburg Site Decontamination, Decommissioning, License Renewal Denials, and Transfer of Assets), LBP-94-41, 40 NRC 340, 341 (1994).

As true with court proceedings requiring judicial approval of settlements, see, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Jeff D. V. Andrus, 899 F.2d 753, 758 (9th Cir. 1989); In re Warner Communications Sec. Litig., 798 F2d 35, 37 (2d Cir. 1986), a presiding officer does not have the authority to revise the parties' settlement agreement without their consent. A presiding officer thus must accept or reject the settlement with the provisions proposed by the parties. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996).

When the parties agree to settle an enforcement proceeding, the Licensing Board loses jurisdiction over the settlement agreement once the Board's approval under 10 C.F.R. § 2.203 becomes final agency action. Thereafter, supervisory authority over such an agreement rests with the Commission. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996) (citing Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) , CLI-80-12, 11 NRC 514, 417 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757-58 (1983). The Commission looks with favor upon settlements. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13, 16 (1998).

The NRC is not required under the AEA to adhere without compromise to the remedial plan of an enforcement order. Such a restriction would effectively preclude settlement because, by prohibiting any meaningful compromise as to remedy, it would eliminate the element of exchange which is the groundwork for settlements. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 219-220 (1997).

In examining a settlement of a enforcement proceeding, the Commission divides its public-interest inquiry into four parts: (1) whether, in view of the agency's original order and risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 202-224 (1997).

In reviewing risks and benefits, the Commission considers (1) the likelihood (or uncertainty) of success at trial; (2) the range of possible recovery and the related risk of uncollectibility of a larger trial judgement; and (3) the complexity, length, and expense of continued

litigation. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209 (1997).

The essence of settlements is compromise and the Commission will not judge them on the basis of whether the Staff (or any party) achieves in a settlement everything it could possibly attain from a fully and successfully litigated proceeding. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 210-211 (1997).

4.2 Proposed Findings

Each party to a proceeding may file proposed findings of fact and conclusions of law with the Licensing Board. Despite the fact that a number of older cases have held that a Licensing Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Power Station, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), the Appeal Board has indicated that a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). 10 CFR § 2.754 permits the Licensing Board to vary its regularly provided procedures by altering the ordinary regulatory schedule for findings of fact. The NRC Staff is permitted to consider the position of other parties before finalizing its position. Consumers Power Co. (Big Rock Point Plant), LBP-82-51A, 16 NRC 180, 181 (1982).

10 CFR § 2.754(c) requires that a party's proposed findings of fact and conclusions of law be confined to the material issues of fact and law presented on the record. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). However, unless a board has previously required the filing of all arguments, a party is not precluded from presenting new arguments in its proposed findings of fact. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1420-1421 (1983), reconsid. denied sub nom. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517 (1984).

Even though a party presents no expert testimony, it may advance proposed findings that include technical analyses, opinions, and conclusions, as long as the facts on which they are based are matters of record. The Licensing Board must do more than act as an "umpire blandly calling balls and strikes for adversaries appearing before it." The Board includes experts who can evaluate the factual material in the record and reach their own judgment as to its significance. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180, 192 (1994); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 n.7 (1997).

Requiring the submission to a Licensing Board of proposed findings of fact or a comparable document is not a mere formality: it gives that Board the benefit of a party's arguments and permits it to resolve them in the first instance, possibly in the party's favor, obviating later appeal. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

Where an intervenor chooses to file proposed findings, the Board is entitled to take that filing as setting forth all of the issues that were contested. Southern California Edison Co.

(San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 371 (1983).

A pro se licensee in a civil penalty proceeding will not be held to strict compliance with the format requirements for proposed findings if it can make a convincing showing that it cannot comply with all the technical pleading requirements of 10 CFR § 2.754(c). Unlike intervenors who voluntarily participate in licensing proceedings, a pro se licensee, who has requested a hearing, must participate in a civil penalty proceeding in order to protect its property interests. A Licensing Board will use its best efforts to understand and rule on the merits of the claims presented. Tulsa Gamma Ray, Inc., LBP-91-40, 34 NRC 297, 303-304 (1991).

4.2.1 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings of fact and conclusions of law only with respect to issues which that party placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.754(c), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

If an intervenor files additional filings that are not authorized by the board, they will not be considered in the board's decision. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 346 (1998).

4.2.2 Failure to File Proposed Findings

Consistent with 10 CFR § 2.754(b), contentions for which findings have not been submitted may be treated as having been abandoned. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1568 (1982).

The Appeal Board did not feel bound to review exceptions made by a party who had failed to file proposed findings on the issues with respect to which the exceptions were taken. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 964 (1974).

A Licensing Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

A party that fails to submit proposed findings as requested by a Licensing Board, relying instead on the submission of others, assumes the risk that such reliance might be misplaced; it must be prepared to live with the consequence that its further appeal rights will be waived. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982).

The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise. The presiding officer is empowered to take a party's failure to file proposed findings, when directed to do so, as a default. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61 n.3 (1984). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1213 n.18 (1984), rev'd in part on other grounds, CLI-85-2,

21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-84-47, 20 NRC 1405, 1414 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-87-13, 25 NRC 449, 452-53 (1987).

Even when a Licensing Board order requesting the submission of proposed findings has been disregarded, the Commission's Rules of Practice do not mandate a sanction. Fermi, supra, 17 NRC at 23, citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-33 (1973).

The failure to file proposed findings is subject to sanctions only in those instances where a Licensing Board has directed such findings to be filed. That is the extent of the adjudicatory board's enforcement powers under 10 CFR § 2.754. Fermi, supra, 17 NRC at 23.

Absent a Board order requiring the submission of proposed findings, an intervenor that does not make such a filing is free to pursue on appeal all issues it litigated below. The setting of a schedule for filing proposed findings falls short of an explicit direction to file findings and thus does not form the basis for finding a party in default. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 371 (1983), citing, 10 CFR § 2.754; Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983).

4.3 Initial Decisions

After the hearing has been concluded and proposed findings have been filed by the parties, the Licensing Board will issue its initial decision. This decision can conceivably constitute the ultimate agency decision on the matter addressed in the hearing provided that it is not modified by subsequent Commission review. Under 10 CFR § 2.764, the Licensing Board's decision authorizing issuance of an operating license is to be considered automatically stayed until the Commission completes a sua sponte review to determine whether to stay the decision. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27, 29 (1981).

Prior to 1979, an initial decision authorizing issuance of a construction permit (or operating license) was effective when issued, unless stayed. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978). At that time decisions were presumptively valid and, unless or until they were stayed or overturned by appropriate authority, were entitled to full recognition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-423, 6 NRC 115, 117 (1977)).

With respect to authorization of issuance of construction permits, 10 CFR § 2.764(e) provides for Commission review, within 60 days of any Licensing Board decision that would otherwise authorize licensing action, of any stay motions timely filed. If none are filed, the Commission will within the same period of time conduct a sua sponte review and decide whether a stay is warranted. In so deciding the Commission applies the procedures set out in 10 CFR § 2.788. With regard to operating licenses, 10 CFR § 2.764(f) provides for the immediate effectiveness of a Licensing Board's initial decision authorizing the issuance of an operating license for fuel loading and low power testing (up to 5% of rated power). However, a Licensing Board's authorization of the issuance of an operating license at greater than 5% of rated power is not effective until the Commission has determined whether to stay the effectiveness of the decision.

10 C.F.R. 2.764(e) does not apply to manufacturing licenses. A manufacturing license can become effective before it becomes final. The Commission does not undertake an

immediate effectiveness review of a Licensing Board decision authorizing its issuance. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), CLI-82-37, 16 NRC 1691 (1982). A Licensing Board decision on a manufacturing license becomes effective before it becomes final because the issuance of a manufacturing license does not conclude the construction permit process, such a license does not present health and safety issues requiring immediate review. Cf. 46 Fed. Reg. 47764, 47765 (September 30, 1981).

A Licensing Board's initial decision must be in writing. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 n.61 (1985). Although a Board's initial decision may refer to the transcript of its oral bench rulings, such practice should be avoided in complicated NRC licensing hearings because it is counterproductive to meaningful appellate review. Limerick, supra, 22 NRC at 727 n.61.

The findings and initial decision of the Licensing Board must be supported by reliable, probative and substantial evidence on the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187 (1975). The initial decision must contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 14 n.18 (1975). Of course, a Licensing Board's decision cannot be based on factual material that has not been introduced and admitted into evidence. Otherwise the parties would be deprived of the opportunity to impeach the evidence through cross-examination or to rebut it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

Licensing Boards have a general duty to insure that initial decisions contain a sufficient exposition of any ruling on a contested issue of law or fact to enable the parties and a reviewing tribunal to readily apprehend the foundation of the ruling. This is not a mere procedural nicety but it is a necessity. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 10-11 (1976); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 n.2 (1973).

Clarity of the basis for the initial decision is important. In circumstances where a Licensing Board bases its ruling on an important issue on considerations other than those pressed upon it by the litigants themselves, there is especially good reason why the foundation for that ruling should be articulated in reasonable detail. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 414 (1976). When resort is made to technical language which a layman could not be expected to readily understand, there is an obligation on the part of the opinion writer to make clear the precise significance of what is being said in terms of what is being decided. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), ALAB-336, 4 NRC 3 (1976).

The requirement that a Licensing Board clearly delineate the basis for its initial decision was emphasized by the Appeal Board in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). Therein, the Appeal Board stressed that the Licensing Board must sufficiently inform a party of the disposition of its contentions and must, at a minimum, explain why it rejected reasonable and apparently reliable evidence contrary to the Board's findings.

Thus, a prior Licensing Board ruling in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977), to the effect that a Board need not justify its findings by discounting proffered testimony as unreliable appears to be in error insofar as it is contrary to the Appeal Board's guidance in Seabrook. Although normally the

Appeal Board was disinclined to examine the record to determine whether there is support for conclusions which the Licensing Board failed to justify, it evaluated evidence in one case because (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy, and (2) it did not take much time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 368 (1978).

In certain circumstances, time may not permit a Licensing Board to prepare and issue its detailed opinion. In this situation, one approach is for the Licensing Board to reach its conclusion and make a ruling based on the evidentiary record and to issue a subsequent detailed decision as time permits. The Appeal Board tacitly approved this approach in Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-460, 7 NRC 204 (1978). This approach has been followed by the Commission in the GESMO proceeding. See Mixed Oxide Fuel, CLI-78-10, 7 NRC 711 (1978).

It is the right and duty of a Licensing Board to include in its decision all determinations of matters on an appraisal of the record before it. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 30 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Partial initial decisions on certain contentions favorable to an applicant can authorize issuance of certain permits and licenses, such as a low-power testing license (or, in a construction permit proceeding, a limited work authorization), notwithstanding the pendency of other contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1137 (1983).

4.3.1 Reconsideration of Initial Decision

A Licensing Board has inherent power to entertain and grant a motion to reconsider an initial decision. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 646 (1974). (See also 4.5)

A presiding officer in a materials licensing proceeding retains jurisdiction to rule on a timely motion for reconsideration of his or her final initial decision even if one of the parties subsequently files an appeal. Curators of the University of Missouri, LBP-91-34, 34 NRC 159, 160-61 (1991).

An authorized, timely-filed petition for reconsideration before the trial tribunal may work to toll the time period for filing an appeal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 (1981).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

4.4 Reopening Hearings

Hearings may be reopened, in appropriate situations, either upon motion of any party or sua sponte. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Sua sponte reopening is required when a Board becomes aware, from any source, of a significant unresolved safety issue, Vermont Yankee, supra, or of possible major changes in facts material to the resolution of major environmental issues. Commonwealth Edison Co. (LaSalle County Nuclear Station, Units

1 & 2), ALAB-153, 6 AEC 821 (1973). Where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 352 (1978). For reopening the record, the new evidence to be presented need not always be so significant that it would alter the Board's findings or conclusions when the taking of new evidence can be accomplished with little or no burden upon the parties. To exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved (10 CFR § 2.756). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). An Appeal Board indicated that it might be sympathetic to a motion to reopen a hearing if documents appended to an appellate brief constituted newly discovered evidence and tended to show that significant testimony in the record was false. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3); (Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

Until the full-power license for a nuclear reactor has actually been issued, the possibility of a reopened hearing is not entirely foreclosed; a person may request a hearing concerning that reactor, even though the original time period specified in the Federal Register notice for filing intervention petitions has expired, if the requester can satisfy the late intervention and reopening criteria. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993).

Motions to reopen a record are governed by 10 CFR § 2.734, which requires that a motion to reopen a closed record be timely, that it address a significant safety or environmental issue, and that it demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180 (1994). A motion to reopen a closed record is designed to consider additional evidence of a factual or technical nature, and is not the appropriate method for advising a Board of a non-evidentiary matter such as a state court decision. A Board may take official notice of such non-evidentiary matters. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 521 (1988).

New regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Where a record is reopened for further development of the evidence, all parties are entitled to an opportunity to test the new evidence and participate fully in the resolution of the issues involved. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). Permissible inquiry through cross-examination at a reopened hearing necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 94 (1977).

A Licensing Board lacks the power to reopen a proceeding once final agency action has been taken, and it may not effectively "reopen" a proceeding by independently initiating a new adjudicatory proceeding. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977).

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the board has another discrete issue pending before it. Public

Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985).

Where finality has attached to some, but not all, issues, new matters may be considered when there is a reasonable nexus between those matters and the issues remaining before the Board. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306-07 (1988). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1714 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-930, 31 NRC 343, 346-47 (1990). The focus is on whether and what issues are still being reviewed. Waterford, supra, 20 NRC at 1589 n.4, citing, North Anna, supra, 9 NRC at 708.

A Board has no jurisdiction to consider a motion to reopen the record in a proceeding where it has issued its final decision and a party has already filed a petition for Commission review of the decision. The motion to reopen the record should be referred to the Commission for consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773, 775 (1985).

Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

Under former practice, the Appeal Board dismissed for want of jurisdiction a motion to reopen hearings in a proceeding in which the Appeal Board had issued a final decision, followed by the Commission's election not to review that decision. The Commission's decision represented the agency's final action, thus ending the Appeal Board's authority over the case. The Appeal Board referred the matter to the Director of Nuclear Reactor Regulation because, under the circumstances, he had the discretionary authority to grant the relief sought subject to Commission review. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261,262 (1979). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-1330 (1983).

The fact that certain issues remain to be litigated does not absolve an intervenor from having to meet the standards for reopening the completed hearing on all other radiological health and safety issues in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. A person or organization which was not a party to the proceeding may not file a motion to reopen the record unless it has filed for, and been granted, late intervention in the proceeding under 10 CFR § 2.714(a)(1). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 (1992), affirmed, Dow v. NRC, 976 F.2d 46 (D.C. Cir. 1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 76 (1992). Stringent criteria must be met in order for the record to be reopened. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123 (1994). Pursuant to 10 CFR § 2.734, a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

> (a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
> (2) The motion must address a significant safety issue.
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
> (b) The motion must be accompanied by one or more affidavits which set forth factual and/or technical bases for the movant's claim. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.734(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . . Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123-24 (1994).

In addition, the motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claims. 10 CFR § 2.734(b); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 734 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484 (1991). In addition, the movant is also free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversight of the facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Houston Lighting and Power Co.

(South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 82 & n.18 (1990).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.13, 34 (1990), aff'd, ALAB-936, 32 NRC 75 (1990).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 CFR 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Id. at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Id. at 1367

n.18; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Turkey Point, supra, 25 NRC at 962; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 43132 (1989).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1366-67.

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the final decision but was received by the Board after the decision, the Board denied the

motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect (referring to 10 CFR § 2.712(d)(3) -- now, 10 CFR § 2.712(e)(3) -- concerning service by mail), but did not reach the jurisdictional question since the motion was properly denied on the merits. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant. The motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.73-4(a)(1). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-927, 31 NRC 137, 139 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Seabrook, supra, 31 NRC at 140.

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and

2), LBP-90-12, 31 NRC 427, 445-46 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A person seeking late intervention in a proceeding in which the record has been closed must also address the reopening standards, but not necessarily in the same petition. However, it is in the petitioner's best interest to address both the late intervention and reopening standards together. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162 (1993).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Diablo Canyon, supra, 19 NRC at 1369.

A motion to reopen the record in order to admit a new contention must be filed promptly after the relevant information needed to frame the contention becomes available. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990).

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The Vermont Yankee tests for reopening the evidentiary record are only partially applicable where reopening the record is the Board's sua sponte action. The Board has broader responsibilities than do adversary parties, and the

timeliness test of Vermont Yankee does not apply to the Board with the same force as it does to parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

4.4.2 Grounds for Reopening Hearing

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 Z 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal

to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct cross-examination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont

Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

A person seeking a discretionary hearing after the expiration of the time period for filing intervention petitions should either address the late intervention and reopening criteria or explain why they do not apply. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas

Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-861, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 71 n.17 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 283 n.8, 284, 292 (1989), aff'd, ALAB-940, 32 NRC 225, 241-44 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.10 (1990), aff'd, ALAB-936, 32 NRC 75 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 443 n.47 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 486 n.3 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing, Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of QA/QC personnel is insufficient, by itself, to support a motion to reopen. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, 11 NRC at 887.

Intervenors failed to raise a significant safety issue when they did not present sufficient evidence to show that an applicant's program and continuing compliance with an NRC Staff-prescribed enhanced surveillance program would not provide the requisite assurance of plant safety. The intervenors' request for harsher measures than the NRC Staff had considered necessary, without presenting any new information that the Staff had failed to consider, is insufficient to raise a significant safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487-88 (1990).

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 799 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Generalized complaints that an alleged ex parte communication to a board compromised and tainted the board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243-44 (1990). This standard also applies to an applicant's design quality assurance program. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant re-litigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

Speculation about the future effects of budget cuts or employment freezes does not present a significant safety issue which must be addressed. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 223 (1990).

4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

4.4.4 Discovery to Obtain Information to Support Reopening of Hearing is Not Permitted

The burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

4.5 Motions to Reconsider

Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Motions for reconsideration of Licensing Board decisions must be filed within 10 days of the date of issuance of a challenged order. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139 (1994).

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appeal an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

A motion to reconsider a prior decision will be denied where the motion is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis and where the proponent does not request that the result reached in the prior decision be changed. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonable have been anticipated. Ralph L.Tetrick (Denial of Application for Reactor Operator License), LBP-97-6, 45 NRC 130, 131 (1997), citing Texas Utilities Elec. Co. (Comanche Peak Steam Elec. Station, Units I and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or on appeal cannot be raised on a motion for reconsideration. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48

NRC 69, 73-74 (1998); see also Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1977).

Additionally, an argument raised for the first time in a motion to reconsider does not serve as a basis for reconsideration of admission of a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 292 (1988).

Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and new arguments are not relevant in such a motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984). In accordance to 10 CFR § 2.734, motions for reconsideration will be denied for failure to show that the Presiding Officer has made a material error of law or fact. International Uranium (USA) Corporations (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986).

A motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law that would have a controlling effect and that has been overlooked or that there has been a misapprehension of the facts. Vogtle, supra, 40 NRC at 140 and n.1. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

A Board cannot reconsider a matter after it loses jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

In accordance with 10 CFR §§ 2.771, 2.1259(b), a dissatisfied litigant in a 10 C.F.R. Part 2, Subpart L informal adjudicatory proceeding can seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992).

Motions for reconsideration are for the purpose of pointing out errors in the existing record, not for stating new arguments. However, A Licensing Board may decide within its discretion to consider such new arguments where there is no pressure in the present status of a case. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 145 (1993).

4.6 Procedure on Remand

4.6.1 Jurisdiction of the Licensing Board on Remand

The question as to whether a Licensing Board, on remand, assumes its original plenary authority or, instead, is limited to consideration of only those issues specified in the remand order was, for some time, unresolved. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-389, 5 NRC 727 (1977). Of course, jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of review of the decision. Issues to be considered by the Board on remand would be shaped by that order. If the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of scope to embrace other discrete matters. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979).

However, a Licensing Board was found to be "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission and the petition for intervention dealt with matters outside that scope. This establishes that a Licensing Board has limited jurisdiction in a remanded proceeding and may consider only what has been remanded to it. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 11, 12 (1987) (the Licensing Board properly rejected an intervenor's proposed license conditions which exceeded the scope of the narrow remanded issue of school bus driver availability).

Although an adjudicatory board to which matters have been remanded would normally have the authority to enter any order appropriate to the outcome of the remand, the Commission may, of course, reserve certain powers to itself, such as, for example, reinstatement of a construction permit suspended pending the remand. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 961 (1978).

Where the Commission remands an issue to a Licensing Board it is implicit that the Board is delegated the authority to prescribe warranted remedial action within the bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

4.6.2 Jurisdiction of the Board on Remand

Under settled principles of finality of adjudicatory action, once an Appeal Board had finally determined a discrete issue in a proceeding, its jurisdiction was terminated with respect to that issue, absent a remand order. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978).

Jurisdiction over previously determined issues is not necessarily preserved by the pendency of other issues in a proceeding. Three Mile Island, supra, 19 NRC at 983, citing, North Anna, supra, 9 NRC at 708-09; Seabrook, supra, 8 NRC at 695-96.

4.6.3 Stays Pending Remand to Licensing Board

10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

4.6.4 Participation of Parties in Remand Proceedings

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

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5.0 APPEALS

Prior to 1991 the Commission used a three-tiered Adjudicatory process. As is the case now, controversies were resolved initially by an Atomic Safety and Licensing Board or presiding officer acting as a trial level tribunal. Licensing Board Initial Decisions (final decisions on the merits) and decisions wholly granting or denying intervention were subject to non-discretionary appellate review by the Atomic Safety and Licensing Appeal Board. Appeal Board decisions were subject to review by the Commission as a matter of discretion.

The adjudicatory process has changed significantly since then. The Appeal Board was abolished in 1991, thereby creating a two-tiered adjudicatory system under which the Commission itself conducts all appellate review. Most Commission review of rulings by Licensing Boards and Presiding Officers, including Initial Decisions, is now discretionary. See 10 C.F.R. § 2.786 (a) - (f). A party must petition for review and the Commission, as a matter of discretion, determines if review is warranted. Appeals of orders wholly denying or granting intervention remain non-discretionary. See 10 C.F.R. § 2.714a.

The standards for granting interlocutory review have remained essentially the same. Under Appeal Board and Commission case law interlocutory review was permitted in extraordinary circumstances. These case-law standards were codified in 1991 when the Appeal Board was abolished and the two-tiered process was developed. See 10 C.F.R. § 2.786(g).

Although the Appeal Board was abolished in 1991, Appeal Board precedent, to the extent it is consistent with more recent case law and rule changes, may still be cited. The following section refers to some Appeal Board decisions that may be useful in understanding NRC practice.

5.1 Commission Review

As a general matter, the Commission conducts review in response to a petition for review filed pursuant to 10 C.F.R. 2.786, in response to an appeal filed pursuant to section 2.714a, or on its own motion (sua sponte).

5.1.1 Commission Review Pursuant to 2.786(b)

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 CFR § 2.786(b)(4). The considerations set out in section 2.786(b)(4) are: (I) a clearly erroneous finding of material fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law; (iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest. Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 184 (1993); Piping Specialists, Inc., and Forrest L. Roudebush (d.b.a. PSI Inspection and d.b.a. Piping Specialists, Inc., Kansas City, Missouri), CLI-92-16, 36 NRC 351 (1992).

The standards for Commission review in 10 CFR § 2.786(b)(4) have been incorporated into Subpart L in 10 CFR § 2.1253. Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.), CLI-95-4, 41 NRC 248, 249 (1995).

In determining whether to take review of a Licensing Board Order approving a settlement agreement, the Commission may ask the staff to provide an explanation for its agreement in the settlement if such reasons are not readily apparent from the settlement agreement or the record of the proceeding. Randall C. Orem, D.O. (Byproduct Material License No. 34-26201-01), CLI-92-15, 36 NRC 251 (1992).

The Commission may dismiss its grant of review even though the parties have briefed the issues. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982), citing, Jones v. State Board of Education, 397 U.S. 31 (1970). 10 C.F.R. § 2.786, describes when the Commission "may" grant a petition for review but does not mandate any circumstances under which the Commission must take review. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997).

5.1.2 Sua Sponte Review

Sua sponte review, although rarely exercised, is taken in extraordinary circumstances. See, e.g., Ohio Edison Co., et. al. (Perry & Davis-Besse), CLI-91-15, 34 NRC 269 (1991).

Because the Commission is responsible for all actions and policies of the NRC, the Commission has the inherent authority to act upon or review sua sponte any matter before an NRC tribunal. To impose on the Commission, to the degree imposed on the judiciary, requirements of ripeness and exhaustion would be inappropriate since the Commission, as part of a regulatory agency, has a special responsibility to avoid unnecessary delay or excessive inquiry. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990).

Sua sponte review may be appropriate to ensure that there are no significant safety issues requiring corrective action. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984).

If sua sponte review uncovers problems in a Licensing Board's decision or a record that may require corrective action adverse to a party's interest, the consistent practice is to give the party ample opportunity to address the matter as appropriate. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n.8, citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309-313 (1980).

Although the absence of an appeal does not preclude appellate review of an issue contested before a Licensing Board, caution is exercised in taking up new matters not previously put in controversy. Virginia Electric & Power Co. (North Anna Nuclear

Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978). In the course of its review of an initial decision in a construction permit proceeding, the Appeal Board was free to sua sponte raise issues which were neither presented to nor considered by the Licensing Board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979). On review it may be necessary to make factual findings, on the basis of record evidence, which are different from those reached by a Licensing Board. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). On appeal a Licensing Board's regulatory interpretation is not necessarily followed even if no party presses an appeal on the issue. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 135 n.10 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978). A decision reviewing a Board order may be based upon grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and, where appropriate, evidence. Id.

5.1.3 Effect of Commission's Denial of Petition for Review

When a discrete issue has been decided by the Board and the Commission declines to review that decision, agency action is final with respect to that issue and Board jurisdiction is terminated. Pacific Gas and Electric co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 841 (1984) (citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-513, 8 NRC 694, 695 (1978)).

The Commission's refusal to entertain a discretionary interlocutory review does not indicate its view on the merits. Nor does it preclude a Board from reconsidering the matter as to which Commission review was sought where that matter is still pending before the Board. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

When the time within which the Commission might have elected to review a Board decision expires, any residual jurisdiction retained by the Board expires. 10 CFR § 2.717(a); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978).

5.1.4 Commission Review Pursuant to 2.714a

NRC regulations contain a special provision (10 CFR § 2.714a) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene. Under 10 CFR § 2.714a(b), a petitioner may appeal such an order but only if the effect

thereof is to deny the petition in its entirety -- i.e., to refuse petitioner entry into the case. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant (Units 1 & 2), ALAB-823, 26 NRC 154, 155 (1987), citing 10 C.F.R. 2.714a; Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-683, 16 NRC 160 (1982), citing, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986); Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 82 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991). Only the petitioner denied leave to intervene can take an appeal of such an order. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 n.7 (1983), citing, 10 CFR § 2.714a(b). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but denying certain contentions. 10 CFR § 2.714(b); Power Authority of the state of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974). Appellate review of a ruling rejecting some but not all of a petitioner's contentions is available only at the end of the case. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978). Similarly, where a proceeding is divided into two segments for convenience purposes and a petitioner is barred from participation in one segment but not the other, that is not such a denial of participation as will allow an interlocutory appeal under 10 CFR § 2.714a. Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

An order admitting and denying various contentions is not immediately appealable under 10 CFR § 2.714a where it neither wholly denies nor grants a petition for leave to intervene/ request for a hearing. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 252 (1993).

A State participating as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation, but it may not seek review of an order which permits the State to participate but excludes an issue which it seeks to raise. Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested state may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested state may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested state from participating in the proceeding. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-838, 23 NRC 585, 589-90 (1986).

Only the petitioner may appeal from an order denying it leave to intervene. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). The appellant must file a notice of appeal and supporting brief within 10 days after service of the Licensing Board's order. 10 CFR § 2.714a; Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991). Other parties may file briefs in support of or in opposition to the appeal within 10 days of service of the appeal. The Applicant, the NRC Staff or any other party may appeal an order granting a petition to intervene or request for a hearing in whole or in part, but only on the grounds that the petition or request should have been denied in whole. 10 CFR § 2.714(c); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 30 (1988).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978). Similarly, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986); Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

Once the time prescribed in section 2.714a for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

5.1.5 Effect of Affirmance as Precedent

Affirmance of the Licensing Board's decision cannot be read as necessarily signifying approval of everything said by the Licensing Board. The inference cannot be drawn that there is agreement with all the reasoning by which the Licensing Board justified its decision or with the Licensing Board's discussion of matters which do not have a direct bearing on the outcome. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 208 n.4 (1974); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2-3 (1985).

Stare decisis effect is not given to Licensing Board conclusions on legal issues not reviewed on appeal. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983), citing, Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978); General Electric Co. (Vallecitos Nuclear Center - General Electric Test Reactor, Operating License No. TR-1), ALAB-720, 17 NRC 397, 402 n.7 (1983); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-826, 22 NRC 893, 894 n.6 (1985). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988); Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998).

5.1.6 Precedential Effect of Unpublished Opinions

Unless published in the official NRC reports, decisions and orders of Appeal Boards are usually not to be given precedential effect in other proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 745 (1980).

5.1.7 Precedential Weight Accorded Previous Appeal Board Decisions

The Commission abolished the Atomic Safety and Licensing Appeal Board Panel in 1991, but its decisions still carry precedential weight. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).

5.2 Who Can Appeal

The right to appeal or petition for review is confined to participants in the proceeding before the Licensing Board. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977); Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 88 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-294, 2 NRC 663, 664 (1975); Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-251, 8 AEC 993, 994 (1974); Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-237, 8 AEC 654

(1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 252 (1986). Thus, with the single exception of a State which is participating under the "interested State" provisions of 10 CFR § 2.715(c), a nonparty to a proceeding may not petition for review or appeal from a Licensing Board's decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Although an interested State is not a party to a proceeding in the traditional sense, the "participational opportunity" afforded to an interested State under 10 CFR § 2.715(c) includes the ability for an interested State to seek review of an initial decision. USERDA (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-317, 3 NRC 175, 177-180 (1976).

The selection of parties to a Commission review proceeding is clearly a matter of Commission discretion (10 CFR § 2.786(d), formerly § 2.786(b)(6)). A major factor in the Commission decision is whether a party has actively sought or opposed Commission review. This factor helps reveal which parties are interested in Commission review and whether their participation would aid that review. Therefore, a party desiring to be heard in a Commission review proceeding should participate in the process by which the Commission determines whether to conduct a review. An interested State which seeks Commission review is subject to all the requirements which must be observed by other parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977).

In this vein, a person who makes a limited appearance before a Licensing Board is not a party and, therefore, may not appeal from the Board's decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

As to petitions for review by specific parties, the following should be noted:

(1) A party satisfied with the result reached on an issue is normally precluded from appealing with respect to that issue, but is free to challenge the reasoning used to reach the result in defending that result if another party appeals. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975). The prevailing party is free to urge any ground in defending the result, including grounds rejected by the Licensing Board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 n.8 (1982), citing, Black Fox, supra, 10 NRC at 789.

(2) A third party entering a special appearance to defend against discovery may appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87-88 (1976).

(3) As to orders denying a petition to intervene, only the petitioner who has been excluded from the proceeding by the order may appeal. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). In such an appeal, other parties may file briefs in support of or opposition to the appeal. Id.

(4) A party to a Licensing Board proceeding has no standing to press the grievances of other parties to the proceeding not represented by him. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30 (1979); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 135 & n.3 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 203 n.3 (1986).

One seeking to appeal an issue must have participated and taken all timely steps to correct the error. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

The Commission has long construed its Rules of Practice to allow the Staff to petition for review of initial decisions. Although a party generally may appeal only on a showing of discernible injury, the Staff may appeal on questions of precedential importance. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

5.2.1 Participating by filing an Amicus Curiae Brief

10 CFR § 2.715 allows a nonparty to file a brief amicus curiae with regard to matters before the Commission. The nonparty must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion. 10 CFR § 2.715(d).

Our rules contemplate *amicus curiae* briefs only after the Commission grants a petition for review, and do not provide for *amicus* briefs supporting or opposing petitions for review. *See* 10 C.F.R. § 2.715(d). Louisiana Energy Services, L.P. (Claiborne Enrichment Center),CLI-97-7, 45 NRC 437, 438-39 (1997).

The opportunity of a nonparty to participate as amicus curiae has been extended to Licensing Board proceedings. A U.S. Senator lacked authorization under his State's laws to represent his State in NRC proceedings. However, in the belief that the Senator could contribute to the resolution of issues before the Licensing Board, an Appeal Board authorized the Senator to file amicus curiae briefs or to present oral arguments on any legal or factual issue raised by the parties to the proceeding or the evidentiary record. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987).

Requests for amicus curiae participation do not often arise in the context of Licensing Board hearings because factual questions generally predominate and an amicus

customarily does not present witnesses or cross-examine other parties' witnesses. This happenstance, however, "does not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda *amicus curiae* (or to present oral argument) on issues of law or fact that still remain for Licensing Board consideration." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987). Thus, in the context of a proceeding in which a legal issue predominates, permitting a petitioner that lacks standing to file an amicus pleading addressing that issue is entirely appropriate. General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 161 n.13 (1996).

A state that does not seek party status or to participate as an "interested state" in the proceedings below is not permitted to file a petition for Commission review of a licensing board ruling. If the Commission takes review, the Commission may permit a person who is not a party, including a state, to file a brief amicus curiae. 10 C.F.R. §2.715(d). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-96-3, 43 NRC 16,17 (1996).

Third parties may file amicus briefs with respect to any appeal, even though such third parties could not prosecute the appeal themselves. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 7 (1976). If a matter is taken up by the Commission pursuant to 10 C.F.R. § 2.786(b), a person who is not a party may, in the discretion of the Commission, be permitted to file a brief amicus curiae. 10 C.F.R. § 2.715(c). A person desiring to file an amicus brief must file a motion for leave to do so in accordance with the procedures in section 2.715(c). Sequoyah Fuels Corporation and General Atomics, CLI-96-3, 43 NRC 16, 17 (1996).

5.2.2 Aggrieved Parties Can Appeal

Petitions for review should be filed only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes appellate jurisdiction to change the result. A petition for review is unnecessary and inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n.21 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 914 (1981); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450, 1453 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 252 (1986).

An appeal from a ruling or a decision is normally allowed if the appellant can establish that, in the final analysis, some discernible injury to it has been sustained as a consequence of the ruling. Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978). As a general rule, a party may seek appellate redress only on those parts of a decision or ruling which he can show will result in some discernible injury to himself. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). An intervenor may appeal only those issues which it placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.762(d)(1), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

In normal circumstances, an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees but which has no operative effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 980 (1978). For a case in which the Appeal Board held that a party may not file exceptions to a decision if it is not aggrieved by the result, see Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 (1978).

The fact that a Board made an erroneous ruling is not sufficient to warrant appellate relief. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 756 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 (1986) (appeals should focus on significant matters, not every colorable claim of error); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 143 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A party seeking appellate relief must demonstrate actual prejudice - that the Board's ruling had a substantial effect on the outcome of the proceeding. Shoreham, supra, 20 NRC at 1151, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 278, 280 (1987) (intervenors failed to show any specific harm resulting from erroneous Licensing Board rulings).

5.2.3 Parties' Opportunity to be Heard on Appeal

Requests for emergency relief which require adjudicators to act without giving the parties who will be adversely affected a chance to be heard ought to be reserved for palpably meritorious cases and filed only for the most serious reasons. Emergency relief without affording the adverse parties at least some opportunity to be heard in opposition will be granted only in the most extraordinary circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 780 n.27 (1977).

5.3 How to Petition for Review

The general rules for petitions for review of a decision of a board or presiding officer are set out in 10 CFR § 2.786(b). The general rules for an appeal from a Licensing Board decision wholly granting or denying intervention, are set out in 10 CFR 2.714a.

5.4 Time for Seeking Review

As a general rule, only "final" actions are appealable. The test for "finality" for appeal purposes is essentially a practical one. For the most part, a Licensing Board's action is final when it either disposes of a major segment of a case or terminates a party's right to participate. Rulings that do neither are interlocutory. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1256 (1982); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 NRC 1365, 1394-1395 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636-37 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-933, 31 NRC 491, 496-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-943, 33 NRC 11, 12-13 (1991).

Where a major segment of a case has been remanded to a Licensing Board, there is no final Licensing Board action for appellate purposes until the Licensing Board makes a final determination of all the remanded matters associated with that major segment. Seabrook, supra, 33 NRC at 13. One may not appeal from an order delaying a ruling, when appeal will lie from the ruling itself. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

Administrative orders generally are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988).

A Licensing Board's partial initial decision in an operating license proceeding, which resolves a number of safety contentions, but does not authorize the issuance of an operating license or resolve all pending safety issues, is nevertheless appealable since it disposes of a major segment of the case. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 298 n.21 (1985), citing, Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

The requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 CFR § 2.714a, and appeals from initial decisions. Waterford, supra, 16 NRC at 895 n.2.

Licensing board rulings denying waiver requests pursuant to 10 CFR § 2.758, which are interlocutory, are not considered final for purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995), questioning Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-920, 30 NRC 121, 125-26 (1989).

In determining whether an agency has issued a final order so as to permit judicial review, courts look to whether the agency's position is definitive and if the agency action is affecting plaintiff's day-to-day activities. General Atomics v. U.S. Nuclear Regulatory Com'n., 75 F.3d 536, 540 (1996).

Judicial review of administrative agency's jurisdiction should rarely be exercised before final decision from agency; sound judicial policy dictates that there be exhaustion of administrative remedies. Exhaustion of administrative remedies doctrine requires that the administrative agency be accorded opportunity to determine initially whether it has jurisdiction. General Atomics v. U.S. Nuclear Regulatory Com'n., 75 F.3d 536, 541 (1996).

In general, an immediately effective Licensing Board initial decision is a "final order," even though subject to appeal within the agency, unless its effectiveness has been administratively stayed pending the outcome of further Commission review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976). In other areas, an order granting discovery against a third party is "final" and appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). Similarly, a Licensing Board order on the issue of whether offsite activity can be engaged in prior to issuance of an LWA or a CP is appealable. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976). When a Licensing Board grants a Part 70 license to transport and store fuel assemblies during the course of an OL hearing, the decision is not interlocutory and is immediately appealable. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976). Partial initial decisions which do not yet authorize construction activities nevertheless may be significant and, therefore, are subject to appellate review. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975). Similarly, a Licensing Board's decision authorizing issuance of an LWA and rejecting the applicant's claim that it is entitled to issuance of a construction permit is final for the purposes of appellate review. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

A protracted withholding of action on a request for relief may be treated as tantamount to a denial of the request and final action. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977). At least in those instances where the delay involves a Licensing Board's failure to act on a petition to intervene, such a "denial" of the petition is appealable. Greenwood, supra.

As previously noted, an appeal is taken by the filing of a petition for review within 15 days after service of the initial decision. Licensing Boards may not vary or extend the appeal periods provided in the regulations. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (1976); Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975). While a motion for a time extension may be filed, mere agreement among the parties is not sufficient to show good cause for an extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

The rules for taking an appeal also apply to appeals from partial initial decisions. Once a partial initial decision is rendered, review must be filed immediately in accordance with the regulations or the review is waived. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975).

Although the time limits established by the Rules of Practice with regard to review of Licensing Board decisions and orders are not jurisdictional, policy is to construe them strictly. Hence untimely appeals are not accepted absent a demonstration of extraordinary and unanticipated circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982), citing, Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); 10 CFR Part 2, App. A, IX(d)(4); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635 (1988). Failure to file an appeal in a timely manner amounts to a waiver of the appeal. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974). The same rule applies to appeals of partial initial decisions. A party must file its petition for review without waiting for the Licensing Board's disposition of the remainder of the proceeding. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974).

The timeliness of a party's brief on appeal from a Licensing Board's denial of the party's motion to reopen the record is determined by the standards applied to appeals from final orders, and not 10 CFR § 2.714a(b), which is specifically applicable to appeals from board orders "wholly denying a petition for leave to intervene and/or request for a hearing". Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986).

It is accepted appellate practice for the appeal period to be tolled while the trial tribunal has before it an authorized and timely-filed petition for reconsideration of the decision or order in question. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983 (1981).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). A Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors

outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Greenwood, supra, 7 NRC at 571.

Finality of a decision is usually determined by examining whether it disposes of at least a major segment of the case or terminates a party's right to participate. The general policy is to strictly enforce time limits for appeals following a final decision. However, where the lateness of filing was not due to a lack of diligence, but, rather, to a misapprehension about the finality of a Board decision, the appeal may be allowed as a matter of discretion. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-160 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635-637 (1988).

A petitioner's request that the denial of his intervention petition be overturned, treated as an appeal under 10 CFR § 2.714a, will be denied as untimely where it was filed almost 3 months after the issuance of a Licensing Board's order, especially in the absence of a showing of good cause for the failure to file an appeal on time. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

5.4.1 Variation in Time Limits on Appeals

Only the Commission may vary the time for taking appeals; Licensing Boards have no power to do so. See Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Of course, mere agreement of the parties to extend the time for the filing of an appeal is not sufficient to show good cause for such a time extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

5.5 Scope of Commission Review

A petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the considerations listed in 10 C.F.R. § 2.786(b)(4)(I)-(v). These considerations include a finding of material fact is erroneous, or in conflict with precedent; a substantial question of law or policy; or prejudicial procedural error.

When an issue is of obvious significance and is not fact-dependent, and when its present resolution could materially shorten the proceedings and guide the conduct of other pending proceedings, the Commission will generally dispose of the issue rather than remand it. Seabrook, supra, 5 NRC at 517.

The Commission is not obligated to rule on every discrete point adjudicated below, so long as the Board was able to render a decision on other grounds that effectively dispose of the appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 466 n.25 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 15 (1981).

On appeal evidence may be taken -- particularly in regard to limited matters as to which the record was incomplete. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 (1978). However, since the Licensing Board is the initial fact-finder in NRC proceedings, authority to take evidence is exercised only in exceptional circumstances. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 351 (1988).

A Staff appeal on questions of precedential importance may be entertained. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Opinions that, in the circumstances of the particular case, are essentially advisory in nature are reserved (if given at all) for issues of demonstrable recurring importance. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284-85 (1988).

There is some indication that a matter of recurring importance may be entertained on appeal in a particular case even though it may no longer be determinative in the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

5.5.1 Issues Raised for the First Time on Appeal or in a Petition for Review

Ordinarily an issue raised for the first time on appeal will not be entertained. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978) (issues not raised in either proposed findings or exceptions to the initial decision). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), citing, Hartsville, supra; Public Service Electric and Gas Co. (Salem Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358, 361 n.120 (1989); Public Service Co. of New Hampshire (Seabrook Station,

Units 1 and 2), ALAB-932, 31 NRC 371, 397 n.101 (1990). Thus, as a general rule, an appeal may be taken only as to matters or issues raised at the hearing. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 (1978); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1021 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 343 (1973); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997). A contention will not be entertained for the first time on appeal, absent a serious substantive issue, where a party has not pursued the contention before the Licensing Board through proposed findings of fact. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). The disinclination to entertain an issue raised for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been, but were not, timely put before the Licensing Board. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

Once an appeal has been filed from a Licensing Board's decision resolving a particular issue, jurisdiction over that issue passes from the Licensing Board. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987); See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 93 (1995). Once a partial initial decision (PID) has been appealed, supervening factual developments relating to major safety issues considered in the PID are properly before the appellate body, not the Licensing Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-383, 5 NRC 609 (1977).

An intervenor who seeks to raise a new issue on appeal must satisfy the criteria for reopening the record as well as the requirements concerning the admissibility of late-filed contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 248 n.29 (1986).

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken to an initial decision rests with the appellate body rather than the Licensing Board. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 n.3 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1713 n.5 (1985).

An appeal may only be based on matters and arguments raised below. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Philadelphia Electric Co. (Limerick

Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 496 n.28 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 281 (1987). Even though a party may have timely appealed a Licensing Board's ruling on an issue, the appeal may not be based on new arguments offered by the party on appeal and not previously raised before the Licensing Board. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). Cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2); LBP-85-27, 22 NRC 126, 131 n.2 (1985). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 812 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 229-30 (9th Cir. 1988). A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 47-48 (1984). A party is not permitted to raise on appellate review Licensing Board practices to which it did not object at the hearing stage. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). "In Commission practice the Licensing Board, rather than the Commission itself, traditionally develops the factual record in the first instance." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49, 51 (1997), citing Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-10, 42 NRC 1, 2 (1995); accord Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-5, 45 NRC 355, 356 (1997).

5.5.2 Effect on Appeal of Failure to File Proposed Findings

A party's failure to file proposed findings on an issue may be "taken into account" if the party later appeals that issue, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 333 (1973), absent a Licensing Board order requiring the submission of proposed findings of fact and conclusions of law, an intervenor that does not make such a filing nevertheless is free to pursue on appeal all issues it litigated below. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 19, 20 (1983).

5.5.3 Matters Considered on Appeal of Ruling Allowing Late Intervention

One exception to the rule prohibiting interlocutory appeals is that a party opposing intervention may appeal an order admitting the intervenor. 10 CFR § 2.714a. See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 n.7 (1976). However, since Licensing Boards have broad discretion in allowing late intervention, an order allowing late intervention is limited to determining whether that discretion has been abused. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 107 (1976); Marble Hill, supra. The papers filed in the case and the uncontroverted facts set forth therein will be examined to determine if the Licensing Board abused its discretion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8 (1977).

5.5.4 Consolidation of Appeals on Generic Issues

Where the issues are largely generic, consolidation will result in a more manageable number of litigants, and relevant considerations will likely be raised in the first group of consolidated cases. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 433 (1979), reconsid. denied, ALAB-546, 9 NRC 636 (1979). The Appeal Board consolidated and scheduled for hearing radon cases where intervenors were actively participating, and held the remaining cases in abeyance.

5.6 Standards for Reversing Licensing Board on Findings of Fact and Other Matters

Licensing Boards are the Commission's primary fact finding tribunals. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975).

The normal deference that an appellate body owes to the trier of the facts when reviewing a decision on the merits is even more compelling at the preliminary state of review. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 133 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977).

In general, the Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically commands, the record compels a different result. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975); accord, Northern Indiana Public Service Co., ALAB-303 supra; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181-82 (1989); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 365 n.278 (1991). The same standard applies even if the review is sua sponte. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981). In fact, where the record would fairly sustain a result deemed "preferable" by the agency to the one selected by the Licensing Board, the agency may substitute its judgment for that of the lower Board. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co.

(Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976). Nevertheless, a finding by a Licensing Board will not be overturned simply because a different result could have been reached. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Moreover, the "substantial evidence" rule does not apply to the NRC's internal review process and hence does not control evaluation of Licensing Board decisions. Catawba, supra, 4 NRC at 402-405. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977). Thus, a Licensing Board's failure to clearly set forth the basis for its decision is ground for reversal. Although the Licensing Board is the primary fact-finder, the Commission may make factual findings based on its own review of the record and decide the case accordingly. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

Licensing Board determinations on the timeliness of filing of motions are unlikely to be reversed on appeal as long as they are based on a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 159-160 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A Licensing Board's determination that an intervenor has properly raised and presented an issue for adjudication is entitled to substantial deference and will be overturned only when it lacks a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 & 5), ALAB-485, 7 NRC 986, 980 (1978).

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980). A Licensing Board finding that is based on testimony later withdrawn from the record will stand, if there is sufficient evidence elsewhere in the record to support the finding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 84 (1986).

Where a Licensing Board imposed an incorrect remedy, on appeal there may be a search for a proper one. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234-235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

If conditions on a license are invalid, the matter will be either remanded to the Board or the Commission may prescribe a remedy itself. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 31 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Appeal Board would not ordinarily conduct a de novo review of the record and make its own independent findings of fact since the Licensing Board is the basic fact-finder under Commission procedures. Wisconsin Electric Power Co. (Point Beach Nuclear Plant No. 2), ALAB-78, 5 AEC 319 (1972). In this regard, Appeal Boards were reluctant to make essentially basic environmental findings which did not receive Staff consideration in the FES or adequate attention at the Licensing Board hearing. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51, 55 (1975).

The Commission's review of a Board's settlement decision is de novo, although the Commission gives respectful attention to the Board's views. In its review, the Commission uses the "due weight to...staff" and "public-interest" standards set forth in 10 CFR § 2.203 and New York Shipbuilding Co., 1 AEC 842 (1961). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997).

The Staff's position, while entitled to "due weight," is not itself dispositive of whether an enforcement settlement should be approved. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207-09 (1997).

The Commission ordinarily defers to the Licensing Board standing determinations, and upheld the Presiding Officer's refusal to grant standing for Petitioner's failure to specify about its proximity-based standing claims. Atlas Corp. (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997).

5.6.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973).

On specific matters, a Licensing Board's determination as to a petitioner's "personal interest" will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 193 (1973). In the absence of a clear misapplication of the facts or misunderstanding of the law, the Licensing Board's judgment at the pleading stage that a party has standing is entitled to substantial deference. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Where a Licensing Board has permitted a petitioner to amend his petition to cure defects prior to issuance of a final order, allowance of an opportunity to amend will not be disturbed on appeal absent a showing of gross abuse of discretion. Prairie Island, supra.

Similarly, a Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. USERDA (Clinch River Breeder

Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf states Utilities Co. (River Bend station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

A Licensing Board ruling on a discretionary intervention request will be reversed only if the Licensing Board abused its discretion. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532 (1991).

The Commission generally defers to the presiding officer's determinations regarding standing, absent an error of law or an abuse of discretion. International Uranium Corporation (White Mesa Uranium Mill), CLI 98-6, 47 NRC 116, 118 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), CLI-98-20, 48 NRC 183 (1998); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1988).

The principle that Licensing Board determinations on the sufficiency of allegations of affected interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

Licensing Boards have broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 2.714(a)(1). However, a Licensing Board's decision may be overturned where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing, Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481-82 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), dismissed as moot, ALAB-946, 33 NRC 245 (1991).

5.7 Stays

The Rules of Practice do not provide for an automatic stay of an order upon the filing of an appeal. A specific request must be made. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 97 (1983). The provision for stays in 10 CFR § 2.788 provides only for stays of decisions or actions in the proceeding under review. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

A stay of the effectiveness of a Licensing Board decision pending review of that decision may be sought by the party appealing the decision. 10 CFR § 2.788 confers the right to seek stay relief only upon those who have filed (or intend to file) a timely petition for review

of a decision or order sought to be stayed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979).

Such a stay is normally sought by written motion, although, in extraordinary circumstances, a stay ex parte may be granted. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420 (1974). The movant may submit affidavits in support of his motion; opposing parties may file opposing affidavits, and it is appropriate for the appellate tribunal to accept and consider such affidavits in ruling on the motion for a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-356, 4 NRC 525 (1976). The party seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977).

General assertions, in conclusionary terms, of alleged harmful effects are insufficient to demonstrate entitlement to a stay. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978).

In the past it has been held that, as a general rule, motions for stay of a Licensing Board action should be directed to the Licensing Board in the first instance. Under those earlier rulings, the Appeal Board made it clear that, while filing a motion for a stay with the Licensing Board is not a jurisdictional prerequisite to seeking a stay from the Appeal Board, Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976), the failure, without good cause, to first seek a stay from the Licensing Board is a factor which the Appeal Board would properly take into account in deciding whether it should itself grant the requested stay. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977); Public Service Co. of New Hampshire, ALAB-338 supra. See also Toledo Edison Co. (Davis-Besse Nuclear Power Plant), ALAB-25, 4 AEC 633, 634 (1971). More recently, however, amendments to 10 CFR § 2.788 on stays pending review have made it clear that a request for stay of a Licensing Board decision, pending the filing of a petition for Commission review, may be filed with either the Licensing Board or the Commission. 10 CFR § 2.788(f).

Where the Commission issues a stay wholly as a matter of its own discretion, it does not need to address the factors listed in 10 C.F.R. §2.788. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 60 (1996).

The effectiveness of conditions imposed in a construction permit may be stayed without staying the effectiveness of the permit itself. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

An appellate tribunal may entertain and grant a motion for a stay pending remand of a Licensing Board decision. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

The provisions of 10 CFR § 2.788 apply only to requests for stays of decisions of the licensing board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a "Motion for Reconsideration" and/or a "Motion to Hold in Abeyance." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2),

CLI-93-11, 37 NRC 251 (1993). The date of service for purposes of computing the time for filing a stay motion under Section 2.788 is the date on which the Docketing and Service Branch of the Office of the Secretary of the Commission serves the order or decision. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, No. 2), ALAB-414, 5 NRC 1425, 1427-1428 (1977).

The Commission may issue a temporary stay to preserve the status quo without waiting for the filing of an answer to a motion for stay. 10 C.F.R. § 2.788(f). The issuance of a temporary stay is appropriate where petitioners raise serious questions, that, if petitioners are correct, could affect the balance of the stay factors set forth in 10 C.F.R. § 2.788(e). Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-3, 47 NRC 7 (1998); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-4, 47 NRC 111, 112 (1998).

Where a party files a stay motion with the Commission pursuant to 10 CFR § 2.730 (which contains no standards by which to decide stay motions), the Commission will turn for guidance to the general stay standards in section 2.788. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). Thus, a full stay pending judicial review of a Commission decision may require the movant to meet the Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), criteria. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974)..

If, absent a stay pending appeal, the status quo will be irreparably altered, grant of a stay may be justified to preserve the Commission's ability to consider, if appropriate, the merits of a case. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334 (1983).

5.7.1 Requirements for a Stay Pending Review

The Commission may stay the effectiveness of an order if it has ruled on difficult legal questions and the equities of the case suggest that the status quo should be maintained during an anticipated judicial review of the order. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80 (1992), citing, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

5.7.1.1 Stays of Initial Decisions

Stays of an initial decision will be granted only upon a showing similar to that required for a preliminary injunction in the Federal courts. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). The test to be applied for such a showing is that laid down in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420, 421 (1974). See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); South

Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1184-85 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 96-97 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1618 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.5 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 290 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 & n.59 (1990); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 267 (1990); Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103-104 (1990); Curators of the university of Missouri, LBP-90-35, 32 NRC 259, 265-66 (1990); Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55 (1993); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

5.7.1.2 Stays of Board Proceedings, Interlocutory Rulings & Staff Action

The Virginia Petroleum Jobbers rule applies not only to stays of initial decisions of Licensing Boards, but also to stays of Licensing Board proceedings in general, Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975), and stays pending judicial review, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). In addition, the concept of a stay pending consideration of a petition for directed certification has been recognized. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976). The rule applies to stays of limited work authorizations, Public

Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630 (1977), as well as to requests for emergency stays pending final disposition of a stay motion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). The rule also applies to stays of implementation and enforcement of radiation protection standards. Environmental Radiation Protection Standards for Nuclear Power Operations, (40 CFR 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 460, 463 (1981). It also applies to postponements of the effectiveness of some license amendments issued by the NRC Staff. In the case of a request for postponement of an amendment, the Commission has stated that a bare claim of an absolute right to a prior hearing on the issuance of a license amendment does not constitute a substantial showing of irreparable injury as required by 10 CFR § 2.788(e). Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981). The rule has been applied to a stay of enforcement orders. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

However, the NRC Staff's issuance of an immediately effective license amendment based on a "no significant hazards consideration" finding is a final determination which is not subject to either a direct appeal or an indirect appeal to the Commission through the request for a stay. In special circumstances, the Commission may, on its own initiative, exercise its inherent discretionary supervisory authority over the Staff's actions in order to review the Staff's "no significant hazards consideration" determination. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); 10 C.F.R. § 50.58(b)(6).

Where petitioners do not relate their stay request to any action in the proceeding under review, the request for stay is beyond the scope of 10 CFR § 2.788. Such a request is more properly a petition for immediate enforcement action under 10 CFR § 2.206. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

Interlocutory appeals or petitions to the Commission are not devices for delaying or halting licensing board proceedings. The stringent four-part standard set forth in section 2.788(e) makes it difficult for a party to obtain a stay of any aspect of a licensing board proceeding. Therefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission. Cf. 10 CFR § 2.730(g). Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

A party may file a motion for the Commission to stay the effectiveness of an interlocutory Licensing Board ruling, pursuant to 10 CFR § 2.788, pending the filing of a petition for interlocutory review of that Board order. See Georgia Power

Co., et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

The provisions of 10 CFR § 2.788 apply only to requests for stays of decisions of the licensing board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a "Motion for Reconsideration" and/or a "Motion to Hold in Abeyance." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251 (1993).

The application for a stay will be denied when intervenors do not make a strong showing that they are likely to prevail on the merits or that they will be irreparably harmed pending appeal of the Licensing Board's decision. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

Note that 10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending proceedings on remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1, 2 & 3), CLI-77-8, 5 NRC 503 (1977). The Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balance of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-89-15, 30 NRC 96, 100 (1989). Similarly, in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977), the Appeal Board ruled that the criteria for a stay pending remand differ from those required for a stay pending appeal. Thus, it appears that the criteria set forth in 10 CFR § 2.788 may not apply to requests for stays pending remand. Where a litigant who has prevailed on a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

Where petitioners who have filed a request to stay issuance of a low-power license are not parties to the operating license proceeding, and where petitioners' request does not address the five factors for late intervention found in 10 CFR § 2.714(a)(1)(i)-(v), the request cannot properly be considered in that operating license proceeding. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 57-58 (1993).

5.7.1.3 10 C.F.R. § 2.788 & Virginia Petroleum Jobbers Criteria

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100 (1994) (the Commission will decline a grant of petitioner's request to halt decommissioning activities where petitioner failed to meet the four traditional criteria for injunctive relief); Hydro Resources. Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies long-standing agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

Under the Virginia Petroleum Jobbers test, four factors are examined:

(1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;

(2) has the movant shown that, without the requested relief, it will be irreparably injured;

(3) would the issuance of a stay substantially harm other parties interested in the proceeding;

(4) where does the public interest lie?

Section 2.788(b)(2) of 10 C.F.R. specifies that an application for a stay must contain a concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of that section. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers (now set forth in 10 CFR § 2.788) is on the movant. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981).

Where the four factors set forth in 10 CFR § 2.788(e) are applicable, no single one of the factors is, of itself, necessarily dispositive. Rather, the strength or weakness of the movant's showing on a particular factor will determine how strong his showing on-the other factors must be in order to justify the relief he seeks. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Florida Power and Light Co. (Turkey Point Nuclear

Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). In any event, there should be more than a mere showing of the possibility of legal error by a Licensing Board to warrant a stay. Philadelphia Electric Co., ALAB-221 supra; Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-158, 6 AEC 999 (1973). The establishment of grounds for appeal is not itself sufficient to justify a stay. Rather, there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

5.7.1.3.1 Irreparable Injury

The factor which has proved most crucial with regard to stays of Licensing Board decisions is the question of irreparable injury to the movants if the stay is not granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 & n.7 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 n.5 (1998). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978). See also Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). It is the established rule that a party is not ordinarily granted a stay of an administration order without an appropriate showing of irreparable injury. Id., quoting Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely

allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998).

In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978), the Appeal Board stressed the importance of the irreparable injury requirement, stating that a party is not ordinarily granted a stay absent an appropriate showing of irreparable injury. Where a decision as to which a stay is sought does not allow the issuance of any licensing authorization and does not affect the status quo ante, the movant will not be injured by the decision and there is, quite simply, nothing for the Appeal Board to stay. Jamesport, supra.

The irreparable injury requirement is not satisfied by some cost merely feared as liable to occur at some indefinite time in the future. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977). Mere economic loss does not constitute irreparable injury. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 81 (1992), citing, Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288, 291 (6th Cir. 1987). Nor are actual injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, sufficient to justify a stay if not irreparable. Davis-Besse, supra. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). The mere possibility that a stay would save other parties from incurring significant litigation expenses is insufficient to offset the movant's failure to demonstrate irreparable injury and a strong likelihood of success on the merits. Sequoyah Fuels Corporation, id. at 8. Discovery in a license amendment case does not constitute irreparable injury. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-8, 37 NRC 292, 298 (1993).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70, and 150), CLI-81-9, 13 NRC 460, 465 (1981), citing, Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) and

Hornblower and Weeks-Hemphill Noyes, Inc. v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

An intervenor's claim that an applicant's commitment of resources to the operation of a facility pending an appeal will create a Commission bias in favor of continuing a license does not constitute irreparable injury. The Commission has clearly stated that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258-59 (1990), citing, Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1985). Additionally, a party's claim that discovery expenses might deplete assets allotted for decommissioning activities does not constitute irreparable injury. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). However, the Commission also noted that the commitment of resources and other economic factors are properly considered in the NEPA decisionmaking process. Seabrook, supra, 31 NRC at 258 n.62. Thus, a party challenging the alternative site selection process may be able to show irreparable injury if a stay is not granted to halt the development of a proposed site during the pendency of its appeal. Any resources which might be expended in the development of the proposed site would have to be considered in any future cost-benefit analysis and, if substantial, could skew the cost-benefit analysis in favor of the proposed site over any alternative sites. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 268-269 (1990).

The fact that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury. It must also be established that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5,19 NRC 953, 964 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 271 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259-260 (1990).

The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 410 (1989). Similarly, irreversible changes produced by the irradiation of the reactor during low-power testing do not constitute irreparable injury. Seabrook, CLI-89-8, supra, 29 NRC at 411.

Mere exposure to the risk of full power operation of a facility does not constitute irreparable injury when the risk is so low as to be remote and speculative. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

The importance of a showing of irreparable injury absent a stay was stressed by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978), where the Appeal Board indicated that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure.

A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to obtain the grant of a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

5.7.1.3.2 Possibility of Success on Merits

The "level or degree of possibility of success" on the merits necessary to justify a stay will vary according to the tribunal's assessment of the other factors that must be considered in determining if a stay is warranted. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing, Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); Hydro Resources. Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Where there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an overwhelming showing of likelihood of success on the merits is required to obtain a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co., ALAB-415, 5 NRC 1435, 1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear

Station, Unit 2), ALAB-914, 29 NRC 357, 362-63 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994).

To make a strong showing of likelihood of success on the merits, the movant must do more than list the possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269-70 (1990). A party's expression of confidence or expectation of success on the merits of its appeal before the Commission or the Boards is too speculative and is also insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

5.7.1.3.3 Harm to Other Parties and Where the Public Interest Lies

If the movant for a stay fails to meet its burden on the first two 10 CFR § 2.788(e) factors, it is not necessary to give lengthy consideration to balancing the other two factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Catawba, supra, 20 NRC at 1635; Hydro Resources. Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 363 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994).

Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC proceedings, a Board may consider such interests in determining whether, under the third stay criterion, the granting of a stay would harm other parties. Thus, a Board may consider the potential economic harm to an applicant caused by a stay of the applicant's operating license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

In a decontamination enforcement proceeding where a licensee seeks a stay of an immediately effective order, the fourth factor - where the public interest lies - is the most important consideration. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 148 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

5.7.2 Stays Pending Remand to Licensing Board

10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

5.7.3 Stays Pending Judicial Review

Requests for stays pending judicial review have been entertained under the Virginia Petroleum Jobbers criteria (see Section 5.7.1, supra) to determine if a stay is appropriate. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974); Natural Resources Defense Council, CLI-76-2, 3 NRC 76 (1976).

Section 10(d) of the Administrative Procedure Act (5 U.S.C. 705) pertains to an agency's right to stay its own action pending judicial review of that action. It confers no freedom on an agency to postpone taking some action when the impetus for the action comes from a court directive. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 783-84 (1977).

The Appeal Board suspended sua sponte its consideration of an issue in order to await the possibility of Supreme Court review of related issues, following the rendering of a decision by the First Circuit Court of Appeals, where certiorari had not yet been sought or ruled upon for such Supreme Court review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-548, 9 NRC 640, 642 (1979).

5.7.4 Stays Pending Remand After Judicial Review

Where a litigant who has prevailed upon a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

5.7.5 Immediate Effectiveness Review of Operating License Decisions

Under 10 CFR § 2.764(f)(2), upon receipt of a Licensing Board's decision authorizing the issuance of a full power operating license, the Commission will determine, sua sponte, whether to stay the effectiveness of the decision. Criteria to be considered by the Commission include, but are not limited to: the gravity of the substantive issue; the likelihood that it has been resolved incorrectly below; and the degree to which correct resolution of the issue would be prejudiced by operation pending review. Until the Commission speaks, the Licensing Board's decision is considered to be automatically stayed. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-13, 22 NRC 1, 2 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 n.2 (1985).

The Commission's immediate effectiveness review is usually based upon a full Licensing Board decision on all contested issues. However, the Commission conducted an immediate effectiveness review and authorized the issuance of a full power license for Limerick Unit 2, even though, pursuant to a federal court remand, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider environmental issues. The Commission noted that: (1) all contested safety issues had been fully heard and resolved; and (2) the National Environmental Policy Act (NEPA) does not always require resolution of all contested environmental issues and completion of the entire NEPA review process prior to the issuance of a license. Philadelphia Electric Co. (Limerick Generating Station, Unit 2), CLI-89-17, 30 NRC 105, 110 (1989), citing, 40 CFR 1506.1.

An intervenor's speculative comments are insufficient grounds for a stay of a Licensing Board's authorization of a full power operating license. The intervenor must challenge the Licensing Board's substantive conclusions concerning contested issues in the proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 (1987), aff'd, Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

Prior to moving for a stay of issuance of the operating license, a person or persons who are not parties to the license proceeding must petition for and be granted late intervention and reopening. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251 (1993).

Where construction of a plant is "substantially completed" any request to stay construction is moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251, 254 (1993).

The Commission's denial of a stay, pursuant to its immediate effectiveness review, does not preclude a party from petitioning under 10 CFR § 2.786 for appellate review of the Licensing Board's conclusions. Shearon Harris, supra, 25 NRC at 4 n.3, citing, 10 CFR § 2.764(9).

Before a full power license can be issued for a plant, the Commission must complete its immediate effectiveness review of the pertinent Licensing Board decision pursuant to 10 CFR § 2.764(f)(2). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 n.26 (1982).

5.8 Review as to Specific Matters

5.8.1 Scheduling Orders

Since a scheduling decision is a matter of Licensing Board discretion, it will generally not be disturbed absent a "truly exceptional situation." Virginia Electric & Power Co. (North Anna Power Station, Unit 1 & 2), ALAB-584, 11 NRC 451, 467 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-344, 4 NRC 207, 209 (1976) (Appeal Board was reluctant to overturn or otherwise interfere with scheduling orders of Licensing Boards absent due process problems); and Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981) (Appeal Board was loath to interfere with a Licensing Board's denial of a request to delay a proceeding where the Commission has ordered an expedited hearing; in such a case there must be a "compelling demonstration of a denial of due process or

the threat of immediate and serious irreparable harm" to invoke discretionary review); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987) (petitioner failed to substantiate its claim that a Licensing Board decision to conduct simultaneous hearings deprived it of the right to a fair hearing); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 68 (1987) (intervenors' concerns about infringement of procedural due process were premature); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 277 (1987) (intervenor failed to show specific harm resulting from the Licensing Board's severely abbreviated hearing schedule); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-4, 29 NRC 243, 244 (1989).

In determining the fairness of a Licensing Board's scheduling decisions, the totality of the relevant circumstances disclosed by the record will be considered. Seabrook, supra, 25 NRC at 421; Seabrook, ALAB-889, supra, 27 NRC at 269.

Where a party alleges that a Licensing Board's expedited hearing schedule violated its right to procedural due process by unreasonably limiting its opportunity to conduct discovery, an Appeal Board will examine: the amount of time allotted for discovery; the number, scope, and complexity of the issues to be tried; whether there exists any practical reason or necessity for the expedited schedule; and whether the party has demonstrated actual prejudice resulting from the expedited hearing schedule. Seabrook, supra, 25 NRC at 421, 425-427. Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 438 (1979).

5.8.2 Discovery Rulings

5.8.2.1 Rulings on Discovery Against Nonparties

An order granting discovery against a nonparty is final and appealable by that nonparty as of right. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). An order denying such discovery is wholly interlocutory and immediate review by the party seeking discovery is excluded by 10 CFR § 2.730(f). Commonwealth Edison Co. (Zion Station, Units 1 & 2),

ALAB-116, 6 AEC 258 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 380-81 (1984).

5.8.2.2 Rulings Curtailing Discovery

In appropriate instances, an order curtailing discovery is appealable. To establish reversible error from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery is impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). Absent such circumstances, however, an order denying discovery, and discovery orders in general are not immediately appealable since they are interlocutory. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472 (1981); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.3 Refusal to Compel Joinder of Parties

A Licensing Board's refusal to compel joinder of certain persons as parties to a proceeding is interlocutory in nature and, pursuant to 10 CFR § 2.730(f), is not immediately appealable. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.3.1 Order Consolidating Parties

Just as an order denying consolidation is interlocutory, an order consolidating the participation of one party with others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Company (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

5.8.4 Order Denying Summary Disposition

As is the case under Rule 56 of the Federal Rules of Civil Procedure, an order denying a motion for summary disposition under 10 CFR § 2.749 is not immediately appealable. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93 (1974). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 CFR § 2.714a exception to the prohibition on interlocutory appeals, and may not be appealed. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977). (See also 3.5).

5.8.5 Procedural Irregularities

Absent extraordinary circumstances, alleged procedural irregularities will not be reviewed unless an appeal has been taken by a party whose rights may have been substantially affected by such irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974).

5.8.6 Matters of Recurring Importance

There is some indication that a matter of recurring procedural importance may be appealed in a particular case even though it may no longer be determinative in that case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), interlocutory review will be refused. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978).

5.8.7 Advisory Decisions on Trial Rulings

Advisory decisions on trial rulings which resulted in no discernible injury ordinarily will not be considered on appeal. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).

5.8.8 Order on Pre-LWA Activities

A Licensing Board order on the issue of whether offsite activity can be undertaken prior to the issuance of an LWA or a construction permit is immediately appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976).

5.8.9 Partial Initial Decisions

Partial initial decisions which do not yet authorize construction activities still may be significant and, therefore, immediately appealable. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 871 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

For the purposes of appeal, partial initial decisions which decide a major segment of a case or terminate a party's right to participate, are final Licensing Board actions on the issues decided. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983). See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

5.8.10 Other Licensing Actions

When a Licensing Board, during the course of an operating license hearing, grants a Part 70 license to transport and store fuel assemblies, the decision is not interlocutory and is immediately appealable as of right. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976).

When a Licensing Board's ruling removes any possible adjudicatory impediments to the issuance of a Part 70 license, the ruling is immediately appealable. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 45 n.1 (1984), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 787 (1986) (a Licensing Board's dismissal by summary disposition of an intervenor's contention dealing with fuel loading and precriticality testing may be challenged in connection with the intervenor's challenge of the order authorizing issuance of the license).

5.8.11 Rulings on Civil Penalties

In a civil penalty case, an order by the Administrative Law Judge affirming the Director of Inspection and Enforcement's order imposing civil penalties on a licensee, but at the same time granting a request for a hearing to present facts to support mitigation of the amount of the penalty, is not appealable. An appeal at this point is foreclosed by 10 CFR § 2.730(f). Section 2.730(f) is a rule of general applicability governing civil penalty proceedings to the same extent as it does licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

5.8.12 Evidentiary Rulings

While all evidentiary rulings are ultimately subject to appeal at the end of the proceeding, not all such rulings are worthy of appeal. Some procedural and evidentiary errors almost invariably occur in lengthy hearings where the presiding officer must rule quickly. Only serious errors affecting substantial rights and which might have influenced improperly the outcome of the hearing merit the hearing merit exception and briefing on appeal. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

Evidentiary exclusions must affect a substantial right, and the substance of the evidence must be made known by way of an offer of proof or be otherwise apparent, before the exclusions can be considered errors. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697-98 n.14 (1982).

For a discussion of the procedure necessary to preserve evidentiary rulings for appeal, see Section 3.11.4.

5.8.13 Authorization of Construction Permit

A decision authorizing issuance of a construction permit may be suspended. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). Immediate revocation or suspension of a construction permit, upon review of the issuance thereof, is appropriate if there are deficiencies that:

(a) pose a hazard during construction;

(b) need to be corrected before further construction takes place;

(c) are incorrectable; or

(d) might result in significant environmental harm if construction is permitted to continue.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 401 (1975).

Whether a public utility commission's consent is required before construction contracts can be entered into and carried out is a question of State law. If the State authorities want to suspend construction pending the results of the public utility commission's review, it is their prerogative. But the construction permit will not be suspended on the "strength of nothing more than potentiality of action adverse to the facility being taken by another agency" (citation omitted). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977).

5.8.14 Certification of Gaseous Diffusion Plants

To be eligible to petition for review of a Director's Decision on the certification of a gaseous diffusion plant, an interested party must have either submitted written comments in response to a prior Federal Register notice or provided oral comments at an NRC meeting held on the application or compliance plan. 10 C.F.R. § 76.62(c). U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 233-34, 236 (1996).

Individuals who wish to petition for review of an initial Director's decision must explain how their "interest may be affected." 10 C.F.R. § 76.62(c). For guidance, petitioners may look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), 44 NRC 231, 234-36 (1996).

5.9 Perfecting Appeals

Normally, review is not taken of specific rulings (e.g., rulings with respect to contentions) in the absence of a properly perfected appeal by the injured party. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374 n.1 (1975);

Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974).

While the Commission does not require the same precision in the filings of laymen that is demanded of lawyers, any party wishing to challenge some particular Licensing Board action must at least identify the order in question, indicate that he is seeking review of it, and give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978).

5.9.1 General Requirements for Petition for Review of an Initial Decision

The general requirements for petitions for review from an initial decision are set out in 10 CFR § 2.786. Section 2.786(b) provides that such a petition is to be filed within fifteen days after service of the initial decision.

5.10 Briefs on Appeal

5.10.1 Importance of Brief

The filing of a brief in support of a section 2.714a appeal is mandatory. The Commission upon taking review, pursuant to § 2.786, may order the filing of appropriate briefs. See 10 C.F.R. 2.786(d).

Failure to file a brief has resulted in dismissal of the entire appeal, even when the appellant was acting pro se. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 485 n.2 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66-67 (1992); see also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975). Commission appellate practice has long stressed the importance of a brief. A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993).

Intervenors have a responsibility to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions. Salem, supra, 14 NRC at 50, citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). Even parties who participate in NRC licensing proceedings pro se have an obligation to familiarize themselves with proper briefing format and with the Commission's Rules of Practice. Salem, supra, 14 NRC at 50, n.7. See Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992).

When an intervenor is represented by counsel, there should be no need, and there is no requirement, to piece together or to restructure vague references in the intervenor's brief in order to make intervenor's arguments for it. Wisconsin Electric Power Co.

(Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 51 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3rd Cir. 1982). Therefore, those aspects of an appeal not addressed by the supporting brief may be disregarded. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Unit 1 & 2), ALAB-693, 16 NRC 952 (1982); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974).

5.10.2 Time for Submittal of Brief

10 CFR § 2.714a(a) requires the filing of a notice of appeal and a supporting brief within 10 days after service of a Licensing Board order wholly denying a petition for leave to intervene. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991).

If the Commission grants review pursuant to 10 C.F.R. § 2.786, it will issue an order asking for the filing of appropriate briefs. This order will typically set the schedule for filing dates and appropriate page limits for briefs. See 10 C.F.R. § 2.786(d).

The Commission may consider an untimely appeal if the appellant can show good cause for failure to file on time. Seabrook, supra, 34 NRC at 265-66.

The time limits imposed for filing briefs refer to the date upon which the appeal was actually filed and not to when the appeal was originally due to be filed prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is not necessary for a party to bring to the adjudicator's attention the fact that its adversary has not met prescribed time limits. Nor as a general rule will any useful purpose be served by filing a motion seeking to have an appeal dismissed because the appellant's brief was a few days late; the mailing of a brief on a Sunday or Monday which was due for filing the prior Friday does not constitute substantial noncompliance which would warrant dismissal, absent unique circumstances. Wolf Creek, supra.

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably submitted, irrespective of the extent of the lateness. Wolf Creek, ALAB-424, supra. Apparently, however, the written explanation for the tardiness may be waived if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Id. at 126.

If service of appellant's brief is made by mail, and the responsive brief is to be filed within a certain period after service of the appellant's brief, add five days to the time period for filing. 10 C.F.R. § 2.710.

5.10.2.1 Time Extensions for Brief

Motions to extend the time for briefing are not favored. In any event, such motions should be filed in such a manner as to reach the Commission at least one day before the period sought to be extended expires. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (1973); Boston Edison Co. (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308 (1972). An extension of briefing time which results in the rescheduling of an already calendared oral argument will not be granted absent extraordinary circumstances. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-144, 6 AEC 628 (1973).

If unable to meet the deadline for filing a brief in support of its appeal of a Licensing Board's decision, a party is duty-bound to seek an extension of time sufficiently in advance of the deadline to enable a seasonable response to the application. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554, 555 (1979).

5.10.2.2 Supplementary or Reply Briefs

A supplementary brief will not be accepted unless requested or accompanied by a motion for leave to file which sets forth reasons for the out-of-time filing. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-115, 6 AEC 257 (1973).

Material tendered by a party without leave to do so, after an appeal has been submitted for decision, constitutes improper supplemental argument. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981).

10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

A permitted reply to an answer should only reply to opposing briefs and not raise new matters. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 243 n.4 (1980).

5.10.3 Contents of Brief

Any brief which in form or content is not in substantial compliance with appropriate briefing format may be stricken either on motion of a party or on the Commission's own motion. For example, an appendix to a reply brief containing a lengthy legal argument

will be stricken when the appendix is simply an attempt to exceed the page limitations. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

Although the Commission's Rules of Practice do not specifically require that a brief include a statement of the facts of the case, those facts relevant to the appeal should be set forth. The statement of facts set forth in the brief on appeal should include an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769, 771 n.2 (1977).

The brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issue raised on appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). A brief which does not contain such information is tantamount to an abandonment of the issue. Id.; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 805 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1619 (1984). At a minimum, briefs must identify the particular error addressed and the precise portions of the record relied upon in support of the assertion of error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) and Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC

43, 49-50 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986). This is particularly true where the Licensing Board rendered its rulings from the bench and did not issue a detailed written opinion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 702-03 n.27 (1985).

A brief must clearly identify the errors of fact or law that are the subject of the appeal and specify the precise portion of the record relied on in support of the assertion of error. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 464 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 424 (1980).

Claims of error that are without substance or are inadequately briefed will not be considered on appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 481 (1982), citing, Salem, supra, 14 NRC at 49-50. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499 (1991). Issues which are inadequately briefed are deemed to be waived. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990). Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). See 10 CFR § 2.762(d).

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and

support for the appellant's claims. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

An appeal may be dismissed when inadequate briefs make its arguments impossible to resolve. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 348 n.7 (1983), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 71 (1985), Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 n.74 (1986). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991).

Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10 (1990). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). Nonetheless, NRC litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Susquehanna, supra, 16 NRC at 956, citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). See Georgia

Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992). All parties appearing in NRC proceedings, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of the facts. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 n.6 (1986).

A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, and (2) relate to matters raised in the party's proposed findings of fact and conclusions of law. Arguments raised for the first time on appeal, absent a serious, substantive issue are not ordinarily entertained on appeal. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

All factual assertions in the brief must be supported by references to specific portions of the record. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 211 (1986). All references to the record should appear in the appellate brief itself; it is inappropriate to incorporate into the brief by reference a document purporting to furnish the requisite citations. Kansas Gas & Electric Company (Wolf Creek Generating Plant, Unit 1), ALAB-424, 6 NRC 122, 127 (1977).

Documents appended to an appellate brief will be stricken where they constitute an unauthorized attempt to supplement the record. However, if the documents were newly discovered evidence and tended to show that significant testimony in the record was false, there may be a sufficient basis to grant a motion to reopen the hearing. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3); (Perry Nuclear Power Plant, Units 1 & 2), ALAB-430, 6 NRC 451 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1985), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).

Personal attacks on opposing counsel are not to be made in appellate briefs, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-838 (1974), and briefs which carry out personal attacks in an abrasive manner upon Licensing Board members will be stricken. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

Established page limitations may not be exceeded without leave and may not be circumvented by use of "appendices" to the brief, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977). A request for enlargement of the page limitation on a showing of good cause should be filed at least seven days before the date on which the brief is due. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 n.3 (1986).

A brief filed in support of an appeal under 10 CFR § 2.714a from a decision granting and/or denying in whole a petition for leave to intervene is not required to contain a table of cases and a table of authorities. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 54-55 (1992). The appellant's brief must contain a statement of the case with applicable procedural history. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-388, 5 NRC 640 (1977). The Commission, at its discretion, may waive the requirement for a statement of the case. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 55 n.2 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table).

5.10.3.1 Opposing Briefs

Briefs in opposition to the appeal should concentrate on the appellant's brief. See Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 52 n.39 (1976).

5.10.3.2 Amicus Curiae Briefs

Amicus Curiae briefs are limited to the matters already at issue in the proceeding. "[A]n amicus curiae necessarily takes the proceeding as it finds it. An amicus curiae can neither inject new issues into a proceeding nor alter the content of the record developed by the parties." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987) (footnote omitted); Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997).

Our rules contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997).

5.11 Oral Argument

The Commission, in its discretion, may allow oral argument upon the request of a party made in a notice of appeal or brief, or upon its own initiative. 10 CFR §§ 2.763; 2.786(d). The Commission will deny a request for oral argument where it determines that, based on the written record, it understands the positions of the participants and has sufficient information upon which to base its decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992).

The Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993) (citing, In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 23 n.1 (1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992)).

A late intervention petitioner may request oral argument on its petition. Comanche Peak, supra, 36 NRC at 69 n.4.

All parties are expected to be present or represented at oral argument unless specifically excused by the Board. Such attendance is one of the responsibilities of all parties when they participate in Commission adjudicatory proceedings. Point Beach, 15 NRC at 279.

5.11.1 Failure to Appear for Oral Argument

If for sufficient reason a party cannot attend an oral argument, it should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported. A bare declaration of inadequate financial resources is clearly deficient. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

Failure to advise of an intent not to appear at oral argument already calendared is discourteous and unprofessional and may result in dismissal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-337, 4 NRC 7 (1976).

5.11.2 Grounds for Postponement of Oral Argument

Postponement of an already calendared oral argument for conflict reasons will be granted only upon a motion setting out:

(1) the date the conflict developed;

(2) the efforts made to resolve it;

(3) the availability of alternate counsel;

(4) public and private interest considerations;

(5) the positions of the other parties;

(6) the proposed alternate date.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-165, 6 AEC 1145 (1973).

A party's inadequate resources to attend oral argument, properly substantiated, may justify dispensing with oral argument. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

5.11.3 Oral Argument by Nonparties

Under 10 CFR § 2.715(d), a person who is not a party to a proceeding may be permitted to present oral argument to the Commission. A motion to participate in the oral argument must be filed and non-party participation is at the discretion of the Commission.

5.12 Interlocutory Review

5.12.1 Interlocutory Review Disfavored

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question whether the petition should have been wholly denied (10 CFR § 2.714a), there is no right to appeal any interlocutory ruling by a Licensing Board. 10 CFR § 2.730(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 280 (1987). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991).

Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307 (1998).

A Licensing Board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate. Rulings which do neither are interlocutory. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are interlocutory and are not immediately appealable, though such rulings may be reviewed later by deferring appeals on them until the end of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). In the same vein see Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 618 (1988) (a Licensing Board denied a motion to add new bases to a previously admitted contention). Similarly, interlocutory appeals from Licensing Board rulings made during the course of a proceeding, such as the denial of a motion to dismiss the proceeding, are forbidden. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977).

The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994). See 10 CFR § 2.730(f). An exception to this rule will be made in compelling circumstances where, for example, there is an emergency situation requiring an immediate, final determination of the issue. Id. The practice of simultaneously seeking interlocutory appellate review of grievances by way of directed certification and Licensing Board reconsideration of the same rulings is disfavored. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

The Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer's decision and filing an appeal of the same ruling because that approach would require both trial and appellate tribunals to rule on the same issues at the same time. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24 (1997), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

Lack of participation below will increase the movant's already heavy burden of demonstrating that such review is necessary. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 175-76 (1983).

In a licensing proceeding, it is the order granting or denying a license that is ordinarily a final order. NRC orders that are given "immediate effect" constitute an exception to the general rule. City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998).

5.12.2 Criteria for Interlocutory Review

Although interlocutory review is disfavored and generally is not allowed as of right under NRC rules of practice (see 10 CFR 2.730(f)), the criteria in section 2.786(g)(1)&(2) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). The criteria in section 2.786(g)(1)&(2) are not new. They are essentially a codification of the standards that governed review of interlocutory matters prior to the July 1991 revision to the NRC

appellate procedures. See 56 Fed. Reg. 29,403 (June 27, 1991); Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992), clarified Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993). Therefore, cases prior to promulgation of section 2.786(g) may provide useful guidance in this area. See e.g. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474, 475 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 171 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-22, 48 NRC 215, 216-17 (1998). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 278-79 (1990).

Discretionary interlocutory review will be granted if the Licensing Board's action either (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.786(1) & (2); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Perry, supra, 15 NRC at 1110; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 568 (1982), citing, Marble Hill, supra, 5 NRC at 1192; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 NRC 565, 568 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 49-50 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 261 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units

1 and 2), ALAB-916, 29 NRC 434, 437 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 360-62 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991).

Satisfaction of one of the criteria in 10 CFR § 2.786(b)(4) is not mandatory in order to obtain interlocutory review. When reviewing interlocutory matters on the merits, the Commission may consider the criteria set forth in 10 CFR § 2.786(b)(4). However, it is the standards listed in 10 CFR § 2.786(g) that control the Commission's determination of whether to undertake such review. Oncology Services Corp., CLI-93-13, 37 NRC 419 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998).

Discovery rulings rarely meet the test for discretionary interlocutory review. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 74 (1987); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-318, 3 NRC 186 (1976). This is true even of orders rejecting objections to discovery on grounds of privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-300, 2 NRC 752, 769 (1975). In this vein, the Appeal Board refused to review a discovery ruling referred to it by a Licensing Board where the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling, and where the ruling was not novel. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Midland, supra.

Similarly, rulings on the admissibility of evidence rarely meet the standards for interlocutory review. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981). In fact, the Appeal Board was generally disinclined to direct certification on rulings involving "garden-variety" evidentiary matters. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767, 768 (1977), the Appeal Board reiterated that it would not allow consideration of interlocutory evidentiary rulings, stating that, "it is simply not our role to monitor these matters on a day-today basis; were we to do so, 'we would have little time for anything else."' (citations omitted). Interlocutory review is rarely appropriate where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 475 (1982), citing, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976).

The Commission has granted interlocutory review in situations where the question or order must be reviewed "now or not at all". Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 (1998). The Commission does not ordinarily review Board orders denying extension of time. However, the Commission may review such interlocutory orders pursuant to its general supervisory jurisdiction over agency adjudications. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998).

Interlocutory review of a Licensing Board's ruling denying summary disposition of a part of a contention, claimed to be an unwarranted expansion of the scope of issues resulting in the necessity to try these issues and cause unnecessary expense and delay meets neither standard for interlocutory review. That case is no different than that involved any time a litigant must go to hearing. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).

Even though the criteria for discretionary interlocutory review have not been satisfied, the Commission may still accept a Licensing Board's referral of an interlocutory ruling where the ruling involves a question of law, has generic implications, and has not been addressed previously on appeal. Oncology Services Corporation, CLI-93-13, 37 NRC 419 (1993); see Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 279 (1990). However, interlocutory review will not be granted unless the Licensing Board below had a reasonable opportunity to consider the question as to which review is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 618-619, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

When interlocutory review is granted of one Licensing Board order, it may also be conducted of a second Licensing Board order which is based on the first order. Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 362 (1990).

5.12.2.1 Irreparable Harm

To meet the first criterion in section § 2.786(g), petitioners must demonstrate that the ruling if left in place will result in irreparable impact which, as a practical matter, cannot be alleviated by Commission review at the end of the proceeding. The following cases illustrate the extraordinary circumstances that must be present to warrant review pursuant to the first criterion:

Immediate review may be appropriate in exceptional circumstances, when the potential difficulty of later unscrambling and remedying the effects of an improper disclosure of privileged material would likely result in an irreparable impact. Georgia Power Co., et. al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (Commission reviewed Board order to release notes claimed to be attorney-client work product); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 50, 51 (1986) (A Licensing Board's denial of an intervenor's motion to correct the official transcript of a prehearing conference was granted where there were doubts that

the transcript could be corrected at the end of the hearing. Without a complete and accurate transcript, the intervenor would suffer serious and irreparable injury because its ability to challenge the Licensing Board's rulings through an appeal would be compromised).

For purposes of interlocutory review, irreparable harm does not qualify as immediate merely because it is likely to occur before completion of the hearing. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

While it may not always be dispositive, one factor favoring review is that the question or order for which review is sought is one which "must be reviewed now or not at all." Georgia Power Co., et. al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) (interlocutory Commission review warranted where Board ordered immediate release of an NRC Investigatory Report); see Oncology Services Corp., CLI--93-13, 37 NRC 419,420-21 (1993) (interlocutory Commission review warranted where Board imposed 120-day stay of a license-suspension proceeding); see also, Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

There is no irreparable harm arising from a party's continued involvement in a proceeding until the Licensing Board can resolve factual questions pertinent to the Commission's jurisdiction. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 62 (1994). Nor is there obvious irreparable harm from continuation of the proceeding. The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a Licensing Board scheduling order. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-7 (1994); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987). In the absence of a potential for truly exceptional delay or expense, the risk that a Licensing Board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985).

Mere generalized representations by counsel or unsubstantiated assertions regarding "immediate and serious irreparable impact" are insufficient to meet the stringent threshold for interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

5.12.2.2 Pervasive and Unusual Effect on the Proceeding

An interlocutory review is appropriate when the ruling "affects the basic structure of the proceeding by mandating duplicative or unnecessary litigating steps." Private Fuel Storage (Independent Spent Fuel Storage Facility), CLI-98-7, 47 307, 310 (1998).

Review of interlocutory rulings pursuant to the second criterion of § 2.786; i.e., the Board ruling affects the basic structure of the proceeding in a pervasive or unusual manner, is granted only in extraordinary circumstances. The following cases illustrate this point:

An Appeal Board conducted discretionary interlocutory review of a presiding officer's rulings issued during the early stages of a materials licensing proceeding where the Appeal Board determined that the presiding officer's rulings, which interpreted and implemented the informal hearing procedures in 10 CFR Part 2, Subpart L, had fundamentally altered the very shape of the proceeding. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

The Commission conducted discretionary interlocutory review of a decision by a Licensing Board and a presiding officer to consolidate a 10 CFR Part 2, Subpart G proceeding and a 10 CFR Part 2, Subpart L proceeding as a Subpart G proceeding. The consolidation order not only raised a novel and important jurisdictional question concerning the authority of the Licensing Board and the presiding officer, but it also affected the Subpart L proceeding in a pervasive and unusual manner by converting the proceeding into a more formal Subpart G proceeding. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1992).

Although a definitive ruling by the Licensing Board that the Commission actually has jurisdiction might rise to the level of a pervasive or unusual effect upon the nature of the proceeding, a preliminary ruling that mere factual development is necessary does not rise to that level. The fact that an appealed ruling touches on a jurisdictional issue does not, in and of itself, mandate interlocutory review. Similarly, the mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding, and thereby justify interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994).

A Licensing Board decision refusing to dismiss a party from a proceeding does not, without more, constitute a compelling circumstance justifying interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994).

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant an interlocutory review. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262-63 (1988). See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159 (1992).

The fact that an interlocutory ruling may be wrong does not per se justify interlocutory appellate review, unless it can be demonstrated that the error fundamentally alters the proceeding. Virginia Electric Power Co. (North Anna

Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n. 11 (1983), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and-2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

A legal error, standing alone, does not alter the basic structure of an ongoing proceeding. Such errors can be raised on appeal after the final licensing board decision. In re. Dr. James E. Bauer (Order Prohibiting Involvement in NRC Licensed Activities), CLI-95-3, 41 NRC 245, 246 (1995).

Similarly, a mere conflict between Licensing Boards on a particular question does not mean that interlocutory review as to that question will automatically be granted. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-485 (1975). Unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" Licensing Board decision. Perry, supra, ALAB-675, 15 NRC at 1112-1113. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263 (1988).

Interlocutory review is not favored on the question as to whether a contention should have been admitted into the proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station, unit 1), ALAB-861, 25 NRC 129, 135; Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987));Perry, supra, 16 NRC at 1756, citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982); A Board's rejection of an interested State's sole contention is not appropriate for directed certification when the issues presented by the State are also raised by the contentions of intervenors in the proceeding. Seabrook, supra, 23 NRC at 592-593. The admission by a Licensing Board of more late-filed than timely contentions does not, in and of itself, affect the basic structure of a licensing proceeding in a pervasive or unusual manner warranting interlocutory review. If the late-filed contentions have been admitted by the Board in accordance with 10 CFR § 2.714, it cannot be said that the Board's rulings have affected the case in a pervasive or unusual manner. Rather, the Board will have acted in furtherance of the Commission's own rules. Cleveland Electric Illuminating Co. (Perry Nuclear

Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). The basic structure of an ongoing proceeding is not changed by the simple admission of a contention which is based on a Licensing Board ruling that: (1) is important or novel; or (2) may conflict with case law, policy, or Commission regulations. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982).

Despite the reluctance to grant review of Board orders admitting contentions, in exceptional circumstances limited review has been undertaken. In Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2),CLI-86-8, 23 NRC 241 (1986),the Commission reviewed, and reversed a Board order admitting a late filed contention. The Appeal Board had declined review of the same ruling, stating that the Board's admission of a contention did not meet the stringent standards for interlocutory review. ALAB-817, 22 NRC 470, 474 (1985). In Duke Power Co. (Catawba Nuclear Station, units 1 and 2), ALAB-687, 16 NRC 460 (1982), the Appeal Board accepted referral of several rulings associated with the Licensing Board's conditional admission of several contentions. The Appeal Board limited its review to two questions which it determined to have "generic implications": 1) whether the Rules of Practice sanctioned the admission of contentions that fall short of meeting Section 2.714(b) specificity requirements; and 2) if not, how should a Licensing Board approach late-filed contentions that could not have been earlier submitted with the requisite specificity. Catawba, ALAB-687, 16 NRC at 464-65.

Adverse evidentiary rulings may turn out to have little, if any evidentiary effect on a Licensing Board's ultimate substantive decision. Therefore, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant interlocutory intercession. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

5.12.3 Responses Opposing Interlocutory Review

Opposition to a petition seeking interlocutory review should include some discussion of petitioner's claim of Licensing Board error. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Failure of a party to address the standards for interlocutory review in responding to a motion seeking such review may be construed as a waiver of any argument regarding the propriety of such review. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 n.7 (1984). Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

5.12.4 Certification of Questions for Interlocutory Review and Referred Rulings

Although generally precluding interlocutory appeals, 10 CFR § 2.730(f), does allow a Licensing Board to refer a ruling to the Commission. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64 (1994). The Commission need not, however, accept the referral. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 475 (1985).

The Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, does not call for a marked relaxation of the standard that the discretionary review of interlocutory Licensing Board rulings authorized by 10 CFR §§ 2.730(f) and 2.718(l) should be undertaken only in the most compelling circumstances. Rather, it simply exhorts the Licensing Boards to put before the appellate tribunal legal or policy questions that, in their judgment, are "significant" and require prompt appellate resolution. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998). The fact that an evidentiary ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. Metropolitan Edison Co., 20 NRC at 1583.

A Licensing Board's decision to admit a contention which will require the Staff to perform further statutory required review does not result in unusual delay or expense which justifies referral of the Board's decision for interlocutory review. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257-258 n.19 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Authority to certify questions to the Commission should be exercised sparingly. Absent a compelling reason, certification will be declined. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977); Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 2; Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982).

Despite the general prohibition against interlocutory review, the regulations provide that a party may ask a Licensing Board to certify a question to the Commission without ruling on it. 10 CFR § 2.718(l). The regulations also allow a party to request that a Licensing Board refer a ruling on a motion to the Commission under 10 CFR § 2.730(f). Developments occurring subsequent to the filing of a motion for directed certification to the appellate tribunal may strip the question raised in the motion for certification of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

The Commission has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 n.3 (1998).

The Boards' certification authority was not intended to be applied to a mixed question of law and fact in which the factual element was predominant. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

A party seeking certification under Section 2.718(l) must, at a minimum, establish that a referral under 10 CFR § 2.730(f) would have been proper -- i.e., that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1652-53 (1982). However, the added delay and expense occasioned by the admission of a contention -- even if erroneous -- does not alone distinguish the case so as to warrant interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982). The fact that applicants will be unable to recoup the time and financial expense needed to litigate late-filed contentions is a factor that is present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory Appeal Board review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982).

The case law standards governing review of interlocutory orders have been codified in 10 CFR § 2.786(g) which provides that the Commission may conduct discretionary interlocutory review of a certified question, 10 CFR § 2.718(l), or a referred ruling, 10 CFR § 2.730(f), if the petitioner shows that the certified question or referred ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). (See "Criteria for Interlocutory Review").

5.12.4.1 Effect of Subsequent Developments on Motion to Certify

Developments occurring subsequent to the filing of a request for interlocutory review may strip the question brought of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977). See also, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-93-18, 38 NRC 62 (1993).

When reviewing a motion for directed certification, an Appeal Board would not consider events which occurred subsequent to the issuance of the challenged Licensing Board ruling. A party which seeks to rely upon such events must first seek appropriate relief from the Licensing Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 271 (1988).

5.12.4.2 Effect of Directed Certification on Uncertified Issues

The pendency of interlocutory review does not automatically result in a stay of hearings on independent questions not intimately connected with the issue certified. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

5.13 Disqualification of a Commissioner

Determinations on the disqualification of a Commissioner reside exclusively in that Commissioner, and are not reviewable by the Commission. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1 (1981), clarified, CLI-81-23, 14 NRC 610 (1981); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

When a party requests the disqualification of more than one Commissioner, each Commissioner must decide whether to recuse himself from the proceeding, but the Commissioners may issue a joint opinion in response to the motion for disqualification. Joseph J. Macktal, CLI-89-18, 30 NRC 167, 169-70 (1989), denying reconsideration of CLI-89-14, 30 NRC 85 (1989).

It is Commission practice that the Commissioners who are subject to a recusal motion will decide that motion themselves, and may do so by issuing a joint decision. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 56-57 (1996).

A prohibited communication is not a concern if it does not reach the ultimate decision maker. Where a prohibited communication is not incorporated into advice to the Commission, never reaches the Commission, and has no impact on the Commission's decision, it provides no grounds for the recusal of Commissioners. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 57 (1996).

Commission guidance does not constitute factual prejudgment where the guidance is based on regulatory interpretations, policy judgments, and tentative observations about dose estimates that are derived from the public record. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 58 (1996).

Where there are no facts from which the Commission can reasonably conclude that a prohibited communication was made with any corrupt motive or was other than a simple mistake, and where a Report of the Office of the Inspector General confirms that an innocent mistake was made and that the Staff was not guilty of any actual wrongdoing, and where the mistake did not ultimately affect the proceeding, the Commission will not dismiss the Staff from the proceeding as a sanction for having made the prohibited communication. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 59 (1996).

In the absence of bias, an adjudicator who participated on appeal in a construction permit proceeding need not disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511, 512 (1980).

The expression of tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

5.14 Reconsideration by the Commission (See also "Motions to Reconsider" section 4.5)

The Commission's ability to reconsider is inherent in the ability to decide in the first instance. The Commission has 60 days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

Petitions for reconsideration of Commission decisions denying review will not be entertained. 10 C.F.R. § 2.786(e). A petition for reconsideration after review may be filed. 10 C.F.R. § 2.786(e).

A movant seeking reconsideration of a final decision must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced, generally on the basis of information not previously available. See Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977). Babcock and Wilcox, LBP-92-35, 36 NRC at 357, supra. A reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See Summer, CLI-81-26, 14 NRC at 790; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1, 3-4 (1988). Babcock and Wilcox, supra.

The Commission has granted reconsideration to clarify the meaning or intent of certain language in its earlier decision. The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 390-91 (1995).

Reconsideration is at the discretion of the Commission. The Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 234 n.6 (1995) (quoting, Florida Power and Light Co. (St. Lucie Nuclear Power plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980)).

NRC rules contemplate petitions for reconsideration of a Commission decision on the merits, not petitions for reconsideration of a Commission decision to decline review of an issue. See

10 C.F.R. § 2.786(e). Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

10 CFR § 2.771 provides that a party may file a petition for reconsideration of a final decision within 10 days after the date of that decision.

A motion to reconsider a prior decision will be denied where the arguments presented are not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead, is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) .

Motions to reconsider an order must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to a case. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25-26 (1983).

A majority vote of the Commission is necessary for reconsideration of a prior Commission decision. U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-8, 15 NRC 1095, 1096 (1982).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision, and the Federal court stays its review pending the agency's disposition of the motion to reconsider; the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

5.15 Jurisdiction of NRC to Consider Matters While Judicial Review is Pending

The NRC has jurisdiction to deal with supervening developments in a case which is pending before a court, at least where those developments do not bear directly on any question that will be considered by the court. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

There has been no definitive ruling as to whether the NRC has jurisdiction to consider matters which do bear directly on questions pending before a court. The former Appeal Board considered it inappropriate to do so, at least where the court had not specifically requested it, based on considerations of comity between the court and the agency. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365 (1976); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 179 (1985), citing, 28 U.S.C. § 2347(c).

The NRC must act promptly and constructively in effectuating the decisions of the courts. Upon issuance of the mandate, the court's decision becomes fully effective on the Commission, and it must proceed to implement it. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 783-784 (1977). Neither the filing nor the granting of a petition for Supreme Court certiorari operates as a stay, either with respect to the execution of the judgment below or of the mandate below by the lower courts. Id. at 781.

When the U.S. Court of Appeals has stayed its mandate pending final resolution of a petition for rehearing en banc on the validity of an NRC regulation, the regulation remains in effect, and the Board is bound by those rules until that mandate is issued. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).

Where a party petitioning the Court of Appeals for review of the decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

The pendency of a criminal investigation by the Department of Justice does not necessarily preclude other types of inquiry into the same matter by the NRC. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The pendency of a Grand Jury proceeding does not legally bar parallel administrative action. Three Mile Island, supra, 18 NRC at 191 n.27.

5.16 Procedure on Remand (See Post Hearing Matters, Sec. 4.6)

5.17 Mootness and Vacatur

The Commission is not subject to the jurisdictional limitations placed upon Federal courts by the "case or controversy" provision in Article III of the Constitution. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979). Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the outcome. The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed. Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). A case may not be moot when the dispute is "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). The exception applies only to cases in which the challenged action was in its duration too short to be litigated, and there is a reasonable expectation that the same complaining party will be subject to the same action again. Comanche Peak, 37 NRC at 205.

The Commission is not bound by judicial practice and need not follow judicial standards of vacatur. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 14-15 (1995).

Therefore, there is no insuperable barrier to the Commission's rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to a Licensing Board's decision. However, this course will not be embarked upon in the absence of the most compelling cause. Comanche Peak, 17 NRC at 93; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 54 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988). Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993); (A case is moot when there is no reasonable expectation that the matter will recur and interim relief or intervening events have eradicated the effects of the allegedly unlawful action). The NRC is not strictly bound by the mootness doctrine, however, its adjudicatory tribunals have generally adhered to the mootness principle. Innovative Weaponry, Inc. (Albuquerque, New Mexico), LBP-95-8, 41 NRC 409, 410 (1995). Based on the mootness principle, the Board in Innovative Weaponry determined the issue of whether there was an adequate basis for the Staff's denial to be moot because the license was transferred. Id.

While unreviewed Board decisions do not create binding precedent, when the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission may choose as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. Louisiana Energy Services, L.P (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998).

The Commission's customary practice is to vacate board decisions that have not been reviewed at the time the case becomes moot. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-24, 48 NRC 267 (1998).